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American Government and Politics

AMERICAN GOVERNMENT AND POLITICS

By CHARLES A. BEARD

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Preface

Two considerations have weighed heavily in my mind during this revision of my *American Government and Politics*. The first is that changes in the organization and functions of government are taking place rapidly, daily, almost hourly, under the stress of the Global War now raging, and that minute descriptions of them are therefore likely to be made obsolete at any moment. The second consideration is that grave questions as to the tendencies and future of constitutional government in the United States have been raised by recent developments in the theory and practice of government, particularly of the Federal Government.

In view of these considerations, I have eliminated innumerable details which are certain to be outmoded in a few weeks or months, and have emphasized the principles and tendencies involved in them. For example, instead of giving in the chapter on Federal Taxation and Finance a factual analysis of the latest income tax provisions, I have sought to present the primary principles followed in the formulation of such provisions. And, in respect of constitutional developments, I have dwelt more fully on liberty and authority and on the struggle for power within the federal system. Besides revising many pages in the older chapters in this relation, I have added a new chapter, The Quest for Efficiency and Responsibility in Government (Chapter IX). In so doing, I have deliberately challenged the tendency of students and practitioners to take for granted the easy perpetuity of constitutional government and to concentrate on administrative practices under it; and I have sought to apply the old axiom that a recurrence to first principles is salutary, indeed indispensable, in times like these, if constitutional government is to survive the crisis in which we now find ourselves.

With reference to what may be called the latest details of government, I have been more concerned with powers and functions than with the names and places of the agencies involved. For example, whether the federal agency in charge of educational activities is called an "office" or a "bureau," or is in the Department of the Interior or the Federal Security Agency, may justly be deemed a minor matter as compared with

the nature of the educational responsibilities assumed by the Federal Government. Again, for the citizen in search of understanding, it is more important to know about the powers and obligations of the State Department than the rearrangement of divisions within the Department effected by the Departmental Order 1218 of January 15, 1944.

Students in search of recent changes in governmental organization and functions now have at their command three regular publications of great value: *United States Government Manual*, issued three times a year, the *Book of the States*, and the *American Municipal Year Book*. But it is well to remember that even these publications must be supplemented by the latest documents, even the morning newspaper.

For aid in this revision I am indebted to my son, William Beard, who has worked with me periodically on American government, especially its technical aspects, for more than fifteen years. I am under special obligations to W. E. Binkley for giving me wise counsel and assuming heavy responsibilities for revising the part on state and local government.

Charles A. Beard

New Milford, Connecticut

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Part I

Federal Government

CHAPTER I

ESSENTIALS OF THE AMERICAN CONSTITUTIONAL SYSTEM

The Primary Issue of Public Affairs. For all American citizens who cherish the good life the primary issue of citizenship is always the maintenance of constitutional government; that is, government by "reflection and choice," by free proposal, open discussion, and uncoerced popular approval and consent. Although more urgent at some times than others, the issue remains a constant concern of citizenship. To it all details of party fortunes, law-making, and law-enforcement are subordinate. The only alternative to such government is government by "accident and force"—government by men who seize power through intrigue or violence and impose their will upon citizens, transforming them into servile subjects. To paraphrase the language of Thomas Jefferson, constitutional government offers a rational way of ordering affairs and the alternative is the irrational rhythm of despotism, revolt, reformation, and despotism again, in endless repetition.

Events Bring This Issue to the Front. Momentous and world-shaking events at home and abroad have recently given to this issue of government concrete and terrifying meaning in terms of life and death. The resort to dictatorships in many countries such as Italy, Germany, Russia, and Japan in our own times is a matter of common knowledge which needs no discussion here. Not only has despotism, under various names, come to many peoples of the earth. Its revival has been accompanied by vehement denunciations of government by "reflection and choice," of democracy, and of constitutional methods in general.

More than this. The revival of despotism has been boastfully justified in the name of sheer force and avarice—the right of the strong to seize the power of government, to defy popular will, to suppress all freedom of speech and press, to reduce all citizens to the level of serfs taking orders from rulers who have achieved power by conspiracy, murder, and other forms of violence. In other words, in our own times both the

theory and practice of constitutional government, such as we have sought to uphold in the United States since the establishment of independence, have been repudiated in many nations in favor of dictatorships; and voices are heard in our country saying that our own form of government is a failure and that we too need "a strong man" to tell us what to do, whom to worship, and how to live.

Increasing Responsibilities of Government Create New Challenges. The downfall of fascist government in Italy and the ultimate overthrow of similar tyrannies in Germany and Japan are not likely to resolve for all time the long conflict between liberty and despotism, between constitutional government and government by violence. Nor is it probable that any settlement of world affairs at the close of the present war will relieve the United States of the necessity of having a constant care for its institutions of government, its defense and security.

Furthermore, entirely apart from external threats, government in the United States is subjected to grave stresses and strains that have recently arisen in connection with the technological revolution in industry. This revolution, which has affected all branches of the national economy, has multiplied the complexities of American society and the responsibilities of government for national welfare.

In the earlier stages of our development as an independent nation, most of the people were engaged in simple agriculture and lived in communities that were largely self-sufficing. Their welfare, prosperity, and safety then depended particularly on their own activities. In those times government was no doubt highly significant for daily living and national well-being, but it was less involved in the specific operations of agriculture, industry, and labor than it is now. Its functions were less numerous and its regulations of life and economy less extensive. Few young people looked forward to employment in public offices or in industries closely regulated by government. Their opportunities were nearly all in private life and enterprise—agriculture, industries, business, and the professions; and they knew that after they entered upon their chosen callings their relations to government would be relatively slight and occasional in nature, rather than basic to their very existence and continuous from youth to old age.

But in our machine age, with all branches of industry and agriculture interlinked in a national economy, governments—federal, state, and local—have assumed numerous duties affecting industry, occupations, and ways of living. This may be deplored. Yet it is a fact. The subject

is a matter of serious debate. Even if brought to an irreducible minimum the functions of government will continue to be vital to the welfare and prosperity of American society. New problems relative to such functions arise from day to day, and amid discussions of these problems has appeared a grave domestic question: How can constitutional government, with its safeguards for liberty, be so firmly supported and so wisely conducted as to cope with the public issues forced upon it by the rapid mechanical and social changes of our times?

How Is This Question to Be Met? Knowledge can provide no neat and easy answer to the question. In a large measure the achievement of this end will depend upon the character of the American people long schooled in self-government—their moral convictions, their personal habits, the way in which they resolve to carry on their relations with one another. In no small measure certainly, it will also depend upon the knowledge of and respect for constitutional government possessed by citizens in general and by political leaders, small and great. If the primary features of constitutional government are unknown to citizens or lightly regarded they are not likely to be maintained. If those who vote and those who govern have little or no acquaintance with constitutional government and with the principles of civil liberty to be sustained against government oppression, it is improbable that they can discharge wisely and efficiently the obligations of citizenship so vitally related to their own welfare and the conduct of public affairs. Knowledge of government alone is not enough but it is indispensable to the maintenance of constitutional processes and the promotion of the general welfare through appropriate measures of government. And there is just one way to acquire this knowledge: by hard and patient work.

Constitutional Government Involves Popular and Rational Actions

Government Founded on Popular Consent. A prime characteristic of the American system lies in the principle that the forms and powers of government are ultimately prescribed by the voters acting in accord with pre-established rules, not by a dictator or a clique following its own whims, passions, avarice, and ambitions. The right of the people to ordain, abolish, and alter their own institutions of government was asserted in the Declaration of Independence. Methods by which alterations may be effected are provided in the Fifth Article of the federal

Constitution, in the appropriate clauses of state constitutions, and in some instances respecting local affairs even in the charters of cities. The American system, as James Madison said in the thirty-ninth number of the *Federalist*, is based on "that honorable determination which animates every votary of freedom, to rest our political experiments on the capacity of mankind for self-government." The voice of the people is not declared to be the voice of God, but it is deemed safer and wiser in the long run than the voice of any person holding office by royal prescription or raised to power by the sword or by the violence of a faction. With the ultimate power vested in a huge popular electorate, it follows that civilian supremacy over the military is taken for granted, is indeed pledged by the very forms and provisions of the federal Constitution itself. The framers of that document knew, as Madison expressed it, that "the liberties of Rome proved to be the final victim of her military triumphs,"[1] and they resolved to take strong precautions against any such calamity here.

Fundamental Control over All Public Authorities. In order that all powers of government shall be wielded by duly established public authorities, with the consent of the voters, supreme laws called constitutions lay down certain rules respecting the high authorities—legislative, executive, and judicial; how many and what kind there shall be; how they shall be chosen; the length of their terms; how they may be removed; what powers they may exercise and in what manner; how they may create, fill, and control the subordinate places necessary to the discharge of official duties. For the American Union the highest authorities are created by the Constitution of the United States and for the several states by their respective constitutions. Supreme however over all organs of government, federal, state, and local, is the federal Constitution, drafted by a convention of delegates from the states at Philadelphia in 1787, ratified by state conventions, put into effect in 1789, and amended in twenty-one respects since that year. To its provisions are subject all state constitutions and laws, all officials high and low, from village constables to the President, from town councils to the Congress at Washington. Every thing done by every agent of government comes within the limitations of that document.

Resolution of Social Conflicts by Rational Processes. Since federal and state constitutions conferring power on public authorities may be amended by regular methods prescribed in advance, the way is opened

[1] *Federalist*, Number 41.

for resolving all conflicts of ideas and interests in American society by pacific and rational processes, by reflection and choice. These processes include freedom in proposing government policies for adoption, liberty of discussion, deliberation in legislation, enforcement by duly constituted administrative agencies, subsequent scrutiny and, if deemed necessary, amendment. In other words the constitutional system substitutes for force and arbitrary acts of will the play of reason and respect for human rights and relevant facts.

Not without warrant was its establishment in the eighteenth century regarded as the greatest achievement of mankind in the long history of empires, monarchies, tyrannies, and despotisms—tempered perhaps by resistance and often destroyed by violence. Only once since the formation of the Constitution has a conflict of ideas and interests burst the bounds of argument and of obedience to the results of popular elections; namely, the controversy that culminated in the Civil War. And few participants in that armed contest ever regarded the outcome as either better or nobler than one that might have been effected within the terms of the Constitution. The power of reason in human affairs, to be sure, may easily be overestimated but as W. Y. Elliott puts the case: "If reason is permitted by the party system to operate, and the facts of economic necessity are recognized, constitutionalism offers a basis of moral strength that is lacking to shortcuts by the route of direct action." [2]

Thus it is a constitutional system under which we live and govern ourselves, and the first task in approaching an understanding of our government is a study of the broad principles on which it rests. And this is a task worthy of the highest intellectual and moral endeavor, for as George Washington truly said in his first inaugural address: "The preservation of the sacred fire of liberty and the destiny of the republican model of government are justly considered, perhaps, as *deeply*, and *finally*, staked on the experiment entrusted to the hands of the American people." This seems to be as true now as it was on the day it was first uttered.

The American System Is Federal

The National Government Assumes the Existence of States. Though independent in its power the National Government rests upon states

[2] *The Pragmatic Revolt in Politics*, p. 497. For "The Assumptions of Democracy," see Charles E. Merriam's article on the subject in *Political Science Quarterly* for September, 1938

and can only operate regularly when states are functioning within their respective spheres. Senators are elected by the voters of the states and Representatives by voters of districts wholly within state boundaries, subject to state election laws and under the supervision of state election officials. No federal officer presides at local polling booths or takes part in the counting of ballots. The President is chosen by electors assigned to the states on the basis of their representation in Congress and the electors themselves are chosen by the voters of the states at large. In no case are state boundaries crossed by any federal election districts. Only when a dispute arises between candidates over election returns and is carried to Washington does Congress normally intervene in the process of deciding contests. In the exercise of its functions also the Federal Government must rely upon the states to discharge the duties which belong to them under the Constitution. Otherwise a general breakdown would occur, no matter how efficiently federal officials might try to fulfill their obligations.

A Republican Form Guaranteed to the States. So vital is the state to the perpetuity of the Union that the Constitution specially recognizes federal responsibility for defending its integrity. Congress cannot erect a new state within the jurisdiction of another state, or form one by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned. Furthermore the Constitution guarantees to every state in the Union "a republican form of government," protection against invasion, and, on application of the proper state authority, assistance against domestic insurrection. There is still meaning in the old aphorism: "An indestructible Union of indestructible states."

The function of deciding when the government of a state is republican in form belongs to Congress. This maxim the Supreme Court declared long ago in a case involving a contest between two governments in Rhode Island for supremacy.[3] "When the Senators and Representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the Government and could not be questioned in a judicial tribunal." In respect of insurrections in states, the power to answer a call for help is vested by act of Congress in the President. "By this act, the power of

[3] Luther v. Borden, 7 Howard, 1 (1848).

deciding whether the exigency has arisen upon which the Government of the United States is bound to interfere is given to the President . . . and must therefore be respected and enforced by its judicial tribunals." When the legislature of a state, or the executive, if the legislature cannot be convened, invokes his aid, the President may call out troops to protect the state against domestic violence.

States Depend upon the Union. Besides relying upon the Union in upholding the republican form of government, the states depend upon it for the discharge of many functions necessary to their existence. The Union defends them against foreign invasion, conducts all foreign affairs, provides the currency for the transaction of business, controls their relations with one another, decides disputes between them, and regulates commerce among them. By assuring to the citizens of each state the privileges and immunities of citizens in the several states, by guaranteeing the return of fugitives from justice, by requiring all states to give full faith and credit to the acts, records, and judicial proceedings of each state, by opening wide the channels of trade, travel, intercourse, and migration, the Constitution enlarges the rights and privileges of citizens in every state, adding to their prosperity, convenience, and welfare. By imagining a condition of affairs in which all such privileges of travelling and doing business throughout the Union were cut off or seriously limited, the dependence of the state upon the Union for its safety and well-being can be readily comprehended.

Powers Divided between the Union and the States. As the federal system requires two sets of governments, so it calls for a division of powers between them. Under the Constitution certain specific and general functions are assigned to the Federal Government, notably, protection of the country against foreign danger, the conduct of foreign affairs, the regulation of commerce with foreign nations, "the maintenance of harmony and proper intercourse among the states," as Madison phrased it, miscellaneous obligations of "general utility," and the right to do all things necessary and proper for the exercise of powers conferred upon the Union. To the states are left the powers not delegated to the United States by the Constitution or prohibited by it to the states or the people. Thus the powers of government are divided between two sets of authorities, not concentrated in the hands of a single government. By the due exercise of the powers thus divided, the Union and the states preserve their integrity, give strength to each other, act as checks upon too much centralization or too much locali-

zation, and facilitate the conduct of their reciprocal relations. This arrangement is more than a mere matter of convenience in the discharge of public functions. It is in keeping with the genius of the American people, which calls for checks on arbitrary action and for freedom in practicing the arts of local self-government within the limits of the general welfare.

Federalism Contrasted with Centralization. The nature of the American federal system can be brought into clearer perspective by setting it over against a centralized form of government such as exists in Great Britain. In that country the central government has the power to institute, combine, divide, and abolish all geographical subdivisions for purposes of government, to confer functions upon local governments and to take them away, and to prescribe the exact manner in which all local authorities shall be chosen. In addition to enjoying complete legislative power over localities, that centralized government supervises in detail the conduct of local officials, the enforcement of local laws, and the determination of local policies. On the other hand in the United States no federal officer, not even the President, can prescribe the way in which the governor of a state or the mayor of a city must discharge the local functions conferred upon him lawfully by the constitution and laws of his state. Nor can Congress increase and diminish at will the powers of a state legislature or city council. If this division of powers often makes for indecision and friction, it also trains citizens in self-government and places a check upon arbitrary and unrestrained action by public authorities anywhere in the Union.

The Powers of the Federal Government Are Delegated and Supreme

The Constitution the Source of All Federal Authority. For everything done by any agency of the Federal Government warrant must be found in some provision or provisions of the federal Constitution. That Government has no inherent powers; it has only those powers which are vested in it by the supreme law of the land. In this respect it differs from the government of the state, for the latter enjoys all powers not denied to it by the constitution of the state or by the federal Constitution. But a caution must be entered on the record. Although it is often said that the powers of the Federal Government are "express" and "enumerated," this statement is misleading. The numbers which are

generally attached to the paragraphs in Section 8 of the First Article do not appear in the Constitution as originally drawn at Philadelphia in 1787 nor indeed in the official copies issued by the Government itself. They have been added by editors for the convenience of readers. The powers of the Government are nowhere "enumerated" in the Constitution. Nor does the word "express" appear in the document. An attempt was made to insert it in the Tenth Amendment when that provision was under debate in the first Congress, making it read: "All powers not expressly delegated to the United States . . . are reserved to the states." Against this proposal James Madison protested, saying that it is "impossible to confine a government to the exercise of express powers; there must necessarily be admitted powers by implication." And the term was dropped.

Delegated Powers Are Specific and General. A number of powers delegated to Congress are in a sense specific; for example, the power to borrow money, to coin money, to establish post offices and post roads, to declare war, and to raise and support armies. Yet even these apparently specific provisions carry with them implied powers not named in the list. By way of illustration, under its power to establish post offices, Congress has authorized the carriage of parcels as well as matter regarded as "mail" in 1789, and under its power to establish post roads, it may build them. In addition, it should be noted that the Constitution contains clauses of a very general nature. Apart from the Preamble, which declares the broad purposes of the instrument, Section 8 of the First Article provides that Congress shall have power to lay taxes, duties, imposts, and excises, to pay the debts and provide for the "general welfare of the United States." Then at the end of the list of powers comes the clause: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

From the debates and proceedings of the convention which drafted the Constitution, it is clear that the framers intended to vest in Congress general and flexible powers. This broad purpose they declared in a resolution reading: "That the legislature of the United States ought to possess the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases for the general interests of the Union, and also in those cases to which the states are separately incompetent, or in which the harmony of the United States may be inter-

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rupted by the exercise of individual legislation." And it was upon this declaration of fundamental principle adopted by the convention that the Committee of Detail, which filled in the outlines, based the list of powers delegated to Congress; and to the list reported by the Committee the convention itself afterward added the "general welfare" clause. Nowhere in the proceedings of the convention is there any indication that the framers of the Constitution intended to make all powers conferred on the Federal Government "express" or "specific" or to have them interpreted in a narrow and stringent manner. On the contrary, the proceedings show the opposite intention.

Federal Law Is Supreme in Case of Conflict. Though the powers of the Federal Government are delegated, not inherent, federal law within its sphere is supreme over all state law. "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." So runs the federal Constitution; and the Supreme Court at Washington is the tribunal of last resort for deciding all controversies between federal and state authorities in cases involving the provision.

An Illustration of Supremacy. The application of the principle may be illustrated by an example. Long ago Congress provided by law that when any civil suit or criminal prosecution is begun against a federal revenue officer in any court of a state in connection with some official act, the case shall be immediately removed into the federal courts. Such an officer, in the discharge of his duty, killed a man in Tennessee, and his trial, against the protest of the state, was transferred to a federal court in due form.

In discussing the constitutionality of the matter, Mr. Justice Strong said of the Federal Government: "It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, these officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once for their protection—if their protection must be left to the action of the state courts—the operations of the General Government may at any time be arrested at the will of one of its members. . . . No state government can exclude it from the exercise of any authority conferred upon the Federal Government by the Constitution, obstruct its authorized officers

against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." [4]

The Powers of Government Are Separated

Power as the Essence and Peril of Government. Every government in the world, whatever its form, exerts power over the lives, property, and occupations of citizens. Power limited, controlled, and diffused comes within the constitutional conception. The concentration of all powers, legislative, executive, and judicial, in the hands of one person or a group, is "the very definition of tyranny." This maxim the framers of the Constitution recognized by distributing the powers conferred upon the Federal Government among three separate departments: legislative, executive, and judicial; and in the states the same principle is applied in the construction of central governments; sometimes even in cities.

Statement of the Doctrine. This doctrine is not expressly stated in a separate section of the federal Constitution, as in several state constitutions, but is embodied in the opening sentences of the three articles relating to the legislative, executive, and judicial branches: "All legislative powers herein granted shall be vested in a Congress of the United States. . . . The executive power shall be vested in a President of the United States. . . . The judicial power . . . shall be vested in one supreme Court and such inferior courts as Congress may from time to time ordain and establish."

Absolute Separation Impossible. A close examination of the Constitution however shows that the men who drafted it did not maintain the purity of the doctrine when they came to details. Indeed it was thoroughly understood by the framers that a complete separation of powers is impossible, save in the realm of pure theory. In commenting on the subject, Madison remarked that the theory "does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other." And he undertook to prove that "unless these three departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained."

Numerous illustrations of his contention are available. The appointing

[4] Tennessee v. Davis, 100 U. S. 257.

power of the President is shared by the Senate. The treaty-making power—legislative in character—is divided between the President and Senate. On the other hand, the President shares in legislation through his veto power. Even the judiciary, which is created by the Constitution, is in many respects subject to the control of Congress, for Congress may prescribe the number of the judges, fix their salaries, and create inferior courts, subject to certain restrictions.

Influence of Departments Varies in Practice. Political practice has shown that the influence actually exerted by a department of the Government varies from time to time. For example, during the period of Reconstruction which followed the Civil War, Congress dominated the executive, overrode his exercise of the veto power, and through various measures gathered into its hands nearly every shred of federal jurisdiction. On the other hand, during American participation in the World War (1917–18), leadership in legislation as well as administration went to the President.

A similar state of affairs obtained immediately after the inauguration of Franklin D. Roosevelt on March 4, 1933. With nearly all the banks in the country closed, industry and agriculture severely crippled by the panic, and physical distress widespread, the President took the leadership in formulating new legislation designed to meet the crisis. For months every great measure passed by Congress came from his office or expressed his views. Moreover these measures were drawn in general terms and conferred upon him what amounted to the right to legislate by extending the general language of the statutes to innumerable details, including the power to reduce the gold content of the dollar. While it is not true, as alleged at the time, that "Congress abdicated," it did in fact, however viewed in theory, accept the direction of the President and confer immense legislative powers on him.

The Judiciary Long Cautious in Applying the Doctrine. Not for nearly one hundred and fifty years did the Supreme Court set aside an act of Congress on the ground that it delegated legislative power to an executive agency or to the President, that is, violated the principle of the separation of powers. From time to time, it is true, usually in relation to matters of minor importance, the issue was raised in judicial tribunals but no congressional measures were invalidated as wrongfully delegating power. In fact the Supreme Court upheld laws authorizing the President to raise and lower tariff duties within limits and to place an embargo on the export of munitions. It sustained acts empowering

the Interstate Commerce Commission to regulate the rates of railways and a law allowing a federal commission to decide what "public convenience, interest, or necessity requires" in issuing licenses for radio broadcasting. In view of such experience it looked as if the Court would never strike down a statute on the ground that it violated the doctrine of the separation of powers.

The Supreme Court at Last Intervenes. When however Congress, in a desperate effort to deal with the economic crisis of 1933, vested in the President large discretionary powers in regulating major economic matters, a halt was called. By the National Industrial Recovery Act of that year Congress attempted to stabilize the oil industry and authorized the President to stop the transportation in interstate and foreign commerce of petroleum and its products "in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation." In the case of the Panama Refining Company v. Ryan, the Supreme Court held that this was an invalid delegation of legislative power to the executive.[5] If the provision in question, said Chief Justice Hughes, "were held valid, it would be idle to pretend that anything would be left of limitations upon the power of Congress to delegate its law-making functions."

Another part of the Recovery Act authorized the representatives of each industry to make codes of fair practices applicable to all members of the industry, under the supervision of the President, and empowered him to promulgate the codes as law. This provision the Supreme Court also declared void.[6] "We think," the Court explained, "that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

Criticism of the Theory. The soundness of the theory of the separation of powers has been severely criticized by two eminent publicists, Henry Jones Ford and Frank J. Goodnow.[7] They hold that the functions of government are only twofold, the formulation and execution of public will—that is, legislative and executive—the judiciary being merely a branch of the law-enforcing agency. In their view the separation of powers creates friction in the government, divides responsibility, necessitates iron-bound party machinery to overcome the antagonisms fostered by it, and altogether works for confusion and obscurity instead of

[5] 293 U. S. 388

[6] Schechter v. United States, 295 U. S. 495.

[7] Ford, *Rise and Growth of American Politics*; Goodnow, *Politics and Administration*.

simplicity and public scrutiny. By way of contrast, they refer to the English system, in which the legislative and executive powers are fused under the direction of the Cabinet, subject to no interference from the judiciary. On the whole, they are convinced that the English parliamentary organization is a better machine for getting political work done expeditiously and efficiently.

Defense of the Theory. In response to criticism of this type, John W. Burgess contends: "I think that we are upon the right line, and that those nations which have developed parliamentary government are beginning to feel, as suffrage has become more extended, the necessity of greater executive independence. Parliamentary government, i.e., government in which the other departments are subject to legislative control, becomes intensely radical under universal suffrage, and will remain so until the character of the masses becomes so perfect as to make the form of government very nearly a matter of indifference. There is no doubt that we sometimes feel embarrassment from a conflict of opinion between the independent executive and the legislature, but this embarrassment must generally result in the adoption of the more conservative course, which is far less dangerous than the course of radical experimentation." [8]

Revival of the Debate over the Theory. As preparations were made for the Global War in 1940 and the United States became more and more deeply involved in it, Congress conferred immense powers upon the President, for example by the Lend-Lease Act of March, 1941; and he exercised power in every direction as Commander in Chief of the armed forces. In this state of affairs the charge was again raised in Congress and outside to the effect that the President was gathering legislative power into his hand and thus violating the doctrine that the powers of government are separated by the Constitution. It was partly in response to this criticism that the new Congress which opened in January, 1943, displayed signs of revolt against presidential leadership, rejected many proposals made by the Executive, and passed bills to which he objected, including two fundamental acts which he had vetoed (below, Chapter IX). Thus it was again demonstrated that the separation of powers is a vital matter, not merely an empty theory. The separation of powers is indeed a primary feature of American government and is constantly made manifest in the practices of government and politics.

[8] *Political Science Quarterly*, Vol. X, p. 420.

The Powers of All Governmental Agencies Are Limited

All Public Authorities Are under Restraints. While granting broad powers to the Federal Government and leaving to the states a wide sphere of action, the Constitution imposes positive restraints on all public authorities in the country, high and low, by setting metes and bounds to the actions they may take and the manner in which they may exercise their undoubted powers. These limitations are designed to protect the person, property, and civil liberties of the individual, by preëxisting and superior law, against all forms of mere arbitrary interference by government officials. In some matters the individual is protected against the Federal Government, in others against state and local governments (see Chapter XXI), and in still others against all governments, federal, state, and local. An example of all-around protection is found in the Fifth Amendment and Fourteenth Amendment which together forbid Congress and states to deprive any person of life, liberty, or property without due process of law. These limitations on the powers of all governments are numerous and in many respects highly technical as interpreted and applied by the courts, but the observance of the restraints by officials and citizens is indispensable to the preservation of civil liberty and the perpetuity of the American system.

Contrast with the Sovereignty of the British Parliament. The fundamental character of these rules can be illustrated by comparisons, first with the English parliamentary system and then with the dictatorships of Fascism and Communism. Any law passed by Parliament—that is, by King, Lords, and Commons—must be enforced; it cannot be called into question by any court; the only remedy for the citizen is at the ballot-box when members of the House of Commons are elected. If the British Parliament should pass a law confiscating the land now owned by private persons, there would be no relief for the victims, unless the same Parliament or a succeeding one could be induced to repeal the law in question. If the Congress of the United States however should pass such a measure, it would be the duty of the courts on the presentation of the proper case to protect landowners in their property rights by declaring the act null and void—in conflict with that section of the Fifth Amendment which provides that no person shall be deprived of life, liberty, or property without due process of law; and that private property shall not be taken for public use without just compensation. Likewise, if the legislature of a state should

pass such a measure, it would be the duty of the courts to protect the citizen under the Fourteenth Amendment forbidding any state to deprive a person of life, liberty, or property without due process of law—compensation being, under judicial interpretation, an indispensable feature of "due process."

Contrast with Unlimited Powers of Dictators. Although the parliamentary system of Great Britain is theoretically absolute, practice and custom have so hedged it about that in reality it does not differ essentially from the American system as far as the liberty of persons and property is concerned. On the other hand a dictatorship, such as that of Fascism or Communism, is despotic and arbitrary in theory and in daily operation. Under a dictatorial system a single person, surrounded by a small group of supporters, raised to power by violence, makes laws as he goes along, at his pleasure or whim, enforces them by any method he chooses, changes them at will, and holds all individuals under his control, at the mercy of his own will. The dictatorial system reached what may be called a climax in the summer of 1934 when Adolf Hitler, Chancellor of Germany, flew to a scene of alleged disaffection, selected certain individuals whom he deemed objectionable, and had them shot immediately without open trial, without giving them a chance to be heard in their defense. On this occasion, he made the law which they were alleged to have broken, formulated the charges against them, acted as judge, condemned them to death, and ordered them executed. So far as forms and processes are concerned a dictatorship means the possession of irresponsible power by an official or leader who has come into office by violence and can only be ousted by revolution. It means a return, perhaps under new phrases and guises, to despotism under which the lives and possessions of citizens are absolutely at the disposal of the passions and whims of the ruler.

It is true that the limitations imposed in behalf of human liberty are frequently violated in the United States by officials who overstep the bounds of preëstablished law and by mobs that defy the rules of law, but the violations that occur are treated as violations by all sober citizens; whereas in a dictatorship the idea of putting the body and property of every citizen at the mercy of government is exalted into a supreme creed.

Constitutional Clauses Imposing Specific Restraints. In a strict sense every line in the Constitution of the United States is a limitation on government, even those clauses which indicate how federal authorities are to be chosen and prescribe the powers they may exercise; but there

are also included in that document many provisions which impose specified restraints on government. For convenience the special provisions may be classified under two heads: those binding on state and local authorities and those applicable to the Federal Government alone. The former will be considered below in Chapter XXI. The latter fall into two broad classes: (1) provisions designed to protect personal liberty against arbitrary actions on the part of the Federal Government or any of its officials, and (2) provisions safeguarding private property against arbitrary and irregular actions and indicating the methods by which such property may be taxed, regulated, or taken for public uses. These we shall now consider in some detail.

Limitations Safeguarding Freedom of Religion, Press, and Speech

Religious Worship. Congress cannot make any law respecting the establishment of a religion, nor can it interfere with the freedom of religious worship. The rule does not mean however that any person may, under the guise of a religious ceremony, commit an act which transgresses the ordinary laws of the land enacted in the interest of good order, health, and safety. This point was settled long ago by the Supreme Court in a case involving the power of Congress to prohibit polygamy in the territory of Utah and penalize offenders who violate the law. A Mr. Reynolds, who was indicted under a federal statute for the crime of polygamy, set up by way of defense the contention that his "plural marriage" had a religious sanction and was thus protected by the Constitution, but without avail. The Court replied that religion has to do with the relations of man to "an extramundane being," and that no citizen can claim a right, in the name of religious freedom, to violate a criminal statute.[9]

Free Press and Speech. Next to religious liberty the Constitution places freedom of press and speech by denying to Congress the power to abridge this famous right. Men of Jefferson's bent knew the history of censorship and intellectual tyranny and were afraid that Congress, in the exercise of its undoubted authority over other matters, might set up a censor, suppress newspapers, and punish critics. From this fear came their insistence on an express stipulation in favor of freedom in the First Amendment. On the other side, Hamilton thought little of the

[9] Reynolds v. United States, 98 U. S. 145.

project. He insisted that it was useless. Whatever declarations on the subject might be inserted in the Constitution, he said, security of the press would depend altogether on "public opinion and on the general spirit of the people and of the government." In short, it was his view that if people believed in liberty, they would have it and, if they did not, paper phrases would not give it to them.

Violation by the Sedition Act (1798). Within a few years Hamilton's opinions were illustrated. The words forbidding Congress to abridge the freedom of the press and speech stood firmly in the First Amendment, but nevertheless in 1798 Congress passed the Sedition Act, laying penalties on persons who published or openly said anything bringing or tending to bring the National Government or any of its officers into disrepute. Under this measure many American citizens were fined and imprisoned for what would be regarded today as harmless, if caustic, criticism of public authorities. At the time Hamilton and Marshall warned their Federalist colleagues against the enactment of such drastic legislation; convinced that it was iniquitous, Jefferson, on becoming President, pardoned all prisoners held in jail under it.

Freedom in the Civil War. In theory the constitutional limits on behalf of freedom of press and speech all apply in war as well as in peace, for the Amendment makes no discrimination as to circumstances. In practice however the National Government has imposed many restrictions on the exercise of such rights in time of war. In the course of the Civil War, for example, the National Government, without adopting a sedition law, suppressed newspapers, arrested and imprisoned editors, and punished speakers for criticizing its activities and advocating immediate peace. When attacked by his opponents for "violating" the Constitution, President Lincoln replied that he had taken a solemn oath to support it and hence that he had the legal right to do all things necessary and proper to sustain the Constitution and the government founded upon it.

Restrictions on Opinion in the World War (1917–18). During the war against Germany and Austria, though the danger to public safety was not so great as during the civil conflict, the National Government was even more severe in placing limitations on liberty of the press and speech and was sustained by the courts. By the Sedition Act of 1918, Congress laid heavy penalties on all persons who printed, wrote, or published any "disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of

the United States . . . or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States or the uniform of the Army and Navy into contempt, scorn, contumely, or disrepute." The above measure, it is evident from the context, was not directed primarily against those who interfered with military affairs but rather against those who criticized the form and operations of the National Government. It was hotly denounced during the debates on it in the Senate, Senator Hiram Johnson going so far as to say that it would "suppress the freedom of the press in the United States and prevent any man, no matter who he is, from expressing legitimate criticism of the present Government." Nevertheless it was adopted in the House with only one dissenting vote and in the Senate by a vote of forty-eight to twenty-six, and was sustained by the federal courts.

Prosecution of Critics. Under federal legislation, hundreds were arrested and scores were sent to prison. As applied in practice, says Professor Zechariah Chafee,[10] "it became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional, . . . to say that the sinking of merchant vessels was legal, to urge that a referendum should have preceded our declaration of war, to say that war is contrary to the teachings of Christ." Many who openly opposed the war or denounced it as a "capitalist" quarrel were swiftly sent to prison for long terms. One girl twenty-one years of age was sentenced to the penitentiary for fifteen years for taking part in issuing a circular severely attacking President Wilson's policy of intervention in Russia. It was with ample historical warrant that Charles E. Hughes, a man given to measured language, warmly protested in an address delivered in the summer of 1920 before the Harvard law alumni against inflammatory appeals to prejudice made by district attorneys and the browbeating of witnesses during trial by judges in every kind of court and in every part of the country, in civil liberty cases. Since that time however the Supreme Court has made numerous decisions bearing on civil liberties, federal and state. Most of these decisions have strengthened the principles referring to personal rights, especially in the states, but no restrictive acts of Congress have been declared unconstitutional.

Civil Liberties in the Global War. Taking cognizance of the protests made by lawyers of national standing against the mass arrests, harsh

[10] *Free Speech in the United States* (second edition, 1942).

prosecutions, and hysteria of the World War, the Roosevelt administration, especially the Attorney General, promised that arbitrary and sensational invasions of civil liberties would not be repeated as the Global War opened. In various respects the promise was observed; and more easily on account of the fact that most of the extreme radicals and communists, such as had denounced the previous war as a capitalist or imperialist war, were heartily in favor of the Global War which they regarded as an aid to Communist Russia. Federal police officials, under the direction of the Federal Bureau of Investigation, were instructed to refrain from hasty and arbitrary arrests of persons on trumped up charges or none at all. The trials of persons accused of offenses against laws respecting liberty of opinion were marked by less hysteria and less tyrannical conduct on the part of judges and juries. The penalties pronounced upon men and women found guilty of expressing opinions against actions of the Government and its theories of the war were often severe; but in the trials of indicted persons due process of law was far more scrupulously observed than in the previous war.[11]

The laws enacted by Congress for the suppression of opinions deemed objectionable or subversive were in some respects milder and in others more severe. The Espionage Act of 1917 was continued in force. The Sedition Act of 1918 was not renewed in its earlier form, but in 1940, before the war began, Congress attached to the Alien Registration Act drastic provisions penalizing the expression of revolutionary opinions and even membership in any group espousing such opinions. These provisions, which may be called for convenience the Federal Sedition Act of 1940, make it a crime, if done with disloyal intent, (1) to counsel, urge, or in any manner cause mutiny, insubordination, or refusal of duty by any member of the armed forces of the United States; (2) to distribute written or printed matter teaching or advising the overthrow of government by violence; (3) to organize or help to organize any group having such propaganda as its purpose; and (4) to be a member of any group of this kind.

These provisions, it is evident, penalize not revolutionary actions, which have always been treated as unlawful, but the expression of revolutionary opinions, such as Thomas Jefferson and Abraham Lincoln had once declared to be an American right. Thus they mark a de-

[11] For criticism of prosecutions during the Global War, see the *Congressional Record* for March 29, 1943, Appendix, p. 1584, and for April 6, 1943, p. 1771.

parture from previous peace-time legislation on the subject of free press and free speech. As Zechariah Chafee points out: This also "makes it a crime to be a member of an organization which is subsequently found to advocate the overthrow of the government by force, regardless of what he himself says or does. . . . We got safely through the Civil War and the [first] World War without finding it necessary to create group guilt outside the limits of actual conspiracy. . . . The Alien Registration Act brings into our federal criminal law the European principle that a man is known by the company he keeps and that guilt is not personal." [12]

Besides writing this doctrine into federal law, Congress, through the agency of committees and by legislation forced various branches of the Federal Administration to expel from office, or demand the resignation of, persons accused of holding "subversive," not criminal, opinions. It is not a crime in American law for any individual to have communist views as long as he does not advocate violence as a mode of realizing them. But two committees of the House of Representatives set about hunting down employees and officials of the Federal Government who were charged with entertaining radical theories or even merely associating with organizations more or less tinged with radicalism; and in several cases they sought to compel the removal of such employees and officials, under a threat of cutting out of appropriation bills provisions for their salaries. Thus was established the precedent that American citizens whose political views do not square with the political views of certain Senators and Representatives have no right to hold positions in the Government, even though they have complied with all the requirements of the civil service laws. However regarded, this precedent was a departure from principles hitherto associated with civil liberty in the United States.[13]

Freedom Is Relative, Not Absolute. It is not easy to draw the correct line between the expression of opinions that are actually dangerous to orderly progress and the expression of opinions that, even if extreme, are within the boundaries of the liberty guaranteed by the Constitution. In any case, freedom cannot be absolute, that is, it does not give the citizen a right to say anything he likes, anywhere, at any time, regardless of circumstances. No government could allow unrestricted liberty to persons who urge direct attempts to overthrow it by violence or the

[12] Chafee, *Freedom of Speech in the United States* (1942 ed.), p. 470.

[13] Frederick L. Schuman, "'Bill of Attainder' in the Seventy-Eighth Congress," *American Political Science Review*, October, 1943, pp. 819 ff.

murder of its officials. In ordinary criminal law the man who induces another to commit a crime by persuasion or promises also shares the guilt of the principal and is punished. So in the case of criticism of the government, conspiracies and attempts to overthrow it by violence are necessarily crimes; otherwise its foundations would be built on sand.

But it is difficult to distinguish between spoken and printed words intended to lead to open violence and those that merely stir up a discontent which might possibly eventuate in violence. Some of the courts have attempted to fix the boundary by saying that language which has "a reasonable and natural tendency to encourage resistance to the law" should be made criminal. This is a doctrine dangerous to liberty of opinion, for does not every criticism of a law have a "tendency" to encourage resistance to it? A perfectly innocent remark by a responsible citizen to the effect that some particular law, in his opinion, is unwise, unjust, or foolish may turn the scale in the mind of someone else and set him in motion to resist the law by displays of violence. A stricter doctrine is that of Jefferson to the effect that only when criticism of the government immediately threatens to culminate in open resistance should public officials interfere with freedom of press and speech. Indeed between the World War and the Global War, the Supreme Court of the United States, in interpreting state and federal legislation restricting freedom of press and speech, developed the doctrine that the test of whether officials should intervene with the exercise of that freedom is this: Does such exercise present a "clear and present" danger of disorder and violence? But this doctrine is not the law of the land and Title I of the Alien Registration Act of 1940 provides that any person who is merely a member of an organization which advocates the overthrow of government by force is guilty of crime even though he personally says or does nothing dangerous to public order.

Freedom a Question of the Spirit. In view of recent legislation, federal and state, respecting freedom of speech, press, and person, it is evident that mere words in the Constitution do not in themselves adequately define or preserve liberty. At bottom, as Alexander Hamilton said long ago, freedom depends in a large measure upon the spirit of the people and their representatives in the various branches of government. Do they believe in liberty as a good in itself to which the dignity of human nature is entitled? Do they recognize the truth that it is essential to democratic government by discussion? Are they willing to allow to others the right of opinion which they claim for themselves? And in

cases at law all depends upon the judge and jury. As an English writer once put it, liberty is what twelve grocers, bakers, and candlestick-makers think it is, and little more. Into harsh law judges and juries may introduce moderation and justice. Under high-sounding proclamations in the name of liberty they can slay freedom in its own house.

The Right of Petition. Besides religious liberty and freedom of press and speech, the Constitution guarantees to the people the right to assemble peaceably and petition the government for redress of grievances. This right is upheld against the states as well as the National Government; but, of course, it does not secure to the petitioners the privilege of having their requests acted upon by federal authorities. Their documents may be presented and filed in the congressional waste basket. Indeed under a precedent now long buried—a rule adopted by the House of Representatives in 1836—petitions may be spurned or tabled without being referred to committees or receiving any further consideration. Perhaps, as John Quincy Adams maintained, the rule is unconstitutional, but nevertheless it was in force for many years with respect to anti-slavery petitions.

Moreover the right of petitioning is apparently limited to requests for things lawful under espionage and sedition legislation. Under the Sedition Act of 1798 a man was indicted for demanding a repeal of the Act. During the World War, "twenty-seven South Dakota farmers were opposed to the draft and believed that an unduly high quota was exacted from their county. They petitioned various state officers, asking for a new arrangement, a referendum on war, payment of war expenses from taxation, and repudiation of war debts. As an alternative they threatened defeat to the officers, their party, and the nation. . . . The twenty-seven were sentenced to more than a year in prison." [14]

Vigilance the Price of Self-Government. In the long history of the struggle for liberty and human rights, it has been made abundantly evident that definite procedures are necessary to preserve the American heritage. First is the cultivation of tolerance and reasonableness in spirit, the avoidance of bigotry, and the resort to protest and legal action when we believe that lawful rights have been violated either by private persons or public officials. In the second place, it is important that the enforcement of civil liberty be left in the hands of duly constituted officials and that individuals and groups refrain from taking the law into their own hands and acting as illegal policemen, judges,

[14] Chafee, *Freedom of Speech*, (first edition) p. 64.

jurors, and executioners, by spying on and maltreating persons who express unpopular opinions. In the third place, public officials themselves need education in the principles of civil liberty on which American democracy is founded, and they are under obligations to be positive rather than merely negative in enforcing the law relative to civil liberty.

Congress is given full authority by the Fourteenth and Fifteenth Amendments to enforce by appropriate legislation many fundamental rights of person and property, and unlike the Courts it does not have to wait until some aggrieved person has raised a formal case before acting. Under its unquestionable powers, the Senate, by a resolution adopted in 1936, instructed its committee on education and labor, or a subcommittee thereof, to make "an investigation of the violations of the right of free speech and assembly and undue interference with the right of labor to organize and bargain collectively." With Robert M. La Follette as chairman, the committee conducted public hearings, made extensive inquiries into the subject, and reported in many volumes numerous and wide-spread practices contrary to the letter and spirit of the law respecting civil liberty—practices by public officials, private detectives and gangsters, and by employers of labor. In the voluminous pages of the committee's reports is detailed evidence of ways in which civil liberty may be violated by public officers and private parties.[15] At the conclusion of its hearings the committee prepared and presented to the Senate a program of legislation designed to prevent abuses of civil liberty such as it had discovered; but Congress did not act upon its recommendations.

Limitations Protecting Liberty of Person against Arbitrary Arrest, Trial, and Punishment

Importance of Criminal Law and Trials. Although millions of people, throughout their lives, never come into collision with officers of the Federal Government or appear in a civil or criminal court for the trial of a case, thousands do every year for reasons good or bad, and anyone may be so involved at any time deliberately or inadvertently. Moreover it is to the courts that all who feel aggrieved by the actions of government or private persons may appeal for redress. Hence the rules by which cases involving crimes and civil rights are tried are a vital con-

[15] *Hearings before a Subcommittee of the Committee on Education and Labor, United States Senate . . . pursuant to S. Res. 266 (74th Congress).*

cern to the liberty of every citizen, despite their apparent remoteness.

Treason Defined in the Constitution. One of the old and powerful devices used by dictators in getting rid of persons deemed objectionable is to accuse them of "treason," which may be made to mean anything from mere criticism of the government to preparations for an armed uprising against it. The Constitution of the United States takes account of this peril to liberty. It does not permit Congress to define this crime in any way it sees fit, but provides a specific definition: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." Congress cannot therefore vindictively declare to be treasonable any act which does not meet its approval.

Trials and Penalties for Treason. In addition, the trial of persons accused of this high crime is carefully safeguarded. No person can be convicted of treason unless on the testimony of two witnesses to the overt act or on confession in open court. In the case of the United States v. The Insurgents,[16] the Supreme Court, interpreting a federal statute, ordered that the names of the jurors and a list of witnesses be furnished to the accused; and that a reasonable time be allowed for the defense to prepare its case after receiving this information. The Court furthermore declared that until the overt act of treason had been proved by the testimony of two witnesses, no collateral evidence relating to the charges could be introduced.

While Congress has the power to provide the penalties for this grave offense, the Constitution stipulates that no attainder (conviction) of treason shall work corruption of blood or forfeiture except during the life of the individual thus condemned. In old English practice, corruption of blood meant that no attainted person could inherit lands or other property from his ancestors or retain those which he possessed or transmit them to his heirs. The constitutional provision mentioned above modifies the old rule by protecting relatives; and accordingly no proceedings may be construed to work a forfeiture of the real estate of a traitor for a longer term than his natural life.[17]

Protection against Arbitrary Criminal Laws and Trials. Likewise in the interest of individual liberty, proceedings against persons charged with crime under federal law are controlled by several explicit provisions of the Constitution. Congress cannot act as a court and pass a bill

[16] 2 Dallas, 335.
[17] Bigelow v. Forrest, 9 Wallace, 339.

of attainder condemning any person to death or to imprisonment or imposing any penalty whatsoever. It can pass no ex *post facto* law; that is, no law making an act a crime which was not a crime when committed, or adding new penalties after the commission of an act, or modifying procedure in such a way as to make it substantially easier to convict a defendant already accused.[18]

Federal authorities have no power to arrest people wholesale on general warrant; warrants of arrest must be issued only upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons and things to be seized. Indictment by grand jury and trial by jury are secured generally to all civilians charged with capital or otherwise infamous crimes, except in the insular possessions. The writ of habeas corpus can be set aside only in case of rebellion or invasion, when suspension may be required by public safety; that is, in ordinary circumstances any person arrested by federal officers has the right to this historic writ which assures him a speedy preliminary hearing before a proper judicial tribunal. Excessive bail cannot be demanded by federal authorities; in other words, except in cases especially grave, federal courts must release prisoners on bail, and must not fix the amount at such an unreasonable sum as practically to deny the right.

Finally, in general, the National Government must allow due process of law in all its criminal proceedings: every trial must be open and speedy and in the state and district where the crime was committed; the defendant must be informed of the nature and cause of the charge against him; the witnesses against him must be brought face to face with him; he may force, by compulsory process, the attendance of witnesses in his favor; he cannot be compelled to testify against himself in any criminal case; and he has a right to have the assistance of counsel in his own behalf.

Dangers of Violations by Officers. Such at least are the grand principles of personal liberty set forth in the Constitution. In actual prac-

[18] The length to which Congress might go in the direction of a bill of attainder was illustrated in 1940 when the House of Representatives by a vote of 330 to 42 passed a bill ordering the Secretary of Labor to seize and deport an alien, Harry Bridges, accused of being a communist and engaging in communistic activities as a labor organizer. The bill was later dropped. Professor Chafee correctly suggests that the provision of the Alien Registration Act of 1940 which authorizes the deportation of an alien for conduct years before the enactment of the law is not harsher than several of the criminal laws already invalidated by the courts under the ex *post facto* clause of the Constitution. *Free Speech in the United States* (1942 ed.), p. 446, note.

tice, during American participation in the World War (1917–18) and for many months afterward, federal officials played fast and loose with them—so fast and loose that a committee of eminent lawyers, among whom were two members of the Harvard Law School, made a public protest and filed a list of violations of law said to have been committed by the Government itself. It was alleged, and the allegation was well supported, that arrests had been made by federal authorities without proper warrants and on trivial and trumped-up evidence; that many persons were herded in jails and held for a long time without bail and without an opportunity to communicate with counsel or friends; that federal detectives actually stirred up meetings said to be seditious and then arrested participants; and that the Attorney General of the United States made improper use of his high office to pursue and punish persons accused of entertaining radical opinions.

Limitations on the Power of the Federal Government over Private Property

Although the rights of persons in their property are to some extent protected by constitutional clauses which cover judicial procedure in general, they are specifically safeguarded in separate provisions. These rights involve three broad questions: What objects may be held as private property? How and in what circumstances may the Federal Government take private property away from citizens and residents? How may the uses of property by private persons be regulated?

Defining the Objects of Property. The power to define objects of property to be regarded as subject to private ownership is left by the Constitution to the states (Chapter XXX) with one great exception, namely, that property in man—slavery and involuntary servitude—shall not exist anywhere within the jurisdiction of the United States. Congress has no power to define property except in the territories and districts not organized into states and with respect to the lands, forests, navigable rivers, and other matters subject to or taken under direct federal control.

Rules for Taking Private Property by Taxation. In the taking of private property by the Federal Government, two methods are employed. One is general in nature and called taxation. The other is specific, is applied to particular pieces of land or objects of property, and is called condemnation. In respect of the former, the Constitution lays explicit

restraints on the power of the Government. Congress must apportion all direct taxes, except income taxes, among the several states according to the respective numbers of their inhabitants. All indirect taxes such as duties, imposts, and excises must be uniform, that is, fall with the same weight on the same object everywhere throughout the United States. The amount of private property which the Federal Government may take by taxation is not limited by constitutional provision, but in raising any given amount by taxation the Government is controlled by principles broadly and generally applicable to all property owners similarly situated. This prevents the indiscriminate confiscation of the property of individuals.

Restraints on Condemnation. When the Government takes pieces of land or other types of property by specific condemnation, it is subject to positive restraints. Particular pieces of property can only be condemned for public purposes; that is, for the uses and services of the Government and its public projects. This means, for example, that the Government cannot condemn the land of one farmer and give it to another farmer for his personal use and profit. Whenever the Government takes private property for public purposes it must make just compensation to the owner. In determining what is just compensation, federal authorities must consider the purposes for which the property in question is suitable and pay due regard to the existing business or needs of the community and such as may be reasonably expected in the immediate future. The proceedings in ascertaining the value of property condemned for public use may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as Congress may determine. They must be conducted in a fair and just manner, affording to the owner of the property in question an opportunity to present evidence as to its value and to be heard on that matter.

Limits on Regulation of Property. In regulating the uses of private property and thus, perhaps, depriving owners of a portion of their possible earnings or returns, the Federal Government is subject to two general limitations. It can directly regulate only property employed in interstate and foreign commerce and in the territories and possessions of the United States. And it is forbidden to prescribe regulations for the use of such property in a manner to deprive any person of property without due process of law, that is, broadly speaking, without resorting to a regular procedure and allowing a fair return on prudent investment (Chapter XVII).

Legislation Respecting Citizenship and Rights of Aliens Is Limited by Constitutional Provisions

Citizenship Is National and Protected against Federal and State Actions. Besides laying down basic doctrines of government, the Constitution prescribes a number of fundamental principles covering citizenship and the rights of persons, including under the latter term aliens resident in the United States. In international law, the word "citizenship" now means membership in a nation and allegiance to its government, but when the American Republic was established it had no very definite connotation in law or practice. The Constitution itself refers to "citizens of the United States" and "citizens of the states" and states once had the power to naturalize aliens; but a strict usage of the term would require us to speak of citizens of the United States and residents or inhabitants of the states. The state now has no power to bestow or withhold citizenship, although it may confer many civil and political rights on foreigners. Citizenship is guaranteed under the Fourteenth Amendment to all persons born on the soil of the United States, with certain exceptions noted below. Furthermore the exclusive right to admit aliens to citizenship is given to the National Government by the clause authorizing Congress to make uniform rules of naturalization.

Citizenship by Birth. Citizenship in the United States may be acquired by birth or by naturalization. According to the Fourteenth Amendment, all persons born in the United States, with a few exceptions such as the children of foreign diplomatic and consular officers, are *ipso facto* citizens of the United States. This is called citizenship by reason of birth in a particular place, *i.e.*, *jure soli*. To secure citizenship to American children born on foreign soil, Congress has provided by law that all children born out of the jurisdiction of the United States, whose parents are at the time of their birth American citizens, shall be deemed citizens of the United States. The rights of citizenship however do not descend to children whose citizen fathers or mothers never resided in the United States; and rights of citizenship may be forfeited on various grounds under the Loss of Nationality Act of 1940 as amended in 1941 and 1942.

Formerly an alien woman who married an American citizen became immediately an American citizen, while an American woman who married an alien lost citizenship in the United States. By acts passed in 1922, 1930, and 1934, Congress altered this ancient rule. The law now

provides that an alien who marries a citizen of the United States shall not become a citizen by reason of such marriage, but may become a citizen by compliance with the naturalization laws on special terms. Marriage to an alien, or subsequent residence with him abroad for a long time, does not now automatically deprive an American woman of her citizenship. She retains her citizenship, but may voluntarily surrender it by formally renouncing it. American women who wish to keep their citizenship, regardless of marriage ties, are at last authorized by American law to do so—a long-delayed installment of simple justice.

Citizenship by Naturalization. Foreigners may be admitted to citizenship by naturalization, either collectively or individually. Collective naturalization may occur when a foreign territory and its inhabitants are ceded to the United States. The manner of this naturalization is generally stipulated in the terms of the transfer. For example, the treaty with France confirming the Louisiana Purchase provided that the inhabitants of the territory should be incorporated into the Union and admitted as soon as possible, in conformity with the principles of the federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.

The naturalization of individuals is subject in all its details to the laws of Congress. It is effected by judicial process in specified federal, state, and territorial courts. Only white persons and persons of African nativity or descent and descendants of races indigenous to the Western Hemisphere may acquire American citizenship by naturalization; foreign-born Japanese, Hindus, and certain other Asiatics are entirely ineligible.[19]

Method of Naturalization. The general method of naturalization is as follows. At the outset the alien in quest of American citizenship, who must be at least eighteen years of age, files in the proper court a declaration of his intention to become a citizen. At the end of not less than two years and not more than seven and after at least five years' residence in the country, the applicant presents a petition signed by his own hand, stating that he is not opposed to organized government or a polygamist, and declares under oath his intention of renouncing his allegiance to his former country. His petition must be supported by the testimony of American citizens as to his residence and moral character.

After ninety days have elapsed from the date of filing the petition,

[19] Chinese were made eligible to citizenship by special act of Congress in 1943.

the case may be heard by the court before which it is laid. On this occasion the applicant announces his adherence to the declarations made in the petition, and is then examined. The testing may be formal or thorough and searching, according to the standards of the judge who conducts it. At all events the judge is required to satisfy himself, either on his own motion or on information received from an examiner, that the provisions of the law have been complied with, that the applicant has behaved as a person of good moral character, can speak English, is attached to the principles of the Constitution, will defend it, and is well disposed to the good order and happiness of the United States. When the court is duly convinced, the certificate of naturalization is issued.

Grounds for Denial of Citizenship. Evidently a large power of discrimination is conferred upon the judges and may be employed to exclude from citizenship an applicant who believes in political doctrines that appear objectionable to them. In 1929, for example, Rosika Schwimmer, an alien woman forty-nine years of age, sought to secure American citizenship through naturalization. In the course of the proceedings, Mrs. Schwimmer declared that she "understood the principles of and fully believed in our form of Government" and had read and was prepared to take the oath of allegiance. She was then asked the following question: "If necessary, are you willing to take up arms in defense of this country?" To this query she replied, "I would not take up arms personally." She then amplified the statement by declaring that "If . . . the United States can compel its women citizens to take up arms in defense of the country—something that no other civilized government has ever attempted—I would not be able to comply with this requirement."

With these facts before it the Supreme Court, to which the case was taken by appeal, held that "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. . . . Whatever lessens the willingness of citizens to bear arms detracts from the strength and safety of the Government." In effect, the Court refused citizenship to Mrs. Schwimmer on the ground that she would not agree to perform a hypothetical act never yet required of any American woman—namely, bear arms in case of need at the age of fifty. From the opinion of the Court, Justice Holmes dissented. He believed that the law requiring the support and defense of the Constitution should not be interpreted to mean that citizens by naturalization must support and defend it in a

manner not yet demanded of natural-born citizens of the United States.

The Schwimmer case has been used as an authority for a number of rulings. Thus a Quakeress was refused naturalization by a federal district judge on account of her unwillingness to fight, "if the law were changed compelling women" to do so. Again, a Russian priest was excluded because his religious convictions forbade him to carry arms—a situation expressly provided for in wartime when conscientious objectors with religious scruples are permitted to choose other than military activities, even though they are American citizens.

Grounds for the De-naturalization of Naturalized Citizens. The mere fact that an alien has been declared to be an American citizen by regular processes of naturalization does not in itself guarantee citizenship to him forever. A naturalized citizen may lose his certificate of citizenship "on the ground of fraud or the ground that such certificate . . . was illegally procured." Luella Gettys gives a list of the concrete grounds on which citizenship has been cancelled.[20] They include proof after naturalization that the person at the time of naturalization was not actually of good moral character, or was not attached to the principles of the Constitution, or took a false oath of faith and allegiance to the United States, or was not qualified as to race, or was an enemy alien. Under these principles many difficult cases have arisen in the courts. For example, may the citizenship of a person be revoked twelve years after naturalization on the ground that, at the time of naturalization, he did not disclose his membership in the Communist party or his various communistic activities, and that he thus did not have the requisite qualifications required for loyal citizenship? This question the Supreme Court answered in the negative, by a divided vote, on June 21, 1943, in the case of William Schneiderman *v.* The United States. Such matters are highly technical and they involve important questions of morals and political or social opinions.

Right of Aliens in the United States. In connection with matters of citizenship, consideration should be given to the position of aliens within the area of the continental United States. In law their rights are determined partly by the Constitution, acts of Congress, and treaties with foreign countries and partly by state legislation. At several points the Constitution specifically mentions *persons* rather than citizens. The Fifth Amendment refers to specific rights of persons. Again, the Fourteenth Amendment declares that no state shall deprive any

[20] *The Law of Citizenship in the United States*, pp. 97 ff.

person of life, liberty, or property without due process of law or deny to any person the equal protection of the laws.

Such provisions are supplemented by treaties with various countries guaranteeing a reciprocity of rights in specified cases, but the enforcement of these treaty agreements is generally left to the states, with appeal, of course, to the federal courts for final determination respecting the validity of any particular local law or action. Undoubtedly Congress has the power to provide federal processes for enforcing treaty provisions which guarantee rights to aliens resident in the country; more than one President has recommended this step; but the opposition has always been too strong. Thus while treaty rights stand squarely on the books, states may encroach upon them, subject to judicial review in the courts of the United States. Furthermore Congress itself may discriminate against aliens in certain cases; it has, for example, denied Japanese and persons belonging to certain other non-Caucasian races the right to become naturalized citizens, even though they have lawfully entered the United States.

By judicial rulings, particularly federal, the rights and disabilities of aliens have been authoritatively defined in various relations. It is unlawful under the Fourteenth Amendment for states to deny aliens the equal right to engage in certain callings, such as the laundry business, on the same terms as citizens; it is unlawful to tax employers specifically for hiring alien laborers, or to compel employers having more than a fixed number of employees to hire a certain proportion of American citizens On the other hand, state legislation forbidding aliens not eligible to naturalization to buy or lease land for agricultural purposes has been sustained. Aliens may be denied the right to hunt and fish in public places, to enjoy the benefits of workmen's compensation legislation, to practice law, or to be employed on public works. In time of war, of course, the rights of alien enemies may be curtailed to the point of disappearance. Moreover the power of Congress to expel aliens for certain types of conduct and offenses is broad, if not unlimited. Hence while a majority of alien residents enjoy nearly all the non-political rights of citizens, many of them labor under disabilities. Vestiges of distant days when aliens were viewed by all countries of the world as rightless persons still remain here and there in American law, sometimes working grave injustice in individual cases.

Deportation of Aliens. The right of aliens residing in the United States to carry on radical agitations became an acute issue after the

Communists rose to power in Russia in 1917. For a long time, of course, it had been a practice of the Government to deport aliens who had entered the country in violation of the immigration laws. But in 1917–18, amid the excitement of the times, hundreds of aliens were charged with holding or propagating communist, subversive or dangerous opinions, rounded up by the police, and deported wholesale, with little regard for their legal rights. After the war closed more respect was paid to due processes of law in deportation proceedings but controversies over such actions continued. As a rule it was aliens charged with communist opinions or activities, rather than German Nazis and Italian Fascists, against whom deportation proceedings were launched.

By the Alien Registration Act of 1940, Congress made drastic provisions for deporting aliens. Now they may be deported if found guilty of advocating or having advocated at any time previously—"no matter how short the duration or how far in the past—revolutionary doctrines or having been a member of any organization engaged in advocating such doctrines of violence." In such cases, deportation is mandatory. Nevertheless Congress did not, and could not under the Constitution, deny to aliens accused of guilt under the Act the privilege of access to the courts of law for a judicial determination of their rights.[21]

Negative Restrictions Are Imposed on the Power of the States to Determine Suffrage Qualifications

Suffrage Originally Left to States. The original Constitution contained no provisions defining the suffrage. It avoided the issue by stipulating that voters for members of the House of Representatives should have the qualifications requisite for electors of the most numerous branch of the state legislature, and by authorizing the state legislatures to elect the Senators and to decide how presidential electors should be chosen. Thus matters stood until the close of the Civil War when the Fourteenth and Fifteenth Amendments were adopted.

Federal Suffrage Amendments. These provisions however do not contain positive qualifications for the suffrage. They still leave the regulation of the franchise to the states but subject it to two conditions. The first declares that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a state,

[21] Chafee, *Free Speech in the United States* (1941 ed.), p. 445.

or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." Supplementing this indirect attempt at general male enfranchisement is an assertion in the Fifteenth Amendment to the effect that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous condition of servitude.

When Congress framed the Seventeenth Amendment providing for popular election of United States Senators, it merely stipulated that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature"—the old form. Nor does the Nineteenth Amendment positively confer upon women the right to vote; it merely declares that the right to vote shall not be abridged by the United States or any state "on account of sex." Within these limits the suffrage is still defined by the states (Chapter XXII).

American Suffrage Not Uniform. Owing to the nature of such provisions, there is no uniform franchise throughout the United States. Various limitations have been established by Congress from time to time in the territories and insular possessions subject to its immediate jurisdiction, and at present more than one-third of the states impose tax, educational, property, or other specific qualifications on the right to vote. In operation these restrictions deny the ballot to thousands of adult citizens, in the North no less than in the South. Theoretically they call for action on the part of Congress. Massachusetts with an educational test is legally quite as liable to a reduction of representation under the Fourteenth Amendment as any Southern state with a poll-tax, property or literacy bar in its constitution. But no serious effort has yet been made to enforce the Amendment.

Nevertheless the heavy and various qualifications, especially the poll tax, imposed on the right to vote by many states have recently become a subject of discussion in Congress and outside, in general and in connection with the voting rights of men and women in the armed forces of the United States. Proposals to abolish the poll-tax restriction have been presented in Congress and blocked in the Senate. It has also been proposed that the Federal Government take charge of balloting in the

armed forces and dispense with a number of qualifications imposed on the suffrage by the states. In 1942, by a law approved September 16, Congress provided that members of the armed forces could vote, and abolished the poll tax as a qualification on voting in federal elections by such members otherwise qualified. It created facilities by which these voters could get ballots from the state from which they came, by applying in due form, and cast their ballots wherever they were. Although only a small proportion of men and women in the armed forces voted in the 1942 elections, proposals were soon advanced in Congress for a more effective system of absentee voting for the elections of 1944. In March, 1944, Congress passed a new bill in respect of voting by members of the armed forces. President Roosevelt allowed it to become a law without his signature. The new Act left control over suffrage qualifications and elections to the states, subject to certain reservations as to election processes (see below, Chapter XXIV).

The Federal Judiciary Is Given a Special Rôle in the Protection of Private Rights and Liberties

A Safeguard against Arbitrary Government. Although it is the duty of all branches and agents of government to observe the limits imposed on their powers by the Constitution of the United States, it is the special function of the federal judiciary to give practical effect to them on appeals from persons who maintain that their rights have been infringed by public authorities. In such matters the Supreme Court in Washington possesses final authority over other agencies of government, federal and state. This judicial supremacy, says John William Burgess, is "the most momentous product of modern political science. Upon it far more than upon anything else depends the permanent existence of republican government; for elective government must be party government—majority government; and unless the domain of individual liberty is protected by an independent, unpolitical department, such government degenerates into party absolutism and then into Cæsarism." [22]

Special Defense of Property. The doctrine that the federal judiciary must uphold the primary rights of property owners against infringement by legislative majorities was set forth about the same time by A. T. Hadley, of Yale University. The theoretical position of property owners,

[22] *Political Science Quarterly*, Vol. X, p. 422.

he says, "the sum of the conditions which affect their standing for the long future and not for the immediate present—is far stronger in the United States [than in other countries]. The general status of the property-owner under the law cannot be changed by the action of the legislature, or the executive, or the people of a state voting at the polls, or all three put together. It cannot be changed without either a consensus of opinion among the judges, which should lead them to retrace their old views, or an amendment of the Constitution of the United States by the slow and cumbersome machinery provided for that purpose, or, last—and I hope most improbable—a revolution.

Relation to Suffrage. "When it is said, as it commonly is, that the fundamental division of powers in the modern State is into legislative, executive, and judicial, the student of American institutions may fairly note an exception. The fundamental division of powers in the Constitution of the United States is between voters on the one hand and property-owners on the other. The forces of democracy on one side, divided between the executive and the legislative, are set over against the forces of property on the other side, with the judiciary as arbiter between them; the Constitution itself not only forbidding the legislature and executive to trench upon the rights of property, but compelling the judiciary to define and uphold those rights in a manner provided by the Constitution itself.

"This theory of American politics has not often been stated. But it has been universally acted upon. One reason why it has not been more frequently stated is that it has been acted upon so universally that no American of earlier generations ever thought it necessary to state it. It has had the most fundamental and far-reaching effects upon the policy of the country. To mention but one thing among many, it has allowed the experiment of universal suffrage to be tried under conditions essentially different from those which led to its ruin in Athens or in Rome. The voter was omnipotent—within a limited area. He could make what laws he pleased, as long as those laws did not trench upon property rights. He could elect what officers he pleased, as long as those officers did not try to do certain duties confided by the Constitution to the property-holders." [23]

Criticism of the Doctrine. Writing long after Hadley set forth the doctrine of judicial protection for property in these stark terms, Henry Steele Commager impugned the idea in his *Majority Rule and Minority*

[23] *The Independent*, April 16, 1908.

Rights (1943). After reviewing the great cases in which the Supreme Court has invalidated acts of Congress, Commager concedes that it has been zealous in upholding property rights and then attacks it for neglecting the rights of "the underprivileged." He concludes that judicial review has been a drag on democracy and that we are justified "in believing that majority will does not imperil minority rights, either in theory or in operation." For all practical purposes, Commager also repudiates the idea that judicial review is useful and proper in the protection of personal liberties, such as freedom of person, speech, and press, and proposes to leave all human rights at the disposal of legislative bodies and executives unhampered by judicial intervention.

The Constitutional System May Be Altered by Amendment

The Amendment Clause. Fundamental as are the great principles for the conduct of government and the guarantees of private rights laid down in the Constitution, none is beyond the reach of change by popular process. To prepare the way for peaceful alterations in the American system, Article V provides a formal method for modifying, adding to, or taking away from the supreme law. A proposition to amend may be adopted by Congress, with the approval of two-thirds of both houses, and may be ratified by the concurrence of the legislatures, or of conventions, as Congress provides, in three-fourths of the states. On the other hand, states may take the initiative, for, on the application of the legislatures of two-thirds of them, Congress must call a national convention for the purpose of drafting amendments, which go into effect when ratified by conventions, or by legislatures, in three-fourths of the states. The composition of the national and state conventions, the procedure to be followed by the legislatures in passing upon proposals, and numerous other questions are left unsettled by the Constitution, but presumably Congress may make such reasonable provisions as it deems fitting.

Ratification by Legislatures. Until 1933, only one method had been employed, namely, proposal by a two-thirds vote in Congress and ratification by the legislatures of at least three-fourths of the states. In adopting resolutions under this practice, Congress has been very brief in its provisions. A suggested amendment is usually submitted in the following form: "Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, two-thirds of both houses concurring, that the following article be proposed to the

legislatures of the several states as an amendment to the Constitution of the United States which when ratified by three-fourths of the said legislatures shall be valid as part of the said Constitution." The state legislatures are then left to their own devices in approving or rejecting the article laid before them. Congress merely directs that "whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published . . . with his certificate specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

Ratification by Conventions. In the historic practice Congress made a break on submitting an amendment repealing prohibition in 1933. The resolution proposing the Twenty-first Amendment, to effect repeal, provided in Section 3 that "this article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of submission hereof to the states by the Congress." As a rule state legislatures arranged for the popular election of delegates to the conventions in accordance with the laws applied to similar elections for their local constitutional conventions.

Time Limits on Ratification. Ordinarily no time limit is placed on ratification by the states. To the resolutions for the Eighteenth, Twentieth, and Twenty-first Amendments however Congress attached a condition that the article shall be inoperative unless ratified within seven years. This presented a problem of constitutionality that is now settled. What about the action of a state in withdrawing ratification after making it in due form? That issue has not been finally determined but certain precedents illustrate the probable outcome, if the question is judicially raised. Although Ohio and New Jersey rescinded their approval of the Fourteenth Amendment, they were counted by the Secretary of State among the ratifying states. Hence the question may be said to be open, with a departmental ruling serving as a guide.

Criticisms of the Amending Process. Owing to the fact that hundreds of amendments were proposed between 1803 and 1865 and between 1870 and 1913, only to meet defeat through failure to secure the requisite two-thirds vote in Congress, there arose at the opening of this century an extensive criticism of the amending process itself. It was noted

that only three amendments—the Thirteenth, Fourteenth, and Fifteenth—had been adopted in the course of a hundred years and that those had been carried as the result of a civil war. In short, it seemed impossible to amend the Constitution in the regular course of things, owing to the large majority required for initiation by Congress, to say nothing of ratification by three-fourths of the states. Some radical changes were then proposed in the amending process itself, and they were under discussion when the spell was broken by the adoption of the income tax amendment in 1913, followed shortly by three others establishing the popular election of Senators, prohibition, and woman suffrage, and then a few years later by two more, both of which were quickly adopted.

Nevertheless the subject of alterations in the Constitution remains more or less under discussion. Two fundamental objections are urged against the existing method. Both of them rest on the ground that states —geographical districts—rather than population are the preponderant element in the ratification of proposed changes. On the one hand, the system is attacked as too conservative; approval by three-fourths of the states is necessary to give sanction to an amendment laid before the country for consideration. That means that thirteen states can hold up an overwhelming majority in its effort to make even the slightest modification in the scheme of government. If we take thirteen of the least populous states, we find that they have a combined population less than that of the single state of New York. In other words, about one-tenth of the people of the nation, distributed in the right geographical districts, can prevent nine-tenths of the people from effecting innovations in their system of government.

On the other hand, it is urged that the same rule makes it possible for three-fourths of the states which are mainly rural in character to force an amendment on the twelve largest states with their accumulated masses concentrated in cities—twelve states containing about one-half the people of the United States. This argument was frequently heard in connection with discussions of prohibition.

Another and perhaps more vital objection to the amendment process runs against the use of state legislatures in passing final judgment. In this case ratification can be effected by a relatively small number of persons who happen to be in the legislatures at the time a proposition is submitted. If we group the thirty-six states with the smallest assemblies together, we find that approximately two thousand members prop-

erly divided between the upper and lower houses can decide the fate of a resolution of amendment laid before them by Congress.

The number of persons taking part in the ratifying operation is not as significant as the fact that they are only incidentally concerned in it as legislators. They are elected for other purposes. Their main duty is to make laws for the states. Often they are chosen prior to the passage of a proposed amendment by Congress, and are thus asked to decide a matter which was not even before the public when they were candidates. Such a method is criticized because it is casual in its nature and does not provide for that special and searching consideration which a change in the supreme law of the land deserves. This particular objection can be easily met however by providing for ratification through state conventions, as was the case in the repeal of the Eighteenth Amendment (p. 41).

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CHAPTER II

INTERPRETATION OF CONSTITUTIONAL PRINCIPLES

The broad principles of the American system laid down in the Constitution require continuous interpretation in connection with practice—with the formulation and discussion of political issues; the enactment and enforcement of laws, federal and state; the discharge of civic duties by citizens; and the protection of civil liberties. Some of its provisions, it is true, are very specific and, being self-explanatory, permit no differences of opinion. For example, "No person shall be a Representative who shall not have attained to the age of twenty-five years. . . . The Senate of the United States shall be composed of two Senators from each State. . . . [The President] shall hold his office during the term of four years." But other clauses of the Constitution, especially those dealing with the powers of government and restraints in behalf of civil liberties for persons and citizens, are general in nature and, within some bounds of agreement, are open to varied interpretations.

Constitutional Interpretation Raises Problems in Government and Citizenship

General Principles Subject to Differing Explanations. Indeed the most vital principles of the American system are so general that officials and citizens may legitimately differ in respect of numerous concrete meanings in practical application. For instance, the Preamble announces among other purposes a design "to establish justice, . . . promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Article I stipulates that "direct" taxes must be apportioned among the states according to population. Article IV says that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The Fifth Amendment declares that no person shall be "deprived of life, liberty, or property, without due process of law."

What is justice? How is general welfare attained? What are direct taxes? What are the privileges and immunities of citizens in the several states? What is due process of law? Can intelligence, no matter how profound, can "natural reason," no matter how keen, find the answers to these questions in the mere language of the Constitution? Decidedly not. Such passages can only be understood by reference to a great body of knowledge and practice outside the Constitution. More than this, they are vague and may be fairly and honestly interpreted in different ways by authorities equally competent and equally sincere in their quest for the truth in the matter.

The Constitution therefore is not a set of clear-cut rules which inexorably control political authorities and citizens in the discharge of their duties as the rules of arithmetic control every bookkeeper, everywhere; it is a printed document explained by official decisions, precedents, and practices and illuminated by understanding and aspiration. In short, the real Constitution is a body of general prescriptions carried into effect by living persons.

Special Knowledge Necessary to Explanation. Since the bare words of the Constitution, even when concrete, are often not self-explanatory, an understanding of them calls for precise information not to be found in the document itself—information that must be sought in outside sources. Some of the sources are older than the Constitution. Others are new, such as the morning paper that announces decisions of the Supreme Court, presidential declarations, or congressional actions. As an illustration, the Constitution says that Congress shall pass no bill of attainder, taking it for granted that the reader knows what these words mean; but a search for an understanding leads us far back in the history of English law. There we find that a bill of attainder was an act of Parliament imposing pains and penalties, perhaps death, upon some person who had committed a public offense or had incurred the displeasure of the legislative body, or a majority of it. Such procedure afforded no trial to the accused and was a swift method for rushing a political foe to prison or execution.[1] Thus historical knowledge clears up a simple phrase. On the other hand, from week to week during its sessions, the Supreme Court announces interpretations of the Constitution in important cases before it and, without access to the morning paper, the citizen may at a given moment lack the latest information respecting particular provisions of that document.

[1] Maitland, *Constitutional History of England*, p. 215.

On Many Points Experts May Differ. Concerning several provisions of the Constitution neither historical knowledge nor current information provides interpretations entirely beyond honest differences of opinion. This is especially true of such phrases as the general welfare, interstate commerce, and privileges and immunities. Problems of obvious difficulty also arise when Congress attempts to deal with some new issue, such as the regulation of the radio, which was unknown to the framers of the Constitution or to judges, law-makers, and other citizens a few years ago. To ask what the framers would have thought about that subject, if they had heard of it, is to put an academic question which nobody can really answer. The best opinion on that point must be little more than a guess. Equally open to varied interpretation is the meaning of some constitutional principles for which only vague precedents or rulings are available. So it happens therefore that discussions and controversies continually arise in connection with interpreting the general provisions of the Constitution in its practical applications; and such discussions and controversies are features of the American system of self-government.

These very debates, if they often seem verbose and futile, are necessary aspects of constitutional government, that is, government by reflection, discussion, and choice, as distinguished from government by accident and violence. Citizens unprepared by knowledge and training for sharing in them are therefore ill-equipped for taking an effective part in the life of the nation, promoting its welfare, and upholding their rights or their interests.

Who Interprets the Constitution?

The Federal Courts. Who, then, makes the Constitution an instrument of control, by answering the thousands of questions which it leaves unanswered? According to the formula usually found in the child's book in civics, it is the Supreme Court of the United States, or at least a majority of the judges, that "interprets" the Constitution. But even a superficial examination of the instrument itself reveals a fatal weakness in this contention. Federal courts have no monopoly over the business of exposition. They are given a field of work, a jurisdiction, and it extends only to certain cases in law and equity.

All problems arising under the Constitution cannot be formulated into cases, or actions between parties, and carried before the Supreme

Court. Moreover the Court has repeatedly ruled that some cases are political in character and lie outside its jurisdiction. If for the sake of argument it be admitted that the Supreme Court in final analysis answers all questions arising under the Constitution, then it is proper to ask, What Supreme Court? Judges die. Times change. New Presidents are elected and nominate new judges to fill vacancies on the bench. Sometimes new judges reverse the opinions of their predecessors, give an opposite meaning to the Constitution. Since this is so, it follows that it is an over-simplification to say that the Constitution is the document as expounded by the Supreme Court.

Congress as Interpreter. And as we have remarked, that is not the whole truth. It is the duty of Congress also to interpret the Constitution. The Supreme Court has declared as a fixed principle that it will show great respect for the interpretations of Congress and will overrule them only when they are clearly and palpably wrong. With reference to many matters which do not get into the form of cases presented to the federal courts, Congress makes its own explanations of the Constitution and establishes precedents of great weight. Thousands of governmental acts that have never been brought before the courts present interpretations of the Constitution. Again and again bills assailed as unconstitutional in the House and Senate by eminent lawyers have been passed, made the law of the land, and upheld by the Supreme Court. When we ask, therefore, Who interprets the Constitution? we must answer, Congress also in part—that changing body of members elected by popular vote.

The President Interprets. Likewise, in his sphere, the President of the United States by his decrees, orders, and actions gives meaning to the Constitution. Many of his findings are "political" in character; and the Supreme Court will not inquire into their legitimacy—for example, a declaration on foreign policy. Others are discretionary and these too, the Court has said, must be left to his judgment. Does the Constitution authorize the President to have a cabinet and to consult its members as a collective body? The written document is silent. Precedents stretching from Washington's time to our own settle that point in the affirmative. May the President, on his own motion, send troops out of the United States and wage war? Very explicitly the Constitution vests in Congress the power to declare war. Yet Presidents have dispatched troops to Caribbean regions and to distant parts of Asia to wage war or to be in a posture to wage it without any express authorization from

Congress. These actions constitute an important interpretation of the President's powers, and it is not likely that they will be challenged by the Supreme Court.

Politicians and Citizens Act as Interpreters. Strange as it may seem, the Constitution is given meaning also by men and women who may hold no office in the Federal Government—by leaders of political parties. Indeed in many ways political parties are important interpreters of that document. Innumerable examples may be cited. The Constitution states that the House of Representatives shall choose the Speaker; in fact, it merely ratifies the choice made by a caucus or conference of the party having a majority of members in that body. The Constitution says nothing about congressional committees but legislation is largely controlled by committees which are dominated by the majority party in each house.

A still more striking illustration appears in the election of the President. It seems beyond doubt that the framers of the Constitution intended that the presidential electors, chosen as the legislatures of the several states may decide, should actually choose the President. Yet, as everybody knows, the electoral system did not function as the Constitution contemplated, after the retirement of President Washington; the electors have been reduced to mere dummies, who vote for the candidate of their party for President, the candidate nominated by a party caucus or convention wholly outside the Constitution. Who decides what the party interpretation of the Constitution shall be? Those who look to the written document for illumination on this point will not find any.

Using a Dictionary on the Words. In their searching for answers to disputed questions how do interpreters go about the operation? Simply by taking the words of the Constitution and consulting a dictionary? Not as a rule. Although a justice of the Supreme Court has said that even the spirit of the Constitution "is to be collected chiefly from its words," difficulties remain. Many words are vague and the adverb "chiefly" leaves a great gap to be filled by some process other than a search for definitions. It is true that the Court sometimes uses Webster's dictionary in hunting for clues to the meaning of the Constitution, but the enlightenment to be attained by that device is limited. Those whose business it is to interpret the Constitution have other and more important methods at hand—methods sanctioned by high authority and long usage.

The Will of the Makers as a Guide to Constitutional Interpretation

A Search for the Intention of the Makers. Among the controlling doctrines of interpretation recommended by custom is the theory that the "intention" of those who made the Constitution should govern. No other assumption seems more rational and inevitable. It is expounded with great cogency by Chief Justice Marshall in the celebrated case of Marbury v. Madison (1803), and runs as follows: "The people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness." This, he says, is the basis on which the whole American fabric has been erected. "This original and supreme will organizes the government, and assigns to different departments their respective powers." Then, in dealing with the issue at hand, the authority conferred upon the judiciary, the Chief Justice asks about "the intention of those who gave this power." Although he speaks in another connection of what "the framers" of the Constitution contemplated, the underlying theory of his argument is that it is the "original and supreme will" of the people which is to be discovered and given effect in interpreting the Constitution.

Yet in applying this principle to an interpretation of the Constitution, perplexities arise. A search for "the will of the people who made the Constitution" leads into a bog. Under this head must be included the members of the national convention who drew up the Constitution in 1787, the members of the thirteen state conventions who ratified it, and the voters who elected the delegates to these ratifying conventions.

The Will of the Draftsmen. In their heroic efforts to disclose "the intention of the makers of the Constitution," judges of the Supreme Court have frequently, if not generally, limited their inquiries to the "intention of the framers," the aims of the men who drafted it in Philadelphia. The Constitution, declared Chief Justice Taney in the Dred Scott case, "speaks . . . with the same meaning and intent with which it spoke when it came from the hands of its framers."

If the inquest be limited to the intention of the framers of the Constitution, the solution of the problem is far from easy in respect of many constitutional points. No stenographic minutes were made of the debates in the convention; our information as to what the members said about the various clauses is limited to notes taken by James Madison and a few of his colleagues. On none of the clauses did all the members

speak; on few if any did a majority speak. Hence, in many cases, it is impossible to discover the "intention" of the convention.

Over the meaning of some propositions the very framers differed. Within two years after the adoption of the Constitution, two members of the convention asserted diametrically opposite views about it. In discussing the constitutionality of the first Bank, Hamilton held that the document should be construed liberally with respect to great ends; Randolph with equal tenacity maintained that it should be construed strictly according to its express language.

Nevertheless those who are called upon to expound the Constitution continually speak with confidence about "the intention of the framers" and cite speeches, letters, and papers to prove one interpretation or another, even though their constructions are frequently opposite in upshot. Undoubtedly light can be thrown on the meaning of the Constitution by studying the writings of the Fathers; but the intention of the collective framers, as to points susceptible of various meanings, often cannot be discovered.

The Will of the Ratifiers. If reference is made to "the will of the men who ratified the Constitution," the mystery grows. What, for example, was the intention of the hundreds of delegates composing the thirteen state conventions called to ratify the Constitution? In some cases only the most fragmentary notices of speeches made in those assemblies have come down to us. In none of them were all the indefinite phrases of the Constitution fully expounded and agreed upon. What the majority in each case may have thought about many phrases, whether they thought about them at all, is not known, can never be known.

When this quest is extended to the will or intention of "the people," the twilight deepens. For various reasons about three-fourths of the adult males did not participate in electing delegates to the several conventions. In some cases, New York, for example, a majority voted for delegates opposed to ratifying the Constitution as submitted by the framers. How many citizens who did vote had read the Constitution and made up their minds as to their "intention"? History is silent. It is useless to pursue this inquiry further. Those who are given to exactness in the use of language will be chary about speaking of "the intention of the people who made the Constitution."

The Intention of Amenders. So far we have spoken of the Constitution as if it were merely the original instrument which was drafted

at Philadelphia in 1787. In a strict sense of course it includes all the amendments also. Matters of "intention" therefore involve the will of the several Congresses which passed the amendments and the state assemblies which ratified them. In all such cases equally stubborn difficulties arise. The Fourteenth Amendment, for instance, was interpreted by the Supreme Court in two ways within twenty-five years after its adoption, and the second view of the Amendment seems to be nearer the truth than the first.

Interpretation by the Rational Method

The Use of Reason and Inference. While paying due respect to the writings and expositions of the men who took part in framing the Constitution, the courts, the President, Congress, party leaders, and laymen called upon to decide what the Constitution actually means with reference to concrete actions are seldom controlled absolutely by the results of any quest for "the intention of the people" at the time of the adoption. In seeking to discover what can or cannot be done under the Constitution, they do not confine their studies to the words and purposes (if known) of the men who made and ratified it. They also resort to processes of reasoning, and to various claims, assertions, and inferences. They cite history, both oral and written; they refer to their memory of what was done or intended. They make use of quotations from the Bible, preceding judicial decisions, acts of Congress, speeches by statesmen, and official documents by authorities presumed to be competent.

Deductions from Premises. Among the mental processes useful in expounding the meaning of the Constitution, that of "logical reasoning" has been perhaps most commonly employed. At all events it is especially prominent in the great decisions of the Supreme Court. Chief Justice Marshall was noted for his use of this intellectual instrument. He was sparing in his citation of precedents and speeches to prove his points. Nowhere is his method better illustrated than in the case of Marbury v. Madison. Though he speaks of the intention of the framers and the people from whom the Constitution emanated, he does not cite long statements from them to prove his proposition that the Supreme Court has the power to set aside acts of Congress when it deems them unwarranted by the Constitution. He uses logic. "It seems only necessary to recognize certain principles," he says, "supposed to have been

long and well established, to decide it." Here in brief is his syllogism:

Premise: The people have made the Constitution, created the departments of government, and assigned powers to each of them, and this Constitution is declared to be the supreme law of the land.

Premise: The Supreme Court has taken an oath to uphold the Constitution.

Conclusion: When an act of Congress (admittedly inferior law) conflicts with the superior law, the Supreme Court cannot enforce it but must declare it null and void.

On its face, nothing seems simpler, but critics of the decision from Jefferson's day onward have been unable to accept it as inescapable. The logic of their interpretation may be formulated in this fashion:

Premise: The people have made the Constitution, created the departments, and assigned powers to each of them, and this Constitution is declared to be the supreme law of the land.

Premise: The President has taken an oath to uphold the Constitution.

Conclusion: When a decision of the Supreme Court (admittedly inferior to the Constitution itself) conflicts with the superior law, the President cannot enforce it but must treat it as null and void.

Hence it would appear that "logic" is in reality a two-edged sword which cuts both ways. "Logical reasoning" is only one mode of discovering truth, at best an uncertain mode. Powerful minds, equally logical and, for practical purposes, equally informed, often arrive at different ends by the logical method.

Resort to the "Spirit" of the Constitution. The inadequacy of logic as an instrument of acquiring knowledge concerning the meaning of the Constitution has been recognized by authorities called upon to expound that document. Looking elsewhere for light, judges of the Supreme Court frequently refer to the "nature of the system," "the spirit of the Constitution," and its "general spirit." Marshall remarked in the Dartmouth College case, with respect to a certain contention, that the framers of the Constitution "could never have intended to insert in that instrument" an idea "repugnant to its general spirit." Long afterward another judge maintained that there are some limitations, not clearly expressed in the Constitution, "which grow out of the essential nature of all free governments." Like the logical method however this process is beset with perplexities because two minds equally conversant with the Constitution may arrive at opposite conclusions respecting its spirit.

Intuitive Judgment in Matters of Interpretation

The Element of Sympathy. Since, under all these methods of exposition, persons of great logical powers and wide information often reach contrary conclusions as to the meaning of the Constitution, it seems to follow that their conflicting judgments are often due to something inside their minds, that is, do not flow inexorably from the plain language of the instrument itself. What, then, is the mental force that inclines the mind to one side or the other? Out of deep knowledge and long judicial experience Justice Holmes answered: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." This removes the explanation of differences of opinion concerning the indefinite clauses of the Constitution from the realm of exact knowledge, and carries it over into the realm of feeling and sympathy.

Sources of Sympathy. Thus we are led to inquire: Whence comes the intuition or sympathy which inclines the mind to one side or the other? Is it inherited with the flesh and blood? Are babies from birth narrow or liberal constructionists by heredity? Or are sympathies acquired from associations—political, economic, and cultural? If the issue is concretely considered, there can be no doubt of the answer. With reference to interpretations of the Constitution by the President, Congress, and political leaders, it is openly admitted that inclinations are connected with partisan sources—using the term in no invidious sense. At one time a political party that proclaims the strict construction is in power; at another time, a party that advocates the liberal construction. Thus the Constitution means one thing in one season; another in the next. With a change in parties comes a change in the interpretation of its nature. And shifts in parties depend on variations in public opinion, in the conditions and beliefs of the people, or at least of the thinking and articulate section of the population.

The General Views of Judges Considered on Appointment. Although none will deny that partisan considerations often affect, if they do not control, interpretations of the Constitution by the political departments of the Government, many contend that the judicial branch, in its operations, is not, or ought not to be, influenced by any such considerations. But this raises some interesting speculations. Judges are chosen by political branches of the Government, by the President and Senate. Do the appointing authorities, in selecting a judge, ignore

his previous career, the decisions he has rendered, if he has served in a lower court, or the views he has advocated as a lawyer at the bar? The correct reply is that they do not. The history of appointments, as far as it is recorded, make this answer emphatic.

In a long letter to Senator Henry Cabot Lodge, written in 1902, with reference to filling a vacancy on the Supreme Bench, President Theodore Roosevelt explained the considerations which governed him in making the appointment. "In the ordinary and low sense which we attach to the words 'partisan' and 'politician,'" said the President, "a judge of the Supreme Court should be neither. But in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man, a constructive statesman, constantly keeping in mind his adherence to the principles and policies under which this nation has been built up and in accordance with which it must go on; and keeping in mind also his relations with his fellow statesmen who in other branches of the government are striving in coöperation with him to advance the ends of government. Marshall rendered such invaluable service because he was a statesman of the national type, like Adams who appointed him, like Washington whose mantle fell upon him. . . . The Supreme Court of the sixties was good exactly in so far as its members fitly represented the spirit of Lincoln. . . . The majority of the present Court who have, although without satisfactory unanimity, upheld the policies of President McKinley and the Republican party in Congress, have rendered a great service to mankind and to this nation."

With this preliminary out of the way, President Roosevelt then turned to the character of the man under immediate consideration for appointment, Oliver Wendell Holmes, of Massachusetts. "Now I should like to know," he said, "that Judge Holmes was in entire sympathy with our views, that is, with your views and mine, and Judge Gray's, for instance . . . before I would feel justified in appointing him. . . . I should hold myself as guilty of an irreparable wrong to the nation if I should put in his [Gray's] place any man who was not absolutely sane and sound on the great national policies for which we stand in public life."

Besides taking this broad view of the function of federal judges as statesmen, President Roosevelt also referred to a particular matter—the attitude of the Court toward modern social legislation. Judge Holmes' "labor decisions," he remarked, "which have been criticized by some of the big railroad men and other members of large corporations, consti-

tute to my mind a strong point in Judge Holmes' favor. The ablest lawyers and greatest judges are men whose past has naturally brought them into close relationship with the wealthiest and most powerful clients, and I am glad when I can find a judge who has been able to preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients. I think it eminently desirable that our Supreme Court should show in unmistakable fashion their entire sympathy with all proper effort to secure the most favorable possible consideration for the men who most need that consideration." In due time, Mr. Holmes was appointed and in his decisions took the liberal course, although he did not always conform to President Roosevelt's "policies."

Political Policies Appear in Judicial Appointments. In seeking for judges in general harmony with their views of large public questions, Presidents have often found it necessary to choose men from their own political party. The Federalist President, John Adams, appointed to the post of Chief Justice, John Marshall, an ardent Federalist who had served his party as a member of Congress and as Secretary of State. His successor, Roger B. Taney, a Democrat who had held the post of Secretary of the Treasury, was chosen by a Democratic President, Andrew Jackson. When Taney died in 1864, the Republican President, Abraham Lincoln, put in his place Salmon Chase, who had been head of the Treasury Department and was an aspirant for the Republican nomination for President in the very year of his appointment. Chief Justice Taft was a Republican President of the United States before he was elevated to his high judicial post by President Harding, a member of his political party. President Hoover selected his Republican colleague, Charles E. Hughes, to fill the vacancy created by the retirement of Chief Justice Taft in 1930.

When two vacancies occurred in 1937, President Franklin D. Roosevelt appointed Senator Hugo Black to fill the first and Stanley Reed to fill the second. Senator Black had been a stanch supporter of the Democratic administration in the Senate and Mr. Reed, as Solicitor General, had argued in favor of New Deal legislation before the Supreme Court. In 1939 President Roosevelt appointed one of his close political advisers, Felix Frankfurter, to the post made vacant by the death of Justice Cardozo. As other vacancies occurred, he filled them with men who had been active in the politics of the Democratic party or were known to be sympathetic with the policies of his administra-

tion. So it came about that in 1944 seven of the nine justices were of Democratic origins and only two of Republican lineage. President Roosevelt did, to be sure, elevate a Republican, Justice Harlan F. Stone, the the post of Chief Justice on the resignation of Charles E. Hughes in 1941, but that left undisturbed the balance of power on the Supreme Court.

After all, is it conceivable that the appointing authorities would select a judge who would so interpret the Constitution as to declare null and void significant measures of Congress which they deem constitutional and vital to the welfare of the country? In this there is nothing invidious. The fact that they espouse these measures may be taken as evidence that they believe in their constitutionality as well as their utility to public welfare. To work for them and then choose judges to defeat them would be a strange procedure.

Indeed high and responsible political leaders have more than once taken the position that it is proper to use the appointing power to secure new judges who will reverse one or more decisions of their predecessors on fundamental issues, re-read the Constitution, discover that it does not mean what it has been interpreted to mean. "We think the Dred Scott decision is erroneous," said Lincoln, shortly after the Court had rendered its opinion. "We know that the Court that made it has often overruled its own decisions and we shall do what we can to have it overrule this."

Such practices do not mean however that justices appointed with reference to their political and social views in general subsequently follow in detail the "party line" of the President who selected them. On the contrary they often display an independence that is irritating to their party colleagues inside and outside the Court, and sometimes they render opinions wholly unexpected in view of their previous careers and pronouncements. No differences of opinion between Democrats and Republicans in the Supreme Court ever exceeded in divergence or perhaps in bitterness those which arose among President Roosevelt's appointees within a short time after they had achieved unquestioned predominance in that tribunal.

Points of Reference for Interpretation

Respect for the Determinations of Congress. It does not follow from the degree of uncertainty which exists in matters of interpretation that

all is uncertainty. In fact there are four axioms which serve as guides or points of reference in reaching conclusions respecting the meaning of the Constitution. First among them is the rule that, when Congress has passed an act, the measure shall be presumed to be valid "unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt." As the Supreme Court once said: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, unless its violation of the Constitution is proved beyond all reasonable doubt."[2] Although this rule is often disobeyed, and there would seem to be reasonable doubt when four Supreme Court justices dissent from the views of the majority, it is a canon of interpretation which, if generally followed, would eliminate many disputes over the meaning of the Constitution.

The Constitution Conceived as Permanent. "We must never forget," declared Chief Justice Marshall, "that it is a Constitution which we are expounding, a Constitution intended to endure for ages, and, consequently, to be adapted to the various crises of human affairs." The framers of the document certainly had in mind some degree of permanence. It was not their idea that it should last only a few years and be quickly superseded by a new instrument framed to meet changed circumstances. The provision for amendments precludes this thought. Nor did they imagine that it was to be so strictly interpreted that amendments and radical revisions would be constantly required to keep government functioning smoothly. The Constitution is to endure for ages and to be regarded as adaptable to the various crises of human affairs, for adaptability is a necessary requirement of permanence.

The Constitution as a Means. The idea of adaptability involves the assumption that the Constitution is not an end in itself. It was in fact designed to serve the ends of the makers and the generations that followed them—the supreme ends of American society. Surely no one could reasonably contend that American society should be sacrificed for the purpose of observing some theoretical interpretation of the Constitution. As Lincoln once put the case simply, a limb is often sacrificed to save a life, but a life is never given to save a limb. "I felt," he said, "that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. . . . I could not feel that, to the best of

[2] Ogden v. Saunders, 12 Wheaton 213–270.

my ability, I had even tried to preserve the Constitution, if, to preserve slavery, or any minor matter, I should permit the wreck of government, country, and Constitution altogether."

Basic Interests of Society Paramount. This doctrine was reaffirmed by Chief Justice Hughes in 1934 in upholding a law of Minnesota imposing a moratorium on mortgage foreclosures at a time of great economic distress—a law admitted to be an impairment of the obligation of contract guaranteed by the Constitution. The Chief Justice stated that the very policy of protecting contracts against impairment presupposes the existence of a government competent to secure "the peace and good order of society," that the state has a reserved power "to protect the vital interests of the community," and that the legislation in question "was addressed to a legitimate end . . . the protection of a basic interest of society." If as alleged in criticism this is "the tyrant's plea," a counter-reply could be made that it is also the quintessence of great statecraft. To say that the framers intended government to stand paralyzed in the presence of a great calamity, such as a flood, earthquake, or economic disaster, until an amendment of the Constitution could be adopted, is to ascribe to them a narrowness of view not in keeping with their character as revealed in their historical records.

Constitutional Interpretation an Art of Citizenship

The Constitution a Phase of American Life. It was after reviewing such indubitable facts that the great commentator, Judge Cooley, came to the conclusion that the Constitution is not a mere written document with a determinate meaning which never changes. "We may think," he says, "that we have the Constitution all before us; but for practical purposes the Constitution is that which the Government in its several departments and the people in the performance of their duties as citizens recognize and respect as such; and nothing else is. . . . Cervantes says: 'Everyone is the son of his own works.' This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it."

If this statement by Judge Cooley is true, and his authority is impressive, then the theory that the Constitution is merely a written document is a legal fiction. The idea that it can be understood solely by a study

of its language and the history of its past development is equally mythical. In respect of its indefinite provisions the Constitution is what the Government and the people who count in public affairs recognize and observe as such.

The Constitution Takes in the Future. It is not merely what it has been, or what it is today. It is always becoming something else, and those who criticize it and the acts done under it, as well as those who praise, help to make it what it will be tomorrow. Indeed an eminent authority, Frank J. Goodnow, recalling how difficult it is to amend the Constitution and how the courts often show a tendency to block changes made imperative by new conditions, contends that criticism of the Supreme Court decisions is necessary to force the continuous readjustment of the Constitution to new requirements. "In these days of rapid economic and social change," he says, " . . . it is on this criticism, amply justified by our history, that we must rely if we are to hope for that orderly and progressive development which we regard as characteristic of modern civilization." And criticism of interpretations and of the Constitution itself is authorized by the Constitution, for that instrument makes provision in Article V for its own amendment by regular political processes. This contemplation of change is a confession that the original falls short of the ideal, at least the ideal always in the process of becoming.

Constitutional Interpretation a Training in Citizenship. It is clear from what has been said that constitutional interpretation calls for exact information, historical, legal, and economic, and that it involves judges, executives, legislators, party leaders, and the people at large. In final analysis what is done by government under that instrument as interpreted reflects more or less directly the knowledge, ideas, and interests of the main body of citizens. Owing to the respect they command, the principles of the Constitution serve as restraining influences, permanent though flexible, on ill-considered actions and furnish guidance for the conduct of private and public affairs. They help to turn great conflicts of interest, as between agriculture and industry or capital and labor, for example, into channels of discussion and deliberation, in which knowledge, reason, and judgment act as moderating forces on the bare assertion of physical power and on the gusts of popular passion that arise from time to time. In spite of the fact that the process of interpretation is attended by many disputes which are far from useful or edifying, it is one of the important phases of American civilization by

which the spirit and the capacity for self-government are nourished and the future of the American system of change under law is assured.

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CHAPTER III

POLITICAL PARTIES AND THE PROCESSES OF GOVERNMENT

A constitution laying down general principles subject to interpretation is not a government. It is only a plan. Government takes on actuality through officials clothed with lawful authority and, in the United States, receives its momentum and direction from associations of men and women bound together in political parties. Realistically conceived, a party is a union of people bent on getting possession of the government authorized by the Constitution and employing its engines in making and enforcing laws which they hold to be just, expedient, or useful to their interests. Through the party their ideas and will to power are brought to a focus. Through government the party seeks to translate its policies into actions.

In practice government represents the pull and haul of two or more parties. Seldom is any party strong enough to ride rough shod with impunity over minorities, without making any concessions to them or to public opinion outside the government. Even if it is very powerful at a given moment, it wishes to keep its power and must avoid going so far with its program as to run the risk of being ousted by opponents always on the lookout for chances to swing votes enough to carry the next election.

For these and other reasons, at the beginning of an inquiry into actual government under constitutional principles, we do well to examine the sources, nature, and operations of political parties.

The Origins of Party Divisions

The Theory of Human Nature. In every civilized country not ruled by a dictator or a single despotic class, that is, where some degree of freedom is allowed, political parties arise. Why is this so? Why do they spring up whenever liberty of opinion is permitted, to speak concretely,

in the United States? Many answers have been made by philosophers.

One main explanation of party divisions falls back on "human nature": innate qualities automatically divide the populace into parties. According to this theory, some people are instinctively conservative and want to leave things as they are; others are instinctively progressive and want to make changes. Or, to take a variant on this explanation, some are inherently aristocratic and sympathize with the "rich and well born" —are therefore Hamiltonian Republicans; while others are inherently democratic and sympathize with the masses—are Jeffersonian Democrats.

This proposition also may be countered by innumerable objections. It is a mere assertion that explains nothing. How does anyone know that these qualities are innate? If they are, why are they not universal—in darkest Africa as well as in the United States? In itself, the theory ignores certain inescapable facts. For a long time the Democratic party was dominated by aristocratic slave-holders whose instinctive sympathy for the toiling masses was slight at best. On the other hand, the so-called aristocratic party has as its idealized leader Abraham Lincoln, whose faith in government by the people was beyond question. The instinctive solution of the problem is no solution—not even a clue.

Akin to this theory is another offered by distinguished authorities, including James Bryce, to the effect that some people believe in a strong federal government and are Republicans, while others cling to states' rights and are Democrats. Whence come the two beliefs? Should a satisfactory answer be made to this question, a disconcerting memorandum would still stand in the way. A study of the votes in Congress on measures strengthening the Federal Government or exalting the states shows that the two parties have not consistently divided on any such issue. Acts of Congress passed during the administrations of President Franklin D. Roosevelt cut more deeply into states' rights than any previous Republican legislation after 1870. After a season of New Deal centralization, Republicans began to clamor for states' rights. Thus this explanation of party origins disappears in a fog.

The Conflict of Economic Interests. Far more realistic is the key to the riddle offered by James Madison, the father of the Constitution. Every civilized society, he says, is divided into groups and classes possessing various kinds and amounts of property—landed, mercantile, industrial, creditor, debtor, and labor interests, for example. From different possessions and economic conditions arise different sentiments driving

the people into parties and factions, each bent on forcing government to do or abstain from doing something deemed advantageous or injurious. Although too simple and open to exceptions, Madison's explanation of party origins is nearer the realities than the rival offerings. At all events if farmers seeking favors, manufacturers demanding protective tariffs, bankers, organized labor, railroads, public utilities, job-hunters, and other interests of a practical character were to withdraw entirely from American political affairs, the substance of government would suddenly become very thin. Politics is not all economics but if economics is left out of account politics is an utter mystery.

The Continuing Force of Economic Interests. At all events, as Arthur Holcombe states the case: "National parties cannot be maintained by transitory impulses or temporary needs. They must be founded upon permanent sectional interests, above all upon those of an economic character. The economic basis of national politics has never been overlooked by successful American statesmen." [1] And this view is supported by Edward M. Sait's survey of parties and elections.[2] An analysis of these sectional interests of an economic character reveals four broad classes with many subdivisions: (1) manufacturing, divided into industrialists who produce mainly for the home market and call for protective tariffs and industrialists who are heavy exporters of goods and need no such protection; (2) financial—domestic bankers and export-import bankers; (3) labor, divided into craft unions generally affiliated with the American Federation of Labor, industrial unions composed of all workers in and around plants, now largely affiliated with the Congress of Industrial Organizations, and unorganized workers of various grades and classes; and (4) agricultural, embracing several interests, such as dairying, which produce principally for the domestic market, and others that are large exporters—wheat, cotton, and corn producers, for example. Although farmers make no munificent contributions to party treasuries, manufacturers, bankers, brokers, and organized labor are generous in expressing their interests by gifts to campaign funds, as Louise Overacker statistically demonstrates in an analysis of campaign funds for the elections of 1936 and 1940.[3]

Races and Nationalities in Politics. Although party lines cut across all groupings, members of races and nationalities of foreign origin now

[1] *Political Parties of Today*, p. 41.
[2] *American Parties and Elections.*
[3] *Political Science Review*, June, 1937, pp. 473 ff.; August, 1941, pp. 701 ff.

in the United States show marked tendencies to flock together in politics as well as in cultural relations. They are usually vocal, if not vociferous, when the spoils of office have not been distributed to their liking or the foreign policy of the United States displeases them; and in many parts of the country it is impossible for politicians to carry a list of candidates without making concessions to a number of racial groups. In New York, for example, "a good slate" includes an Irishman, a Jew, a German, an Italian, a Pole, and representatives of other nationalities.

According to the census of 1940 there were, in round numbers, 11,500,000 foreign-born whites in the United States. Of this number 1,200,000 were from Germany; 1,600,000, from Italy; and 1,000,000 from Russia; and about 2,000,000 from England, Scotland, and other parts of the British Empire. The total number of persons in this country who are either foreign-born themselves or the offspring of foreign-born or mixed parents is in the neighborhood of 40,000,000 in a total population of 131,000,000. How many of this large group are citizens entitled to vote cannot be determined with exactness but the number has been estimated at approximately 8,000,000. When it is remembered that a few thousand, indeed a few hundred, votes may determine the outcome of a state, congressional, or presidential election the significance of this figure for the nature and course of American government and politics assumes arresting forms.

After the great upswing of totalitarian governments in Europe and the growing international tension which eventuated in another European war in 1939, leaders and factions appeared in American politics, urging and promoting the ideas and interests of various Old World nations—German, Italian, British, and Russian. Here was a tremendous economic and political force which was mobilized, more or less, to exert pressures on the foreign and domestic policies of the United States. The claims of the German chancellor, Hitler, and the Italian premier, Mussolini, on the loyalty, if not the subservience, of their nationalities in America raised questions of prime importance for the American system which permits free agitation and rests upon universal suffrage. It was one of the ironies of history that the fortunes of this system, built up at such great cost and sacrifice, were jeopardized by the whims of foreign-born voters whose presence here and whose liberties here were due to the very ideals so scorned and despised by their leaders. Although it is probable that the great majority of Germans and Italians did not favor the introduction of fascist tactics in the United States, enough of them

were undoubtedly active in promoting that form of despotism and intolerance to make serious discords and disturbances in American politics.

Religious Sentiments in Politics. On no principle were the framers of the Constitution more firmly agreed than on the exclusion of theological and sectarian passions from the conduct of government; and later changes made in state constitutions were in accord with this conviction. At a time when religious qualifications for office-holding were common, the framers rejected all such qualifications in connection with the Federal Government, and provided that the President on taking the pledge of office could "affirm" or "swear" according to his own desires; and the First Amendment forbids Congress to make any law respecting the establishment of religion or the free exercise thereof.

The wisest of leaders in all denominations have deplored the introduction of religious disputes into political discussions and campaigns. But it is none the less true that representatives of nearly all churches do actively participate in politics for the purpose of gaining ends called "religious," that appeals are made to co-religionists by or on behalf of candidates for public office, openly or covertly, and that religious hatreds are invoked to elect or defeat candidates. Only strenuous efforts on the part of leaders in all denominations can prevent the development of clerical factions in the United States and subdue sectarian controversies to the principle of religious toleration.

Lust for Power. Whatever interests and passions may be involved in government at any given time, it takes individuals to play upon them, organize them, and bring them to a focus of action. And in every society there are energetic and ambitious persons who love power for its own sake as well as the ends to be gained by its possession. The founders of our Republic had read history and they knew how in times past "strong men" had overthrown republics, kingdoms, and States or, as heads of factions, had dissolved them. Rightly suspecting that human nature would not be wholly different in the United States, they sought safeguards against "the assaults of ambition," by establishing checks and balances; and yet they realized that even these devices would not entirely break the force of ambition, avarice, and ferocity. It is relatively easy for any keen and active person to form a group, club, or association, collect a following, raise money, and shine, if not dominate, as a leader or demagogue. Associated with the lust for power may be a zest for some ideal of human welfare; indeed the greatest of tyrants, Caesar, Napoleon,

Napoleon III, Hitler, and Mussolini, for instance, all professed at the outset their zeal for the welfare of the people; but whether its end be good or evil, love of power is and apparently always will be one of the forces making for the creation of factions and parties and furnishing a dynamic for government.[4]

American Political Parties

The Old Industrial-Agrarian Division. Almost from the foundation of the National Government there have been two major political parties in the United States.[5] Their names have changed, but continuity in the measures and composition of each has rarely been broken—until recent times, at least. One is the Federalist-Whig-Republican party, associated with Hamilton, Webster, Lincoln, McKinley, Coolidge, and Hoover and its center of economic gravity has been in the industrial and financial interests of the nation. Although it made a combination with farmers in 1860 and still has a strong hold on them in the North, the chief sources of its economic strength remained the same for nearly one hundred and fifty years. The second party is the Republican-Democratic organization, with Jefferson, Jackson, Bryan, and Franklin D. Roosevelt as its sponsors. Its historic center of gravity was long in the agricultural interests of the country, although a large body of importing merchants and urban mechanics was early brought into its fold. This interpretation of our party divisions does not mean that all industrialists have been in one camp and all tillers of the soil in the other, but that the predominating interests in American politics have been industrialist and agricultural respectively, with organized labor displaying, on the whole, Democratic inclinations.

If reference is made to the great issues involved in this party antagonism, it will be found that they also have a distinctly economic bearing. Broadly speaking, the Hamilton-Webster-McKinley combination supported high protective tariffs for American industries, centralized banking, a currency based on gold, ship subsidies, a strong navy, internal improvements, commercial enterprise, and light taxation on great fortunes. In the main the Jefferson-Jackson-Bryan party was on the opposite side during the nineteenth century. Exceptions may be found, no doubt,

[4] For an analysis of power lust and its forms, see C. E. Merriam, *Political Power: Its Composition and Incidence.*

[5] Beard, *The American Party Battle.*

in American history, but in the main the cleavage was fairly clear until the twentieth century opened.

Party Divisions No Longer Clear-cut. As American society has become more complex, however, the lines of the old party battle have become confused. Industry now overtops agriculture in the capital employed and the proportion of the population engaged. It is no longer possible to reproduce the conditions of Jefferson's day when farmers and planters were in an overwhelming majority and the greater part of the annual wealth came from the soil. The tables are turned. Large sections of the Middle West and the South, once the strongholds of agrarian Democracy, have become industrialized, with corresponding changes in attitudes toward politics—the protective tariff for instance. On the other hand, industrialism is divided against itself. New industries, such as the manufacture of automobiles, requiring no protection against foreign competition, have sprung up; a part of the accumulated riches of the country is invested abroad and bankers in this field usually favor low tariffs rather than high.

So deep are these changes that the Democrats have abandoned their slogan of "tariff for revenue only" and supported protection, if somewhat modified by reciprocal trade treaties. A survey of the votes in Congress shows that scarcely a single issue brings about a clear-cut division between the two parties. Indeed it might be safely said that the cleavage between the right and left wings of each is greater than the gulf between the parties themselves, especially in the Senate where agrarian states have a disproportionate weight.

After examining the history of parties in the United States, James Bryce exclaimed in metaphorical terms: "The great parties were like two bottles. Each bore a label denoting the kind of liquor it contained, but both were empty." In reality this is an oversimplification of the facts in the case. It makes substantially identical in their aspirations, intentions, and desires all the thousands of persons who constitute the organization in each of the parties; and it reduces the voters to phantoms voting for empty words. If in reality the appeals of the two parties were identical in their emptiness, the party divisions at the polls should have cut across all group, sectional, and class divisions without reference to any ideas or interests cherished by members of such groupings; and this has not been a fact.

For example, according to a sampling poll taken by the American Institute of Public Opinion in December, 1940, the Democratic candi-

date, President Roosevelt, received 28 per cent of the votes in the upper income group of citizens, 53 per cent in the middle income group, and 69 per cent in the lower income group; while his Republican opponent, Wendell Willkie, received 72 per cent of the votes in the upper income group, 47 per cent in the middle group, and 31 per cent in the lower groups. Another poll taken by the Institute in 1943, when the Global War was already raging, showed that, despite some changes in percentages, a similar cleavage in sentiments and opinions existed as between President Roosevelt and Mr. Willkie. If it be assumed that the promises made by the platforms and candidates of both parties are as empty as Bryce declared, it must be admitted that divergences of ideas and interests do characterize the party divisions among the voters. It is not true that the two parties are exactly identical except as to their labels. Their differences are not all irreconcilable; but each of the major parties, especially in times of social tension, is something more than an empty bottle with a label on it.[6]

Third Parties and Their Rôle. Although the major parties have avoided complete disruption, both have been periodically attacked by dissatisfied farmers and industrial workers. Agrarian factions, called first Greenbackers, then Populists, later Non-Partisan Leaguers, and now Farmer-Laborites, have kept up a steady fusillade on the "political machines." Appealing principally to urban labor, the Socialist party has been in the field since 1900 and the Communists, since the close of the World War.[7] Occasionally one of these fragments has made great inroads on the old parties, polling as high as a million votes. But none of them has ever come within gun-shot of victory in a national election; most dissenting groups speedily perish or are merged with the Democratic or Republican organizations as left wings.

Still their operations have made a deep impression on both the major parties. It has been claimed, with full historical warrant, that these intransigent factions have set most of the leading issues of the past fifty years—the income tax, regulation of railways, popular election of Senators, limitation on the use of injunctions in labor disputes, woman suffrage, labor legislation, social security, and "farm relief." Since the two traditional parties are often rather evenly balanced, they must make concessions to independents in return for votes. No doubt this trading,

[6] For a summary treatment of party motivation and electoral behavior, see V. O. Key, *Politics, Parties, and Pressure Groups* (1942), pp. 606 ff.

[7] The American Labor Party, especially strong in New York, has not yet nominated a presidential candidate of its own.

coupled with the enormous expense of constructing a new national political machine, is partly responsible for the failures of third parties. Danger from their direction is allayed before it becomes too serious. Hence it happens that the Government of the United States has been conducted alternately by the Republicans and Democrats, goaded and deflected by dissenters.

Independent Voters. Despite the strength of party loyalties there is a large body of independent voters who swing from one party to another or do not vote at all when they see no issues at stake. Elaborate efforts have been made to discover by statistical research and calculation the proportion of voters who inherit or habitually cling to their party affiliations and the proportion who are really independent, in that they swing easily from one party to another according to times and circumstances. Here, too, exactness in conclusions has not been attained. It can be said with assurance however that the proportion of independents is substantial, that it varies from region to region, and that it seems to be higher in the professional and business classes and among skilled and semi-skilled workers. Estimates of the percentage of independents range from 20 per cent upward. At all events, the body of independent voters, combined with members of minor parties, is so large that managers of the two major parties must take account of them and make bids for their support in election campaigns.[8]

The Inner Nature of the Political Party

Party Officials. Since the political party is so vital in the conduct of government it becomes pertinent to inquire into its structure and composition—its organization, leadership, classes of membership, and sources of strength. Each of the two great parties has a more or less complete set of officials and committees for the nation as a whole and for each state and important subdivision. At the top is the national committee composed of representatives from all states, headed by a chairman and staffed by a set of officers, and two congressional election committees representing party members in the Senate and House respectively and appropriately officered. The states, counties, congressional districts, cities, towns, and precincts likewise have their party organizations (below, Chapter XXIV). No available figures give us the exact number of officials, committee members, and regular workers in

[8] V. O. Key, *op. cit.*, pp. 616 ff.

the hierarchy of each major party from precinct or district groups at the bottom to the chairman of the national committee at the top; but estimates place it in the neighborhood of a million. Of this number a considerable proportion hold government jobs, large or small, or derive some compensation from political sources or have hopes of such pecuniary rewards. For the nation at large and the several political districts there are party leaders inside and outside the official committees. Frequently they are officeholders or aspirants for office; often, lawyers who seem to have time to give to politics.

Party Membership. Around the party organizations and leaders are grouped the rank and file of party members. It is customary to include within the party all those who support its candidates at the polls, but this is loose thinking. Thousands who vote with a party at a given moment are independents or members of opposing parties, who for the time being favor its candidates and platforms. Additional thousands who regularly vote a given ticket bestow no thought or time on party debates and conferences, and could not give a fifty-word account of why they belong to any particular organization or approve its doctrines and methods.

According to another definition, a "party" includes only those who are openly inscribed on its roster and entitled to participate in its primaries. Ordinarily this group consists of from thirty to eighty per cent of the party voters. In practice the number who actually go to the primaries and take a hand in electing party officers and nominating candidates is much smaller, ranging sometimes as low as ten per cent of the enrolled members and not often higher than seventy or eighty per cent.

Influential Members. Among the fifty per cent of the rank-and-file members, more or less, who may be reckoned as taking some positive interest in party affairs, only a minor fraction is active and influential. At the center are some loyal and zealous citizens who believe that the welfare and safety of the Republic depend upon the principles which they advocate—members who hold no office and may be disinterested. But the size of this element in each party is uncertain. More constantly active, as a rule, are the regular and permanent officials of the party, such as the committee members and chairmen (national, state, and local), paid workers, office-holders dependent for their positions upon the party, would-be office-holders looking to it for preferment, pensioners, recipients of public relief, employees on federal work projects, govern-

ment contractors, editors of partisan newspapers, and representatives of various interests which expect favors at its hands.

Party Discipline and Loyalty. Once established, the party institution becomes a kind of State within the State. It has its constitution, officers, committees, laws, treasury, loyal subjects, and penalties for treason. Ordinarily, no one can rise high in politics except through the regular channels of some party. An independent citizen who refuses to become a party member is looked upon as a "crank" or a "goody-goody."

The partisan spirit was accurately reflected about a hundred years ago in the Richmond *Whig*'s editorial on the "no-party man." "We heartily join in desiring the extermination of this pestiferous and demoralizing brood. . . . Let the Whigs and Democrats everywhere resolve that the gentry who are too pure to associate with either of them or to belong to either party shall not use them to their own individual aggrandizement. Let them act upon the principle that the Whig or Democrat who has sense enough to form an opinion and honesty enough to avow it is to be preferred to the imbecile or the purist or the mercenary, who cannot come to a decision, or is ashamed of his principles, or from sordid considerations is afraid to declare them."

Writing long afterward, W. B. Munro described the state of affairs in a way indicating that the spirit praised by the *Whig* was still abroad in the land. "Most men and women," Munro declared, "inherit their party affiliations. . . . They are Republicans or Democrats because their fathers and grandfathers were, although they do not relish being told so. Taking the country as a whole at least sixty per cent of the active electorate is strictly 'regular' in its party allegiance. Irrespective of issues or personalities, the partisan loyalty of these groups is almost absolutely dependable." [9]

Sources of Party Strength

Why has party organization become so minute in its ramifications and so powerful in the United States? While a complete answer can scarcely be made, some of the more obvious reasons are agreed upon.

The Complications of American Government. In the first place, the large number of elective officers makes it difficult for individuals in general to take an effective part in selecting candidates and running political machinery. Wherever elective offices are provided, devices for

[9] *The Invisible Government*, pp. 145 f.

making nominations follow, with a long train of primaries, caucuses, conventions, and committees; and it takes time, expert knowledge, and special gifts to conduct such affairs. So party business of necessity falls mainly into the hands of professional workers experienced in the art of managing primaries and elections.

Even the very structure of our federal system makes party government indispensable to the realization of popular will. The legislative authority is divided between Congress and the states, so that when a party has a policy which requires action in the two spheres, it must seek power in both. For example, if it wants an interstate commerce law, it must go to Washington; for a supplementary measure regulating commerce within the state in a consistent manner, it must turn to the state legislature. Any party which formulates a systematic and national program covering the important questions of our day relative to railways, utilities, labor, conservation, trust regulation, economic stabilization, taxation, social security, and housing must therefore include among its plans federal and state projects; and in order to accomplish its designs, it should be strong enough to control state legislatures and Congress.

The legal separation of executive and legislative powers likewise serves to strengthen party organizations. If popular government is to function freely and smoothly, law making and enforcing must often be in the same hands, lest the one defeat the other. In England this fact is frankly recognized, for the executive cabinet, composed mainly of department heads, is selected from the party in the ascendancy in the House of Commons. Those who formulate policy and those who carry it out belong to one fellowship. In the United States the cooperation of the legislature and the executive must be secured *outside* the written law; and the party system makes it possible. It is the party that assures the nomination of candidates who are in some degree of harmony with one another, and who, if elected, can work together in legislative and executive positions to realize the will of the voters.

The Spoils System. Passing outward from the structure of government, which in itself makes for strong party organization, we encounter the "spoils system." By giving permanent tenure to many public employees, civil service reform has materially reduced the proportion of offices filled by party workers, but there still remains an enormous number of positions to be divided among the victors. The political appointments subject to the President's orders have an annual value of millions of dollars. The multiplication of the functions of state ad

ministration has enlarged the appointing power of the governor and the state senate. Every legislature has at its disposal many offices and positions adapted to partisan purposes, usually free from civil service control. For example, there are sergeants-at-arms, doorkeepers, clerks, librarians, secretaries, caretakers, janitors, stenographers, and messengers to the various committees and assistants first and second, too numerous to mention. Then there are city offices, high and low, steadily increasing in number and, in spite of the civil service restrictions, within the gift of the political party that wins at the polls. Finally there is a veritable army of inspectors, ballot clerks, and poll clerks for the primary and regular elections, who receive annually thousands of dollars from public chests.

Party machines are strengthened by levies on the candidates. Generally speaking, no one can hope to be elected to office today without being nominated by a political party. The party organization wages the campaign upon which the victory hangs. What is more natural and just than the demand that the candidate help to pay the legitimate expenses of the undertaking? It is a regular practice therefore for party organizations, state and local, to collect tribute from candidates for nomination as well as from nominees to office—ordinarily in proportion to the value of the places they seek. There are in addition levies on office-holders after election, sometimes in spite of laws forbidding them. Frequently also the construction of post offices, harbors, parks, school buildings, highways, and other public works yields indirect revenues to the party organization which controls the official agencies in charge of letting contracts.

Beneficiaries of Government Relief and Security Projects. After the Federal Government under the administration of President Hoover embarked on a program for combatting the depression and especially after the Roosevelt administration made wholesale extensions of this program, millions of individuals and all sections of the country were receiving money or borrowing money from the federal treasury. In the summer of 1938 at least seven million people were either directly employed by governments—federal, state, and local—or were employed on federal projects designed to provide work for the unemployed. The latter group alone embraced nearly 3,500,000 persons. In addition hundreds of millions of dollars were appropriated for agriculture, conservation, public works, and other purposes—millions which went directly or indirectly to individuals and communities.

A concrete illustration of the extent to which federal expenditures thus created beneficiaries in communities is given in a speech by Wall Doxey, a Mississippi Representative in Congress, printed in the *Congressional Record* for June 17, 1938 (Appendix). With great pride Mr. Doxey declared, "As a result of the policies and the legislation inaugurated under this Roosevelt Democratic administration, the Second Congressional District of Mississippi has received the following benefits during the period from March 4, 1933, to January 1, 1938":

Sardis Reservoir	$10,800,000
Holly Springs National Forest unit	401,277
Post Office building	363,400
A. A. A. rental and benefit	4,420,026
A. A. A. 1936 conservation program (1937 figures not yet available)	1,503,269
Emergency crop and feed	1,031,033
Federal Land Bank	2,090,850
Farm Security	496,897
Home Owners' Loan	641,217
Federal Housing	370,161
C. C. C. camps	7,770,000
Civil Works	634,059
Emergency Relief	2,161,707
Works Progress	1,768,905
Public Works	911,435
Reconstruction Finance—Drainage	1,944,138
Rural Electrification	566,000
Social Security—Old-age assistance, aid to dependent children and to blind	99,664
Spring Lake State Park	540,000
	$38,514,038

Funds from Private Interests. Large sums of money come to party organizations from private interests. One fruitful source of revenue for political treasuries has been contributions in one form or another from business corporations—even though prohibited by federal law and by many states. They must all apply to some government, national, state, or municipal, for the right to come into existence, and for the right to extend their charter privileges. They are subject to constant regulation by municipal councils, state legislatures, or Congress (possibly by the three agencies); they may be compelled to do things which cost them large sums of money or to abstain from doing things which are highly profitable. In these circumstances, corporations, or their individual members, have often found it cheap to pay party "bosses" for favors and immunities. With a kindred concern for practical ends, leaders of man-

ufacturing interests which thrive under protective tariffs have frequently sought to "insure themselves against free trade" by contributing generously to party war chests. In recent years trade unions have joined the list of large campaign contributors. Equally real though very elusive is the collection of party revenues in return for the official protection of gambling, liquor selling, and vice in various forms; authentic documents show that in the not distant past huge tributes for political treasuries have originated in this way.

Sometimes private interests affected by governmental action give money to parties to secure favors or prevent regulation really designed for public welfare. Sometimes they are forced to contribute by party leaders under threats of punitive legislation. On many occasions, they have given money to both the leading parties with a view to getting a "friend at court" without fail.

Zeal for Association. Leaving the economic realm for that of social psychology, we are on less secure ground, but here too are factors which contribute to the strength of political organizations. From the days of de Tocqueville to our own time, foreign observers have noted that the American people are given to the formation of associations of every kind. There are in the United States literally thousands of lodges, orders, and fraternal societies; there are political, social, benevolent, religious, and reform organizations without number. It is a rare American who is not a member of two or more.

The sources of this zeal for association are obscure, but it is attributed in part to the ferment of opinions in a democracy. Anyone who gets a new idea or a variant on an old one wants to start a society to spread it. The phenomenon has also been ascribed to the weakness of the individual and the power of the mass where theories of equality prevail. Since levelling doctrines are professed and no aristocracy is legally recognized, the individual who refuses to associate on equal terms with other members of the community is an object of curiosity if not suspicion. If he must live by a trade or profession, he cannot hope to succeed as long as he refuses to join lodges and organizations.

The Party as a Social Ladder. Like a church or any other society, the political party may be used as a fellowship through which valuable acquaintances may be made and business, clients, or patients secured. This social power of the party organization draws into its ranks the energies and talents of young people who, though by no means devoid of idealism, cannot be blind to the struggle for existence. In some cities

it is well for the young lawyer practicing in certain courts to be known as a prominent worker in the party to which the presiding judges belong. A Democratic doctor in a strongly Republican district would doubtless find his rise in the world handicapped if he were overzealous in the support of his party, and a belligerent Republican lawyer in a Southern community might find his business limited to practice in federal courts. The subtle insinuations of party control are doubtless more powerful than the gross influences which appear on the surface.

Propaganda. Quite as elusive, and yet substantial, is the influence of the press and propaganda. Nearly all newspapers are partisan; even the independent journals are usually controlled by men affiliated with parties. Most political editorials are written with a bias or a view to party advantage and the news itself is colored more or less by party opinions, through the emphasis given to certain events, in the headlines and the articles. During campaigns, especially, the political atmosphere is charged with propaganda—printed, written, and oral. Gossip, damaging or favorable to candidates, sweeps like a whirlwind through party organizations. A party is indeed "a great political whispering gallery."

Party Aids to Citizens. Last, but not least, parties are strengthened by various aids of a personal nature rendered to voters. Political leaders and workers favor the poor by a thousand charitable acts. They give outings, picnics, clambakes, and celebrations for them; they help the unemployed to get work; they pay the rent of sick and unfortunate persons about to be dispossessed; they dispense relief grants from the public treasury in time of economic distress; they appear in court for those in trouble, and a word to the magistrate may save the voter from the workhouse or even worse; they remember the children at Christmas; and, in short, they are ever watchful charity agents for their respective neighborhoods. A kind word and a little money in time of pressing need often go farther than an eloquent sermon on civic virtue. Thus politics as it operates through party organization is a serious and desperately determined business activity; it works night and day; it is patient; it gets what it can; it never relaxes.

Money in Federal Politics

Party Operations Cost Money. Parties, as we have just seen, are and must be great economic organizations. Under our prevailing system of popular elections thousands and even millions of voters must be reached

through various agencies—such as the press, meetings, post offices, telegraph, radio, and party workers. Huge expenditures are necessary even for legitimate purposes, to say nothing of bribery. To win party nominations for offices in large jurisdictions, individual aspirants and their supporters must make considerable outlays, and to win elections party organizations as well as candidates must do likewise, if they have formidable competitors. Here the American theory of democratic equality breaks down. Although it is not true that the longest purse is always victorious, it is certainly true that without a purse of some kind no citizen can expect to win any important office.

Ordinarily, as we have said, money for such expenditures comes from four prime sources—disinterested persons of wealth, office-holders, office seekers, and citizens engaged in economic undertakings which may be benefited by action or inaction on the part of government. Attempts to raise large sums through petty contributions by the masses have never been successful. Inevitably this brings about a concentration of immense power in the hands of a small number of people with money at their command. And many investigations, not to say scandals, have revealed a widespread use of money by individuals and groups in primaries and elections—money derived from donors economically interested. In recognition of such facts, the most advanced states have enacted elaborate campaign-practices laws (Chapter XXIV) and Congress has dealt briefly with the subject. Federal legislation in this field is of four types.

Federal Laws on Collection and Use of Funds. First of all Congress has imposed limits on the collecting and giving of money in connection with elections. According to the terms of a law originally passed in 1883, no member of Congress or federal officer may solicit or receive any contribution from any employee drawing a salary from the national treasury. This act represented an effort to dry up one of the prime sources of funds for federal politics. Cut off from this assistance, leaders in that sphere relied more and more on the contributions of great financial and industrial corporations. To counter the new movement Congress has made it unlawful for any national bank or other corporation to contribute money in connection with elections at which presidential and vice-presidential electors, Senators or Representatives are chosen; furthermore, in this relation, candidates, political committees, and all other political agencies are forbidden to accept direct financial aid from such sources. Under the Public Utility Holding Company Act of 1935, based

on the power of Congress over interstate commerce, utility holding companies and their subsidiaries are specifically forbidden to make contributions to campaign funds of political committees.

Angered by strikes, threats of strikes, and the defiant conduct of certain labor leaders, notably John L. Lewis, Congress passed, over the President's veto, in June, 1943, the Connally-Smith Act, one section of which forbade political contributions by labor organizations during the war then in course. This provision, as the President pointed out in his veto message, had no relevancy to the prevention of strikes. "If there be merit in the prohibition," he said, "it should not be confined to wartime, and careful consideration should be given to the appropriateness of extending the prohibition to other nonprofit organizations." Even the very meaning of the section is now in dispute.

Limits on the Activities of Public Employees. Besides seeking to restrain the use of money by private individuals and organizations in influencing elections, Congress has at last taken account of the power wielded by public employees and other persons deriving salaries, wages, or other benefits from governments. The Hatch Political Activity Act approved August 2, 1939, places numerous and drastic limitations on the use of money and official influences in federal elections. It forbids any person to coerce or threaten to coerce any person in such elections or in any way interfere with his right to vote as he chooses. No person in any federal administrative position may use his official authority to interfere in such elections. Promising work, compensation or benefit as a reward for political activity is forbidden. Likewise prohibited is depriving or threatening to deprive any person of relief work or benefits. Soliciting and receiving funds from persons deriving benefits from relief funds, furnishing lists of persons benefiting from relief funds, and using any part of relief funds for the purpose of interfering with the rights of persons in elections are forbidden. No person deriving money from federal sources can belong to a political party or organization which advocates the overthrow of our constitutional form of government. With exceptions, no person employed by the Federal Government may use his official position to interfere with or influence elections or take an active part in political management or campaigns. The exceptions are the President and persons employed in his office, the Vice President, heads and assistant heads of departments, and officers appointed by the President with the consent of the Senate who determine policies in foreign relations or in nation-wide administration of federal laws. Federal employees and

beneficiaries retain the right to vote and to express their opinions on all political subjects.

A second Hatch Act, dated July 19, 1940, places similar limitations on the political activities of state and local administrative employees who are engaged in operations financed wholly or in part from federal funds. It was then estimated that the number of such employees was between 200,000 and 300,000 and the number was materially increased later.

Limit on the Amount of Individual Contributions to Campaign Funds. Under the Hatch Acts a limit was placed not only on the amount which a national political committee might receive—$3,000,000 but also on the size of individual contributions to campaign funds for federal elections. The topmost limit for such gifts was fixed at $5,000. No single contribution to any political organization may be above that amount, whether made by private individuals, trade unions, or public officials exempted from prohibitions on making campaign gifts. But the same individual or organization may make contributions to any number of different political committees or organizations.

Limits on the Expenditure of Money. While attempting to prevent the collection of political funds from corporations, trade unions, and various public employees, Congress has placed limits on the amount which candidates for the Senate and House may spend in elections; and it has limited contributions to, or expenditures by, any political committee, for federal campaign purposes, to $3,000,000 in any one calendar year. In no case may candidates for the Senate or House exceed the sum set by state legislation. In the absence of a state law fixing a smaller figure, a candidate for the Senate may ordinarily spend $10,000 and a candidate for the House of Representatives $2,500. However, if the number of voters in a constituency is especially large, this amount may be increased proportionately. Even then, no matter how large the vote, no candidate for the Senate may spend more than $25,000 and no candidate for the House more than $5,000.

But highly significant exceptions must be recorded. In summing up all his expenditures under federal limitations, a candidate may omit outlays for his necessary personal, travelling, and subsistence expenses. He may likewise leave out of the reckoning money spent for stationery and postage, for distributing circulars, and for telephone and telegraph services. Also excepted from the return are all assessments, fees, and charges levied on him as a candidate under the laws of the state in which he resides.

Limits on Purposes of Expenditures. Meager as are the provisions of federal statutes on political contributions and expenditures, they are still more meager with respect to the purposes of outlays. It is unlawful for any candidate for Congress to offer public or private employment in exchange for support or promise his influence to secure employment on this condition. It is likewise unlawful to offer to make or to cause to be made outlays to any person with a view to inducing him to vote for or against any candidate or to withhold his vote. The acceptance as well as the tender of money for these purposes is also prohibited. In some measure, no doubt, the restricted nature of federal limitations on the uses of money is due to the fullness of state laws dealing with bribery and other corrupt practices in elections (Chapter XXIV).

Publicity for Party Funds. A further restraint on the collection and disbursement of money is supposed to be afforded by federal legislation providing for the publicity of campaign funds. Every candidate for Senator or Representative must file with the secretary of the Senate or the clerk of the House, as the case may be, both before and after election, statements showing in detail contributions received in support of his candidacy and itemized expenditures made by him or by any person with his knowledge and consent.

Besides requiring candidates for Congress to file reports of their outlays, the law also prescribes publicity for the financial operations of political committees. Included within the scope of the statute is every committee, association, and organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of Senators, Representatives, or presidential and vice-presidential electors in two or more states. The law does not stop here. It also applies to every other committee, association, or organization engaged in influencing elections, whether it operates in more than one state or not, if it is a branch or subsidiary of a national committee, association, or organization—excluding duly constituted state and local committees of political parties. All political committees covered by this legislation must file periodically statements giving receipts and expenditures and showing in great detail the purposes as well as the dates and amounts of the outlays.

Loopholes in Federal Laws. Perhaps the greatest gap in federal legislation respecting elections is the total exclusion of primaries. The publicity law of 1911 covered them as well as elections, but in 1921 the Supreme Court ruled in the Newberry case that the power of Congress

to regulate the manner of holding elections did not extend, at the time of the enactment in question, to senatorial conventions and primaries. Subsequently Congress expressly provided that the term "election" does not include a primary or convention of a political party. Yet it was at the time doubtful whether this exception was really necessary; and in 1941, the Supreme Court indicated that Congress could regulate primary elections for federal offices, and made possible still more comprehensive legislation on the subject of national elections.

A second criticism of the federal corrupt practices legislation bears upon the clause which exempts from the limits fixed on expenditures all money disbursed by candidates for stationery, postage, printing, personal use, and publicity in general (except for newspapers and billboards). Under this rule outlays for most of the purposes which may be called "legitimate" are in fact not restricted in amount and the person with a long purse is distinctly favored.

Besides leaving the candidate free to spend as much as he likes for such publicity, the law allows his friends to pour out money independently on his behalf without rendering any accounting whatever. It is in this connection that some of the worst abuses arise. Frequently it is not the candidate but some powerful economic interest behind him that is responsible for huge outlays in primaries and elections. As long as the candidate himself is not held personally responsible for all expenditures in support of his contest and as long as the amount is not strictly limited, wealth has a decided advantage in every campaign.

Not until 1940 did federal legislation forbid national committees to print campaign books which include advertisements paid for by business concerns at huge prices and sold to party officials and members at fancy prices. To this practice the Democratic national committee resorted with great profit in 1936. Republicans made an outcry against it, calling it illegal, a bald subterfuge for evading limits on campaign funds. Democrats paid no official attention to the outcry; but the Hatch Act of 1940 made the subterfuge unlawful.

There are also loopholes in the Hatch Acts (p. 78). No federal political committee may receive more than $3,000,000 in contributions; no single contribution may be above $5,000 in amount; and no government employee may assess other government employees. A national campaign committee may however set up other committees, nominally independent, and each of them may receive $3,000,000; or it may instruct givers to turn their contributions over to state committees. An individual may

give $5,000 to many different committees. Political workers who are not government employees may collect contributions from government employees.

Through another hole in the federal law money may creep. Political committees may have large deficits at the end of a campaign and may raise the money to cover them long after the period for making public their accounts of the election has expired. As Senator Bronson Cutting remarked in speaking of a concrete case of this kind: "A contribution made to a preëlection fund would have been in the nature of a gamble, but a contribution made to a deficit and particularly to a deficit of the party which had been successful in the election was simply putting . . . money over the counter and getting a return for the investment. That is a danger which is not dealt with under our present statutes at all." This practice was illustrated in connection with the campaign of 1920 when a contribution covering a big deficit in the Republican fund was made by Mr. Harry Sinclair, who was later charged with fraudulently obtaining oil leases from certain politicians assisted indirectly by his contributions. Mr. Sinclair stated that he did not know whether he was a Republican or a Democrat, but at all events, he staked his money on the winner.

Laxity in Enforcement of Laws. In addition, federal law is weak on the side of enforcement. The provisions for publicity are not effective. Statements of campaign receipts and expenditures are carelessly filed in irregular form; they are not published; and after a period of two years they may be destroyed. Most of them merely accumulate dust. Eager newspaper reporters may dig out certain figures that will make news or a sensation, but as a rule candidates and committees can be fairly sure that little will be heard of their "public" statements. While the national committees of the great political parties report in detail, other political committees and associations and many candidates for Congress are, to say the least, extremely careless in making their returns. It is doubtful whether the news of their publicity statements often reaches their respective districts. In this relation federal law has no teeth.

Furthermore no agency is directly responsible for enforcing its terms. Although a defeated candidate may attack his opponent in the federal courts or before a committee of Congress for some infraction or contest the election results, there is no permanent machinery to investigate charges of irregularity. Committees on elections in both houses and special committees for inquiring into campaign expenditures do go into

specific cases as they arise, but they are almost always partisan in character and concerned primarily with immediate issues.

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CHAPTER IV

THE STRUCTURE AND COMPOSITION OF CONGRESS

The function of giving expression in the form of national legislation to the demands of political forces—the interests and aspirations of the American people reflected in the operations of parties, lobbies, and pressure groups—is vested in the Congress of the United States. Its acts under the Constitution are supreme laws of the land. However weighty may be the influence of the President in shaping legislation, responsibility for law-making rests in final analysis upon Congress. Without constructive action on its part and the appropriation of money, the other two departments of the Government could not operate; nor could the complicated structure of judicial and administrative agencies come into being or, once established, continue the discharge of their duties. It was not without reason therefore that the framers of the Constitution devoted the first Article to the organization of Congress and its powers.

Congress Is Bicameral. Congress is divided into two chambers—the Senate, in which each state has two members, and the House of Representatives, apportioned among the states according to population, counting all persons, including resident aliens and excluding Indians not taxed. Historical and practical considerations are responsible for this bicameral system. At the time the Constitution was framed, Rousseau's doctrine that all men are politically equal and alike and entitled to the same share in government was not generally accepted in this country; nor is it accepted today in practice. Furthermore, when the framers of the Constitution devised the national legislature, they had to deal with a condition—with states already established and each bent on having an equal share of power, if possible—as well as a theory of equalitarian democracy.

Origins of the System. Under the Articles of Confederation, all states stood on an even footing in Congress, and the small states would not

agree to a new plan of government unless their old status was preserved in one branch of the legislature. The adoption of the equality principle in the creation of the Senate was a result of their insistence. On the other hand, the movement for the formation of the Constitution was particularly sponsored by the larger states and they would not federate unless they were given a weight in the legislature proportioned to their numerical strength. Underlying this controversy were important economic facts. The more populous section of the country, the North, was commercial in interest, while the sparsely settled region, the South, was primarily agricultural. The division of Congress into two houses based on different principles of representation was in part the result of an effort to balance these economic powers in the Federal Government. Another consideration was the fear of majority rule which the Fathers entertained. They thought that the Senate would function as a conservative check on the "turbulence of democracy" likely to appear in the popular branch, the House of Representatives. Indeed attempts were made in the constitutional convention to have the Senate represent the wealth of the country, but without avail. Accordingly the Congress is based on states as political entities and on population.

The House of Representatives

Provisions for Apportionment. The number of members in the House is not fixed by the Constitution. Its determination is left to Congress subject to two limitations, namely, that each state must have at least one member and that the total shall not exceed one for every thirty thousand inhabitants. When Congress has fixed the number, it must distribute the Representatives among the several states according to population, including all persons except Indians not taxed. The Constitution also directs that the enumeration of the inhabitants shall take place every ten years and by implication that an apportionment should occur after each census is completed. As a courtesy territories and certain possessions of the United States are permitted to send delegates to the House of Representatives, who may speak but cannot vote.

Number of Members. The membership of the House in the beginning was fixed at sixty-five but the figure has been increased until it now stands at 435. Even so, the average number of inhabitants for each congressional district has risen from about 33,000 in 1793 to about 300,000 in the reapportionment after the 1940 census.

Methods of Apportionment. After the census of 1920 had been taken a deadlock occurred over apportionment which lasted for ten years, violating the spirit if not the letter of the Constitution. At length, in providing for the census of 1930, Congress stipulated that the existing number of members in the House of Representatives, namely 435, should remain unchanged and directed the President to report to the next short session of Congress three projects for the allocation of seats among the states. It further provided that, if Congress failed to enact legislation for apportionment at the short session, one of these plans—for the distribution of members, based on the preceding apportionment—should go into effect for the next Congress to be elected. Late in 1930 President Hoover transmitted his report on the subject to Congress and a scheme of reapportionment went into effect for the election of 1932. In this adjustment some states lost members and states whose population had increased received additional members.

As required by existing statutes, the President of the United States submitted to Congress in January, 1941, two plans for reapportioning seats in the House of Representatives, to bring it in line with the 1940 census figures on population. Under the first of these plans, known as the system of major fractions, Arkansas would have lost a seat to Michigan, a consequence which led the Democratic majority in the House to oppose its adoption. Failure of the Senate to take action resulted in the system of major fractions automatically going into effect 60 days after the presentation of the President's calculations. Under the new apportionment, now in effect, the size of the House remains at 435 members. Each of ten states, Arkansas, Illinois, Indiana, Iowa, Kansas, Massachusetts, Nebraska, Ohio, Oklahoma, and Pennsylvania, lost one representative. Thirty states experienced no change in representation. Seven states gained a representative apiece, namely Arizona, Florida, Michigan, New Mexico, North Carolina, Oregon, and Tennessee. California won three additional representatives.

Laying Out Congressional Districts. In the beginning of our constitutional history, Congress simply assigned to each state its quota of Representatives and let it decide whether they should be elected at large—the whole number on a single ticket—or by separate districts. In 1842 however this practice was abandoned. Every state having more than one Representative was then required by federal law to create a congressional district for each member allotted to it, and to provide for electing only one Representative in each district. For a long time it was also the prac-

tice of Congress to stipulate by law that all congressional districts shall be composed of contiguous and compact territory containing as nearly as practicable equal numbers of inhabitants; but owing to the failure of Congress to repeat these words in the law of 1929 covering the next apportionment, it seems that the principle no longer applies to the making of congressional districts. Such at least is the interpretation of the Supreme Court of the United States.[1]

Nevertheless the theory that congressional districts in each state should be composed of contiguous territory and equal numbers of inhabitants still lingers. In creating districts,[2] the state legislatures, in whose hands the power is vested, are expected to observe the rule, more or less, but in practice they still commit gross violations. If the state legislature fails to lay out congressional districts as required by law, then its Representatives in the House must be elected at large on a state-wide ticket. If it refuses to re-district the state when it is allotted one or more new members, some of its Representatives are elected in the old districts and one or more, as the case may be, are elected at large.

The Practice of Gerrymandering. Notwithstanding the repeated declarations of Congress that congressional districts should be substantially equal and the wide prevalence of the theory to that effect, state legislatures have succeeded in creating, principally for partisan purposes, gross inequalities among districts. By this abuse, known as "gerrymandering," [3] the political party dominant in the state legislature makes its votes go as far as possible in congressional elections and makes the votes of its opponent to count for as little as possible. To accomplish this end it masses the voters of the opposing party in a small number of districts, giving it an overwhelming majority in each, and so marshals its own voters that they can carry many districts by slight majorities.

Gerrymandering is responsible for curious political geography. In one

[1] On this subject, see Roger V. Shumate, "Minnesota's Congressional Election at Large," *American Political Science Review*, February, 1933, p. 60.

[2] A bill of the legislature laying out districts for the state must be signed by the governor or passed over his veto, if the state constitution gives him that power. The rule that the governor must be associated with the legislature in such action has been established by a decision of the Supreme Court of the United States. Shumate, *loc. cit.*, pp. 58 ff.

[3] The term "gerrymander" originated in Massachusetts. It appears that Elbridge Gerry, a distinguished Democratic politician of his day, was instrumental in redistricting his state in such a way that one of the districts had the shape of a lizard. When an artist saw the map of the new district, he declared: "Why, this district looks like a salamander," and gave it a few finishing touches with his pencil. The editor, in whose office the map was hanging, replied, "Say rather a gerrymander," and thus an ancient party practice was given a new name.

of the Southern states there was once a famous "shoe string" district which ran through a large part of the state and by this grouping of voters counteracted the Negro vote. At another time there was an equally famous "saddle bag" district in Illinois, in which many Democratic counties were linked together, assuring the Republicans safe majorities in neighboring regions. In the effort to re-district the state for the election of 1932, the Minnesota legislature created one district that "almost cut the state in half. Beginning on the South Dakota boundary, it embraced a large farming territory in the western part of the state and then extended a long finger to the eastward, a distance of nearly 175 miles, to include a single ward of the city of Minneapolis."

Inequalities in Districts. Owing to gerrymandering and other practices, there is a great variation in the number of people for whom the several Representatives in Congress speak. The rule that each state, no matter what size its population, shall have one Representative, gives Nevada, with a population of 110,000, one member, although the average number of people per Representative is about 300,000. Delaware and Wyoming also fall below the quota. Troublesome fractions left over after the division into districts is made also work against exact equality. There are also glaring discrepancies in the number of voters for whom Representatives speak. This is due to limitations on the suffrage, especially in the South, to the universal exclusion of alien residents from the right to vote, and to the indifference of voters in many sections. The votes cast in a congressional district vary with the nature of the contest; if one party normally has an overwhelming majority in a district, there is likely to be no spirited battle and the number of ballots cast may be small. On the other hand, in hotly contested districts, party leaders may drag the most negligent citizens to the polls and swell the returns.

The House Not an Exact Mirror of Opinions. As a result of gerrymandering and other practices, the House of Representatives is seldom, if ever, an exact mirror of the political opinions expressed at the elections. Sometimes one party secures a majority of the popular vote of the country, taking the congressional districts as a whole, and the other party obtains a majority in the House. For example in the elections to the House in 1942, the Republicans polled 50.6 per cent of all the votes cast throughout the country in those elections; the Democrats, 47.4; and independents, 2 per cent. On the strictly numerical principle the Democrats should have been ousted from power, but, while their majority in

the House was reduced, they won enough seats to keep their control intact, if by a narrower margin.

In congressional elections, the minorities never receive a representation in the House that is proportioned to the number of their votes. In 1920, to cite an illustration, the Republicans cast 1,114,000 votes in the congressional elections of Pennsylvania and won thirty-five Representatives, while the Democrats and other minor party voters, numbering about 600,000 in all, elected only one Representative. The tables were turned in the Pennsylvania congressional election of 1936, for an equal distribution of Representatives on the basis of popular votes at that time would have given the Democrats 19 members instead of the 27 they received; and the Republicans 14 as against their 7; while minor groups would have been entitled to one seat instead of none. Nothing except a complete national program of proportional representation, giving parties representation according to their respective number of votes, can remove the discrepancies created by the gerrymander and other practices. But that reform is certainly not now within the realm of "practical politics," even if it were deemed desirable.

Elections to the House. According to the Constitution, the time, place, and manner of holding elections for Representatives may be prescribed by the state legislature but Congress may make or alter such laws. At present regular congressional elections must be by ballot and occur everywhere, except in Maine, on the same day—the Tuesday following the first Monday in November; special elections are held only when there is a vacancy. Subject likewise to federal law (p. 37), the states fix the qualifications for voters; apart from its negative clauses, the Constitution merely stipulates that persons entitled to vote in each state for members of the most numerous branch of its legislature are entitled to vote within its borders for members of the House of Representatives.

Nomination of Candidates. Candidates for the House of Representatives are nominated by the several political parties in accordance with party customs and state laws; and independents may present themselves by filing with the proper officials petitions signed by a certain number of voters. In some states the candidates of each party are chosen at district conventions composed of delegates representing its membership in units of local government, such as towns or counties. In a great majority of the states however an official direct primary election has been substituted for the convention. Under the primary system a party member who

wishes to run for Congress must have his name put on the party primary ballot by petition. Then at a subsequent primary election the party voters select their nominee from the aspirants on this ballot (Chap. XXIV). The general direction of campaigns is entrusted to the national committees (p. 69) and to congressional committees, each made up of party members in the Senate and House.

Qualifications of Members. No one can take a seat in the House of Representatives unless he has the qualifications required by the Constitution. A member of that body must be a citizen of the United States of at least seven years' standing; he must be not less than twenty-five years old and an inhabitant of the state in which he is chosen. He cannot be at the same time an active military or civil officer of the United States; and nearly all states have forbidden their officers to hold positions of trust under the Federal Government. Some states have gone further and provided that each Representative must be a resident of the district in which he is elected—a restriction which is apparently unconstitutional.

At all events, it is a general rule that the member of the House must be a resident of his district. The few exceptions, as for example in New York, where down-town constituencies have sometimes been represented by up-town residents, merely confirm it. The reasons for this general custom are thus summarized by James Bryce: local pride will prevent a district from seeking its Representative outside its borders; the member of the House is relatively well paid, and the party machine does not want to waste the post on a stranger, preferring to strengthen the local organization; the Representative in Congress is expected to know local needs and to secure special favors for his constituents; and Americans regard the Representative as a spokesman of local interests rather than as a statesman, "formulating reason and justice into law." Undoubtedly the custom excludes able men from Congress because talent is not distributed according to congressional districts, but party affairs are not conducted on the basis of intelligence tests.

Can the House Add Qualifications? While states theoretically cannot add qualifications to those imposed by the federal Constitution on members of Congress, it is conceded in practice that the House of Representatives may exercise its power as judge of the elections, returns, and qualifications of its members in such a way as to exclude persons on other grounds than those laid down in the Constitution. For example,

in 1900, the House shut its doors to Brigham H. Roberts of Utah, alleging that he was a polygamist. The committee reporting in favor of this action asked: "Must it be said . . . that every person who is twenty-five years of age and who has been for seven years a citizen of the United States and was when elected an inhabitant of that state in which he was chosen is eligible to be a member of the House of Representatives and must be admitted thereto even though he be insane or disloyal or a leper or a criminal?" It answered: "The whole spirit of the government revolts against such a conclusion."

To this view a minority of the committee opposed a vigorous dissent: "The adding by this House alone of a disqualification not established by law would not only be a violation of both the Constitution and the law, but it would be a most dangerous precedent which could hardly fail to 'return to plague the inventor.' . . . What warrant have you, when the barriers of the Constitution are once broken down, that there may not come after us a House, with other standards of morality and propriety, which will create other qualifications with no rightful foundations? . . . To depart thus from the Constitution and substitute force for law is to embark upon a trackless sea without chart or compass."

The principle of exclusion was applied long afterward to Victor L. Berger, elected to the House in a Wisconsin district in 1918. Shortly after his election, Mr. Berger was tried under the Sedition Act and found guilty of obstructing and embarrassing the Government in the prosecution of the World War. He appealed his case and appeared in Washington to take his seat, but he was quickly excluded by the House, with only one member dissenting. A new election was then held and Mr. Berger was once more chosen. Once more the House denied him admission. In reporting against Mr. Berger, the chairman of the committee in charge of the matter did not rest the decision on the ground that the man had been convicted of a crime. On the contrary, he said: "The one and only issue in this case is that of Americanism."

To this contention the Republican floor leader, James R. Mann, tersely replied: "Has it come to the point that a man who believes certain things cannot be heard? His people, his constituents, desire him to represent them. It is not our duty to select a representative from this congressional district. That is the duty of the people back at home. . . . To me the question is whether we shall maintain inviolate the representative form of government where people who desire changes in the fun-

damental or other laws of the land shall have the right to be represented on the floor of this House when they control a majority of the votes in a congressional district." As things now stand it would seem that the House can exclude a person for conduct and views which it deems immoral or un-American or indeed simply objectionable. Thus precedents have been set for partisan purges if the House should ever fall into a violent mood.

Settling Disputed Elections. In passing upon the elections, returns, and qualifications of members, the House of Representatives exercises its own judgment. Unlike the Parliament of Great Britain it does not submit cases of dispute to an independent tribunal. Any candidate intending to contest the official results of an election is required by law to serve notice on the member whose seat he claims, and to state his grievances. The member put in jeopardy must answer. Copies of the papers are referred by the Speaker to a committee on elections; testimony is taken; the contestants are given an opportunity to be heard and to be represented by counsel; and the committee presents to the House a report, which is usually accepted. Inasmuch as each of the committees is dominated by the majority party, a disputed election is likely to be decided in the interests of that party, especially if the countervailing facts are not too glaring.

Term of Service. The term of the member of the House is two years —a brevity of tenure which has received so much criticism in our age that it is difficult to understand early apologies for failure to provide annual elections. It is well-known that no Representative can secure a considerable influence in so short a time; it requires a great deal of practical experience to master the mysteries of business procedure and get a hearing from the leaders in the chamber. Perhaps the best that can be said for the biennial election is that it permits an expression of popular opinion in the middle of each President's term and thus serves as some guide to the formulation of policies. But the practice also has its inconveniences. Often the opposition party carries the House at the mid-term election and the result is usually unseemly disputes, futile delays, and deadlocks. During most of the time from 1873 to 1893 the House was controlled by the party opposed to the President; and this state of affairs obtained at the close of President Wilson's second administration and during the second half of President Hoover's administration. Not without force has it been argued that the term of members should run for four years, thus paralleling the President's term.

The Senate

Inequality of Representation in the Senate. The Constitution prescribes that there shall be two Senators from each state, and that no state, without its consent, shall be deprived of equal representation in the Senate even by a constitutional amendment. Inevitably the rule of equality results in gross violations of the democratic theory that human beings, not geographical units, should be the basis of representation.

An examination of the statistics in the case reveals conditions which recall the "rotten borough" system of England in the days before parliamentary reform. For example, the state of Nevada with about 110,000 inhabitants has the same weight in the Senate as New York with about 13,400,000. It now takes eighteen of the less populous states, with thirty-six Senators to their credit, to equal in population the Empire State with its two Senators. Ten states have within their borders about half the people but command less than one-fourth the Senators.

In legislative actions however the small states are not often aligned against the large states; social and economic factors work contrary to such a mathematical or geographical distribution of political forces. Nevertheless the system gives to the agricultural regions a strength in the Senate all out of proportion to their population, sometimes causing great lament in industrial regions.

Qualifications of Senators. The qualifications of the Senator are fixed by the Constitution. He must be not less than thirty years old, an inhabitant of the state for which he is elected, and a United States citizen of nine years' standing. The same question has arisen here as in the House of Representatives, namely, whether the Senate, under its power to judge of the qualifications of its members, can add any to those fixed in the Constitution. The logical answer seems to have been made by Senator Hopkins in 1907 during a debate over the proposition to exclude Reed Smoot of Utah on various grounds, including alleged polygamist affiliations. Mr. Hopkins said that neither the Senate, Congress, nor a state can add to the qualifications prescribed by the Constitution; that the power given to the Senate is not to create Senators but to judge whether they have the qualifications set forth in the Constitution; that the Senate has no authority to inquire into the antecedents and early career and character of a Senator who applies for admission with proper credentials from his state; that no Senator had ever been denied a seat in the Senate of the United States because of any lapse of morals prior

to his election; and that the Senate should content itself with the exercise of its power to expel a member for disorderly behavior whenever his conduct is such as to lower the standard of that body or bring it into disrepute. On the basis of such reasoning, Mr. Smoot was given his seat and became one of the leading bulwarks of conservatism.

The Senate Adds Qualifications. Although such were long the accepted principles governing the qualifications of Senators, there later developed in the Senate a decided inclination to regard the expenditure of a large sum of money in his election campaign as sufficient reason for excluding a member-elect. In 1922 the Senate set an important precedent in this relation. It appeared that Truman Newberry, or rather friends on his behalf, had spent about $195,000 in his primary and election contests in Michigan, not fraudulently but lavishly. Thereupon the candidate was indicted for the violation of the federal law respecting the use of money in politics, and escaped punishment only because the Supreme Court of the United States declared a section of the statute in question unconstitutional. Attempts to exclude Mr. Newberry from the Senate were also defeated but, as a kind of warning, the Senate resolved "that the expenditure of such excessive sums in behalf of a candidate, either with or without his knowledge and consent, being contrary to sound public policy, harmful to the honor and dignity of the Senate, and dangerous to the perpetuity of a free government, such excessive expenditures are hereby severely condemned and disapproved." In effect, Senator Norris contended, this resolution said to the applicant: "We will seat you this time, but . . . we will never again seat anyone under such circumstances."

The dictum thus laid down was applied later by the exclusion of a Senator-elect from Illinois in whose campaign a large sum of money had been spent, including contributions from wealthy men interested in matters likely to come before the federal administration. When the governor of the state appointed the rejected applicant to fill the vacancy created by his own mishap, the would-be Senator did not dare to press for admission to the Senate.

Shortly afterward, in the case of William S. Vare of Pennsylvania, the Senate followed this precedent. An investigating committee of that body reported that approximately $785,000 had been spent in the election, on behalf of the victor, and that there were instances of fraud in connection with his candidacy. Although it seemed that Mr. Vare had

received a plurality of the lawful votes, the Senate in 1929 denied him the seat by a vote of 58 to 22.

In vain was it argued that a member-elect who possessed credentials of election and the qualifications prescribed by the Constitution was entitled to admission. While some Senators voted against the petitioner merely on account of alleged frauds, it was evident from the debates that a huge outlay alone was regarded as affording justification for exclusion. It is true that the amount which a candidate or his friends may spend in the primaries is not limited by federal law. Yet, judging by these precedents, the Senate may debar persons, otherwise qualified, on the ground that they have disbursed too much money in securing their nomination and election. Where is the line to be drawn? The law makes no answer. The Senate assumes the power to answer it at pleasure.

Popular Election of Senators. Until the ratification of the Seventeenth Amendment in 1913, the Constitution provided that Senators should be chosen by the legislatures of the respective states. The Amendment in question, adopted after a long struggle, provides that the two Senators from each state shall be "elected by the people thereof for six years. . . . The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Under this Amendment, the states had to make provision for the nomination of Senators, and the direct primary was adopted in nearly all cases (above, p. 89).

Effects of Popular Election. What has been the effect of popular election upon the Senate? Perhaps no scientific answer can be formulated, but some pertinent facts may be brought under review. Since every candidate for the Senate under the direct system must make a state-wide campaign, the man who is most efficient in framing programs which arouse public interest and in making speeches which evoke popular enthusiasm has an advantage over the more reserved and less resourceful leader. The quiet and thoughtful person of larger intellectual powers is likely to be overborne by a whirlwind campaigner or an astute manipulator of federal patronage. On the other hand, the clever negotiator with

mere money or talent for slipping softly around and winning over local "bosses" probably has less chance under the present régime. He may buy huge publicity for himself and perhaps win an election, but he cannot escape the necessity of making some statements as to his political opinions. There is also another point worthy of note: the Senator who desires reëlection must now take more time away from legislative business for the purpose of "nursing" his state—keeping his supporters in line and preventing someone from stealing a march on him while he is at the national capital. But that is not an unmixed evil.

On other phases of the subject we can speak with less assurance. The Senate was once regarded as the stronghold of huge capitalistic interests, representing railways, express companies, and protected manufacturers, and blocking the more democratic and progressive House of Representatives. The great Senators who once spoke authoritatively for those interests have nearly all passed from the scene, and it now seems impossible for newcomers to rival the powerful masters of the old order. Is the direct election responsible for this novel situation, or have other forces brought it about?

It was prophesied that popular choice would make reëlection more difficult and that the practice of retaining Senators for long terms and drawing benefits from their experience would be abandoned. Events have hardly borne out the forecast. It was insisted by Senator George F. Hoar that popular election would overthrow "the whole scheme of the national Constitution as designed and established by the framers." For the present at least that Constitution still stands.

Frequently the contention is heard that popular election makes the use of money a prominent factor in senatorial contests, but for every case of this kind in recent years a match can be found during the period prior to the adoption of the Seventeenth Amendment. Indeed the most flagrant instances of indecent barter and sale in connection with elections were in the old days when state legislatures were sometimes bought outright by senatorial aspirants.

Changed Character of the Senate. Whatever effects may justly be attributed to popular election, it became apparent, a few years after its adoption, that the character of the Senate had been altered. For some reason it became impossible to construct a well-oiled machine dominated by a few powerful Senators capable of marshalling a majority of the members in solid ranks behind selected measures. Again and again the Senate carried resolutions, defeated bills, rejected presidential ap-

pointees, and made investigations against the wishes and efforts of "the Old Guard." Centralized leadership completely disintegrated. Radicals in the Senate had long protested against "steam-roller" tactics on the part of the Old Guard; now it was the turn of the conservatives to protest against the new methods which governed the transaction of business.

During controveries over this state of affairs, the change was ascribed to the popular election of Senators, but whether this was the real explanation or not could not be discovered. Doubtless national party organizations exercised a stricter control over the choice of Senators in the old days when selections were made in the secret caucuses of state legislatures. Perhaps a man who has fought his way up through a primary campaign is more independent than a man picked by a small, unofficial political committee. Yet this alone does not account for the novel situation; the Senators aligned in the conservative ranks are chosen in the same way. Hence the method of choice does not automatically produce identical results in all states.

When probed to the bottom it appears that the conflict which disrupted party leadership largely sprang out of a struggle between Senators from industrial states and Senators from agricultural states. With perfect frankness J. R. Grundy of Pennsylvania, later elevated to the Senate, attributed the breakdown entirely to Senators from "backward states" —such agricultural states as Arkansas, Georgia, Mississippi, North Dakota, Montana, and Idaho—and insisted that they should not be allowed "to throw the monkey wrench into the machinery twenty-four hours a day." He declared that equality in the Senate is a "misfortune," and that the states in which industries are more extensively developed should control the making of tariff schedules. He said, in addition, that if "the volume of voice" of these agricultural commonwealths were reduced to the proportion of their tax contributions to the support of the Government, some of them would need an amplifier to be heard. Apparently, then, the divisions in the Senate that shattered party leadership must be ascribed primarily to divergences in economic conditions in the country at large, not wholly to changes in election machinery.

Terms of Senators. The term of the Senators is fixed at six years and they are frequently reëlected. A service ranging from twelve to twenty-four years is by no means uncommon. Additional solidity is given to this chamber through an arrangement by which only one-third of its membership may be normally renewed at each biennial election to Congress.

Constitutional Provisions Governing Privileges of Members and the Organization of the Houses

Salaries. Members of both houses of Congress are entitled to certain privileges. First among these may be reckoned payment for their labors. The Constitution prescribes that Senators and Representatives shall receive compensation for their services, to be ascertained by law and paid out of the treasury of the United States. Under existing law they receive an annual salary of $10,000—to which is added a sum for secretarial, travelling, and certain other expenses that may amount to $10,000 or more.

Freedom from Arrest. The second privilege enjoyed by members of Congress is exemption from arrest during attendance on the sessions of their respective houses, and in going to and returning from the same, in all cases except treason, felony, and breach of the peace. This privilege frees Representatives and Senators from many processes which involve imprisonment as a penalty for disobedience. That is, a Congressman, during the period mentioned above, cannot be compelled to testify in a court, serve on a jury, or respond to a civil action brought against him. The term "breach of the peace" however extends to "all indictable offenses, as well those which are in fact attended with force and violence as those which are only destructive to the peace of the government"; therefore the member of Congress really enjoys no exemption from the ordinary requirements of the criminal law.

Freedom of Speech. A third privilege conferred on members of Congress is freedom of speech during discussions in their respective chambers. According to the Constitution, they shall not be questioned in any other place for any speech or debate in either house. This famous right, sometimes regarded as a mere guarantee for the full and free discussion of public matters, is really derived from the practices of the English Parliament where it was formerly invoked to safeguard members against arbitrary arrest for criticism of the king. Apparently it was placed in the American Constitution to relieve Senators and Representatives from responsibility to their constituents. However that may be, the effect of the concession is to give them immunity from liability to legal action for libel or slander for anything said in Congress, in committees, in official publications, or in the legitimate discharge of their legislative duties. Apparently also it allows them to circulate libelous speeches at will throughout the United States.

Freedom of Action. Members of Congress are free to determine the business to be transacted in their respective chambers. To be sure, they are often instructed by state legislatures in formal resolutions to bring up for discussion, or to support, certain propositions, but such orders have no binding force. A state legislature cannot compel a member of Congress to resign or penalize him for disobeying its requests. No provision in the Constitution warrants actions of this character. Indeed many publicists hold that a representative, though chosen in a geographical district, is in reality a member of a national assembly bound to act on broad national grounds. Since however every Congressman is sensitive to the wishes of his constituents, or at least the local party leaders, he is not likely to ignore imperative communications from below. Moreover, in regions where party contests are close and a few marginal voters hold decisive power, every demand of any significance carries weight.

Control over Organization and Procedure. With respect to internal organization both houses of Congress are governed by several explicit provisions of the Constitution. The Vice-President of the United States is made the presiding officer of the Senate with a vote only in case of a tie; neither house can expel a member for a breach of its rules except on a two-thirds vote, a quorum being present; each chamber must keep a journal of its proceedings and publish the same from time to time, except such parts as it may deem necessary to keep secret; if one-fifth of the members present in either body demand a record of the yeas and nays upon the journal with regard to any question, that vote must be taken by roll-call. Subject to these conditions, each house has the right to elect its own officers, compel the attendance of members, and prescribe rules of procedure and discipline.

Open and Closed Sessions. Nothing in the Constitution requires the houses of Congress to hold their sessions in public. Indeed it is implied that they may, if they wish, transact their business behind closed doors, for, as we have just said, they can except from publication such parts of their journal of proceedings "as may in their judgment require secrecy." Shortly after the House of Representatives assembled in 1789, it threw open its meetings and has departed from that practice only in very special circumstances. The Senate, on the other hand, during the first four years of its life, kept everything secret and issued no official reports of its debates. Only under great pressure, from within and from without, did it begin to hold public meetings in 1793. Later it decided

that all sessions dealing with treaties and nominations presented by the President should be secret. It also provided for the expulsion of any Senator who divulged information respecting its confidential transactions.

Under rules still effective early in 1929, "executive sessions" on presidential matters were closed, unless the Senate, by a two-thirds vote, rarely by majority vote, resolved to open them to the public. Nevertheless news of the proceedings in secret meetings usually leaked out, causing confusion and controversy. So a new plan was devised.

According to a rule adopted in 1929, the Senate must transact all business openly unless it specifically decides in favor of secrecy. If it so decides, proceedings in an executive meeting may be made public by the action of a mere majority. Furthermore it is provided that any Senator may publicly state how he voted in a closed executive session. Under this ruling it appears that a Senator may reveal his decision on any confidential matter, but cannot add the reasons assigned for it in debate, unless the Senate gives him permission by special resolution.

The Quorum. The quorum necessary for lawful operations in each house is fixed by law and practice at a majority of all the members legally chosen, living, and officially sworn, but a smaller number may adjourn from day to day, and may compel the attendance of absentees. This is no formal matter. It is necessary to make the quorum large to prevent "snap" legislation by minorities, and yet the stipulation may result in serious inconveniences.

For a long time it was a common practice for the minority party in the House of Representatives, whenever it desired to delay business, to refuse to answer the roll-call, and thus compel an adjournment on the ground that a quorum was lacking. To stop "filibustering," as such dilatory tactics were called, Speaker Thomas B. Reed, in 1890, held that members actually in the House who declined to answer should be counted as legally present in determining a question of a quorum. Shortly afterward the House embodied this principle in a rule authorizing the clerk, on demand of a member or at the suggestion of the Speaker, to record as present Representatives who are in the chamber and yet refuse to respond when their names are called.

Control of Houses over Private Citizens. The right of Congress, in the course of its proceedings, to interfere with private citizens is clearly limited by the Constitution: neither house has general authority to punish outsiders for contempt. If however the examination of private citi-

zens is necessary to the performance of its regular legislative duties, Congress may require their attendance as witnesses and compel them to give testimony (p. 126). Each house may also punish its own members for disorderly behavior; but the Supreme Court has ruled that the power to penalize members and outsiders is confined to the session in which the condemnation occurs and cannot extend beyond imprisonment during the remainder of the session.

The Sessions of Congress

The "Lame Duck" Amendment. Prior to the adoption of the Twentieth Amendment in 1933, the term of members began on March 4th following their election, although they did not assemble until the next December unless called in a special session. Under this arrangement an old Congress remained in power for about four months after a new Congress had been chosen. Thus members defeated for reëlection helped to make laws for constituents who had repudiated them. These defeated members were popularly known as "lame ducks."

For a long time this practice of allowing defeated members to continue in power for four months encountered criticism. It was said that as repudiated agents they had no moral right to speak for their constituents or the country, that they often neglected their duties, and that some of them voted for reprehensible measures because they knew that they could not be punished at the polls, even for corruption. From year to year, especially under the leadership of Senator George W. Norris, an amendment to the Constitution was urged in Congress—the "lame duck" amendment, as it was called; and at length in 1932 it obtained a two-thirds vote in both houses. The following year it was ratified by the requisite number of state legislatures.

Regular Sessions. In accordance with Amendment XX, Congress must assemble at least once every year and at noon on the 3rd day of January, unless they shall by law appoint a different day. Thus members of Congress elected in November begin their work about two months later.

Special Sessions. While Congress must now hold an annual session, beginning in January, either house or both may be called in a special session by the President during any interim period—the Senate in particular to confirm appointments or ratify a treaty. As a rule the President only summons the national legislature to deal with some pressing

issue and usually he announces his purpose in advance. Thus he can direct the attention of Congress and the country sharply to the business in hand. If Congress adjourns without acting on his program, he can call it again. In this way he can assume effective leadership on extraordinary occasions.

Meetings of Congress Called by Party Leaders. The power of Congress to adjourn for a specified time and thus take a vacation is duly recognized by the Constitution and has often been exercised. But what if a crisis arises during the vacation adjournment and members want to reassemble, before the date set, for the purpose of dealing with the crisis? Can they make provision for such a contingency or must they depend upon the President to call them in a special session? Suppose the President is eager to be rid of congressional interference and refuses to call them before the date fixed in the resolution of adjournment? These questions took practical form after the outbreak of the European war in 1939 when opponents of President Roosevelt's foreign policies feared that, by taking drastic actions during an adjournment, he might involve the country in the war. Partly on this ground Congress kept in almost continuous session in 1939, 1940, and 1941. After the United States became involved in the war in December, 1941, a feeling of necessity, coupled with a desire to keep a close watch on the President's activities, kept Congress in almost continuous session. In 1941 it was in session for 365 days; in 1942, for 346 days, with a brief recess in December. In 1943, between January and July, it was in session 184 days, and the need for a vacation was generally recognized.

Yet many of the members were unwilling to adjourn even for a month or two without making any provision for meeting earlier than the date set in a resolution of adjournment, in case of urgency. In these circumstances party leaders made an arrangement for a "conditional" adjournment of the two houses. The resolution provided for adjournment on July 8 and for meeting again on September 14, 1943, or until three days after they were notified to reassemble, whichever event occurred first. To provide for such notification, the resolution stipulated that the President of the Senate and the Speaker of the House could respectively call the houses together whenever in their opinion legislative expediency might warrant it. This was not enough however for cautious Senators and Representatives. So the resolution further provided that Congress was to be recalled "whenever the majority leader of the Senate and the majority leader of the House, acting jointly, or the minority

leader of the Senate and the minority leader of the House, acting jointly, file a written request with the Secretary of the Senate and the Clerk of the House that the Congress reassemble for the consideration of legislation." Although one Senator declared that "all parties" had not agreed to the resolution, it was carried quickly.

According to this precedent, Congress can put itself in a posture to adjourn safely at its pleasure and yet be readily reassembled on the call of the majority or minority leaders. It may in effect make its sessions long or short and yet be emancipated entirely from dependence upon the willingness of the President to call it in a special session. Thus in 1943 congressional independence was declared in an unmistakable form.

The Two Houses

Size and Term. The difference in the organization of the two houses suggests a comparison. The Senate is the smaller body, being composed of ninety-six members, as against 435 in the House of Representatives. Generally speaking, its fellowship includes statesmen older in years and wider in political experience. Frequently Senators have previously served in some branch of state government or in the House of Representatives. As their term is longer and the chances of reëlection greater, they are usually better acquainted not only with the problems of law-making but also with the inner workings of the federal administration.

Influence. The influence of Senators, due to age and experience, is augmented by their position as party leaders within their respective states. Through their right to pass on many presidential nominees to positions in the administration, they have a large power over appointments to federal offices; sometimes they are able by this means to strengthen their political machines in their respective states. They usually have great weight in selecting delegates to national party conventions, and in fact they are often responsible for the predominance of the office-holding element in those assemblies. Such command over party resources within their states enables the Senators to bring more or less pressure on the members of their party in the House of Representatives. When the state organization, in close touch with its Senator or Senators, adopts a policy, it is usually expedient for the members of the lower chamber affected by it to fall in line with instructions.

Decline of Senate "Oligarchy." Shortly after the opening of the twentieth century, political leadership, especially in the Republican party,

was mainly in the hands of Senators who were masters of the party machinery in their respective states. They made and unmade governors and minor officers at home, controlled legislation at Washington, and were powerful figures at national conventions. They were to be found among the influential members of the platform committee and the national committee. It seemed for a time as if senatorial leadership in national politics was an established institution, but appearances were deceptive. As the old directors of policy withdrew or died, they left no successors able to wield such high authority.

Superior Skill of Senate. If it possesses fewer leaders of the old type, the Senate still holds a whip over federal legislation. Owing to the almost unlimited freedom of debate in that chamber (p. 135), each member can block some bills indefinitely and force the consideration of others. In such circumstances the "steamroller" tactics of the House cannot be so effectively applied. Although the Constitution provides that revenue bills must originate in the lower chamber, the Senators, in practice, pay very little attention to that mandate. Their technical skill, their long experience, and their legal talents give them a superior position in strategy. Seldom does a debate in the House attract the attention of the press throughout the country, but senatorial discussions on vital questions frequently break into front-page news. Whether on its merits or not, it completely overshadows the House in both government and politics.

Independent Spirit of Senate. Once the Senate was looked upon as the bulwark of conservatism. Such, the Fathers thought, would be its historic function. But a comparison of votes in the House and Senate on measures which may be called radical or progressive makes the former, more often than the latter, appear to be the seat of conservatism and unreflective reactionism. It is from Senators rather than Representatives that the public may expect stanch defense of constitutional methods and powerful opposition to violent, high-handed, and bigoted opinions and actions.

Economic and Cultural Composition of Congress. As a whole the average Congress mirrors with considerable accuracy that portion of American society known as "the middle class." More than half its members are lawyers. From eight to ten per cent are loosely described as business men. The remainder usually includes a few teachers, journalists, physicians, engineers, and publishers, with an occasional clergyman, actor, dentist, mechanic, and woman interested in public affairs. Of

farmers there may be eight or ten; even the Southern states seldom send simon-pure planters. Industrial labor is still more sparingly represented, generally, if at all, by a trade union leader.

After analyzing the occupational composition of the Seventy-seventh Congress, Madge M. McKinney concluded: "Business, financial, and professional interests are well represented. The farmer's representation does not correspond to his position in America, but more than one in ten of the congressmen have had personal experience with the farmer's problems. . . . It is the laborer who is grossly under-represented; only one man listed himself as a factory worker. Others may possibly have had experience in this capacity, since a few of them have been affiliated with labor unions [26, seven of them listed as honorary members]; but this is only a conjecture. . . . Certainly the laboring class and the 'Have-nots' are surprisingly under-represented in the national Congress, particularly in a country in which labor is strongly organized." [4]

The fact that from sixty to seventy per cent of the members have received a college training of some kind shows that Senators and Representatives are removed a few steps from labor in fields, factories, and mines, if indeed they have ever encountered that experience. Many set themselves down as members of lodges and fraternal orders—Masons, Elks, Odd Fellows, Knights of Columbus, or Knight Templars. Veterans of the World War have a representation larger than their proportion of the adult population. The sprinkling of women in the House and Senate sometimes invites especial courtesy during proceedings but in the main they work on committees and take part in debates according to customary procedure. Occasionally one of them receives an important chairmanship.

Political Experience. To their work, the members of Congress bring a varied experience in politics. In the Senate, even after a political overturn, there is always a large proportion of members who have served many terms in that house. Enough "old timers" are ever present to take charge of directing the business of the chamber. The House likewise has a substantial quota of persons who "have grown gray in service," although after a party upheaval perhaps one-fourth are new to the business. On March 4, 1933, for example, 151 members entered the House of Representatives for the first time and nineteen new members appeared in the upper chamber. According to a computation made by

[4] *American Political Science Review*, February, 1942, pp. 37 ff.: "The Personnel of the Seventy-seventh Congress."

O. R. Altman after the still greater upheaval of 1936, the average tenure of the House Democrats, as of January, 1937, was five and a half years and of the Republicans nearly eight years.[5]

As a rule about one-half of the Representatives and Senators have had an apprenticeship in state or local government as legislators, governors, mayors, judges, or county officers. John Brown Mason's study of five Congresses, from the seventy-first to the seventy-fifth inclusive, shows that about one-third the members of both houses had formerly served in state legislatures.[6] It is evident therefore that Congress is no assembly of amateurs. In drafting bills, serving on committees, making trades, debating, reading public opinion, and gauging popular tempers, the majority are seasoned adepts. The oldest among them in point of service have seen many Presidents come and go, have been through tempests and calms. Continuity as well as change in American life is sure to be reflected in every Congress.

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[5] *American Political Science Review*, December, 1937, p. 1075.

[6] *Annals of the American Academy of Political and Social Science*, January, 1938, "The State Legislature as Training for Further Public Service."

CHAPTER V

CONGRESS AT WORK

The Functions of Congress

In principle the functions of Congress under the Constitution are few and simple. In practice they are numerous and highly complicated. Furthermore they are so interconnected that they cannot be listed for enumeration and description in the order of their importance for national life. Any list of these functions is therefore arbitrary in nature and merely illustrative and for convenience in dealing with them and thinking about them.

Executive and Judicial Affairs. Elementary treatises on the Federal Government usually declare that it is the duty of Congress to make laws, while it is the duty of the President to enforce them and the courts to interpret them. The Constitution does, no doubt, vest legislative powers in Congress and they are listed in the Constitution. But it also gives to the Senate control over the ratification of treaties and over appointments to many executive and judicial offices; and it authorizes the Senate, on impeachments by the House of Representatives, to remove federal officials, from the President and Supreme Court justices down to minor officers. Besides, what are legislative powers and what knowledge, qualities of character, inquiries, procedures, and activities are necessary and proper in Congress to the exercise of legislative powers under the Constitution?

Legislative Duties. Included among the legislative powers is the power to make two broad classes of laws. The first class embraces laws, which may be called administrative, respecting the structure and functions of the executive and judicial branches of the Federal Government. In this relation Congress may create and prescribe the duties of all the departments, offices, commissions, boards, and agencies through which the President carries out his executive functions. In this relation also Congress determines the number of Supreme Court justices, the num-

ber and nature of all inferior courts, the procedure of the courts, and, subject to a few limits in the Constitution, the kinds of cases which each type of court may hear and pass upon. Finally, Congress alone can lay taxes and provide the money for the conduct of the executive and judicial branches, without which they would be powerless.

The second broad class of laws, which may be called social and economic, embraces statutes respecting the life, liberty, property, and happiness of the American people and their relations to other nations of the earth in peace and war. Under this head Congress, subject to the Constitution, may prescribe what the people or classes of people must do or refrain from doing, what they may say and do in expressing their ideas and opinions, and what uses and dispositions they may make of their labor and property.

Responsibility for Law Enforcement. Besides enacting, amending, and repealing administrative and social and economic statutes, Congress must scrutinize their enforcement and inquire into the results of such enforcement. Thus it is bound to be constantly concerned with the ways in which the executive and judicial branches of the Government actually operate and, if need be, to correct executive and judicial modes of conduct. Although Congress cannot itself exercise ordinary executive and judicial powers, it bestows many such powers upon particular executive and judicial agencies and has responsibility for seeing that these powers are duly exercised in accordance with its intentions.

Congress as Guardian of Public Interests. Its obligations do not begin and end here. Under the Constitution members of Congress are representatives of their constituents and at the same time guardians of the national interest and welfare no less than are the President and the judges. They are under obligation so to conduct themselves in official and private life as to uphold the American system of constitutional government, command the respect of the American people for that system, protect the liberties of the people against arbitrary actions, maintain national security against foreign and domestic foes, and assure the safety of the Republic. In discharging their manifold duties they are also morally bound to inform themselves respecting the matters with which they deal and dedicate their talents to the fulfilment of the trust vested in them.

It is with reference to the nature of these vital responsibilities imposed on Congress that a study of its work must be approached. They furnish not only the criteria for judging its performances in relation to

its obligations. They also indicate the necessity of keeping in the foreground certain fundamental facts while seeking to view the operations of Congress with a reasonable degree of understanding.

The Overarching Constitution

The Question of Constitutionality. First of all it is to be remembered that Congress is bound to proceed only in accordance with the terms of the Constitution. In organizing for the transaction of business and taking up matters of legislation touching matters of life, liberty, and property, it must face the question of constitutionality. Unlike the British Parliament, it cannot deal merely with the merits of the case but must consider whether any proposal comes within its constitutional powers or whether, within the limits of the Constitution, it is free to act as expediency might dictate. In respect of highly debatable matters, if the constitutional issue does not appear obvious to all, it is certain to be raised by some member. A measure may be wise, expedient, and even necessary, but if it is clearly outside the powers of the legislature, it is useless to discuss it. If there is any doubt at all as to the validity of a bill, it surely will be the subject of searching inquiry and exposition on the part of the skilled lawyers in Congress.

These discussions are often of a high order and of undoubted value in expounding the terms of the Constitution, but they are also quite as often displays of black-letter lore or personal vanity. "If we must wait until the great constitutional lawyers agree upon any subject," exclaimed Bourke Cockran in the House long ago, "it is plain that we would never take a step in any direction. We would stand paralyzed at the threshold of every legislative enterprise, amazed and bewildered. . . . I defy any man to define Congress itself according to the constitutional lawyers, after he has read three of their speeches."

Doctrine of Strict Construction. Broadly speaking, there are two views of the Constitution which have been taken by members of Congress in deciding controverted questions. The first of these is known as "strict construction"—a concept that would restrain the powers of Congress to the bare letter of the written instrument, and confine the means of carrying its powers into execution to those absolutely and imperatively necessary. In our day this theory, once warmly espoused by Democrats, is more of a shibboleth than a reality. Both parties, it is true, sometimes appear to oppose "encroachments" by the Federal Government,

but their constructive legislative proposals are seldom in keeping with a narow conception of the Constitution.

Doctrine of Liberal Construction. A second position respecting the powers of Congress, originally taken by the Federalists and held at various times by all parties, as their interests have required, is that of "liberal construction." Adherents of this school deny that there is any warrant whatever in the Constitution for applying astringents to it, and lay great stress on the general welfare clause and on the clause which authorizes Congress to make all laws necessary and proper for carrying into execution the powers expressly delegated. They give a generous exposition to the powers named, and then interpret the words "necessary and proper" to mean "highly useful and expedient." Under this construction, American industries have been protected, national highways built, provisions made for lending money to farmers, subsidies granted from the federal treasury to the states, irrigation, electric power, and numerous other large schemes of public improvement undertaken, and the huge array of "New Deal" legislation enacted. Only under this conception of the Constitution has the authority of the Federal Government been made adequate to the exigencies of a national system of economy.

The Nature of the Business before Congress

Complexity of Issues. With the question of constitutional interpretation duly considered, the next important fact to grasp is that the business before Congress is intricate in character and enormous in amount. It involves every phase of political economy and international relations. Taxation in all its branches, the administration of the post office, natural resources, and other property, technical questions of defense (guns, battleships, and airplanes), the regulation of railways, the control of agriculture, the interests of labor, the relief of the unemployed, the government of the city of Washington—these and a hundred other matters equally complex are constantly pressed upon the attention of the members. The demand for new legislation from every quarter is steady and insistent. Large problems in policy and problems minutely special in nature continually call for judgment of the highest order and knowledge deep and wide-reaching.

This is true in times called "normal." It is doubly true in times of war and national crises. And in this connection it is well to remember that nearly every generation in American history has been involved in

wars; for example, 1812, 1846, 1861, 1898; 1917, and 1941; and that economic depressions seem to be cyclical occurrences; for example, 1873–1878, 1893–1897, and 1929–1940. In such times of war and economic distress demands for far-reaching legislation affecting life and property flow in torrents upon Congress as the focal point of legislative action on a national scale.

Immense Number of Bills. At all times the business before Congress is immense in sheer bulk, to say nothing of the difficulties involved in it. Each Congress in the course of its life of two years is confronted by from ten to thirty thousand bills, joint resolutions, concurrent resolutions, simple resolutions, and reports. Any member may introduce as many proposals as he likes. He does not have to secure the permission of anyone in advance or assume any responsibility for them even if they carry a charge upon the treasury. As a matter of fact many are introduced "by request" just to please this or that group of voters.

Public Bills. It is not enough to say that a multitude of bills is introduced in each Congress; the character of these measures must be analyzed, for it has a close relation to leadership in both houses. Some of the measures are general in nature; these we may call "public bills." Others pertain to particular persons, localities, or claims; these are "special bills." For every important public bill there will be hundreds of special propositions laid before Congress.

The significant public bills affect vital economic interests throughout the country such as railways, manufacturing, shipping, labor, and farming; they concern the whole nation as well as special groups. Over them the more serious political divisions occur. It is mainly in carrying such public bills through Congress that the leaders of the majority must bring pressure to bear on the rank and file. It is in this connection that cleavages between the right and left wings of each party appear and threaten the disruption of the regular organization.

Special Legislation—The "Pork-Barrel." Great as may be the interest of the ordinary member in the fate of general bills, his own political fortunes are likely to be closely bound up with obscure special measures making appropriations for post-office buildings, river and harbor improvements, jobs for the unemployed, the satisfaction of private claims for money, and pensions for soldiers, widows, and orphans in his district (p. 73). The local party machine and active citizens among his constituents expect him to get all he can out of the federal treasury for his section. On seeking reëlection he must be in a position to "point with

pride" to the amount and importance of the favors he has secured for "his people" (above, p. 74). If he fails to obtain advantages for them, they may turn against him and support some more energetic and resourceful person.

Law making of this character is called "pork-barrel legislation," a term reminiscent of plantation days. It was an old custom on Southern estates to allot periodically a certain amount of pork to the slaves; at the appointed time the pork-barrel was rolled into view, the head knocked in, and the contents distributed among eager beneficiaries. The applicability of the figure of speech to the legislative process described above needs no elucidation. In fact such a public bill as a tariff measure may well be placed under this head also because even advocates of low duties "in principle" are usually found voting for high rates in detail on goods produced in their districts, thus making "trades" with other members to secure local favors.

"Log Rolling." To "get his pork" from the treasury, the ordinary member is usually compelled to do two things. In the first place, he must secure the consent of his party leaders who control legislation, and in return he must usually vote as he is told on other bills. Thus he may have to sell his birthright for a "mess of pork." In the second place, he must coöperate with his colleagues bent on the same enterprise. Such coöperation is called "log-rolling." In olden times pioneers on the frontier helped one another to cut trees and pile up logs for cabins or for burning—a process known as "log-rolling." Like the term "pork-barrel," the phrase affords a homely but accurate characterization of the legislative procedure to which it is applied. So when the member of Congress with his eager eye on special bills is not busy placating his party leaders, he is likely to be engaged in making trades with his friends.

Selection of Bills for Passage. If thirty thousand bills, resolutions, and reports were taken up in order and ten minutes were devoted to every one of them, five thousand hours would be spent by each house in the operation, that is, about eight hours every week day during the life of a Congress. Obviously therefore all measures cannot be brought up for review; there must be a selection from the enormous mass of business. Hence it follows that some person or group of persons must choose the proposals to be discussed and passed upon. Since even then the time is limited, methods must be devised for putting an end to debates. Now, the power to select measures and to control proceedings is a fundamen-

tal power; it carries with it in effect full authority to decide what laws shall be passed and how they shall be passed.

Party Organization in Congress

The Majority and the Minorities. In discharging their many obligations and selecting the public and private bills to be debated and passed upon, the members of the House of Representatives and the Senate are not abstract personalities, all equal, alike, and undifferentiated. They are on the contrary individuals of varied experiences belonging to political parties or groups. One party is a majority in control of one or both houses and is regarded as mainly responsible for the principal policies and measures to be adopted. In opposition to it is a minority composed of a major faction and one or more independents, bound by conviction to criticize and perhaps vote against the measures advanced by the majority. It is true that votes on propositions in Congress are by no means always cast according to party divisions, but the principal achievements as well as the failures of each session are generally to be ascribed to the majority party, especially its leaders who formulate and direct legislative business.

The Party Caucus. In connection with its directing machinery, each party has a separate caucus or conference of its members in each house, but definite statements about the organization and functioning of this body are difficult to make. Its meetings are irregular and its powers are informal. Yet we may safely say that, before the opening of a new Congress, the majority in the House of Representatives holds a caucus which chooses its candidate for Speaker, chooses a committee to select its members of the various House committees, and arrives at decisions respecting the rules of the House—adopting or modifying those previously in force. About the same time the minority also holds its caucus, agrees upon its candidate for Speaker, and arranges for the distribution of its seats on committees. From time to time other meetings are held to discuss matters of high importance, including bills and resolutions of evident party significance. In the Senate similar partisan "conferences" operate behind the scenes.

Power of Caucus in Senate. Beyond this all else is formless, dependent upon the exigencies of politics. During some periods in our political history, the caucus has been a mere "rubber stamp" for approving proj-

ects and measures already formulated by a few leaders. Such was the state of affairs in the Senate near the opening of the twentieth century. At the present moment however there is no such concentration of power in that body. True, the party conference continues to function there and committee members are selected by a "committee on committees." But, owing to the independence of "insurgents" and "progressives," and to the absence of narrow limits on speech-making, those who appear to direct things must resort to persuasion, and the caucus has become a kind of informal council called occasionally as special efforts may be required to reach an understanding by common consent. Senators are not bound to speak and vote for the measures agreed upon in their party assembly, although naturally they must allow some weight to its decisions. Only occasionally does a caucus meeting have great significance; as, for example, in 1944 when Alben Barkley, the Democratic leader, after a clash with President Roosevelt, resigned his position and was given a vote of confidence by reëlection in a special meeting of the Democratic caucus.

Power of the House Caucus. In the House of Representatives the power of the party conference varies from time to time, although the very size of that body works for a greater subordination of the individual. At the opening of the twentieth century the House caucus was also mainly a machine for ratifying decisions already reached by a handful of managers, including the Speaker, the chairman of the rules committee, and a few elder statesmen. But in the great progressive upheaval which soon followed, their iron rule was broken. On coming to power in 1911, the Democrats sought to give vitality to the caucus and to grant the individual members a larger share in formulating policies. Henceforward, they said, the Speaker and the committees will be chosen in a full and free council of the party members; power and responsibility will be widely diffused among the rank and file.

The Democratic ideal of making the caucus "a little House," in which all party members were to be theoretically free and equal, and matters were to be decided by majority vote, undoubtedly had some influence on later developments, but in the ordinary course of things leadership is concentrated in the Speaker, the chairman of the rules committee, the majority floor leader, and the chairman of the ways and means committee in charge of finance—"the four horsemen," as they are sometimes called. Only when there is a powerful "insurgent" movement in a party organization is there likely to be any vitality in the caucus, that is, fre-

quent resort to it as a means of settling inner-party disputes. If things come to such a pass, it is probable that the influence of the President, if he is of the same party, will be brought to bear in reaching decisions either for or against the insurgents.

Nature of Caucus Meetings. Whether acting under its own momentum or under the direction of a few masterful figures, the caucus frequently overrides individual dissenters in the party, in the House of Representatives at least. Meetings are held in secret. Many members may be absent and decisions in such cases will be made by a small portion of the party group. Since every member is morally bound to abide by the decision of his party caucus—unless he has made contrary pledges to his constituents—a vote in the conference may compel him to support, on the floor, a particular bill or resolution which he does not favor. Again and again it has happened that the dissenters among the majority, if united with the opposition, could have defeated or carried a measure. In other words the caucus makes possible legislation by a minority of the House.

Not All Issues Settled in Caucus. Yet it would be a mistake to lay too much emphasis on it as a directing organization. In any case only a small part of the business before Congress is settled in advance in solemn caucuses; hence the party member enjoys a large degree of freedom with respect to the ordinary grist of business. Moreover from time to time experiments are made in cutting athwart caucus and party lines. For example in 1921, as a result of conferences attended by Senators and Representatives of both parties, a "Farm Bloc" was formed to speak for the agricultural interests of the country. After discussing the issues in hand, they agreed to act together on bills of common concern to the farmers. Again in 1929 agrarian Republicans and agrarian Democrats in the Senate for a time united in a war on the Republican tariff bill sent up by the House, without making a formal treaty of alliance. In the Seventy-fifth Congress, 1937–1938, a small group of Democrats and Farmer-Labor members held regular meetings and united in sponsoring certain measures, for example, the Industrial Expansion Bill. In the Seventy-eighth Congress, which opened in January, 1943, without forming anything like a bloc, many Democrats and Republicans conferred and united in defeating or carrying bills contrary to the wishes of the majority leaders or President Roosevelt as Chief Executive and leader of the Democratic party.

Under the most favorable circumstances, the caucus works only a

partial concentration of power in the houses of Congress in the matter of selecting the propositions to be considered and passed. It is too large and miscellaneous in membership to act on all measures or even to discuss critically very many of them. Most of the technical decisions and recommendations presented to it by experienced committee chairmen are accepted on faith; it cannot pretend to expertness. If the caucus did in fact frequently attempt to reverse the decisions of committee chairmen, it would break down the working party organization.

Leadership and Management

Contrast with English Cabinet. In practice, a still smaller number of members than is embraced in the party caucus must perforce assume the responsibility for choosing the measures to be considered, directing congressional procedure, and deciding what bills shall be finally enacted into laws. In England this power is vested by law and custom in the hands of the cabinet, composed of twenty or more persons (most of them members of Parliament) who are in theory at least chosen by a conference of the dominant party. Among the cabinet officers, the acknowledged leader is the prime minister. Indeed he is picked first and accepts as colleagues only those who can work with him in a fair degree of harmony. He is responsible before the whole nation for carrying into effect the principles of his party.

In the United States neither law nor custom vests the open and avowed leadership in the House of Representatives or the Senate in any such body of men known to the public and held accountable for the questions debated and the laws passed. Here authority is shadowy and behind the scenes. As the influence of the rank and file of the members in the party caucus expands and contracts, so leadership varies in character. With political changes, too, it shifts from one center to another.

Through all the transformations and efforts at diffusion, however, a certain concentration of power has remained. As the shots at a target, wild though some of them may be, tend to group around the center, so attempts to build up the necessary directing management in the House are found grouped around five sources of influence: the Speaker, the rules committee, the chairmen of the important committees, the floor leader, and the "steering committee"

The Speaker a Party Leader. The Speaker of the House of Representatives, a party man chosen by a party caucus, cannot be simply a presiding officer, like the Speaker of the House of Commons in England where the premier assumes responsibility for the fate of important measures under discussion. In the beginning of our history, to be sure, he was regarded as a mere moderator, but after political lines were sharply drawn, it became impossible for him to sit passively and see the proposals advocated by his party defeated by the dilatory tactics of the minority. In a sense leadership has been thrust upon him and, since his powers over procedure are great, he can exercise it in many directions. He may refuse to put motions which he thinks designed merely to delay business; he may recognize or refuse to recognize anyone who wishes to debate a question or call up a measure for consideration; he may rule members out of order and decide questions of parliamentary law—subject, of course, to appeals from the decision of the chair. In spite of recent changes these powers yet remain. The Speaker therefore inevitably holds a sector in the line of influence.

Rules Committee. Closely associated with the Speaker is the rules committee, in which a majority speak for the party that is supreme in the House. It has a right to be heard at almost any moment. It may bring in resolutions stating what measures shall be considered, how long they shall be debated, whether they may be amended and when the vote shall be taken. Members of the party for which the rules committee acts may revolt and refuse to support such resolutions, but if they do they incur all the risks inherent in party "treason."

Chairmen of Committees. The third element of leadership in the House of Representatives is composed of the chairmen of the important committees in charge of the weightiest measures brought up for debate and action. The premier among them is the chairman of the ways and means committee, which prepares revenue bills. Next in order of precedence may be placed the chairman of the appropriations committee, which, under the budget law of 1921 and the rules associated with it, exercises a material influence on decisions respecting the amount and purposes of expenditures. Then follow in uncertain order the heads of other great committees, ten or fifteen in all, with the minor men swinging off loosely on the edges of power.

Floor Leader. Finally in considering the inner dominion of the House we must take account of the majority floor leader chosen by the party

caucus. In fact each party has such an agent. It is his duty to keep in close touch with the rank and file of his colleagues, to learn their opinions, to understand their prejudices and ambitions, and whenever necessary to "line them all up" in support of some measure on which the party managers have reached a decision. The floor leader is influential in determining who shall speak on bills, because by conferences with party brethren he helps to make up the list of members whom the presiding officer will recognize. On important matters the majority floor leader will take counsel with the minority leader and reach an agreement as to the Representatives who are to be heard and the time to be allowed for debate before the vote is cast.

In short, the majority floor leader has succeeded to many of the prerogatives formerly exercised by the Speaker; in terms of power perhaps he ranks next to that official; and if he is clever he may hope to rise to the honor of taking the chair himself. But he must be circumspect. His power is uncertain. He is subject more or less to the direction of a "steering committee," composed of party members from various parts of the country, chosen by the caucus, *i.e.*, by "natural selection," for the purpose of exercising a general supervisory authority over proceedings —an informal group of a few members who operate quietly behind the scenes. He must also deal gently with the independents, especially if their votes are needed to carry party measures. But by the exercise of tact and with the aid of his "whip," a member charged with helping to hold the party in step, his assistant whips, and his steering committee, he may keep the machine in smooth running order.

Leadership in Senate Is Less Domineering. In the Senate, the problems of leadership are not so difficult to work out. The number of members is small. Among them are always several men with experience derived from long service, who are marked for management. The presiding officer, under constitutional provision, is the Vice-President of the United States, who, though himself a partisan, is usually more of a moderator than a director. Often indeed he represents the minority, not the dominant group in the Senate. In such circumstances actual leadership falls largely to a few committee chairmen, among whom the head of the finance committee takes high rank. There is a party conference, of course; its power, like that of the House caucus, expands and contracts with passing events but is seldom if ever despotic. Majority and minority floor leaders, whips, and steering committees also are to be found in the Senate; but their function is not dictation; their business is rather to

secure party harmony or get work done by informal methods. The individual Senator enjoys more weight in party councils and more independence of action on the floor than the member of the House.

Leadership outside Congress. There are in addition other practices and customs which work for a concentration of power on business in Congress. The President, through his prestige, his party leadership, and his control over appointments to office, exercises an immense influence on the work of the national legislature. In times of party crises, informal conferences of the leaders in both houses and party officers and workers may be held at the Capitol or the White House. But here we pass from the known to the unknown, out into the realm of complex and often hidden forces which press in upon Congress from every part of the country.

Leadership, once secured, thrives upon the meat with which it is fed. Every member of Congress, as we have seen, has schemes of his own relating to his district and demanded by the voters who elected him. So he must get a hearing. And in the press of things he cannot get it without the consent of one or more powerful committee chairmen. What can he give in return? His vote on the measures recommended by party leaders, his loyal support to the program as formulated by them. So the net is drawn tightly and power concentrates—until accumulated discontent dissipates it again.

Why Is Struggle over Leadership Constant? What after all is the source of the continual uproar over the management of Congress? Why are there always insurgents raging against established leadership and demanding a redistribution of authority? What do they really want? The answers are difficult to formulate, but an attempt may be made. Whenever any party has enjoyed a long tenure of office, two things happen. The senior members in service gather all the power they can, for men thirst after it for its own sake and for the loaves and fishes connected with it. In the meantime new men appear and there is discontent on the left wing of the triumphant party. That is natural and inevitable also.

Now, if the old machine remains intact, the new members will receive little or no recognition unless they obey orders; that means they will otherwise get no power and no spoils; their measures will be smothered in committee and never see the floor of the house. To attain their ends they therefore usually insist on reforms: a wider dispersion of important committee assignments and party authority, and some kind of device for getting their bills out of the hands of committees and up for

action. Intransigents have occasionally gone beyond this, and demanded that every bill introduced shall be automatically brought out and put to a vote. But it is not likely that such a utopian reform will occur soon; it is more probable that we shall witness the continuance of the old struggle with changes only in emphasis.

The Committees of Congress

Standing Committees. Whatever happens to other pieces of political machinery, a very fundamental element in congressional leadership will always be found in the standing committees—nominally chosen by each house but in fact by party managers, including as a rule the President, if he is of the same party, subject to more or less interference on the part of the caucus and to the principle of seniority—the precedence of members oldest in service. As the bills brought into Congress become more and more technical, with the advance of the industrial age, so the power of those who have special knowledge and experience in various fields must increase. This is inevitable. It is highly desirable. At all events, the legislative work of each house is done mainly by ten or twelve committees composed of members more or less expert in the several branches of law making. Each important committee is dominated by a majority representing the party which is supreme for the time being and its chairman is nearly always a prominent leader. He has power and must be heard.

The number of standing committees varies from time to time, but there are usually about forty five in the House and thirty in the Senate. In the lower house, the leading committees are on ways and means, appropriations, rules, banking and currency, interstate and foreign commerce, rivers and harbors, military affairs, naval affairs, post offices and post-roads, public lands, labor, and pensions. In the Senate, the committees on finance, appropriations, foreign relations, judiciary, military affairs, naval affairs, interstate commerce, and pensions take high rank. From time to time the standing committees are supplemented by select committees, congressional commissions, and joint committees chosen for some particular function and dissolved when they have fulfilled their duties.

Each standing committee has a well-furnished office and many perquisites which are not despised by members of Congress; that is, it has an allowance for secretaries, stationery, and other purposes. Often mem-

bers employ their wives or relatives as clerks and assistants. Undoubtedly a great deal of money is wasted in useless activities, especially in connection with the minor committees, but criticisms of the system fall on deaf ears. Although efficiency calls for pruning the outlays of committees, the necessity of having assignments for all members and jobs for their constituents makes economy in this relation well nigh impossible.

Committees Nominally Elected by the House. Formerly all standing committees of the House of Representatives were appointed by the Speaker, but the rule has been changed in favor of election by the House itself. After this "revolution" occurred, both parties adopted the practice of vesting the selection of committee members in the hands of a committee on committees chosen by the caucus. The recommendations of the committee on committees are always submitted to party conferences for approval, and then laid before the House for formal confirmation.

"Natural Selection" of Committeemen. Although the transfer of the appointing power from the Speaker to the House asserted the authority of the latter, the change in practice was more apparent than real. Since the beginning of the party system in the United States, the selection of committees in each house has been more or less in the hands of the party caucus; but that assembly, as we have seen, is not a conference of members equal in terms of service, wealth, abilities, or political power. It is generally under the dominance of a few members experienced in the arts of management. To borrow a term from economics, we may say that the committee assignments are determined by a "higgling of the market" and that the various posts fall to members roughly according to seniority, their abilities, their power as leaders, their capacity for negotiation. This "higgling" begins long before a new Congress meets. Most of the important assignments are probably determined in fact, if not in theory, before the party conference assembles, and the caucus only ratifies the decisions of preliminary meetings just as the houses ratify the work of the caucuses. The minority party chooses representatives for each committee, of course, but they seldom count for much in the determination of policies and the framing of laws. Third party members, small in number, receive slight consideration in the making of committee assignments. Yet on the whole every significant committee—usually ranging in the House from about twenty-one to thirty-five members and in the Senate from twelve to twenty members—is a fair mirror of the chamber which it represents.

The Rule of Seniority in Selection. Among the practices or traditions governing the choice of committees none is more noteworthy than the custom which distributes important assignments among members in accordance with the length of their service—the "seniority rule." It is only natural that the direction of affairs should fall to the most experienced. However, when one of the parties returns to power after a long season in the opposition, the new incoming members are sure to make a great outcry against allowing their older colleagues to monopolize all the choice posts; but the principle of seniority is consistently applied, with occasional exceptions. This means, when the Democrats are in power, that Southern members, who have usually seen long service on account of continuous Democratic supremacy in their section, will loom large among committee chairmen. In the Seventy-fifth Congress, for example, the chairmen of five out of ten important committees in the Senate were from the South and the chairmen of seven out of ten important committees in the House were from the same section.[1] As an offset to the seniority rule no Senator or Representative is ordinarily permitted to serve on more than two powerful committees.

Committees Receive and Originate Measures. Thus each of the two houses has created miniature legislatures to which are referred, in accordance with their subject matter, all bills and resolutions. For example, in the House, every piece of proposed legislation relating to the revenue, or purporting to raise revenue automatically goes to the committee on ways and means. The recommendations contained in the President's message are distributed among committees on the same principle. But a committee is not limited to suggestions from outside; it may and does itself originate bills and other measures relating to questions placed under its jurisdiction.

Committee Action on Bills. Thousands of the bills, resolutions, and reports which go to committees are not considered at all. It is only the propositions which are likely to be reported to the house for action that receive a more or less severe scrutiny. In such cases papers and documents may be secured from the President or high officials; department heads or other administrative authorities may be requested to appear personally, expound their opinions, and answer questions. Friends and opponents of projects are frequently admitted to state their views; witnesses may be summoned to give testimony; and the committee may even travel about the country, hold hearings, and gather evidence. Every

[1] O. R. Altman, *Political Science Review*, December, 1937, p. 1074.

year thousands of pages of testimony before committees are taken and printed at enormous expense. Citizens with ideas to expound and grievances to ventilate have abundant opportunities to air their views. Thus a safety valve is provided for the release of opinions.

In most instances the measures entrusted to a particular committee are scrutinized or formulated by a sub-committee (in which the minority members may receive scant recognition), and the whole committee generally accepts its report. When a strict party question, such as the tariff, is on the carpet, the majority members of the committee in charge may fix up the bill. After it is completed, they may invite the minority in to vote on it as a matter of form or they may even overlook that courtesy. With regard to any proposition in hand, a committee may recommend its adoption, with or without amendments, report adversely, delay the report indefinitely, or ignore it altogether.

Committee Decisions Carry Great Weight. As a rule the committees really control the sifting, preparation, and report of bills for debate, and their final deliberations are secret. Moreover in the pressure of business, especially in the House of Representatives, important measures are often forced through exactly as they come from committees, without any serious examination or a single amendment. This practice, of course, vests an enormous authority in the committees and has almost changed the House from a deliberative into a ratifying assembly, despite the appearances of discussion. At the other end of the Capitol, however, the Senators, fewer in number, can insist on subjecting projects laid before them by committees to more careful analysis and more searching review. In their chamber the committee holds no such power of life and death over bills and resolutions.

Decisions May Be Overruled. Measures on which committees do not report favorably have a very slight chance of passing, and even a favorable report is not a guarantee of victory, especially in the Senate. In the House it rarely happens that a member is able to get action on a bill which the committee in charge opposes; only by securing the signatures of 218 members can he bring on the floor a project "buried in committee." In the Senate greater freedom is enjoyed in this respect, because it is easier for a Senator to obtain unanimous consent to a motion discharging a committee from the consideration of a measure and thus get it before the chamber for discussion.

Criticism of Committee System. Owing to the high prerogatives enjoyed by committees, to the secrecy that surrounds their operations, and

to the pressure of lobbies on them, a great deal of criticism has been directed against the whole system as a piece of legislative machinery. In the House complaints are constantly made, especially by the minority. "You send important questions to a committee," once lamented a member, "you put into the hands of a few men the power to bring in bills, and then they are brought in with an ironclad rule, and rammed down the throats of members; and then those measures are sent out as being the deliberate judgment of the Congress of the United States when no deliberate judgment has been expressed by any man."

It would be idle to contend that the indictments brought against the committee system are to be lightly dismissed. In the House of Representatives, at least, it certainly tends to break responsibility into forty or more fractions and to reduce that chamber to the level of a "rubber stamp" for committee reports. Since debate on the floor is likely to be ineffective, the secrecy that surrounds committee proceedings is made all the more objectionable. Besides contributing to back-stairs legislation the system permits the committees to work on their respective measures with little or no regard for one another, each preparing its own bills without constant reference to kindred measures in other hands. Thus conflicts, contradictions, and confusion in legislation may easily arise.

In their operations, spirit, and effectiveness, standing and special committees vary widely. The hearings of a committee may be carefully prepared in advance and the testimony of witnesses, whether administrative officers or private persons, may be skillfully directed to specific issues of the highest value to legislative action. Often they are merely rambling discourses, punctuated by disputes and irrelevant dissertations. Corresponding committees of the House and Senate waste the time of public officials by holding separate hearings and make reports that duplicate information. If the committeee chairman is a sensationalist, and in the case of the special committee, he often is, then a committee hearing may degenerate into a public brawl which gives egotists a chance to break into the headlines of newspapers and win a meretricious notoriety. And inasmuch as Congress makes each committee a kind of law unto itself, unrestrained by general rules as to method and decorum, it so happens that the committee system as operated, despite its utility and merits, works for a dispersion of talents and energies and wastes an enormous amount of time and money. At present the system is receiving more criticism than ever and a reconstruction of it is demanded in various proposals for the reorganization of Congress (Chapter IX).

Information for Legislative Action

Although each house has standing committees to deal with the broad classes of issues which come up for discussion on the floor, it frequently makes special provisions for securing information on economic, technological, administrative, and other complicated problems. Both chambers have limited allowances for this purpose and additional amounts may be set aside by law.

Inquiries by Committees. Generally speaking, five types of agencies are employed in such work. The Senate or House may direct one of its standing committees to conduct an inquiry into a particular matter and supply it with funds to hold hearings and engage expert investigators and advisers; or it may create a special committee for such a purpose. If the question is deemed of high significance by both chambers, they may unite in appointing a joint committee of inquest with similar powers. A fourth type of exploring organ, occasionally created, consists of members of both houses and prominent citizens named by the President or members of both houses and representatives from executive agencies. Such committees are usually authorized to appoint expert assistants for the purpose of collecting data, making detailed analyses, and aiding in the formulation of policies.

Inquiries by Executive Agencies. The fifth type of agency used by Congress in developing information is a branch or division of the executive department. For example, on one occasion, by joint resolution, it instructed the Interstate Commerce Commission to scrutinize railroad discriminations and monopolies, and to report on the same from time to time. Frequently an executive office or agency is authorized by law to carry on certain studies on its own motion and report the results to Congress. Such powers, for instance, are enjoyed by the Federal Trade Commission. Again, an establishment may be called upon by both houses or either of them to make a particular inquiry.

Power of Congress to Investigate Executive Affairs. In making inquiries Congress may pry into the workings of federal departments and offices. Although the Constitution vests the executive power in the President, a long line of precedents establishes the right of Congress to scrutinize his enforcement of the law. In the early part of the nineteenth century, the House of Representatives asserted its authority in this respect, to find out whether any of the federal employees had conducted themselves improperly and to discover whether the money appropriated

had gone into legal channels. Long afterward, during the winter and spring of 1923–24, more than forty congressional investigations were made into the "oil scandals," corruption in the Veterans' Bureau, and other seamy matters. Before the season closed two cabinet members were forced out, one prominent official went to the penitentiary, and indictments were formulated against certain alleged offenders.

Notwithstanding these and many other precedents, it is still an open question how far Congress or either house may go in compelling the executive branch of the Government to yield to a demand for information. For example, in 1909 the Senate, by a resolution, instructed the Attorney General to state whether he had instituted proceedings against the United States Steel Trust for absorbing the Tennessee Coal and Iron Company in violation of the Sherman anti-trust law, and if not, why not. With his customary bluntness President Theodore Roosevelt directed the Attorney General not to respond. The President further declared that "heads of departments are subject to the Constitution and laws passed by the Congress in pursuance of the Constitution, and to the direction of the President of the United States and to no other direction whatever." In 1943 President Franklin D. Roosevelt ordered certain officials not to turn over to a committee of the House a number of documents demanded during its investigation of the Federal Communications Commission. On some occasions executive officials have insisted that their communications should be secret or have declined to give documents and data to congressional committees on the ground that such action would be incompatible with sound public policy. This practice is often followed by the State Department in respect of foreign affairs.

Evidently there is a line beyond which Congress cannot go by mere resolution. But presumably by formal legislation it may proceed to almost any length. Surely the theory of the separation of powers does not mean that the moment an executive agency is created, it is subject to the President alone and is entirely emancipated from congressional scrutiny. It would be preposterous to say that Congress can organize and abolish departments and offices at will, and yet cannot inquire into their operations.

Citizens May Be Compelled to Testify. Although the power of Congress to investigate other branches of the Federal Government appears to be hemmed in by certain restrictions, its right to secure information from private citizens on matters germane to its work is now fully recog-

nized. If there had been any doubt on the point, it was settled by the Supreme Court of the United States in the case of McGrain v. Mally S. Daugherty, decided in January, 1927. The defendant in the case declined to appear before a select committee of the Senate engaged in investigating certain acts of his brother, Harry M. Daugherty, Attorney General, and was taken into custody under a Senate resolution directing the Sergeant-at-arms to bring him before the bar of the chamber. Shortly after he was arrested under this measure, the defendant was released by the federal District Court at Cincinnati on the ground that the Senate had exceeded its authority. On appeal the Supreme Court reversed the decision of the lower tribunal and in the course of a long opinion held that the Senate investigation was ordered for a legitimate object, that the witness had wrongfully refused to appear and testify, that he had been lawfully attached, and that the Senate was entitled to require him to give testimony pertinent to its inquiry either at the bar or before the committee. Later the power of Congress in this connection was reënforced when a prominent leader in the oil industry was sent to prison for refusing to answer questions respecting alleged frauds in the granting of oil leases by the Federal Government. Hence a private person who refuses to testify is in peril of imprisonment.

Ordinary Committee Hearings. Naturally the chief sources of information for legislative purposes are the hearings and investigations conducted by the various standing committees of Congress. Each of them has commodious quarters in one of the magnificent office buildings constructed for the Senate and the House. It has at hand a collection of materials bearing on the subjects referred to it and commands the rich resources of the Congressional Library and of the libraries maintained by various departments and agencies of the Government. It may also derive invaluable information as to facts, actions, and policies from the testimony of private persons and federal officials subjected to questioning at its hearings.

Technical Assistance. Committees as well as individual members of of Congress may call upon the Division of Legislative Reference in the Library of Congress to make researches, collect materials, and supply facts and opinions bearing on various aspects of questions up for congressional consideration. In formulating and drawing up bills they may bring to their aid the skill of experienced men in the Legislative Drafting Service, headed by two counsels, one for the Senate and another for the House of Representatives.

Debates as Sources of Information. Although debates in the two houses are often desultory, fruitless, and marred by unseemly partisan or personal wrangling, they are frequently informing in many ways, especially when they are held to the subject of discussion by the Speaker and the floor leaders either under a rule or a previous agreement. In such orderly debates the majority and minority members of the committee in charge of a bill, who have given the problem more or less serious study, may lay the theme wide open and reveal the grounds of their differences to their colleagues on the floor.

The average member of the House or Senate however is absorbed in his own affairs and the work of the committees to which he is assigned. Hence he is likely to accept the results reported by the other committees without attempting to make investigations of those results on his own account. But even members who have not specialized in the subject under consideration may bring their experiences to bear upon it, ask illuminating questions, force a better joining of issues, or give pertinent and informed opinions on the probable results of the proposed measure in their own districts or states.

This is particularly true in the Senate where freedom of debate is generous if not unlimited. There it is worth while for the member to devote days and weeks to special inquiries. In that chamber he is given enough time to present to his colleagues all sides of the most complicated question and to discuss it at length amid a running fire of questions put to him by Senators as his argument proceeds. Speeches in the Senate receive more attention in the press. The Senator knows that an able argument may produce changes in proposed bills, command attention in the White House, and affect public opinion.

The General Course of Procedure

Organizing the Chambers. At the opening of a new Congress the House of Representatives is brought to order by the clerk of the last House, who calls the roll and, finding a quorum present, announces that it is time to choose the Speaker. In response the majority and minority put forward their candidates already picked by the caucuses; the former's nominee is duly elected and takes the oath of office. The other officers are chosen, and the President of the United States and the Senate are informed that the lower chamber is ready for business. A proposition to adopt the rules of the preceding House, with modifications perhaps, is

threshed out, and carried, often with protests from the minority. In due time the names of the committeemen selected by the conferences of the parties are read and approved by the House.

The Senate differs from the lower chamber, as we have said, in being a continuous body. At each Congress only one-third of the membership is renewed. The presiding officer, the Vice-President, as required by the Constitution, usually takes the chair. In case of his absence, the duties are performed by a president *pro tempore*. The names of the newly elected Senators are read; sometimes each in turn is escorted to the presiding officer's desk, by the colleague from his state, and there takes the oath of office, but sometimes they are inducted collectively or in groups. The President and House are notified.

Introduction of Bills. Proposals for legislative action originate in various ways, obvious and obscure. Nominally every bill is introduced by a member but this does not necessarily mean that he originated it or even approves it. Many bills, especially petty measures, occasionally important measures, owe their origins to individual Senators or Representatives or to committees of Congress. Others—in recent years, practically all great measures—come from the White House or from departments or the Government or from unofficial groups of interests or politicians, with or without presidential sponsorship. It is in keeping with the historical record to say that nearly every great substantive measure enacted by Congress between 1933 and 1943 originated outside of Congress, generally in a corps of advisers associated with President Roosevelt. Judging by the experience of the past few years the power or the will to initiate important pieces of legislation has passed from the legislative to the executive branch of the Government. Indeed for a time it was openly said in high political circles that "Congress has abdicated." In the session of 1943 there were signs of a reaction in Congress against presidential leadership but little evidence that Congress was prepared to assume full responsibility for originating on its own motion many great pieces of constructive legislation (Chapter IX).

Reference of Bills and Reports on Bills. On introduction in the House by a member, a bill is referred by the Speaker to the appropriate committee, which may hold hearings and give the matter any amount of attention it sees fit. As we have said, it may report the bill favorably, unamended; it may make changes and report a new form; it may report unfavorably; or it may not report at all. Similar arrangements prevail in the Senate. When a bill is reported favorably for passage it is usually

placed on a calendar and, unless otherwise ordered, it comes up for discussion on the day when the particular calendar is reached under the rules. But the chief measures, such as appropriation bills and important projects sponsored by party leaders, have the "right of way" under various technical rules, including the privilege of "unanimous consent" and special orders of the rules committee. They may be brought out on the floor at almost any time. As a matter of fact bills reported favorably may be pushed aside by party leaders and not considered at all. The day and hour for proceeding with many bills, even important measures, and the amount of time to be allotted to debates are often arranged by private conferences between the majority leader and the minority leader, occasionally quite informally on the floor of the House or the Senate in full view of the other members.

Debates on Measures. Days and days are wasted in both houses of Congress in the making of speeches which do not take the form of debates on formal legislative questions. For example, the proceedings of the House of Representatives for about six weeks in January and February, 1943, were devoted to matters of little or no public significance—to discussing recent attacks on Congress, assailing "subversive bureaucrats," and wrangling over personal and partisan affairs which had slight reference to any significant legislative measures. As expressions of opinions, tempers, and distempers, they were perhaps not without some value. Considered in terms of constructive results their value seemed scarcely worth the effort and expense.

When however important bills are brought into the House of Representatives under specific rules or arrangements, and time is allotted to a given number of speakers on both sides, speech-making may be turned into debating and may run through several days in an orderly fashion, producing actual results. Out of the discussions may come amendments and, rarely, a return of a bill to its sponsoring committee for reconsideration and modification. In the Senate also a great deal of time is spent on partisan and personal wrangling but not so much as in the House. From day to day Senate proceedings are interrupted by the introduction of numerous questions or proposals by agreement among the leaders or more or less fortuitously. Yet when proceedings take the form of "full-dress" debates, bills, proposals, and public policies are subjected to keen and orderly scrutiny.

Many speeches that appear in the *Congressional Record* are delivered to empty benches, especially during sessions of the committee of the

whole,[2] or not delivered at all or consist of extended or revised remarks put into the text or the Appendix of the *Record*. Frequently they are directed to the constituents of the orator rather than members of Congress. Since the "leave to print" or to "extend remarks" is rather generously granted, Senators and Representatives may address the voters of their districts through speeches supposed to have been made on the floor, often printed at public expense, and sent free of charge through the mails.

Bills Sent to President—the Veto. When a bill has passed either house, it is immediately transmitted to the other chamber for review. For example, if it goes through the Senate, it is sent to the House; if it is carried there in its original form, the Senate is notified; it is then signed by the President of the Senate and the Speaker of the House and is handed to the President of the United States for his signature. If he approves the bill, he transmits it to the State Department for official publication. If he vetoes the measure, he returns it to the house of its origin, with a statement of the reasons for his decision, unless that body has adjourned. Repassage by a two-thirds vote is necessary to carry a bill over the President's veto.

Although the provisions of the Constitution are explicit to the effect that every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President, Congress has devised a scheme known as the "concurrent resolution," which, although it clearly has the effect of law, is not submitted to him for approval. Sometimes it is employed in ordering the publication of documents, in paying therefor, and in incurring and meeting other expenses, from money that has already been appropriated for the use of the two houses in their legislative work. At other times it is used to enact what amounts to legislation in fact.

A Check on the Executive Veto Power. In recent years, especially since Congress has adopted the practice of conferring immense blanket powers on the President by legislation, the concurrent resolution has taken on new significance.[3] When an act vests large discretionary powers

[2] The committee of the whole forms a convenient body for discussion and provisional voting on measures. In it, one hundred constitute a quorum and the Speaker's chair is taken by some other member. Measures approved in it are reported to the House for formal adoption.

[3] Howard White, "Executive Responsibility to Congress via Concurrent Resolution," *American Political Science Review*, October, 1942, pp. 895 ff.

in the President, ordinarily it can only be removed from the statute books (unless a time limit has been placed on it so that it automatically lapses) by a repeal bill subject to his veto. This means that such powers can be taken away from him only by a two-thirds vote of both houses in case he objects and interposes with a veto. In other words a small majority may grant him power and a two-thirds majority must be mustered to withdraw it. Recognizing the objections and indeed the perils in this situation, Congress has, on numerous occasions, included in laws conferring blanket powers on the President a provision that they shall expire at a specified time or at such time as the President may designate or Congress may designate by a concurrent resolution—a resolution not subject to executive veto. Thus Congress expressly reserves the right to repeal laws by ordinary majorities, without allowing the President to employ the veto in such cases. The constitutionality of the use of the concurrent resolution in such formal legislation has been questioned but the practice is now fairly well established.

Adjustment of Differences between Houses. Whenever a bill originating in one house is altered in the other, it must be returned to the first for reconsideration, and for adoption or rejection as amended. If, at last, the houses are unable to agree—a regular occurrence in the case of important measures—the presiding officer of each body appoints representatives on a joint conference committee, as it is called, authorized to discuss the differences, to come to some conclusion on the disputed points, and to report back to the respective houses their agreement, or their inability to come to terms. As a general principle the conference committee, in reaching an understanding, should introduce no new matter into the proposal which it has under consideration—that is, no provision which has not been already adopted by either the Senate or the House. But it is not easy to determine whether new materials have been introduced into a long and complicated bill. Certainly the conferees are not limited in their action to a choice of clauses actually passed by one house or the other. They may, and often do, effect a compromise, perhaps midway between the extremes, and in drafting it they may, in fact, depart substantially from the language of the two bills before them. When a conference committee report is submitted, each house adopts it or rejects it as a whole, unless it is purposely divided into parts so that separate action can be taken on special items. Thus the conference committee enjoys great power in the framing, shaping, and passing of legislation.

Variations in Practice. Such is the general course of procedure. An examination of actual transactions as reported daily in the *Congressional Record*, however, shows that in practice no mechanical system prevails. With unanimous consent almost anything can be taken up at any time, and unless the pressure of business is great the privilege is generously granted. Powerful committees, privileged to report projects whenever they are ready, may interrupt proceedings almost any hour, especially in the House, and start them off on a new tack. When a bill is up for discussion, particularly in committee of the whole, members may use their time in speaking on matters not germane at all to the subject in hand. Thus, for example, debates on the wool schedule of a tariff bill may include speeches on good roads, patriotism, or banking. It has been said that the rule of the Senate is to have no rules. Although there is a touch of exaggeration in this statement, the same generalization may be applied, with still more reservation, to the lower House. At all events in neither chamber does there prevail a rigid system which requires the consideration of measures in order of their importance or their appearance from committee rooms, holds debates to any topic until it is disposed of, and relegates all minor issues to particular days.

Rules for Expediting Business

Given the immense mass of business before Congress, it is necessary for each house to provide a body of principles for expediting action. These principles are to be found in Jefferson's *Manual of Parliamentary Practice*, the standing rules of each chamber, and the vast number of precedents established during the history of Congress.

In addition to assuring a certain degree of regularity in procedure and providing for exceptional actions, the rules of the House and Senate make it possible for leadership to direct, limit, and in a measure dictate decisions. They are a part of the system of control and amid all the changes reflecting the concentration and diffusion of power noted above (pp. 116 ff.), certain regulations remain fairly fixed.

Dilatory Actions Forbidden. In the larger body, the House of Representatives, the Speaker is authorized, by a rule adopted in 1890 and still in effect, to refuse to put dilatory motions—that is, propositions designed merely to delay business. The rule is not applied however until the purpose of such a motion has become apparent, and the Speaker usually waits until a point of order is raised on the floor before he brings

it into force. Even then the constitutional right of members to call for yeas and nays (p. 136) cannot be denied although the object is evidently dilatory.

The purpose of the rule against dilatory motions is to stop "filibustering" by the minority or by small groups. In ordinary use, the term filibuster means to act as a freebooter or buccaneer, but in a parliamentary sense it is applied to the obstruction of legislation "by undue use of technicalities of parliamentary law or privileges, as when a minority, in order to prevent the passage of some measure obnoxious to them, endeavor to tire out their opponents by useless motions, speeches, and objections." Frequently, the purpose of such interfering tactics is to call the attention of the country in an emphatic way to the policy of the majority, and often it is highly successful.

As a part of the program for expediting business in the House of Representatives, the Speaker is also authorized to count as present those members who are actually in the chamber but refuse to answer to their names on a roll-call for the purpose of compelling an adjournment on the ground of the absence of a quorum (p. 100). This principle was established about the same time as the rule on dilatory motions.

Limits on Debates in House. Besides putting a ban on dilatory acts, the rules of the House expedite business by limiting the time devoted to the discussion of propositions. They provide that no member shall occupy more than one hour in debate on any question in the House or in the committee of the whole. This restraint was imposed in 1841, and in commenting on it Senator Benton declared that it was "the largest limitation upon the freedom of debate which any deliberative assembly ever imposed upon itself, and presents an eminent instance of permanent injury done to free institutions in order to get rid of a temporary annoyance." But it is difficult to see how the House could meet the enormous pressure upon it, if any member could talk as long as he pleased on any project. Furthermore when the House goes into committee of the whole, it fixes a time to be employed in discussion which cannot be extended by the committee; in many other ways freedom of debate is arbitrarily limited by agreement, and members are allotted only a few minutes each for speeches on specific questions. Then as a climax it is always in order to move "the previous question" and shut off debate in the House automatically.

Privileged Reports Have Priority. Fortifying these restraints on dilatory tactics and time limits on debate are provisions which enable the

leaders of the majority party in the House of Representatives to compel that body to give attention to important measures whenever they see fit. This end is accomplished by rules which permit the leading committees, especially with the approval of the Rules Committee, to report on specified subjects practically at any time in the course of the proceedings, no matter what may be under discussion. When such a privileged report is made, the House must consider it, subject to the numerous restrictions on delay and loquacity.

Limiting Debates in Senate. With respect to such restraints the Senate by contrast is singularly free. When its rules were revised in 1806, the right to move the previous question and thus close debate summarily was omitted, and all attempts to restore control failed until 1917. At the session convened in March of that year, the Senate found its business blocked in an apparently endless dispute. By a certain irony of fate the Democrats, who had often been ardent champions of free speech, were forced to insist upon some method of limiting it. Acting on the recommendation of a special committee, the Senate then adopted a new rule providing that, on petition signed by sixteen Senators, a motion to cut off the discussion of any measure can be presented to the Senate. If approved two days later by a two-thirds vote, debate will come to an end, after each member has enjoyed the privilege of speaking for not more than one hour on the pending question; when such a closure has been approved, amendments to the bill under consideration can be made only by unanimous consent and dilatory motions are out of order.

In practice it has been found impossible to bring this rule into frequent use, and long filibusters have often blocked the business of the Senate since it went into effect. Denunciations of delays have often been renewed; but the Senate has been obdurate and not without reason. As Lindsay Rogers cogently contends in his book, *The American Senate*, liberty of debate in that body acts as a salutary check on the administration, gives the minority the right to be heard, and assures at least one open forum in the country for the free consideration of issues which might otherwise be smothered.

Rights of Minority to Check Majority Rule. After this survey of the devices by which the dominant party leaders, especially in the House of Representatives, may control reports of committees and the discussion and passage of measures, it might be assumed that the minority is powerless to influence in any effective manner the course of legislative procedure. This view however is not strictly correct. By exercising cer-

tain constitutional privileges, the minority may hamper proceedings and go a long way toward forcing the majority to accept policies it would not initiate on its own motion, or at least to allow a freer discussion of its measures than it prefers. The Constitution provides that, on the request of one-fifth of the members present, the roll of either house must be called on any question and the yeas and nays of the members entered upon the journal. It furthermore stipulates that no business shall be done unless a quorum is present. Therefore the minority, in the House or Senate, may insist upon one roll-call after another, thus consuming time and making delays. Finally, since a great deal of the legislative business is actually done under the rule of unanimous consent, the minority can employ the threat of refusal as an engine of coercion. More than once a leader of the opposition has thrown down the gage to the directors of the majority and frankly informed them that unless a certain course is followed his contingent will exercise all its privileges for the purpose of obstructing business.

Pressure Groups and Lobbies

Affiliations of Congressmen. So far we have spoken of Congress as if it were merely a determinate body of representatives working at a given spot—the national capitol. In reality this is far from the whole truth. Congress is a part of the living organism of American society—united with that society not only on election day but throughout the whole course of its proceedings. Each of the 531 Senators and Representatives is a personality, with a cultural heritage of his own, possessing immediate associations, including economic affiliations, with his constituents. In the process of winning his seat he has made commitments and formed ties which bind him as a legislator. After he arrives at Washington, perhaps even before, he comes under wider influences. Indeed he may owe his election largely to funds furnished by the congressional campaign committee of his party—funds derived from sources outside his district. Once in Washington he forms connections with his party in Congress, with an organization having national responsibilities and subject to forces operating on a national scale.

Pressures of Groups. In the discharge of his duties the member of Congress is under pressure from two directions—his constituents at home, particularly the local party leaders, and individuals and associations operating in Washington. And it must be remembered that

various elements in these two groups may be themselves united by innumerable ties. The farmers, manufacturers, and trade unionists of his district have national affiliations, and national associations in their turn have local branches. All of them are welded into solid bodies by the post office, the telegraph, and the radio. Theoretically the member of Congress represents free and equal heads, all animated by a common aspiration—the public good. In reality he is under constant surveillance by powerful groups linked in chains throughout the country.

Economic and Professional Groups. Considered according to type those groups may be marshalled in four classes—economic, professional, reform, and religious. To the first belong the industrial and trade associations, organized on a national basis, numbering about one thousand, and including all important divisions such as railways, oil, steel, retail stores, and public utilities. To this class also belong the farmers' organizations—the National Grange and the Farm Bureau Federation, for example. Under this head comes organized labor, directed by the American Federation of Labor, the Railway Brotherhoods, and the Congress of Industrial Organizations. Functioning both coöperatively and independently is the Federal Employees Union, concerned especially with the hours, wages, and conditions of work in the government service. Likewise partly economic in character, various professional bodies—lawyers, engineers, and architects for example—offer advice and counsel in technical matters. Not wholly disassociated from economic considerations is the American Legion, speaking for the veterans of the World War; for, besides its other activities, it is constantly concerned with appropriations for hospitals and pensions, conveying benefits to its members.

Reform and Religious Groups. Acting as reform organizations not seeking economic legislation as such, at least directly, are literally scores of societies, large and small. Some of them lobby for bigger appropriations for the Army and Navy in the name of patriotism—the Daughters of the American Revolution, the Navy League, the Reserve Officers' Association, and the American Legion. Naturally munition makers and shipbuilders approve their activities. On the other side are several active peace societies. In the reforming class may be placed the National Popular Government League and the People's Lobby interested in developing popular government and in exposing the operation of powerful economic interests in politics. Feminist in its views, the National Woman's Party demands a federal amendment putting women on a strict legal

equality with men. Less specialized in interest is the League of Women Voters which sponsors selected policies and measures of legislation from time to time.

The fourth class includes numerous religious organizations—for example, the National Catholic Welfare Council and the Federal Council of the Churches of Christ in America. Although they deal primarily with religious and ethical questions, such associations occasionally take a stand on issues in other fields.

Pressure Agencies in Washington. Several of these organizations maintain in Washington powerful staff agencies which concentrate their energies on advancing or blocking legislation. Without attempting to list them in order of importance, there is first the National Chamber of Commerce, a federation of the local chambers throughout the United States, with elaborate machinery for taking the opinions of American business men on measures arising in Congress. Not far from the Capitol stands the large building which houses the American Federation of Labor, always indefatigable in its support of friendly legislation and its warfare on measures deemed inimical to labor's cause. Nearer the Chamber of Commerce is the office of the Congress of Industrial Organizations. Equally active are the nation-wide farmers' associations. Then descending to trades we find each one of the leading manufacturing and mercantile branches and many special trade unions, such as the United Mine Workers, represented in Washington and prepared to bring powerful influences to bear on Congress in season and out.

It is estimated that there are in all about one hundred fifty economic organizations (to say nothing of moral and religious reformers) which can place agents in the lobbies of Congress on short notice. Among them, for example, are the spokesmen of the coal, leather, beef, silk, glove, fertilizer, cotton, banking, wire, steel, express, drug, advertising, utility, insurance, lime, and beet sugar interests. To the more or less permanent bodies may be added temporary associations formed and financed to advocate or oppose specific measures. Such, for instance, was the Cuban Sugar Lobby "exposed" in 1929 as operating against an increase in the tariff on imported sugar—in conflict with domestic sugar producers. All these interests have skillful and astute agents, paid large salaries, and granted generous expense accounts for entertainment and other purposes.

Types of Pressure Agents. Experts in lobbying vary widely in their training, talents, prestige, and methods. Some of them are distinguished

lawyers who are retained by corporations to file briefs with the committees of Congress, interview members, and otherwise make themselves useful to their employers. Other lobbyists are former members of Congress or federal officials, of deep experience and wide acquaintanceship at the Capital, who may "practice law" in Washington or engage in some nominal vocation. More recently there has come upon the scene a third type—"the high-powered publicity expert," the ex-journalist, who specializes in "putting stuff over" through the newspapers and in attempting to frighten Congressmen by threats of antagonism or revelations in the press. Still operating, in spite of the emphasis on the new psychology, are the quiet, firm agents of special associations, who are expert in the statistics and technology of their business and rely largely on "the correct presentation of their cases" to the committees and members of Congress.

Lobby Methods. With respect to methods those who seek to direct governmental action seem to be masters of the science and art of influence. They appear formally before committees of Congress to present facts, briefs, and arguments. They form "personal contacts," directly or through the social lobby, with "key" officials, Senators, and Representatives. They promise employment to politicians about to retire. They "build fires" behind recalcitrant members at home by instructing prominent constituents and local organizations, such as chambers of commerce, to deluge their representatives with telegrams and letters. They "release" to the press news "stories" designed to construct in the popular mind images known as public opinion.

Criticism of the Pressure System. Congress must always work therefore amid a vast net of agencies, having large sums at their disposal to spend in agitation and in maintaining research bureaus to accumulate facts favorable to their special concerns—agencies equipped with all mechanisms of modern society for bringing "pressure" to bear. Consequently there are students of government who boldly advocate giving up the theory of political equality and suggest the incorporation of manufacturing, labor, agricultural, and professional interests in Congress itself.

Lobby Legislation. But there are very grave difficulties in the way of creating a direct and legal representation of economic interests in Congress. It would involve radical changes in our form of government and is generally viewed as outside the range of practical action. Instead it is proposed by other observers that legislation should be enacted controlling lobbies. Several states have laws of this character and many bills of

a similar nature have been introduced in Congress. Broadly speaking, such proposals give a definition to lobbying and require all who come under that head to be officially registered, to reveal the names of the parties for whom they are working, and to describe the purposes of their operations. But no scheme will eliminate diversity of interests; government inevitably reflects them; and the problem is how to bring them out into the open and impose some sense of responsibility upon them.

Instead of passing any general anti-lobbying bill, Congress has dealt with particular types of lobbyists. In the Holding Company Act of 1935, it forbade public utilities to make contributions to parties and candidates and provided for the registration of utility lobbyists. In 1938 it brought two other pressure groups to book. By the Alien Propaganda Agency Act, Congress required all persons engaged in propaganda work in America on behalf of foreign interests to register with the State Department and to put on record the nature of their activities. Having learned by a Senatorial inquiry how shipping lobbyists operated in and on Congress, it provided that all such agents must file with the federal Maritime Commission statements as to their connections, labors, and compensation.

By an act of Congress, approved January 13, 1940, penalties were prescribed for any person who, corruptly or by threats or by threatening letter or communication, attempts to influence, impede or intimidate any witness before any agency of the United States Government or any committee of Congress, or, by such methods, attempts to interfere with proper administration of law or proceedings of inquiries. The language of this act is broad and general. Its consequences are difficult to foresee. But certainly it can be used against lobbyists of all kinds. The word "influence" in the Act would seem to cover almost any kind of "pressure" known to politics, whether brought against administrative agencies or committees of Congress.

An amendment to the Alien Propaganda Agency Act of 1938 alters the law to include any domestic organization which is subsidized directly or indirectly by a foreign government, political party, or similar political source. Agents of such organizations must also be registered in the State Department, every six months. Representatives of bona fide commercial and financial activities in foreign commerce and persons engaged in bona fide religious, academic, scientific, and artistic pursuits are exempted.

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CHAPTER VI

NOMINATION AND ELECTION OF THE PRESIDENT

Fear of "Popular Tumults" in Elections. The framers of the Constitution undoubtedly intended to confer upon the President large powers in respect of law enforcement and the formulation of national policies. At the same time they were afraid to have him elected by direct popular vote. They sought to establish a method for the election of the President, which would, as Alexander Hamilton phrased it, "afford as little opportunity as possible to tumult and disorder," and would not "convulse the community with any extraordinary or violent movements." To accomplish this end they provided that the President should be indirectly elected by a small body of electors chosen in each state, as the legislature of the state should decide, and casting their ballots for President separately in each state. Each state electoral body, it was imagined, would meet quietly, consider the merits of the important persons deemed best fitted for the high office, and select the candidate most eminent "for virtue and ability."

The Election of the President Is a Tumultuous Affair. But the quiet, dignified procedure contemplated by the framers of the Constitution has been upset by the growth of political parties and party practices. Although the language of the Constitution bearing on this point remains unchanged, the business of nominating candidates for the presidency, carrying on campaigns, and casting ballots has become a popular operation of the first magnitude. It fills the land with discussions and agitations for six months or more every four years. It puts at stake the ambitions of individuals in quest of power, the interests of classes, and the fortunes of the country. Nearly everybody takes part in it, from the President in the White House, busy reëlecting himself or helping in the selection of his successor, down to bootblacks and garage-boys, who discourse on the merits and demerits of candidates with as much assurance as on the outcome of the latest prize fight. The performance involves endless discussions, public and private, oratory, tumult, and balloting,

the election of thousands of delegates to grand national conventions, the concentration of opinion on a few ambitious leaders, a nation-wide propaganda as the sponsors for various aspirants exhibit the qualifications of their favorites to the multitude, and the expenditure of millions of dollars on publications, meetings, "rounding up delegates," and "seeing that goods are delivered."

In seeking to comprehend the office of President—his actual powers as distinguished from mere legal powers—it is necessary therefore to go beyond the letter of the Constitution and examine party practices connected with presidential nominations and elections. At the outset we encounter extra-legal party organizations known as national conventions which present the candidates for whom presidential electors are morally bound, by the customs of political parties, to vote according to the mandate of the election returns at the polls.

Composition of the National Convention

Congress as a Model for the Apportionment of Delegates. For a long time it was the practice of both the leading political parties to form their national conventions on the model of Congress by assigning to the party in each state a number of delegates based on the number of its Senators and Representatives in Congress. In other words if a state had eight Representatives, besides its two Senators, each party in the state was given twenty delegates in the national convention of the party. Under this arrangement, obviously, the number of delegates assigned to each party in each state bore no necessary relation to the number of voters affiliated with the party. As applied in the Democratic party, the system gave a handful of Democrats in a Northern State that was as a rule overwhelmingly Republican the same number of representatives in the convention as it allotted to a state of equal population in the South where there might be eight or ten times as many Democrats. The practice worked for even greater inequality among the Republicans. There have long been several states in the South in which regular Republicans constitute a small minority and are often led by federal office-holders in the area. As a result, whenever there was a Republican President in the White House, he could handpick the Southern delegates to the convention of his party, and almost force his own re-nomination or the nomination of his successor. In the course of time vigorous protests were made in each of the major parties against the congressional plan of apportion-

ing delegates to national conventions and in recent years many changes have been made in the old system, without destroying it entirely or reaching any fixed substitute for it. The Republicans began to institute reapportionment reforms in 1916 and the Democrats in 1940.

Apportionment of Delegates for the 1944 Conventions. Less sectional in the distribution of their party membership among the states, the Democrats have been more content with the congressional model in apportioning delegates, but for the convention of 1944 they provided that each state which went Democratic in the preceding national election should have two delegates in addition to a number of delegates equal to twice the number of its Senators and Representatives in Congress. For their national convention of 1944, the Republicans made the following complicated apportionment: four delegates at large from each state; two additional delegates at large for each Representative at large from each state; three additional delegates at large from each state which cast its electoral vote or a majority thereof for the Republican nominee for President in the last preceding presidential election and elected a Republican Senator at the next succeeding election; one district delegate for each congressional district casting one thousand or more Republican votes for the Republican nominee for President or for Congress in the immediately preceding elections; and one additional district delegate from each congressional district casting ten thousand or more votes in such immediately preceding elections. Besides assigning delegates to each state, both parties allow representation to the District of Columbia, Hawaii, Alaska, and Puerto Rico; occasionally, by one or the other party, the Virgin Islands and the Canal Zone, and the Philippines have been accorded representation.

In spite of these changes glaring inequalities in representation will continue to exist, but too much stress should not be laid on political arithmetic. The vote for President fluctuates and the outcome of one election is not an exact criterion for estimating the poll in the next, as experience in 1932 and 1940 abundantly demonstrated. Moreover the Republicans, always suffering from sectionalism, cannot safely destroy their skeleton organization in the Southern regions where they have little or no influence at present. The future political trend may be different from the past.

Election of Delegates. For more than half a century the Democrats and Republicans prescribed different methods for the choice of delegates. The former, regarding the state as the unit of representation, pro-

vided that its delegates should be chosen at a state party convention or by the state committee. Professing another view of the Union, the latter ordered the election of all the delegates-at-large at the state convention and the remainder at congressional district conventions. But the appearance of the direct primary as a means of selecting delegates forced alterations in the traditional rules. Less than one third the states now require the selection of delegates at primaries; in a large majority, the delegates are chosen at party conventions, state and district; and in a few cases delegates are chosen by party committees.

Direct Voting on Presidential Aspirants. In addition to applying the direct primary to the choice of delegates to the national convention, about one third of the states allow their voters to express preferences for the presidential nomination. The primary laws vary widely in character, but they provide two general methods of assuring the people a chance to voice their opinions on party contestants. In some states, a list of presidential aspirants is printed on the primary ballot of each party and the voter may readily indicate his choice at the polls. In others, candidates for delegate to the convention may specify on the ballot whom they will favor for President if elected. Thus the voters may disclose their will indirectly. First used in the campaign of 1912, when Theodore Roosevelt and William H. Taft waged a bitter contest to secure control of the Republican organization, the presidential primary has had an uncertain career.

At no election has it been a deciding factor. Never have enough ballots been cast in such a primary to reveal the real opinion of a majority in either party. More than once the aspirant receiving the highest vote at the polls has been rejected by the convention. Nor are there any signs of a marked drift in practice. The task of organizing and financing a presidential primary is stupendous and, after more than thirty years of experimenting, it remains to be seen whether it can be so operated throughout the Union as to become an effective instrument for the nomination of candidates.

It is easy to pick flaws in the presidential primary. Not half the states have the system, so that no truly national test can be made. The primaries are held at different dates, ranging through two or three months or more. No method is provided for securing the submission of the names of all the prominent aspirants in all the states. Indeed aspirants may refuse to lay their claims before the voters of regions in which they believe their strength to be slight. Besides these objections, there is no

way of forcing delegates to fulfill pledges to vote in the convention for the men preferred by the electors at the polls. About all that can be said for it at present is that it permits a presidential aspirant to try out his strength in a selected state, if he is prepared to take the risk.

The National Convention at Work

The Convention a "Big Show." The national convention of each party assembles on the date—usually in June preceding the election—and in the place fixed by its national committee at a preliminary meeting. Before the convention is formally opened, the committee confers again, determines upon the program of proceedings, selects temporary officers subject to the approval of the grand party conclave, and makes up a provisional roll of delegates from the returns sent in by the authorities under whose auspices the primaries or local conventions have been held.

The convention assembles in some huge building—large enough to seat the thousand delegates or more and perhaps ten or twenty thousand spectators. Each delegation is arranged around the banner of its state, and is directed by a chairman. Some of the more important delegations have brass bands, and often carry curious symbols and transparencies. In the audience are usually gathered the most active politicians not serving as delegates, enthusiastic partisans from all over the country, and visitors attracted by the spectacular affair. Bands play; party heroes receive prolonged cheers as they appear; wire-pullers rush about, making and extracting promises. It is a cool-headed politician who is not swept off his feet by the excitement of the hour. As if to add to the emotional tension a radio hook-up is now made so that millions throughout the country may "listen in."

The purpose of the national convention is threefold. It formulates party principles into a platform on which an appeal is made to the voters during the ensuing campaign. It nominates candidates for President and Vice-President, and appoints committees to notify both nominees. Finally it organizes a new national committee charged with carrying on the campaign and managing party affairs for four years.

Organizing the Convention. While procedure varies, a certain general course is pursued. The convention is called to order by the chairman of the national committee and prayer follows. Even here discretion is necessary. Clergymen from different congregations are chosen for the sev-

eral sessions, so as to avoid offending religious susceptibilities. After prayer, the first important action is the nomination of the temporary officers already selected in fact by the committee. Usually these nominations are accepted without question, for the function of the temporary organization is largely formal. The temporary chairman, it is true, makes an appropriate address which is often regarded as the "keynote" to the proceedings, but he does not make important decisions which may affect either the platform of the party or its nominations. The first day's session is then concluded by calling the roll of the states and territories and securing from each of them the names of its members for the four great committees of the convention: on credentials, on permanent organization, on rules and order of business, and on resolutions or platform.

In due course, the reports of the various committees are heard, not necessarily in any fixed order. The committee on credentials, charged with passing upon disputes over seats, naturally must act quickly. All notices of contests are filed in advance with the national committee, which makes up the temporary roll. Documents relative to the several cases are transmitted to the credentials committee, which holds meetings, hears arguments, and prepares reports for the convention. Sometimes the conflicts are very exciting, as among the Republicans at Chicago in 1912; for the policy of the party on national issues and the fate of candidates may be decided by the admission or rejection of a few individuals. Generally speaking however the recommendations of the majority of the committee on credentials are accepted by the convention; if necessary to peace, two opposing delegations may be seated and each member given one-half of a vote.

The next important report is that of the committee on permanent organization, which nominates the regular chairman, secretary, and other officers of the convention. Usually this report is also approved without debate, although, of course, the convention may refuse to confirm the names suggested by the committee. The permanent chairman is promptly installed, and makes a long speech. The regulations, under which he controls the assembly, are drawn up by the committee on rules, and are, in principle, those of the House of Representatives.

Adopting a Platform. On the second or third day the convention is ready to hear from the committee on resolutions, to which is entrusted the preparation of the platform. This committee begins its sessions immediately after its appointment and ordinarily agrees on a unanimous report—which may have been written by a person or group outside the

convention, even by the President of the United States, especially if he is nominated by his party to succeed himself. The platform is not often a statement of the particular things which the party proposes to do if it gets into power; it is rather a collection of generalities which will serve to create good feeling and unite all sections around "the grand old banner." Custom dictates that it shall contain, among other things, references to the great history of the party, interspersed with the names of its leaders, and denunciations of the policies and tactics of other parties. Owing to its elusive character, the program drafted by the committee on resolution seldom meets opposition in the convention. It is only when some very contentious matter arouses deep feelings, such as free silver in 1896 and Progressivism in 1912, that there is likely to be a divided report or any serious discussion of its terms.

Presenting Candidates. About the third or fourth day the chairman announces that the next order of business is the nomination of the party's candidate for President of the United States, and the roll of the states is then called in alphabetical order. If the first state has no "favorite son" to offer, it may defer to another lower on the list. A representative of the delegation which gets the floor thereupon places a candidate before the assembly in a speech full of high-sounding phrases and lofty sentiments dealing with many subjects. This opening gun may be followed by speeches seconding the nomination, delivered by "spellbinders" from various delegations, including as a rule at least one woman orator. After the way is opened, the names of other aspirants may be presented in a similar manner.

Balloting—The Old Unit Rule. When the nominations are all made, the vote is taken by calling the roll of the delegations by states, which announce their respective choices through the chairmen. Previous to the rise of the direct primary, every party followed its own rules with respect to balloting in the convention. The Republicans assumed in theory that each member could vote as he pleased, although in practice he was often instructed by his party organization at home to support a certain candidate. The Democrats on the other hand permitted the central organization in each state to authorize a majority of its delegation to decide that all its votes should be cast in one block. This practice, known as the "unit rule," was defended on the ground that the party machine of a state had greater weight when it could "swing" all its representatives at the national convention.

Now the direct primary and the presidential primary, wherever ap-

plied, have upset the historic practices of both parties. Delegates in the Republican convention may be morally bound by pledges made in their campaign for election or by preferences indicated by the party voters (p. 145). Owing also to obligations imposed by primary legislation, the Democratic state organization could not always bind its delegation to follow the unit rule; at their 1936 convention the Democrats abolished the rule.

Counting the Ballots. After all the delegations, subject to the various limitations imposed by law, customs, and pledges, have reported the results of their balloting to the convention, the total is announced. If any aspirant for President in the Republican assembly receives a bare majority of the votes cast, he is declared to be the party candidate. The Democrats long had a rule making a majority of two-thirds necessary to a choice but they abolished this rule in 1936 and adopted the majority principle. If no one receives the requisite number of votes, the roll is called until that outcome is reached—sometimes for hours and even days, should the contest be sharp. Immediately after the presidential candidate has been selected, the nomination for Vice-President is made in the same manner and by the same majority, with less display of rhetoric however.

Notifying the Victors. When the convention has chosen its candidates, it usually appoints a special committee to convey to each of them a notification of his triumph. But Franklin D. Roosevelt broke the custom by flying to the Chicago convention in 1932 to deliver his acceptance speech to the assembly itself and by going to Philadelphia in 1936 to address a huge out-door mass meeting. In 1940 he accepted his nomination by radio from the White House to the convention in Chicago. Often the acceptance speech is an important political document, for the candidate may employ it to interpret the party platform in his own way, going even so far as to modify its spirit, if not its letter, thus injecting unexpected issues into the campaign. After all, it is his speeches, rather than the platform, that attract the attention of the country. It would be interesting to know how many voters ever saw a political platform.

Nature of Presidential "Timber." What are the qualities that make men available for the presidency? What elements of distinction? Bryce has a chapter devoted to inquiring why great men are not selected. One answer is that some of them have been chosen, but still a number of mediocrities have also been elevated to that position. Another answer

is that merits are difficult to assess. Was Clay greater than Jackson, Blaine than Garfield, Hill than Cleveland? Who in the Republican party was greater than Charles E. Hughes in 1916 or in the Democratic party greater than Franklin D. Roosevelt in 1932? Friends of defeated aspirants lament the failure of the democratic process to choose the best, but their motives are open to suspicion.

It may be safely said however that certain factors enter into the business of selection. Very often unknown men, "dark horses" as they are called, have been presented as candidates. This frequently happens when there is a spirited contest among a number of prominent party leaders, none of whom can command enough votes in the convention to win. An outstanding man whether great or not, a man who has seen long service and taken a positive position on one issue or another, is sure to have foes, so many that his election may be out of the question. Protestantism in religion seems to be one prerequisite, for America is predominantly a Protestant country. Since the Civil War no resident of the South has been elected. Republicans for obvious reasons do not look in that direction. And the Democrats, knowing that it is loyal anyway, can ignore its claims. Since 1860, the Democrats have been successful only with candidates from the East—Cleveland, Wilson, and Franklin D. Roosevelt; for, apparently, the conservative wing of the party distrusts Western radicalism. The Republicans, on the other hand, commanding the support of Eastern conservatism, usually offer the nomination to the Middle West. Until 1928 all its successful candidates, save two, Theodore Roosevelt and Coolidge, had been from Ohio, Indiana, or Illinois, and in that year it presented Herbert Hoover, a son of Iowa, who had lived abroad for many years and had a nominal residence in California. In 1936 the Republicans nominated Alfred M. Landon of Kansas and in 1940 Wendell Willkie of New York and Indiana. In these two cases however the appeal to the Middle West proved to be vain. Perhaps the old power of the West in this respect has been broken.

Careers Leading to Presidency. What career leads to the White House? It is certainly not a straight and narrow path like that to the premiership in England—constant service in and out of power for many years and marked qualities of leadership. We have had many generals: Washington, Jackson, Harrison, Taylor, Pierce, Grant, and Garfield; two colonels, Monroe and Theodore Roosevelt, and one major, McKinley. So we might venture the suggestion that military service, often accompanied by no definite political opinions, is an element in availability. Men of

marked power in the Senate are never chosen. To carry a strategic state, New York, for example, as a candidate for governor, as did Theodore Roosevelt and later Franklin D. Roosevelt, is to enhance one's value in the presidential field. Lincoln was somewhat unique in that, beyond a term in the House of Representatives, his political experience on the national stage had been slight. He was not widely regarded as a great man when elected, and had he served in time of peace he might today be reckoned among the insignificant occupants of the presidential chair.

Law and arms are the professions to which political parties have most often resorted. Wilson, Harding, and Hoover stand apart—the first was a teacher and a university president, the second a newspaper editor, and the third an engineer who, after winning fame during the first World War as an administrator, added to his claims by work as Secretary of Commerce. Franklin D. Roosevelt was a man of inherited wealth, who had served in the New York legislature, in President Wilson's administration at Washington, and as governor of his state. Once humble birth, perhaps in a log-cabin, was an asset to a candidate; but in an age of apartments, bungalows, town mansions, and country estates, that appeal has lost its charm. It is an uncertain path that leads to the White House. Many who have deliberately set out in that direction have missed the goal and others have been blown into the right path by the winds of personal and political fortunes.

Favorite Sons. It often happens that there are many aspirants for the nomination, all fairly equal in talents and claims, as well as popularity, or that the run-of-the-mine politicians are bitterly opposed to some outstanding aspirant. In such cases it is a common practice for the politicians in each of several states to put forward "a favorite son," sometimes because they believe he has a chance of winning and sometimes for trading purposes. When this comes about the victor usually owes his triumph to the bargaining skill of his managers rather than to any demonstration of superlative merits on his part. At all events favorite sons nearly always appear. For example, John N. Garner was a favorite son of Texas in 1932, with some support from the outside, and in the final shake-down his backers were able to win for him the nomination for the vice-presidency after throwing their votes to Franklin D. Roosevelt for the presidential nomination. Occasionally a delegation carries its favorite son to success; quite often it merely manages to exchange him for one consideration or another, such as a cabinet position or a desirable post in the diplomatic service.

King-makers and Booms. No man now becomes President through sheer talent and character popularly acclaimed in a kind of spontaneous combustion. The process of selection is more devious. A President in office may be so popular that election to succeed himself is a foregone conclusion; or he may, if another term for himself is out of the question, designate and secure the nomination and election of his successor. In such cases the President will use patronage and the prestige of his office to bring about the result he desires. For an aspirant "fresh from the people," other devices are necessary. Somebody must recognize his merits or at least his availability, put him forward, and press for his success. The country always has a large number of potential makers of Presidents. Editors, publicists, and politicians are ever scanning the horizon for "likely" candidates. In that way they hope to serve their party and their country, and perhaps achieve fame and position for themselves. Every President, except Washington, has first been "picked" by some person or group of persons. Marcus A. Hanna, a retired business man, played the role of Warwick, the king-maker, for William McKinley, and won a place in the Senate for himself. Woodrow Wilson was heavily obligated to George B. Harvey who early brought many "Wall Street" friends to Wilson's support and launched his "boom"; and subsequently to Walter F. McCombs who led the struggle for his nomination in 1912. Franklin D. Roosevelt owed a large part of his strength in 1932 and in 1936 to the indefatigable labors of James A. Farley, perhaps the most astute handshaker, patronage dispenser, and "maker of friends" ever produced in "the great game of politics."

Once started, booms are engineered with the aid of powerful agencies of propaganda—press, radio, post office, and public speaking. With a few thousand dollars, a clever public relations counsel, and friends among editors, a governor in a strategic state can readily start what appears to be a spontaneous demand for his nomination as "the man of the hour." Well aware of this fact, those who play the game of politics begin to plan for the next election soon after a new President is installed and often for even eight years ahead. Most king-makers fail and most booms burst, but without the aid of one or more king-makers and a boom no citizen can ever hope to become President of the United States.

The Vice-President. Since the sole function of the Vice-President, in ordinary circumstances, is to preside over the sessions of the Senate, not much consideration is usually given to his qualifications for the presidency to which he may be called on the death of his superior. Two rules

usually govern the choice of candidates for this office. The first is that he should not be from the same geographical district as the presidential candidate. If the latter is from the West, the former may be from the East, and vice versa. Wilson was from New Jersey; Marshall from Indiana. Harding came from Ohio; Coolidge from Massachusetts. Franklin D. Roosevelt came from New York; Garner from Texas. The second, by no means so strictly applied, is that the candidates for the two offices shall represent different wings of the party. In 1940 Henry A. Wallace of Iowa was united with Roosevelt, and Charles McNary of Oregon with Wendell Willkie of New York and Indiana.

The Presidential Campaign

The National Committee. The work of directing the party campaign is entrusted to the national committee composed of two members—one man and one woman—from each state and in some cases from American possessions. Although formally confirmed at the national convention, the committee members are in reality chosen at state conventions, by state committees, or at direct primaries, as local customs and law prescribe. The principal officers of the national committee are the chairman, secretary, and treasurer. Since the chairman conducts the campaign for victory, the wishes of the presidential candidate count heavily in his selection. Harmony between the two men is essential to success. If no capable and energetic organizer is found in the original committee, the chairman is taken from party leaders on the outside. A similar practice is followed in the case of the treasurer. Owing to his importance as the collector of funds, he must be capable of wielding a large financial influence and the most available man will be drafted wherever found. It is therefore impossible to lay down absolute rules regarding the choice of committee officials, for the operation is not determined by any law. It is left for adjustment according to circumstances.

The National Chairman. Immediately after the convention adjourns, the newly elected committee meets and proceeds with preparations for the campaign. Leadership in this great national contest is taken, of course, by the chairman, who disburses enormous collections made by the treasurer, directs the huge army of speakers, organizers, and publicity agents scattered over the Union, and as the day of election approaches surveys the field, discovering weak places, hurrying up reënforcements to the doubtful states, and, perhaps, pouring immense sums

of money into districts where wavering voters may be brought into line. The outcome of the campaign depends in a great measure upon the generalship of the chairman of the national committee.

Raising Campaign Funds. The amount of money which a party must or can raise for the fray depends upon circumstances. If great issues are at stake and the country is excited over industrial, labor, banking, or monetary questions, the amount is likely to be large and the spending lavish. The campaign of 1936 was such a contest. The major portion of the money contributed to the two great parties by bankers, brokers, manufacturers, utilities, merchants, real estate dealers, and newspaper owners went to the Republicans; while the Democrats received special favors from brewers, distillers, tobacco manufacturers, motion picture producers, theater owners, office-holders, and organized labor. One significant feature of the campaign was the contribution of $770,218 by labor groups to the Democratic national committee and other Democratic organizations for electioneering purposes. Two special money-raising devices were successfully employed by James Farley, head of the Democratic committee. One was a series of Democratic dinners at prices ranging sometimes as high as $100 a plate; circumspect Democratic office-holders were careful to attend in large numbers. Another was the *Book of the Democratic Convention of 1936* sold at prices ranging from $2.50 to $100 a copy; advertisers, for reasons of weight, even corporations forbidden to contribute to campaign funds, bought generous space for advertising purposes; and party members, especially job holders, bought copies as mementos (p. 81). Between January 1 and December 31, 1936, the Democratic national committee raised more than $5,000,000 and the Republican committee nearly $9,000,000—apparently "an all-time high" up to that moment. And of this huge sum only a relatively small amount came from the rank and file of party voters who were not job holders or expectants of favors.

In the raising of campaign funds for the party battle of 1940 the national committees were handicapped somewhat by the Hatch Act (p. 79) which limited each committee to the expenditure of no more than $3,000,000. Nominally the Democratic committee's outlay for 1940 was $2,197,816 and the Republican committee's outlay was $2,242,742. But these figures did not tell the whole story. Heavy contributions were made by members of both parties to state party committees and to numerous "auxiliary" committees formed to forward the interests of the Democratic and Republican candidates respectively. For example, the

Associated Willkie Clubs of America spent $1,355,604 in the Republican cause and the National Committee of Independent Voters for Roosevelt and Wallace, formed under White House auspices, spent $250,455 in the Democratic cause. The total reported Democratic outlay for 1940 amounted to $5,855,082 and the Republican outlay to $14,941,142.[1]

Campaign Literature and the Press. Since the chief work of the national committee in carrying on the campaign is to influence the voters, it gives systematic attention to the preparation of campaign "literature." As soon as the issues of the contest are fairly well settled, each party publishes a campaign textbook, which usually contains the platform, notification and acceptance speeches, biographical sketches of the candidates, statistics on business, tariff, trusts, money, and other economic problems, addresses by eminent leaders, papers in defense or criticism of the administration, and the most cogent arguments which the party can advance in support of its position. Campaign textbooks are sent out in large quantities to newspapers, speakers, and others in a position to win voters by argument. Besides this great document another textbook is issued for each party by its congressional committees (chosen by the party delegation in the House and Senate respectively) to furnish collateral information on the legislative "records" and policies of the contestants.

These central pieces of campaign literature are supplemented by innumerable pamphlets, leaflets, posters, cartoons, and congressional speeches, printed in every language that is represented by any considerable number of voters. A regular bureau of printing and publication, supervised by an expert, directs this enormous "literary" output, which is distributed broadcast, partly through state central committees.

A far more effective way of reaching the public is through the newspapers. Thousands of the uninteresting documents sent out by the national committee are doubtless thrown away unopened. The newspapers however have regular readers and reach the public directly; accordingly the national committee makes extensive use of the established journals, from the great city daily down to the rural weekly.

Campaign Orators. In addition to the printed arguments, there are oral arguments. To manage the latter activity the national committee generally maintains a special bureau which prepares a list of available

[1] For a striking and informing analysis of campaign funds, see Louise Overacker's articles in the *Political Science Review;* for the campaign of 1936, in the June issue of 1937; for the 1940 campaign, the August issue of 1941.

statesmen and "spellbinders." These orators are of every rank, from the person with a strong voice who can harangue a street corner crowd from an automobile or a sound-truck to the finished speaker whose very name will draw multitudes. Hundreds of them are directed from the national headquarters, while thousands of local volunteers are supervised by state and county committees, sometimes in consultation with authorities higher up. Itineraries are laid out, halls and bands engaged, parades organized, and every device utilized to give the greatest possible effect to campaign eloquence.

Generally the presidential candidate himself enters the lists. In 1896 Bryan toured the country and delivered at least four hundred reported speeches in twenty-nine different states—the greatest oratorical record of any candidate up to that date. Twelve years later Bryan equaled his first record, while Taft, his opponent, outdid him by traveling eighteen thousand five hundred miles and making four hundred and thirty-six speeches in thirty states. In 1936 President Roosevelt and Alfred M. Landon toured the country from coast to coast. In 1940 President Roosevelt and Wendell Willkie made long tours and spoke in many strategic centers. Apparently the day has passed when candidates can safely remain at home and speak to visiting delegations from the front porch or hand out statements to the press.

The Radio. A very efficient means of enabling candidates and their supporters to invade the homes of the people with party appeals is now afforded by the radio, an agency on which more than $700,000 was expended by the national committees of the two leading parties in the campaign of 1940. Indeed the radio has done much to revolutionize political campaigning. It is no longer necessary to devote three or four months between party conventions and the election to the business of reaching the voters. Within two or three weeks the candidates and their supporting orators can lay before more than twenty-five million radio owners the merits of their respective causes. Subjected to the high costs and impersonal limits of the radio, they must measure their words. Jokes, ridicule, and wise-cracking become less effective; brief, pointed, definite statements of facts, principles, and policies are imperative if the invisible audience is to be convinced. Unquestionably a new and amazing instrument has been thrust into the operation of forming political opinion with reference to elections. Its power is recognized by party leaders, as campaign expenditures indicate.

If a President is a candidate for reëlection, he enjoys special privileges in the use of the radio. As President he can broadcast his message to Congress and make addresses to the country over the radio, nominally in the process of transacting public business but practically with a view to capturing voters for his party cause. It is, of course, difficult if not impossible for a President in such circumstances to separate public business from party interests and maneuvers. In any case he is likely to be charged by his political foes with using his high office as a "sounding board" for partisan politics. For instance, when President Franklin D. Roosevelt in the summer of 1943 made a broadcast to the nation in which he discussed proposals for aiding soldiers on their return from the war, he was accused by the chairman of the Republican national committee with "playing politics" and seeking to promote his own reelection in 1944, for a fourth term. Whatever the merits of such disputes, a President as a candidate for reëlection has many advantages over his opponents in using the radio, as well as in the dispensation of patronage, jobs, contracts, and favors to various economic interests representing wealth and poverty.

Advance Polling of Voters. Campaigns, of course, are not limited to oratory and the dissemination of political literature. A very practical part of the national committee's work is the polling and supervision of the wavering states—an operation in which it has recently been aided by the nationwide polls taken by the American Institute of Public Opinion, the *Fortune* magazine, and other agencies which make forecasts often with uncanny accuracy. Early in the contest a political census is usually taken, especially of the regions in which the vote is known to vacillate or in which incipient revolts appear. Frequently this survey is minute in the extreme. Thus the party leaders find out about how many voters they can rely upon and obtain a fairly accurate list of the doubtful persons whose opinions may be altered. With the results of the census in its hands, the national committee is acquainted with the strength and weakness of the opposition and plans the lines of advance calculated to win the victory. Effective means for influencing doubtful persons may then be dispatched to the scenes of action.

It is indeed a marvelous contest that closes on the day when the ballots of more than forty million voters are cast for presidential electors. By act of Congress that day is fixed: Tuesday following the first Monday in November.

Casting and Counting the Electoral Votes

Constitutional Provisions. The political activities described above are wholly unknown to the Constitution. That document contains only a few clauses respecting the choice of the President and Vice-President. In the first place it contemplates a system of indirect election: the President and the Vice-President are to be selected by electors, not by the people themselves. To insure all sections a voice in the process, each state is given a number of electors equal to the number of Senators and Representatives to which it is entitled in Congress. To remove the electors from direct connections with the Federal Government, it is provided that none of them shall be a Senator or Representative or a person holding any office of trust under the United States.

In the second place the electors of each state are to be chosen as the legislature thereof may determine. No less than three distinct methods have been tried. In the beginning the state legislatures often elected them; but later this practice was displaced by popular election. When the more democratic system was adopted, it was frequently the custom at first to have two electors chosen by the voters of the state at large, and the others by congressional districts. It was discovered at length that a state's influence in national politics was greatly increased if all its electors were carried by one party or the other; consequently, the district system was abolished, and election of the entire list on a general ticket by popular vote (p. 36) throughout the state became the universal rule.

Nomination of Electors. It is necessary, accordingly, for each party organization in each state to prepare a list of candidates equal to the total number of electors assigned to the commonwealth under the Constitution. In practice the presidential electors are usually nominated by the state convention or state committee; very often the office is treated as a titular honor to be given to distinguished citizens or to partisans willing to make liberal contributions to campaign funds.

On election day therefore the voter does not formally cast his ballot directly for President and Vice-President, although for his information the names of the candidates of officially recognized parties appear on the ticket.[2] On the contrary, he ordinarily votes for all the presidential elec-

[2] A few states put only the names of the candidates for President and Vice-President on the ballot and assign the ballots cast for them to the proper candidates for presidential elector. "The Presidential Short Ballot," by L. E. Aylsworth. *Political Science Review*, November, 1930.

tors put forward by his party in his state. There is no point in distributing preferences among the various parties, unless a fusion occurs, such as existed several years ago in some of the Western states between the Democrats and Populists whereby the two groups shared the electors by agreement. What happens then on the election day is the choice in each state of a certain number of presidential electors—531 throughout the Union.

Election by Plurality Vote. Normally the party which secures a plurality of the popular votes in any state is entitled to all the electoral ballots of that state for President and Vice-President; very rarely is there a split in the tickets. No elector would dare to break faith with the party which nominated him and support the candidates of any other party. Consequently, the deliberative, judicial, non-partisan system designed by the framers of the Constitution has been overthrown by political custom.

Minority Victories Are Possible. It is sometimes held that through this party practice the popular election of President and Vice-President has been established but, if by this is meant choice by a majority of the voters throughout the United States, it has not been attained. Indeed several of our Presidents have been elected by a minority of the popular ballots cast. Lincoln, for example, was chosen President in 1860 by a vote of 1,866,452 against a total of 2,815,617 polled by his opponents; the opposition being so distributed that it obtained only a minority of the presidential electors. In the election of 1912 Woodrow Wilson's total vote fell short of a majority by more than a million. Two Presidents, Hayes and Benjamin Harrison, did not receive even a popular plurality, that is, they stood lower in the scale than their principal rivals.

This possible contingency of election by a minority of the popular vote cast is due to the fact that when a party carries a state, even by the smallest margin, it wins all the presidential electors allotted to that commonwealth. Therefore a party that is victorious by narrow margins in enough states to obtain a majority of the presidential electors may in reality have a smaller popular vote to its credit than the opposing party which may have swept its states by enormous majorities. As a matter of fact, the system works with a fair degree of regularity only because the voters are somewhat evenly divided between two great parties. The appearance of a strong third party or the multiplication of factions would frequently result in throwing the choice into the House of Representatives.

Victory by a Minority of the Eligible Voters a General Rule. If in the presidential electorate are included all the voters who are lawfully en-

titled to vote, then no victorious candidate for President in recent years has won a majority of all the voters. It appears that the proportion of men and women eligible to vote who have actually taken the trouble to cast their ballots in recent presidential elections ranges from fifty-five to seventy per cent of the total number who could vote if they would. Exact percentages cannot be obtained, for the number of persons who have the qualifications of voters under the laws is unknown; even the best of estimates vary more or less. But if the number of actual voters is fixed at the highest point, namely, seventy per cent of all the eligible voters, every presidential election since 1912 has been carried by a minority of the people entitled to vote. Whatever moral or practical significance this may have, it is a fact now fairly well established by statistical calculations.[3]

Casting and Counting Electoral Votes. The rules according to which the electors chosen in each state meet and cast their votes for President and Vice-President are prescribed by the Constitution and federal and state statutes. Federal law provides that the electors of each commonwealth shall convene on the first Monday after the second Wednesday in December, following their election, at such place as the legislature of their state directs—in practice, the state capital. When they have assembled, the electors vote by ballot for President and Vice-President, "one of whom at least must not be an inhabitant of the same state with themselves"—that is, for the two candidates nominated by their party. Thereupon they make separate lists of the number of votes cast, and sign, certify, seal, and transmit the documents to the president of the Senate of the United States. Among their returns the electors must include their certificates of election as evidence of their power to act—evidence of crucial importance in contested elections. When they have cast their votes and dispatched their documents, the electors have performed their whole duty.

The counting of the total electoral vote begins in the Hall of the House of Representatives on the sixth day of January, following the meeting of the electors in their respective states. It is conducted in the presence of the two houses of Congress with the president of the Senate in the chair. Except in the case of a contested election, this count is, of course, a mere formality, for the result is always known in advance.

Action in Absence of Majority Vote. If no candidate for President

[3] V. O. Key, *Politics, Parties, and Pressure Groups*, pp. 606 ff., for estimates and comments on the nature and significance of non-voting in elections.

obtains a majority of all the electoral votes cast, the House of Representatives chooses the President from the three candidates who received the highest number of electoral ballots. In the selection of the President by this process, each state represented in the House is entitled to only one vote; a quorum consists of the members from two-thirds of the states; and a majority of all the states is required for a choice. Necessarily, in such cases, the single vote of each state is commanded by the majority of its Representatives. Should the House, in these circumstances, fail to reach a decision before the time fixed for the beginning of his term, namely, January 20th, then the Vice-President shall act as President until a President shall have qualified. Only two Presidents have been elected by the House of Representatives—Jefferson in 1801 and Adams in 1825.

If none of the candidates for Vice-President receives a majority of all the electoral votes, the election is thrown into the Senate, and the Senators voting as individuals must choose one of the two candidates standing highest on the list. Two-thirds of the whole number of the Senators constitute a quorum for this purpose, and a majority of the entire body is necessary for a choice.

Legal Qualifications for President. The legal qualifications for President are laid down in the Constitution. He must be a natural-born citizen, not less than thirty-five years old, and a resident in the United States for at least fourteen years. Identical rules apply to the Vice-President. The term is fixed at four years, and so far as the Constitution is concerned, the President or Vice-President may be reëlected indefinitely.[4]

The Third-Term Doctrine. Until President Franklin D. Roosevelt was elected for a third term in 1940, it had long been supposed that no President should hold more than two terms, at all events in succession. This "third-term doctrine," as it was called, was often alleged to have been established by the example of George Washington, who declined reëlection after eight years of service as President. According to one tradition, he acted on principle but this has little or no foundation in fact. The Constitution places no limit on the number of terms a President may lawfully serve and there is no reason for believing that Washington

[4] In case of the removal or inability of the President, the Vice-President succeeds. By statute Congress provided, in 1886, that in case of the removal or inability of both the President and Vice-President the following officers shall serve, in the order mentioned: Secretary of State, of the Treasury, of War, the Attorney General, the Postmaster General, the Secretary of the Navy, and of the Interior.

objected to three terms or more. Indeed in his Farewell Address he explained why he in particular ought not to be charged with a lack of patriotism or neglect of duty in refusing to continue in office.

Jefferson was for a time dubious on the point of the presidential term. He originally believed that the President should have a seven-year term and be ineligible for reëlection. Later he decided that service for eight years with the possibility of removal at the end of four years was nearer the ideal arrangement. By retiring in 1809 he followed the example of Washington and besides he urged the adoption of an amendment to the Constitution forbidding a third term. Thus the third term doctrine received a high sanction and seemed to be a fixed rule of politics until it was exploded, at least for the time being, when President Roosevelt was elected for his third term in 1940, and his ardent supporters began to speak confidently of a fourth term.[5]

The Inauguration

A new President assumes his official duties, under the Twentieth Amendment, on January 20, following his election. Originally March 4th was the day, but the "Lame Duck" amendment to which reference has been made (p. 101) moved the inauguration back, nearer to the day of election, for the purpose of giving more immediate effect to the popular decision at the polls, shortening by nearly two months the possible rule by a defeated party.

Formerly it was the practice for Congress, after the official count of the electoral ballots, to select a committee to notify the victor, but this was not uniformly followed, and has now been abandoned. Curiously enough no official notice is given to the President-elect. He is supposed to be aware of his election himself, and on the twentieth of January he appears to assume his responsibilities, unless of course he is already President and is succeeding himself. On the day of inauguration, the President-elect is driven to the Capitol. If the weather permits, the oath of office, administered by the Chief Justice of the United States, is taken in the open air on a platform at the east front of the Capitol; otherwise, in the Senate Chamber. Following the custom established by Washington, the new President then delivers an inaugural address. After the ceremony, he returns to the White House, where he reviews from a special stand a long procession organized in his honor. Then he is ready for work.

[5] Charles W. Stein, *The Third-Term Tradition* (1943), an interesting and scholarly treatment of the subject in its historical origins and development.

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CHAPTER VII

THE OFFICE OF PRESIDENT

Constitutional Provisions as to Powers and Responsibilities. When the victor in a presidential campaign emerges from the turmoil and is formally clothed with the authority of his office, he finds himself limited in many respects by the Constitution, laws, and treaties; and in other respects, free to speak and act, subject to the circumstances of the times. Article II of the Constitution which deals particularly with the office of President, gives him only a few clues to his powers and responsibilities. The major portion of the Article is devoted to the methods of election, his term, qualifications, compensation, and oath of office.

The clauses relative to his powers and duties are few and brief. Some of them are cast in general terms and hence open to interpretation. Others are specific in language and thus beyond debate as to meaning. The first line of the Article, for example, declares that "the executive power shall be vested in a President of the United States of America." Does this provision confer upon the President any power in itself or is the total range of his power limited to the powers specifically named in Sections 2 and 3? Over this question differences of opinion have long been, and still are, entertained by students of the Constitution. Again, what powers does the President have as Commander-in-chief of the army and navy? No answer universally agreed upon has yet been made? He shall recommend measures to Congress. May he bring pressures to bear on Congress to force the adoption of his measures? Long practice has answered this question in the affirmative.

Leadership of the President in National Affairs[1]

Within Limits the President May Choose His Role. Since many provisions in Article II are general, the President may take a narrow view or a broad view of his responsibilities as chief executive. He may, if his

[1] On conflicts over presidential leadership, see below Chapter IX.

temper and circumstances permit, confine his activities rather narrowly to the enforcement of the Constitution and the laws, the discharge of routine duties of administration, without seeking to secure the enactment of new laws or to force any new policies upon public attention. He may make few speeches, send few messages to Congress, and refrain from carrying on agitations. Like President Calvin Coolidge he may not strive to be "a great President."

Or, on the other hand, the President may take a broad view of his powers and responsibilities; as did Theodore Roosevelt when he said that his powers were not limited to matters expressly mentioned in the Constitution, but extended to every question of public welfare not closed to him by the Constitution. He may proclaim domestic and foreign policies of far-reaching significance for the fortunes of America. By a message to Congress in 1823 President James Monroe laid down a doctrine of foreign policy that is still influential in American thought and practice. By defining and insisting upon American rights of commerce and travel in the early stages of the World War, President Woodrow Wilson took a position which, when challenged by German acts of power, made war the only alternative to the surrender of those rights. Immediately after his inauguration in 1933, President Franklin D. Roosevelt assumed leadership in framing and pressing through Congress a program of measures designed to overcome the economic crisis then prevailing and later formulated foreign policies respecting the aggression of the Axis powers in Europe and Asia, under which the United States became involved in a global war.

Rôle of the President Affected by His Personality and the Times. The sayings and doings of the President depend upon many things. They are shaped by the nature of his personality—his manner, his convictions, his theories, his will power, and his ambitions. They grow in part out of his capacity "to get along with people," to engage their confidence, to arouse them by the terseness and cogency of his messages, to charm them over the radio by the clearness and friendliness of his voice, to win their affection, and draw them into the train of his leadership. His actions and achievements are conditioned by the state of the country; whether it is at war or peace, enjoying "prosperity" or tossing in the fever of a business depression. The spirit of the times—the ideas in circulation and at the forefront of public discussion—has a direct bearing on his course. His party in Congress may deflect, block, or advance his purposes and policies. In any event, he plays a dual rôle. He is a leader of his party, of

the wider multitude willing to follow him, and of the official hierarchy of the Federal Government. He is also a public functionary bound to discharge certain duties vested in him by the Constitution and laws of the United States.

Methods of Political Leadership. As a political leader, the President may use his exalted position to appeal to the nation or to sectional, class, or group interests; he may use his veto power against laws passed by Congress; he may agitate by means of his messages; and he may bring pressure to bear in Congress and within his party through a discriminating use of the federal patronage. Owing to his preëminence he can exert a tremendous influence on public opinion by the distribution through his messages and interviews of selected facts, alleged facts, and theories of government and policy. There is a corps of astute journalists in Washington ever alert to catch even the most trivial phrase that falls from his lips at press conferences or off hand, and spread it broadcast over the country. Such is the state of modern science that the President can even dispense with the press and through the radio speak to his listening countrymen directly. So we may say that mechanical inventions may make a greater revolution in the powers of the President than a constitutional amendment. At all events, we cannot discover the whole office of President by looking into the Constitution, laws, treaties, and judicial decisions.

Leadership in Work of Government. Besides manifesting itself in the formulation of great national projects and in the creation of supporting sentiment, presidential leadership also appears in the discharge of the various duties prescribed by the Constitution and the laws. As head of the federal administration, with its official hierarchy centering in Washington and operating throughout the United States and abroad, the President may shape policies in detail, hold agencies of government up to a high standard of performance; or he may neglect this side of his work and allow administration to sink into a state of inefficiency. He is a leader of some kind, then, in civil administration, in foreign affairs, in the direction of the Army and Navy. In other words, he has executive duties to perform; and upon his success or failure as an administrator may depend the outcome of his other policies and activities. Under the Constitution, the President may recommend to Congress the enactment of proposed laws and veto bills to which he objects. Thus he has powers as a legislator and if Congress is weak or incapable of acting on its own

initiative he may assume preëminence in the promotion of legislation.

Leadership in the Interpretation of the Constitution. Although a tradition assigns the function of interpreting the Constitution to the judiciary and great Chief Justices, such as John Marshall and Roger B. Taney, have exerted a profound influence on American views of that document, it is probable that Presidents have outstripped them in the formation of constitutional opinion. The broad interpretation adopted by Washington in the beginning, the liberal conception held by Lincoln, the theory of loose construction put forward by Theodore Roosevelt, and the ample doctrines expounded by Franklin D. Roosevelt have perhaps done more to educate the public in that line of thought than all the opinions of the judges put together.

In addition it is relevant to note that Presidents have led in many conflicts with the judiciary which have ended in the modification of its views or in a constitutional amendment or both. Lincoln did. So did President Grant. In our own time President Franklin D. Roosevelt challenged opinions of the Supreme Court which ran contrary to his program, proposed changes in the personnel of the Court, and, though defeated on his bill, had the satisfaction of seeing the Court reverse itself frankly on one point and alter its conceptions of others (Chapter IX). As an interpreter of the Constitution, the President has responsibilities no less grave than those of the Supreme Court of the United States and, no less than the judges of that Court, he is bound in law and conscience to protect the processes of constitutional government against the assaults of ambitions and interest within the Government and outside.

The President as Head of the Cabinet

The President is surrounded by a cabinet of ten members, composed as a rule of persons high in the councils of his party. But he cannot shift his responsibilities to that body or any officer in it. He cannot make them individually or collectively accountable to the country for the policies and actions of the Federal Government over which he presides.

Origins of the Cabinet. In creating the first departments in 1789, Congress did not even recognize the possibility that the chief officers would form a presidential council. Indeed the act establishing the Treasury Department indicated a desire to bring the Secretary under congressional control in many ways. Apparently the Senate was then expected to

serve as the President's advisory body, for it shared with him the power of making treaties and appointments and was in the beginning sufficiently small in size to meet the requirements of a council.

Whatever may have been the view of Congress, Washington regarded the four chief executive officials, including the Attorney General, as his confidential advisers, though the term Cabinet was not immediately applied to them. He also exercised his constitutional right of requiring opinions from the heads of departments, and took them into his confidence in all important matters very soon after the first appointments were made. By a gradual process, he welded them into an executive council, and by 1793 the term Cabinet or Cabinet Council had come into use.

Work of the Cabinet. Some Presidents have cabinet meetings regularly at stated times, but others merely call sessions when matters in hand seem to require common action. The meetings are usually secret, and no minutes are kept of transactions. As the special business of each department is discussed separately with the President by the appropriate officer, only affairs pertaining to the general policy of the administration are likely to be brought up for consideration in the Cabinet. Votes are seldom taken on propositions, and they are of no significance beyond securing a mere expression of opinion. This is illustrated by an incident related of President Lincoln, who closed a grave debate in the Cabinet, in which he found every member against him, with the announcement: "Seven nays, one aye, the ayes have it." Nevertheless cabinet meetings are of service to the administration, especially in maintaining harmonious coöperation among the departments and in formulating executive programs.

In the ordinary course of things, it appears from such glimpses as we can catch in papers of former members, most of the sessions are of slight importance, especially under a dominant President. This view is given in the records of Franklin K. Lane, who served under President Wilson as Secretary of the Interior. A few entries will illustrate the point: "Today's meeting has resulted in nothing, though in Mexico, Cuba, Costa Rica, and Europe we have trouble. . . . For some two weeks we have spent our time at cabinet meetings largely in telling stories. Even at the meeting of a week ago, the day on which the President sent his reply to Germany, . . . we were given no view of the note which was already in Lansing's hands and was emitted at four o'clock; and we had no talk upon it, other than some outline given off-hand by the President to one of the cabinet who referred to it before the meeting; and for three-fourths

of an hour we told stories on the war and took up small departmental affairs."

A study of the nine volumes presenting the public papers and addresses of Franklin D. Roosevelt, from 1928 to 1940, discloses the fact that the cabinet as a collective body counted for little in the formulation of his policies and decisions, as compared with the influence of his personal friends and advisers from the outside, upon whom he drew for aid and counsel. In the indices to the last five volumes appears only one reference to his cabinet and that one is trivial—the dismissal with a bare comment of a newspaper report on alleged changes to be made in his cabinet. As Andrew Jackson came to rely almost entirely upon his "kitchen cabinet" of personal friends, so President Roosevelt gave slight consideration to the members of his cabinet and instead took into his confidence a small group of men picked to suit his purposes—a circle called by its critics "the White House janissariat."

Extent of the President's Control. Clearly the Cabinet is merely the kind of organization which the President wishes to make of it. It is his own council in a very peculiar sense. Having no existence or warrant in law, it is not subject as such to congressional control. In the first administration of President Jackson this point was settled for all time. When the Senate requested the transmission of a paper supposed to have been read by him to the heads of the executive departments, he replied: "I have yet to learn under what constitutional authority that branch of the legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of departments acting as cabinet council." Congress cannot hold them to account collectively for anything that they do.

The President as Director of the Administration

President's Power to Direct Subordinates. In addition to serving as leader of the Cabinet, the President assumes high technical responsibilities as the head of the national administration. It is his duty, among other things, to see that the Constitution, laws, and treaties of the United States and judicial decisions rendered by the federal courts are duly enforced throughout the country. In the fulfillment of this obligation, he may direct the heads of departments and their subordinates in the discharge of the functions vested in them by the acts of Congress. Some of the departments are placed, by law, more specifically under his

control than others. For example, the Secretary of State, in the conduct of foreign affairs, is completely subject to the President's orders; and the Attorney General must give an opinion or institute proceedings if required to do so. On the other hand, when the Treasury was organized in 1789, it was definitely understood that Congress had a special interest in the administration of that department (p. 167).

How far the President, in ordinary times, may go in controlling administrative officers is a matter of dispute among lawyers. Long ago the Supreme Court held that he is bound to see that an officer faithfully carries out the duties assigned to him by law, but is not authorized to direct the officer as to the ways and means to be employed in the operation. It is doubtful however whether this view would be taken today. Clearly the President has power to remove the head of a department who refuses to obey orders, and it is difficult to see why, in reality, he cannot determine, within the lines of the statutes, the steps to be taken by that officer. He is not likely, of course, to quarrel with a cabinet officer over details but when there is a serious conflict over important public policies, the President, if firm in his views, will prevail, and the officer will yield, resign, or be dismissed. Such a conflict occurred in the administration of President Coolidge in 1924 between the President and his Attorney General, Harry M. Daugherty; and the Attorney General was forced to resign under protest.

Overhead Organization for Administration. In order that the President may have knowledge of the work done by millions of officers and employees and supervise it with some degree of efficiency, he is provided with an overhead organization consisting of the following principal parts:

1. The White House Office—secretaries, administrative assistants, clerks.
2. The Bureau of the Budget—to prepare the annual estimates of expenditures for presentation to Congress by the President.
3. Agencies connected with national defense and war activities in time of war.
4. The Cabinet composed of ten department heads.
5. Independent agencies, commissions, and offices not grouped under department heads and not immediately connected with war activities (Chapter X).

Especially useful to the President are six administrative assistants whose offices were created on the recommendation of the President's Committee on Administrative Management in 1937. The duties of these assistants are not precisely described by law but they include: collecting in-

formation for the President on all matters of interest to him as chief administrator and head of his party; smoothing out troubles in politics and administration by seeing and talking to the "right" people; scrutinizing and reporting on appointments to offices and the work done by the immense body of civil servants; keeping the President in touch with Congress and acting as conciliator in his relations with Congress; and keeping the President informed as to the opinions, desires, and complaints of citizens and groups of citizens and of state and local governments with respect to the work of federal agencies.

Power of Law Enforcement. The President's authority over the direct execution of the law through the agency of the Attorney General is very great. He may instruct the Attorney to institute an action against anyone suspected of violating federal statutes. Since the principles which control the proceedings of officers in arresting, holding, and prosecuting accused persons are general in character, the very spirit as well as the tactics of law enforcement can be shaped by the President. Laxness or severity is largely within his discretion, subject to the vigilance exercised by members of Congress. Such vigilance is always latent or active, and often highly effective. It was largely the attacks made by Senators on Harry M. Daugherty that induced President Coolidge to demand his resignation. On protests from a Senator in 1943 a federal prosecutor given to violent language and practices in certain trials was forced to withdraw from them. If the liberties of the people guaranteed by the Constitution are upheld or grossly violated however the credit or the blame, as the case may be, belongs in the final analysis principally to the President of the United States.

When the enforcement of the laws encounters a violent resistance too strong for the United States marshals and other enforcement officers, the President may use the armed forces at his command under conditions established by federal statutes. Indeed he is not wholly limited in the exercise of this power to cases of violent resistance. If, for instance, postal operations are obstructed or interstate traffic is seriously hampered by local disturbances, he may order out the troops. In 1894 President Cleveland, against the protest of the Governor of Illinois, sent soldiers to Chicago which was the scene of a great railway strike affecting the movement of commerce and the mails. President Wilson resorted to similar action on the occasion of a labor dispute at Gary, Indiana, among the steel workers, and President Harding turned to the Army in 1922 when a strike threatened to tie up the railways.

The President's Power of Appointment and Removal

In connection with his executive functions, the President chooses or nominates a large number of federal officers. This is significant from the point of view of politics, as well as administration. It is a power which may be employed to foster partisanship or to secure the efficient performance of public duties.

Two Classes of Officials by Appointment. When considered in relation to the manner of their selection, the civil authorities of the United States—other than the President, Vice-President, presidential electors, Senators, and Representatives—fall into two groups: officers whose appointment is entrusted by the Constitution or by act of Congress to the President and Senate; and "inferior" officers whose appointment is vested by Congress in the President alone, the courts of law, or the heads of departments.

Between superior and "inferior" offices no clear distinction has ever been made. The right of Congress to decide, when establishing an office, that it shall be deemed "inferior" is beyond question, but no very consistent rule has been adopted for guidance. A few bureau chiefs of great importance are "inferior" officers in the view of the law, while others, some relatively less significant with respect to their duties, are in the upper range. In the main clerks and minor officers are chosen by departmental heads subject to the terms of the Civil Service Act (Chapter X).

Political Appointments. The first or superior group—chosen by the President and Senate—embraces nearly all the high officers of the Federal Government; for example, the heads of departments, most bureau chiefs, judges of the federal courts, the members of various commissions, heads of divisions, and chiefs of agencies. Taken together, they constitute an official army numbering thousands of persons, whose salaries amount to millions of dollars a year. In filling positions in this class, usually by choosing party workers, the President and Senate are unhampered except in some cases by statutes imposing such qualifications as citizenship, professional attainments, technical training, and the like. And as many of these officers serve only for a term of four years, under various acts or in practice, each incoming President has at his disposal an enormous amount of patronage, subject to the approval of the Senate. When Congress is in fairly harmonious relations with the President it is inclined to increase the proportion of officials whose appointment is vested in him alone or in heads of departments. But in times of conflict,

it displays another mood. When, for instance, in 1943, Congress was in revolt against President Roosevelt's domestic measures, it devoted days to criticising some of his appointees and the Senate actually passed a bill providing that the selection of all officials, with certain exceptions, receiving $4500 a year or more, should be subject to the approval of the Senate.[2] Such a threat is always "a gun behind the door" which Congress may employ in controlling the exercise of the President's appointing powers.

The officers appointed by the President and Senate may be subdivided into classes according to the degree of freedom which the former enjoys in exercising his own judgment.

The President's Personal Appointments. Members of the Cabinet, that is, heads of departments, are usually the President's personal choices, although in this relation he is often bound by preëlection promises or by obligations incurred in gaining the support of prominent persons in his party. At all events, the Senate, even when it is in the hands of the opposition, usually ratifies the President's nominations to these offices promptly and without objections. One exception in the course of thirty years or more—the rejection of a nominee for the office of Attorney General presented by President Coolidge—merely illustrates the rule. The choice of diplomatic representatives is also left largely to the President's discretion, as far as the Senate is concerned, although he always has many party obligations to consider in this connection. On occasion however he may be defeated in an attempt to secure the appointment of an ambassador or a minister. In 1943 when President Roosevelt nominated Edward J. Flynn, an influential Democratic party worker of New York City, to the post of ambassador to Australia, a storm broke in the Senate. Mr. Flynn was attacked as a politician with a clouded past and a man utterly unqualified for the position in question. Impressed by the attacks or convinced that the nomination would be rejected by the Senate, President Roosevelt withdrew the name of Mr. Flynn from consideration. Military and naval appointments, especially in times of crisis, are principally subject to presidential determination, but political influences are by no means wanting here. Nominations to the judiciary are nearly always approved—although occasionally the subject of hot contests in the Senate.

[2] It was estimated in 1943 that there were 27,684 employees in the executive branch receiving over $4500 a year and that their combined salaries amounted to $154,900,400 a year. *Congressional Record*, June 4, 1943.

Influence of Senators. A class of important federal offices scattered among the states, though nominally filled by the President with the advice and consent of the Senate, is subject largely to the control of the latter, as a result of a time-honored practice known as "senatorial courtesy." Under its power to advise and consent, the Senate does not officially suggest names to the President, but it will ratify nominations to many offices only under certain conditions. If either one or both of the Senators from the state in which the offices under consideration are located belong to the President's political party, then executive freedom of choice almost disappears. If only one Senator is of the President's party, then that Senator's will is likely to prevail. If both Senators are party colleagues, the preferences of the senior member will probably be accepted, especially if he is the stronger of the two; or a division of spoils may occur. At all events in such circumstances selections are made in fact, or at least approved in advance, by the Senator or Senators in question; otherwise the Senate, acting under the rule of senatorial courtesy, will probably reject the nominations. In case the federal offices to be filled are located in a state which has no Senator of his party, the President has more freedom of action, but even here he is bound to consult party leaders in the region concerned.

Influence of Representatives. A third class of officers subject to presidential nomination is composed of minor authorities of the United States such as revenue officers, marshals, and federal attorneys within congressional districts. In this relation it has become the custom to allow the Representative, if he is of the President's party, to name the appointees for his district; but if he is not of that persuasion, the patronage may go to a Senator, if there is one of the President's political party; unless for special reasons the President desires to make a "personal" appointment. The advice of the Representative is not always taken, but it has great weight, for as a rule such patronage is of considerable utility in maintaining his local party organization.

In selecting officers of the Government in localities, the President is compelled to rely more or less on persons familiar with local opinion. Speaking on the point, President Taft once remarked: "A member of a community remote from the capital . . . wonders that a President, with high ideals and professions of a desire to keep the government pure and have efficient public servants, can appoint to an important local office a man of mediocre talent and of no particular prominence or standing or character in the community. Of course the President cannot make

himself aware of just what standing the official appointed has. He cannot visit the district; he cannot determine by personal examination the fitness of the appointee. He must depend upon the recommendations of others; and in matters of recommendations, as indeed of obtaining office, it is leg muscle and lack of modesty which win, rather than fitness and character. The President has assistance in making his selection, furnished by the Congressmen and Senators from the locality in which the office is to be filled; and he is naturally quite dependent on such advice and recommendation."

Proposed Reforms in Appointment Methods. It is obvious that the appointment and removal of federal officers must consume a large share of the President's energies, especially just after his inauguration. The task is made far from easy by the necessity of consulting Senators and Representatives, hearing complaints from them, considering their suggestions, and allaying their grievances. It has been proposed therefore that nearly all the offices, except those political in nature, now filled by the President and Senate be placed under civil service rules (Chapter X). This would require in some cases a constitutional amendment and in others changes in law calling for a self-denying ordinance on the part of the Senators.

It has been argued that if the President could appoint without having to consult the Senate, the quality of the persons selected would be improved. The contention may be well founded but, on the other hand, the President could thus build up a political machine of his own. This is exactly what Republican Presidents usually do in the Southern states where they have no Senators of their party to placate with appointments. Nor have Democratic Presidents failed to take advantage of the situation in Northern states which insist on electing Republican Senators. The popular election of Presidents inevitably involves politics, and appointments will be made with reference to partisan exigencies as well as efficiency. For some social problems there is no mechanical solution.

Another proposed reform in appointment methods bears on the practice of giving good posts in the executive or judicial departments to former members of Congress defeated for reëlection—"lame ducks." This practice has long been common. It enables a President to encourage or hold in line many supporters in Congress by assuring them that, if they are defeated by the voters on account of their loyalty to him and his policies, they may count on getting good jobs in the Government as soon as they are out of Congress. In the general congressional revolt of

1943 this practice was severely criticised. A list of "lame ducks" appointed to high federal posts by President Roosevelt was laid before the House of Representatives by a Republican member and it was proposed that no Senator or Representative should be allowed to take a federal office until two years after the expiration of his legislative term. No action resulted from the proposal but the subject was discussed with some animation.

Efforts to Limit the President's Power to Remove Officials. The power of removal, so indispensable to the conduct of efficient administration, has long been one of the controverted points of American law. The Constitution itself makes no provision for removal except by impeachment—accusation by the House of Representatives and trial by the Senate acting as a court. On the general subject it is silent. With respect to officers chosen by the President in coöperation with the Senate, it was early agreed that the President could remove them at will without asking for senatorial approval. However, by a memorable act passed in 1867, during the long dispute between Congress and President Johnson, it was provided that in effect no person holding a civil office to which he was appointed with the ratification of the Senate could be removed by the President without the consent of that body. Although this sweeping provision was subsequently modified, Congress from time to time applied the same principle to certain classes of federal officers. For example, by a law enacted in 1876, it stipulated that first, second, and third class postmasters shall be appointed and may be removed by the President by and with the advice and consent of the Senate.

Consent of the Senate to Removal Not Necessary in Some Cases. Fifty years later this provision came squarely before the Supreme Court in the case of Myers v. the United States, and the Court ruled that the section in question "by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid." Apart from certain historical arguments, Chief Justice Taft, who rendered the opinion, rested his conclusion mainly on the clauses of the Constitution which vest in the President the executive power, the duty of appointing officers (when it is not placed elsewhere by Congress), the duty of taking care that the laws be faithfully executed, and the responsibility for commissioning officers of the United States.

Uncertainties in the Law. While clear as to the exact point decided, this case left important questions hanging in the air. What restrictions,

if any, can Congress place on the President's removal power? Can it stipulate that certain officers shall hold their positions for a fixed term of years and shall not be removed during that period except for specified causes? According to law, Federal Trade Commissioners may be removed for "inefficiency, neglect of duty, or malfeasance in office." Could the President oust them merely for dissenting vigorously from his policies? These points were not definitely settled by the Myers case.

In Some Respects Congress May Limit the Removal Power. Although Chief Justice Taft indicated in the Myers case that the President's power of removal was very broad and might be used generally, even to oust members of various federal commissions exercising quasi-legislative powers, the Supreme Court ruled otherwise in 1935 in the Humphrey case. The latter involved the action of President Roosevelt in removing W. E. Humphrey, a Republican member of the Federal Trade Commission, who had been outspoken in his opposition to the President's policies. In this instance the Supreme Court insisted that the President could remove only on the grounds set forth in the law and not for mere differences in opinion respecting the enforcement of law. At the same time it implied that the ruling also governed members of the Interstate Commerce Commission and the Court of Claims and left unquestioned merely the power of the President to remove purely executive subordinates. In other words, there seems to be a clear distinction between purely executive officials and officials exercising quasi-legislative and quasi-judicial powers. The former the President can remove at will; the latter, only on grounds set forth in the law, when such grounds are specified by Congress.

Senate's Influence over Removals. Perhaps however this is laying too much stress on legal formalities. Although it seems that Congress may no longer require the consent of the Senate to the removal of every officer whose nomination it ratifies, the upper chamber is not powerless. Its consent is still necessary to the appointment of the successor to any officer in this class unseated by the President. Hence it may serve informal notice on the President that it will not approve any name suggested for the vacancy if an incumbent is dismissed. This is not academic. Many years ago a President ardently desired to get rid of an Interstate Commerce Commissioner whose term had expired, and was taking steps in that direction. But his plan was blocked by underground news from powerful Senators to the effect that in case he did not reappoint the man in question he would face a vigorous fight in the Senate

to secure the confirmation of any new person; the President yielded and renominated the Commissioner whose tenure was in dispute. What the law forbids, political custom may establish by other means.

The President and Foreign Affairs

Although foreign affairs are treated below in separate chapters, the President's powers in this field are so great that, even at the risk of some repetition, they must be emphasized in the present review of his high office. It is true that in some respects he is controlled by the Senate and in others by Congress. The Senate may confirm or reject the treaties which he negotiates and has a similar jurisdiction over his nominations to diplomatic and consular posts. Congress alone can provide for American representation abroad and appropriate money for its support. In many instances also Congress must enact the special laws necessary to put treaty stipulations into effect. But while it may pass bills and resolutions, such as tariff and immigration measures, which deeply affect the attitude of other nations, neither house of Congress nor Congress as a body attempts to establish and maintain formal relations with any foreign country. This is now a firmly fixed practice. Congress may invite representatives of foreign governments to address its members. Foreign ambassadors and ministers may visit and consult with members of the House and Senate committees in charge of foreign affairs. Committees of either house may be sent abroad to investigate conditions bearing on the exercise of legislative powers. Congress has grave responsibilities in respect of all foreign relations. But the formal conduct of such relations is left to the President of the United States.

Control over Diplomatic Relations. The Constitution does not expressly declare that the President is the official spokesman of the United States in international affairs. Constitutional interpretation and practice ascribe this function to him. Under the terms of the Constitution he appoints ambassadors, other public ministers, and consuls, by and with the advice and consent of the Senate; he negotiates treaties with foreign governments, subject to the approval of the Senate; and he receives ambassadors, ministers, and other agents from abroad.

But his authority is not limited to the letter of the law. He may do many other things of vital significance in this sphere. He may proclaim foreign policies of far-reaching consequences. He may dismiss an ambassador or minister of a foreign government for political reasons and

embroil the country in a serious conflict. His power to receive foreign representatives authorizes him to recognize the independence of a new state, perhaps in rebellion against a legitimate sovereign, and thus he might involve the country in serious complications.

Naval and Military Actions. As head of the Navy, he may order a fleet or a single vessel to a foreign port under circumstances likely to raise difficulties; the ill-fated battleship *Maine* was sent to the harbor of Havana by President McKinley at a critical time when the action was regarded by many Spaniards, though not officially, as unfriendly. The result all the world knows. As Commander-in-chief of the Army he may move troops to a position on the very borders of a neighboring state and bring about an armed conflict. A notable instance of such a stroke occurred at the opening of the Mexican War, when President Polk directed American troops to enter disputed territory and, as soon as they were attacked by the Mexicans, declared that hostilities existed by act of Mexico. In July, 1941, President Franklin D. Roosevelt informed Congress that American armed forces were in Iceland and that he had ordered the Navy to protect communications between the United States and Iceland. In October of that year, before Japan attacked Pearl Harbor, he announced that Hitler had attacked American ships; that "shooting has started . . . America has been attacked."

Messages and Declarations on Foreign Affairs. Again, in his messages, notes, and public addresses the President may outline a foreign policy so hostile to another nation or combination of nations as to precipitate a diplomatic clash, if not more serious results. In his negotiations with Germany after the sinking of the *Lusitania* in 1915, President Wilson followed a policy that ended in an open break and then war. By his enunciation of principles, his notes to Germany, his dismissal of the German ambassador, his appeal to the nation for popular support, and other acts, he placed Congress in such a position that war was for practical purposes the only choice before it. On the other hand, a negative attitude on the part of the President may be of high significance in foreign affairs. The refusal of President Harding to recognize the government of Soviet Russia and to take part in numerous conferences held in Europe after the World War kept the United States out of the official international assemblies of the Old World and contributed to the growth of the policy called "isolation." After pursuing in effect an isolationist policy for about four years, President Franklin D. Roosevelt veered sharply away from it in the direction of "collective security," that is, an

active participation of the United States in the combined efforts of world powers to put down aggressors.

Treaties and Executive Agreements. In directing foreign affairs the President is not compelled to draw up every positive arrangement with another country in the form of a treaty. On the contrary he may make "executive agreements" on his own authority. Under the Constitution only treaties must have the approval of the Senate; while other types of international understandings are left by custom to presidential discretion. If this seems extraordinary at first glance, the reasons become clear on second thought; the number and variety of minor adjustments necessary to the smooth working of international relations render it impossible to employ the cumbersome treaty-making process in every case. Taking this fact into account, Congress has recognized the existence of a distinction between agreements and regular treaties; for example, by empowering the Postmaster General to make "conventions" with foreign countries respecting the carriage of international mails, without asking for senatorial approval. In this sphere the President's discretion is large (Chapter XIII).

Exchange of Notes. Another class of compacts is covered by the term "identical note." Such an understanding is really an exchange of letters between the Secretary of State, acting under the President's direction, and the representative of some foreign power. A remarkable illustration of that operation is afforded by the Lansing-Ishii Agreement of 1917 between Mr. Lansing, our Secretary of State, and Mr. Ishii, the Japanese ambassador, recognizing, so to speak, "by correspondence," among other things, the special position of Japan in the Far East—a sort of Oriental Monroe Doctrine for that country. This was in reality a vital commitment with respect to American foreign policy, and under the administration of President Harding it was cancelled.

Another illustration of what the President may do by a mere exchange of views was provided by President Roosevelt's conference with the British prime minister, Winston Churchill, on shipboard "somewhere in the Atlantic Ocean" in August, 1941. He conferred with Mr. Churchill on measures to be taken by their respective countries in the face of dangers from Hitler and the governments associated with him. They also drew up and signed a statement of principles common to the policies of the United States and Great Britain. This statement, soon published to the world and known as the Atlantic Charter, President

Roosevelt incorporated in his foreign policy as a fundamental feature to be realized in practice as far as possible.

Trade Agreements. An enlargement of the President's power over negotiations with foreign governments and the establishment of definite commercial relations occurred in 1934 when Congress, by the Reciprocal Trade Act, authorized him, for a period of three years, to enter into trade agreements with foreign countries, and in this connection lower the tariff rates by proclamation as much as fifty per cent, without securing the ratification of the Senate. Interested parties likely to be affected by such agreements were guaranteed merely the right to be heard. It was only under great pressure that this concession was wrung from the Senate. Perhaps nothing but the desperate search for foreign markets could have won it. Nevertheless when the law expired in 1937 Congress renewed it for another term of three years. In 1940 the term was again extended, for three years; and in 1943, for two years. Although the operation of the measure has not produced a remarkable upswing in American foreign trade, the Republicans have been unable to make an effective opposition.

Line between Treaties and Agreements Is Uncertain. The line between matters appropriate to a treaty and an executive agreement respectively is difficult to draw. As a matter of fact, a President may resort to the latter when he has been baffled by the Senate in an effort to make a treaty or believes that he could not obtain senatorial approval if he negotiated it. In 1905 Theodore Roosevelt signed a treaty with the government of Santo Domingo and the Senate rejected it. Thereupon he made an agreement with that government so framed as to accomplish the chief ends of the treaty and sent an American battleship to Dominican waters as a sign that he was in earnest. "The treaty has been practically carried into effect without consulting the Senate," a critic complained; but the Senate was helpless in the business. Between 1940 and 1944 President Franklin D. Roosevelt signed agreements with Great Britain and other governments included among the United Nations, which in effect made far-reaching commitments in the name of the United States. In 1943 such actions encountered hot protests in the Senate and at a kind of unofficial conference Senators and members of the State Department reached an understanding that a check would be put on efforts to "by-pass" the Senate and Congress in the making of agreements (Chapter XIII).

Secret Understandings Possible. All the cases to which reference has just been made were publicly known, but the President is not limited to "open diplomacy." He may enter secret agreements with foreign powers and commit himself to the pursuit of a specific policy. Through a high emissary sent to Tokyo in 1905, President Theodore Roosevelt came to terms with Japan on certain oriental affairs. On her part Japan undertook to respect American dominion in the Philippines; on the other side President Roosevelt agreed to accept the establishment of Japanese sovereignty over Korea (whose independence the United States had officially recognized). In the same exchange the President assured the Japanese premier that the people of the United States were in full accord with Japan and Great Britain in maintaining peace in the Far East, and that "whatever occasion arose, appropriate action of the government of the United States . . . for such a purpose, could be counted upon by them quite as confidently as if the United States were under treaty obligations." The whole affair was so quietly arranged that the American people knew nothing about it until after Theodore Roosevelt's death. Both before and after the United States became involved in the Global War, President Franklin D. Roosevelt held conferences with the British prime minister, Winston Churchill, and heads of other governments, in Washington and in places outside the country. Some of the agreements reached at these conferences were publicly announced. For reasons of State, others were kept secret.

Presidential Agencies in Foreign Affairs. Whatever the nature of the foreign business in hand, the President has a wide range of choice as to methods to be employed in negotiation. He may take up matters personally with the spokesmen of other countries in Washington or in a foreign place. If he employs agents, he has many possibilities open before him. The regular ambassadors, ministers, and consuls, of course, are at his command, but he is by no means limited to them. He may use a personal representative chosen and instructed at his pleasure, without reference to any act of Congress or the approval of the Senate. Hundreds of such representatives have been enlisted by Presidents since the establishment of the Republic. More than once during his administrations, President Wilson sent a private citizen, Colonel E. M. House, to Europe—sometimes with a general commission to sound foreign governments and on other occasions with high and significant powers, virtually to speak with the same authority as the President himself. President Hoover and later President Franklin D. Roosevelt employed

Norman Davis as a kind of roving commissioner for carrying on negotiations with governments in Europe. Again, the agent may be very secretly engaged; even the American ambassador in Tokyo did not know the purpose for which the President's agent visited Japan in connection with the affair mentioned above. If circumstances warrant, presidential representatives may be given high official rank. When President Wilson dispatched a mission to Russia in 1917, he assigned to the chairman the title of ambassador and to the other members that of ministers plenipotentiary. Yet they were not officers of the United States in a legal sense; they were merely executive agents. President Hoover and President Franklin D. Roosevelt occasionally sent representatives abroad on "roving commissions" for the purpose of inquiring into and reporting on specific or general situations. Appointments of this kind are not submitted to the Senate for ratification; and the President, who always has a contingent fund at his command, is for all practical purposes free to use his own discretion.

The Military Powers of the President

President Is Commander-in-chief. In peace and war the President is Commander-in-chief of the Army and Navy and of the state militia when called into the service of the United States. Provisions of law empower the President to appoint military and naval officers by and with the advice and consent of the Senate—except in the militia—and in time of war to dismiss them at will. The practice of vesting the removal power in courts-martial during peace relieves the President of a heavy burden.

War Powers as Commander-in-chief. In the actual conduct of hostilities the President is not limited to the direction of the armed forces; he may do whatever a commander-in-chief is warranted in doing under the laws of war to weaken and overcome the enemy. It was under this general power, belonging to his office, that President Lincoln, during our civil struggle, suspended the writ of habeas corpus in states even outside the theater of combat, emancipated the slaves in sections in arms against the Union, arrested those charged with giving aid and comfort to the Confederacy, established a blockade of Southern ports, and, in short, brought the whole weight of the North, material and moral, to bear in the contest. Under his war power, the President may also govern conquered territory. He can appoint officers there, make

laws and ordinances, lay and collect taxes of all kinds, and, in brief, practically exercise sovereign jurisdiction until Congress has acted.

Extent of and Limitations on War Powers. As demonstrated by President Wilson and President Franklin D. Roosevelt during two great wars in which the United States became involved, the war powers of the President as Executive and as Commander-in-chief are undoubtedly immense; and Congress may add to them by enacting blanket legislation giving him discretionary authority in matters of vital importance in domestic and foreign affairs. In the name of war necessity, he may make decisions almost immeasurable in their commitments and consequences. But they are not illimitable. Even in time of war, the President, as well as Congress, is subject to the provisions of the Constitution. It is scarcely conceivable, for example, that he would be permitted, even if he so desired, to alter the representation of the states in the Senate on the ground that it is necessary to winning a war. Beyond such obvious limits however lies a domain of war power which cannot be described in words—which can only be illustrated by practices (Chapter XIV).

Power of the President to Initiate and Carry Out Military Measures. According to the Constitution, Congress declares war, but in practice, many limited wars have been started and pursued by Presidents on their own motion. Many times since the establishment of the Federal Government, Presidents have, without previous authorization by Congress, ordered American naval or military forces to wage war. President McKinley in 1900 directed American armed forces in the Far East to coöperate with the troops of other governments in an armed expedition to Peking for the purpose of rescuing foreigners from the hands of the Chinese insurgents known as the Boxers. During President Wilson's administration, American marines were landed in Haiti and Santo Domingo under executive orders, local skirmishes were waged, and American military supremacy was established over the two countries. In 1918 President Wilson, in coöperation with certain Allied powers, including Japan in the Far East, sent American troops to Archangel and Vladivostok in Russia. Nominally the United States was at peace with Russia. War was not declared on Russia by Congress. But in fact American soldiers took part in fighting Russian troops. Under Harding and Coolidge, American armed forces were employed to suppress "disorders" in certain Caribbean countries. When in 1940 German naval forces began to fire at American ships operating under orders of President Roosevelt, "a shooting war" was started.

Use of Troops in Domestic Conflicts. At home the President may likewise use armed forces in executing federal law against resistance that cannot be overcome by ordinary civil process (p. 8). The United States, under the Constitution, guarantees to each commonwealth a republican form of government, protects it against invasion, and, on application of the legislature or of the executive (if the legislature cannot be convened), defends it against domestic violence. By act of Congress, the President is authorized to send troops when aid is asked by state authorities struggling with disorder.

The President's Relations with Congress in Form and Practice

President as Legislator. It is often said that Congress makes the laws and the President executes them. The statement is not correct even according to the letter of the Constitution, nor does it square with practice. Speaking strictly, Congress passes bills. If the President signs them, they become laws duly enacted. If he vetoes a bill, it does not become a law unless Congress repasses it by a two-thirds vote. Congress may vote to repeal a law duly enacted but if the President vetoes the repeal the law continues in force unless Congress can muster a two-thirds vote for the repealer (above, p. 131). Again, in a strict sense, Congress does not enact all the federal laws in force in the United States. Often it writes bills in general terms and confers upon the President or specified executive agencies the power to fill out the general terms by orders containing provisions of law in great detail. A statute may contain only a few lines and the executive orders issued under it may fill many pages. Besides, the President as Chief Executive and Commander-in-chief of the armed forces has an independent power to make and enforce some ordinances or orders in his own right.

Presidential Messages. As an officer under the Constitution and as head of his political party, the President shares with Congress the legislative powers vested in the Government of the United States. Indeed it is not too much to say that the fame of most Presidents rests upon their success in writing policies into law rather than upon their achievements as mere administrators. The Constitution itself contemplates presidential leadership in this relation. It requires the President to give Congress from time to time information on the state of the Union and to recommend such measures as he may deem necessary and expedient. The presidential message may be delivered orally in the presence of both

houses or sent to them as a document. Washington and Adams adopted the former procedure; Jefferson discontinued it and substituted the practice of sending written messages. This was the rule for more than a hundred years, until President Wilson in 1913 with a somewhat dramatic gesture returned to Washington's custom and read communications to the houses. For a time his successors followed in his footsteps. President Coolidge even read his first message to the general public over the radio as well as to Congress. But later he resumed the old practice of transmitting messages to Congress in the form of state papers. Subsequently the custom of reading important messages to Congress was restored by President Franklin D. Roosevelt.

The nature and purpose of the message vary from time to time. Occasionally it is a formal document conveying definite information on some special issue. Again, particularly at the opening session of Congress, it may have great political significance. It may be a solemn declaration of party policies drafted in consultation with party leaders. It may be a bid for reëlection in the form of a careful statement of the views entertained by its author. It may be an announcement to some other country, warning it against pursuing a certain course of action. It may contain a noteworthy statement of principles, such as the doctrine incorporated in Monroe's famous message of December, 1823, or the Four Freedoms in which Roosevelt summarized objectives of American foreign policy in 1941. Sometimes the message even goes into details and suggests specific laws.

Whatever may be its purport, the message is the one great public document of the United States which is widely read and discussed. Congressional debates receive scant notice, but the President's message is often quoted extensively in metropolitan dailies, and is the subject of general editorial comment throughout the length and breadth of the land. It stirs the country; it affects congressional elections; and it may establish grand policy.

Presidential Pressure on Congress. The treatment which the President's recommendations receive at the hands of Congress varies, of course, according to circumstances. They may be accepted if Congress feels that they are sound and that there is an effective demand for them in the country. If it is not convinced on such grounds, the President, by his party leadership, personal favors, or the use of patronage, may compel action. At all events, having set the issue by a proclamation to

the country, he is in a strategic position to force extended, if not favorable, consideration.

The Veto Power. Besides bringing pressure upon the national legislature to secure the adoption of his policies, the President may veto acts of Congress which are out of line with his convictions. Every bill or joint resolution, except proposed constitutional amendments, concurrent resolutions, and questions of adjournment, must be presented to the President. If he signs, it becomes law; if he disapproves, he must return it to the house in which it originated, with a statement of his objections. The house in question must then reconsider it and a two-thirds vote of both chambers is sufficient to carry a measure over an executive veto. If the President fails to return a measure within ten days (Sundays excepted) after it is presented to him, it becomes a law without his signature, unless Congress prevents its return by adjourning—at the close of a session or on the expiration of its term. In this case it does not become a law if the President withholds his signature. When Congress adjourns leaving many bills on his desk, the President may then quietly suppress those he does not like—a procedure known as the "pocket veto."

Unlike the governors of several states, the President cannot veto single items in appropriation bills. Taking advantage of this situation, Congress has occasionally attached other measures—disapproved by the President—to appropriation acts with a view to forcing his signature. Unwilling to block the wheels of the Government by cutting off supplies, he accepts the evil with the good. The practice of attaching "riders" to finance measures is somewhat discredited however so that Congress resorts to it only in exceptional circumstances.

Grounds for Exercising the Veto. On what grounds is the Chief Magistrate justified in employing the veto? According to the opinion of Hamilton, the right of negation was conferred on the President so that he could defend his prerogatives against the propensity of the legislature to absorb the powers of the other departments. To this contention Hamilton also added: "The power in question has a further use. . . . It furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body." On the question of propriety, Presidents themselves have differed. Jefferson contended: "Unless

the President's mind, on a view of everything which is urged for and against the bill, is tolerably clear that it is unauthorized by the Constitution—if the pro and con hang so even as to balance his judgment—a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion." On the other hand, President Jackson thought that he could do as he pleased and besides he had his own opinion about the meaning of the Constitution; he even alleged unconstitutionality as one of the reasons for refusing to sign the Bank Bill, although such a measure had been clearly upheld by the Supreme Court.

Frequency and Nature of Vetoes. Naturally it is when the President is of one party and Congress of another that the veto is most likely to come into play. Yet in practice there are striking exceptions to this assumption; Coolidge's administration a Republican Congress enacted a bill granting a bonus to veterans of the World War and then repassed it over his veto. President Franklin D. Roosevelt had a similar experience with a bill providing for the payment of the soldiers' bonus in cash; and right in the midst of the Global War in 1943 Congress overrode his veto of the Smith-Connally "anti-strike" bill—a measure hotly opposed by organized labor, upon whose support the President had drawn heavily in his three elections.

Sometimes it is understood among party leaders that the President will veto a specific bill if it is passed; thus members of Congress may win favors with their constituents by voting for it, knowing in advance that the President will block it. Sometimes a President will veto a bill in such a fashion as to put the onus entirely upon Congress while gaining applause in certain quarters for his own action. For example, when President Roosevelt delayed acting on the Smith-Connally bill until many members opposed to the bill had gone home for the weekend, his critics declared that he did this intentionally, knowing that enough votes could not be mustered to sustain his veto. The charge, of course, could not be proved, but the incident illustrated the importance of methods and timing in the exercise of the veto power. The next year, 1944, after President Roosevelt had vetoed an important revenue bill and sharply criticized Congress in his veto-message, the House and Senate, in a tempest of wrath, carried the bill over his veto by overwhelming majorities.

Criticism of the Veto. Whether the veto system as operated has improved the quality of legislation or worked for responsibility in government is certainly open to question and has often been questioned. As

recently as 1943, Hatton W. Sumners, a Democratic member of the House, severely criticized it as operated and proposed a resolution amending the Constitution in such a way as to permit Congress to override a presidential veto by a simple majority vote. Mr. Sumners declared that "from Washington to Lincoln, inclusive, there were only 43 bills vetoed by those sixteen Presidents . . . ; whereas from March, 1933, to June 26, 1943, inclusive, there have been 592 vetoes." The system, he contended, gives the President too much power, especially at a time when his power has been greatly augmented in other ways, and permitting Congress to overcome a veto by an ordinary majority vote would help to redistribute power in the Government and would really make Congress responsible for legislation.

Presidential Leadership in Legislation. Formally, every bill considered by Congress must be introduced in Congress by a Representative or a Senator or on a report from a committee. The President, however, according to the Constitution, shall from time to time recommend to Congress "such measures as he shall judge necessary and expedient." He may and often does accompany his recommendation with the text of the bill which he wishes to have considered and enacted into law. Thus the Constitution vests in him a responsibility for leadership in legislation. To his obligations as Chief Executive has been added in political practice a responsibility for legislation as the leader of his political party. As a matter of fact, it is to the President rather than to Congress that his supporters look for the translation into law of the promises made in the party platform or in speeches delivered during the campaign for election.

"Under our system of politics," said President Taft, "the President is the head of the party which elected him, and cannot escape responsibility either for his own executive work or for the legislative policy of his party in both houses. He is, under the Constitution, himself of the legislature insofar as he is called upon to approve or disapprove acts of Congress. A President who took no interest in legislation, who sought to exercise no influence to formulate measures, who altogether ignored his responsibility as the head of the party for carrying out ante-election promises . . . , would not be doing what is expected of him by the people."

The President's Legislative Weapons. The constitutional power to recommend measures to Congress and the strength of party leadership do not alone account for the President's full authority in legislative

leadership. He has other instruments, honorific and pecuniary, at his command. He can make nominations to high offices carrying prestige and honor throughout the country and may bestow these prizes on members of Congress if they receive his favor—and politically, "deserve" it, or on men designated by Senators or Representatives. He has at his disposal thousands of less glittering offices, with salaries attached. He has a certain degree of control over the distribution of lucrative contracts and of funds from the federal treasury for various purposes, federal, state, and local. With the enormous increase in the number of federal officials and employees and in expenditures for a variety of purposes, the power of the President over the ambitions and fortunes of Senators and Representatives in Congress has been correspondingly augmented, in practical ways almost beyond calculation.

The President's Powers as Legislator. In matters of legislation the President is not merely limited to his rôle of leadership in initiating measures and pressing them through Congress. He is in fact, if not in theory, a legislator in his own right. In respect of some matters he has a power to issue decrees and make ordinances as Chief Executive and as Commander-in-chief of the armed forces. In other cases he makes rules, orders, and instructions carrying out in detail the acts of Congress conferring upon him what amounts to legislative power. In recent years it has been a growing practice of Congress in passing laws to cast them in general terms and to allow the President or executive agencies to fill in the outlines—to legislate in fact. Enlarging upon an old practice, Congress began, during the economic crisis of 1933, to enact "blanket bills," that is, bills written in vague language, vesting enormous powers in the President over life and property. For example, the National Industrial Recovery Act of 1933 authorized the President to organize and regulate the industries of the United States, to create new agencies, to make regulations for them, to delegate functions to subordinates, and to do other things deemed necessary to bring about economic prosperity. In that year and in subsequent years other bills of the same general character were enacted into laws. As a matter of fact most of the legislation constituting "the New Deal" was planned by the Executive Department, not by Congress, and augmented the power of the President to issue orders.

Legislative Leadership of Franklin D. Roosevelt. Beginning with the inauguration of Franklin D. Roosevelt in 1933 presidential leadership in legislation reached a point of power higher than ever before in the

history of the United States. With a few exceptions, every important measure enacted by Congress between 1933 and 1943 either originated in the Executive Department or was sponsored by the President. Not only did President Roosevelt recommend measures to Congress and use his many powers in pushing them through to enactment. He even sought, though with little success, to "purge" Congress of certain Democratic opponents by openly opposing their reëlection, especially in the congressional election of 1938. His triumph in his campaign for a third term in 1940 seemed to give the stamp of popular approval to both his methods of leadership and his measures.

The congressional election of 1942, however, marked a turn in the tide, at least for a time. In that election Republicans and independents received a majority of the total vote cast and the Democratic majority in Congress was materially reduced. The new Congress, which assembled in January, 1943, struck down one after another measures sponsored or favored by President Roosevelt; and its members, Democrats as well as Republicans, assailed the policies of his Administration, especially in respect of domestic affairs. Meanwhile the question of presidential leadership and congressional responsibilities was vigorously discussed in Congress and outside and the debates were accompanied by demands for reforms in legislative practices and in the relations of the President and Congress (see Chapter IX).

The Pardoning Power

In addition to his powers as Executive and in relation to legislation, the President has a high judicial power. He may grant reprieves and pardons (except in cases of impeachment) for offenses against the United States. He may remit a fine, commute a death sentence to a term of imprisonment, or give a convict complete freedom; but when forfeiture of office is one of the penalties imposed, he cannot restore the offender to his former position. Clemency may be exercised before or after conviction.

In this field, the President relies, of course, largely upon the conclusions of others. In each instance the application for pardon is sent to the office of the Attorney General, where a pardon-clerk takes charge of preliminaries. Usually the judge and the district attorney under whose direction the case was first tried are asked to make a statement about the merits of the appeal.

After the facts are carefully reviewed, the Attorney General expresses his opinion on the application and transmits the documents to the President for final determination. "If the trial seems to have been fairly conducted," said President Benjamin Harrison, "and no new exculpatory evidence is produced, and the sentence does not seem to have been unduly severe, the President refuses to interfere. He cannot weigh the evidence as well as the judge and jury. They saw and heard the witnesses, and he has only a writing before him. It often happens that the wife or mother of the condemned man comes in person to plead for mercy, and there is no more trying ordeal than to hear her tearful and sobbing utterances and to feel that public duty requires that she be denied her prayer." This is a burden which the President cannot escape.

The President's Privileges and Rights

In the discharge of his duties, the President enjoys certain privileges and rights. No court of law in the land has any jurisdiction over him for any offense. He cannot be arrested for any crime, no matter how serious. Like other civil officers he may be impeached by the House of Representatives and tried by the Senate for treason, bribery, or other high crimes and misdemeanors, but until judgment has been pronounced against him, he cannot be in any way restrained in his liberty.

The President is entitled of right to payment for his services, for the Constitution provides that he shall receive at stated times a compensation which may not be increased or diminished during the term for which he is elected. He is forbidden however to receive any other emolument from the United States or from any state. The salary of the President now stands at seventy-five thousand dollars per annum. In addition to his personal compensation the President is furnished a residence known as the White House, administrative offices, and allowances for contingent expenses. In time of war or other crisis huge sums have been placed in his hands by Congress to be expended at his own discretion.

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CHAPTER VIII

INTERPRETATION AND ENFORCEMENT OF LAW BY THE JUDICIARY

Dual Rôle of the Judiciary. From one point of view the judiciary may be treated as the guardian of the whole American system because on appeals made in due form by interested parties it may pass upon the constitutionality of acts performed by all other public agencies in the United States, high and low, from the village council to the Congress at Washington. Beyond the decisions of the Supreme Court in such matters there lies no formal appeal save to the cumbersome process of constitutional amendment. From another point of view the judiciary may be regarded as an executive organ engaged in the interpretation, application, and enforcement of law. By far the major portion of its business—that is, the cases which come before it—falls within the sphere of law enforcement. Hence it may properly be bracketed with the executive department of the Government. Wherever it comes in any philosophic arrangement, its dual rôle as supreme guardian of the Constitution and as an executive agency should be kept in mind.

Constitutional Position of the Federal Courts

Power of Congress to Create. The brief Article of the Constitution dealing with the judiciary makes only a slight reference to the number and structure of the federal tribunals. It merely states that the judicial power shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish. Thus Congress is given authority to determine the number of judges appropriate to the Supreme Court and to create additional tribunals. For the judges of all the regular courts however the Constitution seeks to maintain a high degree of independence by assuring them permanence of tenure during good behavior and a compensation for their services which cannot be diminished during their continuance in office.

Power of Congress to Control. Still to some extent the federal courts are at the mercy of Congress. While it cannot abolish the Supreme Court at one stroke, cut the salaries of the acting judges, or remove any of them except by the process of impeachment, it may by a circuitous route effect a revolution in the composition of the Court. It may reduce the number of judges by providing that on the death or resignation of any of them the vacant post shall be abolished or, as Franklin D. Roosevelt proposed, increase the number of judges and secure the "right" kind of appointments (p. 227). As to the inferior courts, Congress has gone even farther. In 1802, during Jefferson's administration, it repealed the law of the preceding year creating sixteen circuit judgeships which President Adams had filled with Federalists at the close of his term. Moreover Congress can prevent certain classes of cases from coming before the Supreme Court by refusing to provide a system of appeals; this has been done on one occasion. Nevertheless we may say that, except in times of crisis, the federal judiciary enjoys a high degree of independence from legislative interference.

Appointment and Tenure of Judges. A special guarantee is afforded by the method of selection. All federal judges are nominated by the President and appointed by and with the advice and consent of the Senate. With regard to the inferior courts, this rule is a matter of custom rather than of express command. The Constitution merely stipulates that the President and Senate are to appoint the judges of the Supreme Court and authorizes Congress to vest the appointment of such "inferior officers" as it thinks proper in the President alone, in the courts of law, or in the heads of departments. But by uniform practice it is settled that the judges of the lower federal tribunals are not "inferior officers" whose appointment should be taken from the President and Senate and vested in some other authority. All regular judges hold office during good behavior and can be removed only by impeachment.

The National Judicial Power

The jurisdiction of the federal courts as a whole is defined in the Constitution. It embraces two broad classes of cases: those affecting certain *parties* or *persons* and those relative to certain *matters*.

Jurisdiction over Persons and Parties. With reference to the former, federal jurisdiction covers all cases pertaining to ambassadors, other public ministers, and consuls; controversies to which the United States is a

party; controversies between two or more states, between a state and citizens of another state, between citizens of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects. To this generalization an exception must be made, namely, that the judicial power does not extend to any suit in law or equity commenced or prosecuted against any state in the Union by an American citizen or by a citizen of a foreign country. It must be noted also that, in actions coming within federal jurisdiction, corporations are citizens although for other purposes they may be deemed persons. When parties enumerated above are involved in actions at law their cases may come under federal judicial authority, even though the Constitution and laws of the United States are not at all drawn into controversy. So much for the jurisdiction of the federal courts over parties to actions at law.

Jurisdiction over Matters. Regardless of the parties involved, federal judicial power extends to certain *matters*, that is, to all cases in law and equity arising under the Constitution, the statutes, and the treaties of the United States and to admiralty and maritime questions. Under this head a proper case is made, says Story, "when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law," that is, starts a suit involving federal law.

The Structure and Business of the Courts

The Nature of the Supreme Court. Under these constitutional mandates, Congress has created a hierarchy of federal tribunals. At the head is the Supreme Court composed of nine judges—a Chief Justice, paid twenty thousand five hundred dollars a year, and eight Associate Justices with salaries of twenty thousand dollars. This Court holds its formal and open sessions usually from October until May in Washington. Concerning the actual duties of the Supreme Court the Constitution says little. It confers on that tribunal original but not exclusive jurisdiction over all cases affecting ambassadors, other public ministers, and consuls and those to which a state is a party; that is, as far as the Constitution is concerned, such cases may be carried before the Supreme Court in the first instance without having been heard previously in a lower court. But in all other cases the jurisdiction of the Supreme Court is necessarily appellate, subject to such exceptions and regulations as Congress may see fit to make.

Wide Discretion of the Supreme Court. Hence it may be said that the language of the Constitution throws little light on the actual jurisdiction of the Supreme Court—on the substance of the business which comes before it for decision. For information on this point it is necessary to examine the laws of Congress stretching back over more than a century. In general the later laws, especially the highly significant Judiciary Act of 1925, reveal a striking tendency to diminish the obligation of the Court to hear specific kinds of cases and to widen its discretionary authority. To speak concretely the classes of cases which can be carried up on appeal, as a strict matter of right, from state and lower federal courts are now limited mainly to matters involving the constitutionality of state and federal laws and the regulation of economic enterprises.

It is the discretionary power of the Court which is broad and flexible. It has wide authority to hear petitions for the writ of *certiorari* asking it to call up, review, and determine cases tried or pending in lower courts for "special and important reasons" governed by "sound judicial discretion." Although the reading of such petitions consumes a large amount of its time, the Court is free to pick and choose the weighty matters upon which it wishes to pass.

Growth of Interpretative Functions. In all this there is nothing theoretical. The rapid narrowing of obligatory jurisdiction is statistically revealed in comparative tables presented by Frankfurter and Landis in their epoch-marking volume on the business of the Supreme Court. According to their figures a noteworthy decline has occurred in the amount of ordinary private and common law litigation before that Court. On the other hand a great increase has taken place in cases involving state and federal control over trusts, railways, labor, and other economic matters and cases affecting the constitutionality of state and federal statutes, which are also frequently concerned with regulation of economic enterprises.

Cases of Large Policy. The exercise of the jurisdiction conferred upon the Supreme Court makes necessary two types of intellectual operations, one pertaining to large issues of public policy and the other to technical matters. In the former instance the Court is controlled only by the general language of the Constitution, which, as a judge once remarked of a particular clause, is characterized by "convenient vagueness." Speaking of problems under this head, the authors just cited remind us: "The words of the Constitution on which their solution is based are so unrestrained by their intrinsic meaning or by their history or by tradition or

by prior decisions, that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life. . . . The process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the Justices are their 'idealized political pictures' of the existing social order."

Technical Cases. The second type of intellectual performance mentioned above, namely, that pertaining to technical matters, is illustrated in innumerable railway and utility cases. Frankfurter and Landis give a few examples. "What constitutes a 'spur track,' when public convenience justifies a railroad extension or abandonment, under what condition one railroad must permit use of its facilities by a rival, how far the requirements of a state for the abolition of grade crossings depends upon approval by the Interstate Commerce Commission, these and like questions cannot be answered by the most alert reading of the Transportation Act. Their solution implies a wide knowledge of railroad economics, of railroad practices and the history of transportation, as well as political philosophy concerning the respective rôles of national control and state authority." Even more complicated issues may arise in patent litigation, forcing the Supreme Court to review the development of difficult technical processes and inventions and to pass upon matters that might well baffle the most skilled chemist, physicist, or engineer. Of such diverse materials is the business of the Supreme Court composed.

Nature of a Case. A case as presented to the Court is an action between two parties over property, personal rights, or the validity of some act of a state or federal authority. It appears in the form of a statement of facts and law involved in the controversy, supplemented by briefs and arguments of attorneys supporting the contentions of their respective clients. When a case has been submitted, it is the duty of the justices to consider the issues and to apply the law. After each judge has examined the matter independently, a conference is held at which the various points are discussed at length and a decision is reached, if necessary by a majority vote.

Opinions of the Court. Thereupon the Chief Justice either prepares, or requests one of his colleagues to prepare, a document called "the opinion of the court," which contains a line of reasoning, citations of authorities, and the final order in the disposition of the affair. This "opinion" is subjected to careful scrutiny and, after revision, it is printed and placed on record. Any judge who agrees with the decision, but bases his con-

clusion on other grounds than those put forward in the official argument, may prepare what is called a "concurring opinion," in which he explains how he arrives at the same end. In some instances therefore a majority of the Court may agree that a particular controversy shall be decided in a certain way, but two or more justices may assign different reasons for the judgment.

Dissenting Opinions. If there is a diversity in views, judges who are not in accord with the ruling of the majority may file a "dissenting opinion," setting forth their reasons for believing that the case should have been decided otherwise. Occasionally each of the dissenters prepares his own statement; sometimes one of them writes an argument which is concurred in by his colleagues. Such protests, of course, are not law but they are by no means futile gestures. Often in the drift of time they are accepted by the majority of the Court and made the basis for reversing earlier decisions. At all events powerful dissenting opinions are widely read by lawyers and enter into public consideration of federal jurisprudence—become a part of the thought of the land which in the long run affects the law of the land. Since many great cases are decided by a narrow vote of five to four, it can readily be seen that a slight change in the composition of the Court may transform a dissent into an official declaration.

All opinions rendered by the Supreme Court are published in the *United States Reports*, and at the present time the decisions for a single term may fill three or four volumes. They furnish a great authoritative source of information on the historical development and present status of constitutional law.

District Courts. At the bottom of the regular judicial hierarchy is the federal District Court. To bring such a tribunal within easy reach of litigants, Congress has divided the country into numerous districts and provided a federal court for each of them. In the sparsely settled regions, a state may constitute a single district; but the larger and more populous states are laid out into two or more districts. The number of judges assigned to a District Court also varies from place to place according to the magnitude of the business to be handled. If a district is very big it is in turn laid out into "divisions," and arrangements are made for holding terms of the Court in each of them at stated times of the year.

The matters which may be brought to trial in a federal District Court are so varied in character and so complicated that they need be mastered only by the practicing lawyer whose duty it is to discover the proper

forum into which his clients' business may be taken and reviewed. Among other things the jurisdiction of this tribunal embraces all crimes and offenses cognizable under the authority of the United States, cases arising under the internal revenue, postal, and copyright laws, proceedings in bankruptcy, and actions involving the laws which govern the immigration of aliens, contract labor, and monopolies in restraint of trade.[1]

Circuit Courts of Appeal. Between the Supreme Court and the District Courts is a Circuit Court of Appeals in each of ten great circuits into which the United States is divided. Where the amount of litigation is large, the Circuit Court consists of four or five judges; in other places, of three. To each of the ten regions a Supreme Court Justice is assigned, but he no longer "rides the circuit" as in former times. As its position in the judicial system indicates, the prime function of the Circuit Court of Appeals is to hear appeals from the District Courts and to relieve the Supreme Court of a large mass of transactions that would otherwise glut its calendar.

To effect this purpose two fundamental arrangements are made by law. In the first place all appeals from District Courts, with a few substantial exceptions, must go to the Circuit Court of Appeals for the appropriate circuit. The exceptions are cases involving federal legislation against trusts and monopolies, the enforcement of the orders of the Interstate Commerce Commission, the validity of state laws, and a few other matters of special weight; only such controversies may be carried from District Courts directly to the Supreme Court of the United States. In the second place the decisions of the Circuit Court of Appeals in the ordinary run of things are final. However, it may ask the Supreme Court for instructions on any point of law and under certain conditions causes may be removed from its forum to the highest court of the land (p. 197). Thus by a sifting process, as we have said, the Supreme Court gets cases of high economic and constitutional significance.

The Judicial Conference. For more than a century the several regular courts operated separately, and Congress was left largely to its own de-

[1] In addition to the regular hierarchy of courts, Congress has created from time to time special courts. There is a Court of Claims composed of a chief justice and four associate judges whose duty it is to hear claims against the Federal Government. If it decides that a certain amount of money is due from the United States to any party, it cannot order payment, but must depend upon appropriations made by Congress. This Court partially relieves Congress of the great political pressure brought on behalf of private claims. Congress has also created a judicial system for the District of Columbia comprising a district court, a district court of appeals, a supreme court, and minor courts. For special business there are a Court of Customs and Patent Appeals, a Customs Court, and a Tax Court.

vices in discovering the needs of the judiciary as revealed by experience. Meanwhile judicial business increased in size and complexity, taxing the strength and ingenuity of the judges to the limit. If perplexed by their tasks or overburdened with duties, they could merely address appropriate congressional committees in search for remedial legislation.

At last in 1922 Congress, in response to obvious needs, authorized the establishment of a "judicial conference," to be called annually by the Chief Justice, or in case of his disability by the senior Associate Justice of the Supreme Court, and to be composed primarily of judges from each of the circuits, preferably the senior circuit judges. At these conferences reports are heard from the several circuits on the state of their business; problems of improving judicial procedure are discussed; and suggestions are made for changes in statutes and court rules. In this way the Chief Justice and Congress may be kept informed respecting the questions and conditions of law enforcement throughout the Union. A further step has been taken in the improvement of judicial administration by an enactment authorizing the Chief Justice, in certain circumstances, to transfer district judges from one district to another temporarily to relieve congestion of business.

Growing Importance of the Judicial Conference. Many things conspire to make the judicial conference of increasing significance for the government of the United States and the rights of life, liberty, and property. As the complexities of legislative problems multiply and Congress confers new regulatory, ordinance, and discretionary powers on the President or specific executive agencies, the burdens of the federal courts grow in number and weight, for upon them falls the duty of interpreting such legislation and determining whether executive agencies have exceeded their powers. Their decisions in such cases affect not only the rights of parties to the particular cases they decide but constitute guiding law for all outside parties coming within the purview of the acts of Congress and executive agencies in question. Federal judges are thus, in a way, high administrative supervisors in the Government and quasi-legislators, as well as final adjudicators in legal controversies. They are active in, and informed respecting, the whole business of the United States Government.

The Judicial Conference as a National Assembly. The Judicial Conference, meeting annually and on call of the Chief Justice, is in reality an assembly for the transaction of national business extending in scope far beyond the technology of legal adjudications. The session held in Sep-

tember, 1943, for instance, was attended by the Chief Justice, a judge from each of the ten circuits, the Chief Justice of the District of Columbia, the Attorney General and departmental assistants, officers of the Administrative Office of the United States, and, on invitation, majority and minority representatives from the judiciary committees of the House and Senate.

Before this conference came the following matters for discussion and action: recommendations of the Attorney General respecting procedures and bills for future legislation; the state of the dockets in all the federal courts; questions of delays in judicial business and proposals for expediting it; budget estimates for the maintenance of the federal courts; many technicalities important for improving the procedures of the court; resolutions pertaining to issues of judicial efficiency and to legislation to be enacted by Congress. Among the resolutions adopted was one declaring it to be the sense of the Judicial Conference that it is incompatible with the proper service of the federal judiciary for its officers or employees to become candidates for political office or participate in other political activities of a kind forbidden to employees of the executive branch of the Government. At the close of the conference a number of special committees were appointed to study and report on matters to be considered in the future.

Jury Trial. Attached to the federal judiciary, of course, is the ancient jury system, so long and so intimately associated with the development of personal liberty in England. The original trial of all crimes, except in cases of impeachment, shall be by jury, runs the original Constitution; and to this stipulation are added detailed provisions by way of amendment (p. 28). But in practice the jury is not used in federal criminal cases called "petty."

Judicial Power to Punish for Contempt. In connection with the exercise of their authority, federal courts, in common with courts in general, have the power to punish private parties for "contempt." According to one theory that power extends only to the right to punish persons for acts which are committed in the presence of the court or have the effect of interfering with the proper conduct of judicial proceedings. In practice however judges have fined and imprisoned critics for spoken or written objections uttered outside the court room and merely casting some reflection on judges themselves. For example, on one occasion, the Comptroller of the City of New York published a letter passing certain more or less severe strictures on the conduct of a federal judge in that city in

a particular case and was promptly sentenced to prison by the irate judge. The Comptroller was only saved from jail by a timely pardon issued by President Coolidge. Such cases, which are rather numerous, are responsible for a demand for the curtailment of the power of the courts to act as accusers, judges, and jurors in matters of contempt against themselves committed outside the court room, especially in controversies involving criticisms of judicial policies and decisions, which in no way impede the course of justice (below, Chapter XIX).[2]

The Power of Passing upon the Constitutionality of Statutes

The Question of Intention. The jurisdiction of the federal courts extends not only to matters in law and equity in the strict sense; it also includes cases involving the constitutionality of state and federal acts. Nowhere, it is true, does the Constitution expressly provide that the federal courts may declare an act of Congress or of a state legislature invalid. Indeed some writers hold that the framers did not intend to confer such a power, at least over federal statutes, upon the courts of the United States and that the judiciary has usurped its authority in this regard. Long ago President Jefferson declared that it was the design of the Fathers to establish three independent departments of government, and that to give the judiciary the right to review acts of the other branches would make it supreme over Congress and the President.

Despite many claims made in their name, it is not possible to discover exactly what was the opinion of all the members of the convention at Philadelphia on this point. The issue was not laid before that body in the form of a definite proposition and was never made the subject of a direct vote. Still we are not entirely in the dark. It is known that a few of the delegates were opposed to the idea of judicial control, for they expressed such a conviction incidentally while discussing other topics. It is likewise established that many other members, either before or after the adoption of the Constitution, indicated their belief that the federal judiciary, in the normal course, should exercise the power to pass upon the constitutionality of laws.

The affirmative side of the case was very plainly put by Hamilton in the *Federalist*: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded

[2] For the great writs employed by the federal courts, see Beard, *The American Leviathan*, pp. 121 ff.

by the judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." There is good ground for thinking that a majority of the prominent members of the convention took a similar view of the federal judicial power.[3]

Question Answered by Marshall. Whatever may have been the intention of the framers, Chief Justice Marshall, in the famous case of Marbury v. Madison, decided in 1803, announced that the Supreme Court, under the Constitution, possesses the power to hold federal statutes void when they conflict with the fundamental law (p. 49). Although there were some protests at the time from objectors, they made little stir, especially as the measure which Marshall declared invalid was of no great importance and the Court did not attempt to nullify another for more than fifty years.

Power over State Actions. In the early days of the controversy respecting the judiciary far more attention was paid to the power of the Court over acts of state governments. With trip-hammer strokes, Marshall struck down one state statute after another as violating the Constitution. And with equal regularity Jefferson or other defenders of states' rights protested against his policy. They admitted the supremacy of the Federal Government within its domain, but they argued that to give the Supreme Court the right to determine the validity of state laws would in fact enable the Government to define its own sphere of sovereignty and reduce the states to mere administrative subdivisions. However the leaders of this opposition did not offer any adequate plan for amicably settling disputes between federal authorities and state governments over their respective limits of power. The logic by which the federal judiciary secures its right to pass upon the validity of state legislation is as compelling as that applied in the case of federal statutes.

Process of Testing State Laws. At all events, Congress has provided by law various ways for testing in the federal courts the validity of state actions. For example, a case may be taken to the Supreme Court of the United States from the highest court of a state having jurisdiction over the issue, whenever the latter denies the validity of a federal treaty or

[3] Beard, *The Supreme Court and the Constitution*

statute or any exercise of authority in the name of the Government of the United States. A case may also be taken to the Supreme Court whenever a state court of final jurisdiction declares that a state law or act done under state authority does not violate the Constitution or the laws of the United States.

To make the process clear, let us take a concrete case. The legislature of New York once passed an act limiting the hours of employees in bakeshops to sixty per week or ten per day. One Lochner, an employing baker in that state, contended that the statute interfered with rights which he enjoyed under the Constitution of the United States, and resisted its enforcement. His case was carried up to the highest court of New York where the statute in question was declared valid. Since this ruling was against the privileges which he claimed, Lochner appealed to the Supreme Court at Washington and won from that tribunal a favorable decision, holding the law in controversy void, as contrary to certain provisions of the federal Constitution.

The Nature of Judicial Annulment. In deciding against the validity of any statute, federal or state, the Supreme Court does not officially annul the measure; it declares it void and refuses to enforce it in the particular case in hand. Thereupon the appropriate officers take cognizance of the fact and stop their efforts to carry it into execution.

All actions in the federal courts in this relation are in the nature of judicial proceedings. Courts take notice of the constitutionality of a statute only when the matter is brought to their attention in the form of a case involving the rights of parties to a suit. In no instance will federal judges consider the validity of a law in the abstract or render any opinion to Congress or the President on the constitutionality of a proposed measure. This rule was adopted early. In 1793 Washington sought the advice of the Supreme Court by laying before it twenty-nine different questions, but the Court declined to answer them on the ground that it could not give opinions except in regular cases properly brought before it in the ordinary course of judicial proceedings. Federal practice in this regard therefore differs from that in some of the states.

Law Enforcement

Dependence of the Courts on Administrative Officers. The power of federal courts depends not only on their decisions and interpretations of law but also upon the degree to which they can win compliance with

their interpretations and orders. In the latter regard, the courts are largely at the mercy of executive agents. It is on the administrative branch that the courts must rely for the arrest of alleged offenders and the presentation of a variety of cases. Consequently the ability of the courts to gain solid respect for the law varies according to the diligence with which offenders are sought out, and the skill with which they are prosecuted by executive officers. There was a decided difference, for instance, between the attention paid to the anti-trust laws during the lenient McKinley Administration when but two indictments were brought under them, and during the "trust-busting" days of Theodore Roosevelt, when there were forty-five indictments, or during the furor of prosecutions under Franklin D. Roosevelt for a few years (below, Chapter XVIII).

Nor does the dependence of the courts on executive agents for the efficient enforcement of the law end with the presentation of cases. To a large extent, courts must rely upon administrative officers for carrying out the judicial will. In the Merryman episode of Civil War days, the Supreme Court ordered the commander of Fort McHenry to show cause why a certain person held in his custody by the army should not be released, but the refusal of that officer to comply with the demand brought the matter to an end. On the other hand, if executive agents readily cooperate, the Court may see its decrees rapidly executed and its interpretation of the law prevail.

In all its phases, the dependence of the courts on administrative agents for ferreting out criminals and carrying their decrees into effect is increasing. With the rapid advance of technology, the country has been flooded with new devices to be regulated, creating an unprecedented rise in the number of laws to be enforced. What is more, the mass of federal legislation is becoming steadily more complex, as matters of physics, chemistry, and mechanics find their way into the statute books. To the mounting volume and intricacy of federal legislation must be added still a further barrier to the easy apprehension of violators by executive officers —the ability of modern criminals to warp science and invention to their own ends, as by smuggling goods by airplane or having their appearances changed at crucial moments by plastic surgery. In the circumstances, the effective operation of executive agencies in supplying cases to the courts and executing judicial decrees is essential to law enforcement.

The Department of Justice. The work of discovering offenders against federal law and bringing them before the courts is distributed among several distinct organizations of the Government with a personnel total-

ling more than 50,000. Only one of these agencies, the Department of Justice, has general authority to enforce the whole body of federal legislation. The head of this Department is the Attorney General of the United States, who is the chief law officer of the Federal Government. "He represents the United States in matters involving legal questions; he gives his advice and opinion when they are required by the President or by the heads of the executive departments on questions of law arising in the administration of their respective departments; he appears in the Supreme Court of the United States in cases of especial gravity and importance; he exercises a general superintendence and direction over the United States attorneys and marshals in all the judicial districts in the states and territories; and he provides special counsel for the United States whenever required by any department of the Government." In a strict sense therefore execution of federal laws depends in a large measure upon the activities of the Attorney General, or rather upon the policy of the President expressed by him.

District Officials. Coöperating with the Department of Justice and subject to its general direction is a large corps of federal authorities scattered throughout the Union. Each judicial district (p. 199) has a United States district attorney, with one or more assistants, who represents the Government in the prosecution or defense of causes arising within his jurisdiction. Each judicial district also has a marshal and deputy marshals whose duty it is to arrest offenders against federal law, carry out orders of the courts, and otherwise aid in judicial administration. Since these attorneys and marshals are appointed by the President and Senate and may be removed by the President alone, they too are subject to immediate direction by the President and the Department of Justice.

Bureau of Investigation. Besides local officials in every judicial district, the Department of Justice has a separate enforcement branch of its own, the Federal Bureau of Investigation, with a large corps of agents operating in all parts of the country. These scattered representatives report periodically to the central office where threads of evidence from various communities are compared to determine whether a case is merely a small infraction or an incident in a widespread plot. The Bureau does not work alone. It keeps in touch with other federal police agencies and it cooperates with various public authorities, both here and abroad, in the identification of fugitives from justice. Through a Division of Identification and Information it maintains a clearing house of data on criminals for the use of the police everywhere in the nation.

Special Agencies. Supplementing the historic divisions of the Department of Justice are several special agencies which concentrate their attention on the enforcement of particular laws and regulations or on certain types of offenses. An important phase of this policing is the patrolling of our national boundaries and seaports. Upon the Bureau of Internal Revenue falls the duty of preventing and running down violations of laws imposing taxes on liquor, tobacco, and other objects of revenue; while the Bureau of Customs performs a similar function pertaining to the smuggling of goods into the United States. The Treasury Department, through its secret service, is constantly warring against the counterfeiting and forging of United States money and securities. The Post Office Department, through a staff of inspectors, keeps watch over the administration of its own affairs and seeks to apprehend offenders against the postal laws and regulations in detail. In view of the complexities involved, these divisional police authorities, acquainted with the characteristic problems of a single service, are a useful adjunct to the general force.

Coöperation with State Police Forces. In connection with the enforcement of criminal law, special note should be taken of a startling development which came to a climax in the enactment of "Six Federal Crime Control Acts" in 1934. Under the Constitution, as originally applied, federal authorities were largely confined to dealing with crimes against the Federal Government alone. They had little to do with crime in general, for that was left to the states. But with the growth of rapid transportation, especially by automobile and airplane, it became increasingly difficult for the states to cope with burglars, kidnapers, bandits, and "hold-up" men and women who moved swiftly from one state to another, committing the gravest of crimes. If such criminal activities were to be handled effectively by public authorities, then coöperation among state and federal officers was deemed imperative. In recognition of the changed situation, Congress provided for this coöperation in a series of laws enacted in 1934. In summary form, it may be said that these laws draw federal officers into the work of suppressing and coping with grave crimes once left entirely to state and local authorities.

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CHAPTER IX

QUEST FOR EFFICIENCY AND RESPONSIBILITY IN GOVERNMENT

Although the framers of the Constitution intended that the three great departments of the Government should check and challenge one another in the exercise of power, they expected such a degree of cooperation among them that the Government would so act upon the issues of national life and economy as to fulfill its obligations to the people amid the changes and trials of the succeeding ages. While they were sure that conflicts would arise among the departments, they hoped that such conflicts would not degenerate into irresponsible quarrels, paralyze government, and lead to a dissolution of society or a dictatorship. Great powers relative to the security and welfare of the country are vested by the Constitution in the departments; and with these powers goes a moral responsibility for exercising them wisely and effectively and for prudent and continuous readjustments among the departments in achieving the great ends of the Union. This responsibility for coöperation among the departments is as much a characteristic of the American system as the duty of each department to protect its own domain against encroachments.

In distant times when simple agriculture and handicrafts predominated in national economy and the requirements of national defense were relatively slight, neither evasions of responsibility by any of the departments nor unseemly quarrels among them imperilled the very existence of the nation and constitutional government. But in our own age many tendencies and experiences have conspired to raise anew a fundamental question of political science: How and in what ways can the three departments of the Federal Government be made to assume their full responsibility for efficient action in their respective fields, for coöperation where that is required in the interest of the public safety and welfare, and for the maintenance of those checks upon one another which prevent a sudden or gradual usurpation of powers by any one of the three departments?

Tendencies in Practices and Theories of Government

Growing Complexities and Integration of Economy. In the domain of economy, which supports government and in turn is regulated by government, the tendencies of recent years have been indubitable. The days of simple agriculture and handicrafts have passed away. The self-sufficing farm and community which produced all or nearly all the goods necessary for a convenient, if not commodious, life have disappeared. Giant machine industries and systems of transportation by rail, truck, steamship, and air have supplanted little workshops, stage coaches, and sailing vessels; and from year to year these industries and systems become more and more complex. Self-sufficing agriculture has been supplanted by specialized agriculture. Through specialization and rapid transportation the local market has been merged into a national market and that has been connected with world markets. The number of interrelated but often conflicting economic interests has been multiplied. The demand for government control and regulation of these interests, coming from all sides, has culminated in a multiplication of government functions, and an enlargement of the army of public officers and employees engaged in discharging these functions. For minute descriptions of such tendencies great libraries of economic books and statistical tables supply information both general and microscopic.

Decline in the Legislative Efficiency of Congress. Confronted by the growing complexities of economy and the increasing demands for legislative action pertinent to them, the Congress of the United States has displayed an unwillingness or inability to lead in devising and enacting laws designed to cope with the economic issues before the country, especially since the panic of 1929. For many years it has spent days, weeks, and months wrangling over personal and partisan matters, petty details of business, and questions of little or no legislative significance. It is no exaggeration to declare that not a single great measure dealing with vital issues of national economy enacted since 1929 has owed its origin and form wholly to wise and thoughtful planning and decision in either the Senate or the House of Representatives. This is not to say that all the congressional debates during these years have been of a low order. On the contrary many of them have been packed with information, well reasoned, and worthy of the best traditions of Congress. But there can be no doubt that as a legislative body charged with formulating great public policies, reducing them to the principles and details of bills, debat

ing them, and enacting them into law, Congress has been declining in efficiency. As a creative agency of government it has drawn dangerously near the point of abdication on numerous occasions during the past twenty-five years.

Rise of the Executive Power. The decline of Congress in creative efficiency has been accompanied by an almost revolutionary increase in the power of the Executive. Many circumstances have contributed to this transformation. Among them are the multiplication of the administrative duties imposed on the President by law, the increasing army of civil servants and officers put under his control, the billions of dollars placed at his disposal, and the innumerable powers over life, liberty, and property vested in him. But no small part of the transformation is due to the actions of Congress itself. By haggling over trivialities in times of crisis and refusing to act on pressing issues before the country, it has again and again created situations in which the President had either to act or stand idly by and allow public business to drift, perhaps into perilous channels. Besides augmenting the President's power through its display of negative qualities, Congress has enlarged it deliberately by enacting numerous blanket bills conferring upon the President all the powers applicable to particular contingencies and permitting him in effect to do the legislating himself. In a large measure the vacuum created by congressional neglect of its duties has encouraged and permitted strong and determined personalities in the Executive Department to assume a legislative and administrative dominion over life, liberty, and property that approaches the limits of sovereignty and has awakened protests and alarms through the country.

Illustrations of Tendencies. These critical tendencies in government were forcefully illustrated during the economic calamities of 1933. For two years, the Senate in the hands of Republicans and the House under Democratic control had done little or nothing in the way of coping with the paralysis in business, the unemployment of millions, and widespread poverty. When Congress assembled in March, 1933, it was no better prepared for the discharge of its immediate responsibilities. In the circumstances, President Roosevelt, with the aid of advisers, drafted and laid before Congress a number of bills dealing with the economic crisis. He urged Congress to adopt them or such other measures as it might "build out of its experience and wisdom." Then he warned Senators and Representatives that if they did not act quickly, he would call upon them to grant him "broad Executive power to wage war against the emergency,

as great as the power that would be given me if we were in fact invaded by a foreign power."

Unready itself and thoroughly frightened, Congress side-stepped its obligations and yielded to the President's demands. It passed the emergency banking bill in just forty minutes. Between March 4 and June 15 it enacted twelve fundamental bills dealing with every major phase of national economy and spent only sixty hours in debating this entire legislative program. All the bills were blanket bills conferring immeasurable powers upon the President and authorizing him to create the bureaucracy to enforce them. And yet it was boasted in Congress that the efficiency of democracy and a popular legislature had thus been demonstrated.

During subsequent years of President Roosevelt's administrations, while his party easily dominated both houses of Congress, his leadership in legislation continued unabated. Congress acquiesced in innumerable actions and decisions on his part, which had little or no specific sanction in the Constitution or in statutes duly passed and in force. All the great laws materially affecting life, liberty, and property enacted in Congress between 1933 and 1943 either originated in the Executive Department or were carried through the House and Senate under administration pressures. By statute after statute couched in general terms Congress added to the powers vested in the President, until a climax was reached in the Lend-Lease Act of 1941 (p. 268). Legislation by presidential decree expanded; between 1933 and 1943, Congress passed 4,300 public laws and during that period 3,556 Executive orders were issued, to say nothing of Executive agreements made by the President with various foreign governments (p. 179).[1] Among high actions taken by the President on general grounds during this period, with little or no statutory authorization, two were outstanding: the exchange of destroyers with Great Britain for leases on naval bases in this hemisphere and a decree putting a ceiling on salaries at the figure of $25,000 a year after taxes. The former was the subject of an ineffective protest and the latter was overridden by an act of Congress. Able lawyers offered briefs in support of both actions and extended arguments were made against them. At all events both were exercises of high authority by the President on his own responsibility as Chief Executive.

A Theory for Recent Tendencies. Along with these tendencies has run the development of a theory which defends and justifies the reduc-

[1] *Congressional Record*, June 24, 1943, Appendix.

tion of Congress to the level of a scrutinizing and debating society and the exaltation of presidential leadership, if not dominance, in domestic and foreign affiairs—legislative, executive, and even judicial. The theory was hinted at by Woodrow Wilson in his *Congressional Government* published in 1886 and elaborated in his *Constitutional Government in the United States* published in 1909. In the latter volume Wilson wrote: "He [the President] is . . . the political leader of the nation, or has it in his choice to be. The nation as a whole has chosen him and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for unification and it craves a single leader. . . . If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it."

In an article published in 1941,[2] the historian, Henry Steele Commager, worked out a series of propositions designed to justify the exaltation of executive power and the reduction of Congress to the rôle of criticising and restraining the President's activities and ambitions. The separation of powers, he maintained, was a mistake on the part of the framers of the Constitution. In a democracy, he argued, there is no need for men to fear government, for they themselves are the government; the President is "the peculiar representative of the whole people—the voice and symbol of national unity"; "democracy apparently flourishes when the Executive is strong, languishes when it is weak"; "Presidents have aggrandized power not because they were ambitious but because power had to be exercised and the President was the natural and effective instrument for its exercise." This theory Commager later amplified by attacking the power of the Supreme Court to declare unconstitutional any acts of Congress whether passed on its own motion or under the pressure of executive power and patronage. In sum and substance this theory savors of the fascist "leadership principle," even though it retains the restraints of popular elections and legislative criticism and

[2] The New York *Times*, March 2, 1941.

permits a possible rejection of presidential demands by Congress. Whatever its merits, it amounts to a denial of constitutional government as conceived by the framers of the Constitution and incorporated in the document.[3] Yet the theory has a considerable support in various circles, though now subject to a marked reaction at the polls and in Congress.

Depreciatory Criticism of Congress. Accompanying the acquiescence of Congress in President Roosevelt's leadership has been a running fire of criticism directed against Congress by the press and independent publicists. The criticism increased in volume and intensity after President Roosevelt broke the third term tradition in 1940 and especially after reports of a fourth term were spread abroad in the land. Some of this criticism was of course partisan in character and concerned more with discrediting Democrats than with arriving at constructive and constitutional ends. But it was by no means all captious and partisan. In no small measure it was serious in thought and purposes, particularly in view of the fact that dictatorships had recently arisen on the ruins of popular legislative bodies in many parts of the world and that loss of confidence in the capacity of legislatures to act promptly and efficiently was strikingly evident in American as well as foreign opinion.

The keynote of scornful hostility to Congress was sounded in 1942 by a popular columnist in a declaration that "the ignorance and provincialism of Congress render it incapable of meeting the needs of modern government." Censure in this vein also ran to the effect that Congress had become a mere "rubber stamp" for the President, and had hopelessly sunk into futility as a legislative body. If such depreciatory attacks on Congress are to be taken as true, then the national legislature, in which the Constitution vests all legislative power therein granted, might as well be dismissed as unworthy of serious consideration as an instrumentality of government.

Constructive Criticisms of Congress. But fortunately for the future of constitutional government in the United States, indiscriminate censure of Congress was countered by constructive criticism directed to objectionable practices which could be corrected by positive actions of Congress and the President. Among such criticisms the following had decided pertinence to congressional customs or abuses that have contributed to the weakness and the disparagement of one or both houses:

Although the House and the Senate have members of competence and high talents for the work of government, such talents, instead of being con-

[3] C. A. Beard, *The Republic*, Chapters xiii–xvi.

centrated on public business, are dispersed among many committees or wasted in rambling debates.

The practice of having so many committees for each house, and allowing each committee of each house to hold hearings, make investigations, and completely dominate the business before it, makes it impossible for Congress to initiate and formulate an integrated legislative program early in its sessions and to secure orderly and concentrated debates on its program.

The insistence of Congress upon dealing with thousands of petty bills relative to such matters as individual claims, pensions, bridges, and other trivialities leads to the waste of days and weeks in debates about petty affairs —desultory debates attended by only a few members and likely to give the public false impressions of congressional activities.

While Congress votes millions of dollars annually to executive agencies for the purpose of employing the best experts in the country in their work, it has no large and competent staff of experts to draw upon in framing and discussing bills of the highest importance for the life, liberty, and property of the people.

The public debates and proceedings of Congress, usually shaped from day to day by little arrangements among party leaders, are marked by confusions and irregularities unworthy of the national legislature.

Relations between Congress and the President, duly recognized by the Constitution and indispensable to competent government, are conducted in an irregular, subterranean, and often vulgar and capricious fashion and should be so institutionalized as to be regular, open, dignified, and direct.

Congress Turns to Self-Scrutiny and Constructive Proposals

Congress Takes Note of Its Deficiencies and Responsibilities. With striking frequency, members of Congress referred to indictments brought against their honorable body, discussed the validity of these outside protests, and brought forward proposals designed to assure the discharge of their duties as legislators and in relation to the Executive Department. This mood of self-examination became especially marked in the Seventy-eighth Congress which opened in January, 1943. To some extent the emphasis was due to Republican victories in the Congressional elections of the previous year which substantially enlarged the Republican minority in the House and the Senate. But it was not solely due to that partisan gain; for members of both parties joined in the general self-scrutiny and in making three types of proposals: (1) for transforming Congress into a more efficient and responsible legislature; (2) for drawing more clearly and strictly the boundaries of the President's power; and (3) for establishing more effective working relations with the Executive

Department and its agencies in general. Although no little pettiness and vindictiveness marred the discussion of these subjects in both chambers, many speeches reasonable in tone and rising far above mere party considerations were made in the House and the Senate. Some were directed to details and others to the problem of congressional reform on the whole.

Matters of Detail. Illustrations of discussions bearing on details of congressional reform are scattered all through the *Congressional Record* for the year 1943. Two examples may be taken as illustrative.

On February 2, 1943, Jerry Vorhis, a Democratic member from California, spoke to the subject in the House of Representatives and introduced a resolution containing one concrete proposal. He remarked that speech after speech had been made on the floor demanding that "Congress should assume its full and proper place as a coördinate branch of government," and expressed himself in hearty accord with this doctrine. His resolution opened by calling attention to the extensive powers which had been conferred on executive agencies, to the responsibility of Congress for seeing that such powers are actually exercised in harmony with legislative purposes and neither abused nor arbitrarily employed by these agencies; and it declared that Congress should be continually informed respecting the functioning of executive agencies. For carrying out these principles, Mr. Vorhis proposed that either the standing committees of the House in charge of specific matters, or standing committees especially designated by the Speaker, should be required to maintain a continuous review of the way in which executive agencies operated, and to report their findings periodically to the House. This plan, Mr. Vorhis declared, was designed to promote coöperation between the executive and legislative branches of government and avoid unnecessary confusion, friction, and misunderstanding between the people and their Government, while at the same time advancing the war efforts of the United States.

Addressing himself to the problem of foreign relations, Senator Alexander Wiley of Wisconsin resubmitted to the Senate on January 7, 1943, a resolution calling for the creation of a joint council on foreign relations to coördinate the operations of the President and Congress in respect of foreign affairs. Mr. Wiley drew attention to the fact that both branches of the Government had constitutional responsibilities in this connection and insisted that machinery should be established to facilitate coöperation between them and avoid conflicts or antagonisms, such as had often marked their transactions in time past. Senator Wiley's reso-

lution ran to the effect that the Chief Executive be invited to join with the Senate in the creation of a Foreign Relations Advisory Council consisting of the Secretary of State and other representatives of his Department, members of the Senate committee on foreign relations, and members of the House committee on foreign affairs—members from the majority and the minority. Such a Council, Senator Wiley argued, would facilitate coöperation between the Senate and the Executive in spheres where the Constitution requires them to work together and would help in finding better answers to questions of war and peace and to contemporary economic and political problems. Prodded by other Senators, the Senate committee on foreign relations later entered into personal communications with the Secretary of State and arrived at a modus vivendi with him by which he was committed to the closer observance of the rights and duties of Congress in making further agreements with foreign governments (p. 295).

General Overhauling of Congress Demanded. In an article written for a popular magazine and reprinted in the *Congressional Record* for January 14, 1943, Representative Albert Gore of Tennessee pictured a general decline in the efficiency and prestige of Congress and called for a thorough overhauling of its machinery and methods. "There are," he said, "basic reasons why Congress has steadily declined in public popularity and power. . . . Congress has failed to keep step with national development . . . has become wholly unable to function on an equal footing with the ever-swollen executive branch of the Government. . . . Rarely does Congress pass an important law which does not originate in some executive agency. . . . Today, executive officials not only draft legislative proposals and submit them to Congress, but they use the facilities and overwhelming strength of the executive branch to push and persuade the people and Congress to their points of views." The President castigates Congress for action or inaction. The press and the public scold it for faults that lay at the door of the Executive. The President's addresses and statements are broadcast all over the country; congressional proceedings receive little attention, often only because they are marked by a crack-pot ideas or intemperate speeches. "How," Representative Gore asked, "can Congress regain its rightful place as an independent branch of the Government and recapture public esteem?" His answer to the question was: Thoroughly overhaul its traditional organization and procedure.

Later in the same year Senator Robert M. La Follette of Wisconsin sounded a note of general alarm, also in a magazine article, reprinted in the *Congressional Record* for July 1, 1943. "Wars and dictatorships," he opened, "have swept aside all but the merest vestiges of representative government elsewhere in the world. It should come as no surprise that representative government in the United States is on trial for its life." Although he gave little weight to the immense amount of captious abuse hurled at Congress, Senator La Follette was oppressed by the growing complexity of the political, social, and economic problems with which the modern Congress has to deal and by the increasing predominance of the Executive in legislation as well as administration. Functions of government have become more technical. Congress sidesteps its legislative duties by leaving the initiation of laws to the President and by enacting blanket legislation, authorizing him to "issue such regulations and orders as he may deem necessary and proper in order to carry out the purposes" of the acts passed. The President grows in power. The Congress declines. If control by the people's representatives in Congress is not to drift into the hands of a bureaucracy, relatively irresponsible, then Congress must be reorganized for the efficient discharge of its responsibilities, and constructive relationships must be established between the Legislature and the Executive. This survey of Congress, Mr. La Follette followed up on July 5, 1943, by introducing in the Senate a set of resolutions for a thoroughgoing reorganization of the committee system of that body.

Constructive Proposals for Congressional Reorganization. In speeches made in Congress and in articles, editorials, and special studies, numerous proposals were presented for changes in organization and procedure in the interest of competence and efficiency. In range these proposals run from minor changes in the committee system to large plans for a general overhauling.[4] For purposes of a summary review the chief proposals of a comprehensive nature may be formulated as follows:

A reorganization of the committee system; drastic reduction in the number of committees in each house; provision for joint hearings and operations by the committees of the House and Senate having charge of common subject matters.

The creation in each house of a general planning and directing committee to formulate the legislative program of each session in advance and

[4] See "Second Progress Report of the American Political Science Association's Committee on Congress," *American Political Science Review*, December, 1942, pp. 1091 ff.

give an orderly direction to the proceedings connected with discussions of and actions upon the several features of the program.

The establishment of a general legislative council for the nation, more or less on the model of such councils in several states (below, Chapter XXV), composed of representatives of the majority and the minority in each house, and equipped with a staff of experts in primary problems up for congressional consideration and action; such a council to be made responsible for preparing, either in full outline or in detail, the principal measures to be acted upon in the sessions of Congress; the fundamental purpose being to concentrate talents upon legislative business, to command expert counsel, and overcome the present dispersion and confusion of efforts.

The creation of staffs of experts for each committee or a general staff to be drawn upon by committees according to need or by the legislative council if established.

The use of the legislative council or the organization of a special committee or council for the purposes of regularizing and institutionalizing the relations of Congress and the Executive Department.

Elimination of petty business before Congress by transfer of private claims and other private legislation to administrative agencies subject to congressional review and action en bloc.

Reduction in the number of days given to debates, curtailment of idle and rambling discussions on the floors, and concentration of debates in fewer debate sessions, stricter enforcement of the rules for decorum, and perhaps enforced attendance of members at debate sessions devoted to primary measures.

Creation of a special agency of Congress or use of the legislative council for the purpose of maintaining constant scrutiny over administrative agencies in the Executive Department, especially those in which large discretionary powers are vest by blanket legislation.

Further reorganization of the executive branch of the government to bring it in closer correspondence to the revised organization of Congress, with a view to more effective coöperation and exchange of information between these who make the laws and officials engaged in enforcing them, thus reducing the number of needless clashes between congressional and executive authorities.

A revival of the old proposition that members of the President's cabinet shall appear on stated occasions before the House and Senate, expound their policies, and answer questions according to some formal rules of procedure.

Proposed Congressional Investigation of the Problem. As discussion of congressional reorganization proceeded in Congress, interest in the subject widened and deepened. At length on November 9, 1943, a joint resolution for a comprehensive inquiry and a report on measures of reform was introduced. In the Senate the resolution was presented by

Francis Maloney, Democratic Senator from Connecticut, and in the House by A. S. M. Monroney, Democratic Representative from Oklahoma. The resolution called for a joint committee composed of six Senators and six Representatives (not more than three of whom from each house shall be of the majority party). The committee is to be given large powers in employing experts, conducting hearings, making inquiries, and drawing upon all available sources of information relative to the subject in hand.

The duties of the committee are stated in a special section of the resolution. It shall make a full and complete study of the organization and operation of Congress and recommend improvements in such organization and operation with a view to strengthening the Congress, simplifying its operations, improving its relations with other branches of the Government, and enabling it better to meet its responsibilities under the Constitution. The study is to include, but not be limited to, the organization and operation of each house; the relations between the two houses; the relations between Congress and the other branches of the Government; the personnel employed by members and committees of Congress; and the structure of, and relations between, the committees of Congress.

Prospects of Governmental Reconstruction. Owing to the growing pressure of informed opinion in Congress and outside, it is improbable that constructive action on various proposals for making Congress more efficient and creating better working relations between Congress and the Chief Executive, will be indefinitely postponed. Positive measures adopted in the Seventy-eighth Congress indicated that, at least for the time being, the executive power was to be materially curtailed, the practice of conferring blanket powers on the President modified if not abandoned, and legislative powers returned to Congress. Again and again after the opening of 1943 Congress peremptorily refused to grant additional general powers to the President, abolished agencies created by executive orders, and forced through measures of its own even in spite of executive objections or vetoes. To some extent such actions expressed partisan hostility to President Roosevelt and represented political expediency rather than constitutional principles, but by these actions the people were once more reminded that the accumulation of all powers in the hands of one man or a body of men is the very essence of tyranny. At the same time experience awakened members of Congress to a recog-

nition of the fact that only by measuring up to its responsibilities for the exercise of its legislative powers can it maintain its prestige and its rightful place in American system of popular government.[5]

The Judiciary as a Coördinate Power in the Government

Nature of the Judicial Power. Like Congress and the Executive, the Judicial Department is an independent and coördinate branch of the Federal Government, and yet its independence, like that of the two other Departments, is limited, not absolute (p. 195). Under the American constitutional system, the Judiciary has special functions in the exercise of which it becomes involved in the great political questions that divide the people, and thus in contests for power between the Legislative and the Executive, and in the conflicts between the Federal Government and the states. In last analysis the Supreme Court has the duty of interpreting and applying the provisions for civil liberty in the Constitution and protecting the people in the enjoyment of this liberty against invasion by Congress, the President, and the states—all governing authorities in the country. The Judiciary also interprets and applies in concrete cases before it acts of Congress and orders of the President, which are often cast in loose and vague language, allowing great leeway to the judges. It passes upon the constitutionality of state and local measures and acts. According to long and accepted practice, it has the power to set aside acts of Congress and the President which it finds contrary to the Constitution. No less than Congress and the President it is duty bound to resist encroachments upon its power from every direction and to help in maintaining the whole system of government. Ultimately, as the highest court of appeals, the Supreme Court must bear a burden that, in its way, is fully comparable to the responsibilities of Congress and the President.

How Conflicts over Judicial Power Arise. In exercising the power to declare invalid acts of Congress, orders of the President, and acts of state and local authorities, the Supreme Court uses power against power and in so doing may invoke conflicts akin to those which often arise between Congress and the President. An important statute of Congress

[5] The possibilities of harmonious coöperation between departments of the Federal Government, where the spirit and the will are present, are illustrated by the Judicial Conferences, attended by members of the high judiciary, members of Congress, and representatives of the Executive Department, held annually for the scrutiny of public business especially involving the Federal Judiciary. See Chapter VIII, above.

usually reflects the policies of a political party; often it is the fruit of a long and ardent agitation. If it is set aside by the Supreme Court, warm feelings are naturally aroused. Although the Court, in declaring an act void, seldom departs from the austere logic of the law, it does in fact pass often judgment upon the wisdom or merits of the measure under scrutiny. Theoretically the justices of the Supreme Court do not say what the law *ought* to be; they merely proclaim the Constitution as it is. Practically the matter is not so simple, for the language of that document, as we have said above, is very general in some parts. In such cases the judges themselves often disagree; five think the Constitution means one thing and four think it means something else. What the judges really do in these circumstances, leaving all quibbling aside, is to say whether they believe a particular act of Congress or state law is desirable or permissible at the moment—that is, according to their notion of the facts and contentions involved. Inevitably their adverse rulings awaken political resentments.

Two Classes of Disputes. Broadly speaking, controversies arising from this source fall into two classes. The first includes issues growing out of cases in which the federal courts invalidate state laws. In recent times contests respecting such matters have arisen mainly in connection with the judicial nullification of social and economic measures enacted by state legislatures, particularly under the Fourteenth Amendment (Chapter XXI). Since the power of the Supreme Court to declare state legislation void is now recognized, its wisdom rather than its authority is usually drawn in question in such disputes. A second type of controversy has grown out of decisions of the Supreme Court setting aside acts of Congress. An exercise of this authority may involve large national questions, and on several momentous occasions it has dragged the Supreme Court into partisan hostilities.

The Dred Scott Case. Perhaps the most famous of all these conflicts occurred in connection with the celebrated case of Dred Scott (1857), in which Chief Justice Taney sought to accomplish the impossible feat of settling the slavery issue by a judicial discourse. In principle Taney held that Congress had no constitutional warrant for abolishing slavery in the territories of the United States. But at the very moment, the new Republican party was staking its hopes and gaining strength on the contention that Congress had full power in the premises and should immediately exercise it.

Owing to the excitement over the slavery question which prevailed at

the time, Chief Justice Taney's opinion precipitated a bitter struggle in the political forum. Naturally Southern leaders accepted his dictum as final. In the North however it aroused a storm of protest, and the legislatures of several states passed resolutions condemning his doctrines enunciated in the name of the Court. Maine, for example, expressed her views in the following legislative declaration:

> Whereas, such extra-judicial opinion subordinates the political power and interests of the American people to the cupidity and ambition of a few thousand slaveholders, . . .
>
> Therefore—
>
> *Resolved*, that the extra-judicial opinion of the Supreme Court in the case of Dred Scott is not binding in law or conscience upon the government or citizens of the United States and that it is of an import so alarming and dangerous as to demand the instant and emphatic reprobation of the country.
>
> *Resolved*, that the Supreme Court of the United States should, by peaceful and constitutional measures, be so reconstituted as to relieve it from the domination of a sectional faction. . . .

On reading Taney's epoch-making opinion, Lincoln, who was to wage war and sacrifice slavery to preserve the Constitution, spoke of the ruling with moderation, but he refused to accept it as the last word on slavery in the territories. Two or three months after it was rendered, he declared his belief in, and respect for, the judicial department of the Government, saying that its decisions should control the policy of the country until reversed by some lawful process. "We think the Dred Scott decision is erroneous," he declared to his neighbors at Springfield. "We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it."

But in the heat of the fray he grew more belligerent. A year later, in a speech at Edwardsville, he exclaimed: "Familiarize yourselves with the chains of bondage and you prepare your own limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you. And let me tell you, that all these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people."

Furthermore Lincoln accepted without reserve the declaration of the Republican platform on which he stood for the presidency in 1860: "The

new dogma that the Constitution, of its own force, carries slavery into any or all of the Territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency and subversive of the peace and harmony of the country." In the end fate upheld Lincoln and the Republican party. Slavery was abolished not only in the territories but also throughout the Union. The Supreme Court was overruled by history.

Income-Tax and Injunction Cases. It was the Democratic party that was to raise the next serious controversy over a judicial action, nearly forty years after the Dred Scott case. In 1895 the Supreme Court, by a narrow vote of five to four, declared unconstitutional the fundamental parts of the federal income-tax law passed by a Democratic Congress during the preceding year—a law avowedly designed to shift a part of the burden of federal taxation from goods consumed by the masses to "accumulated wealth." When the Democratic national convention assembled in 1896, feelings ran high among the radical elements against the action of the Court. It was openly said that the Court had discriminated against the poor in favor of the rich. At the same time popular indignation was intensified by a conflict over the use of injunctions by the federal courts in labor disputes (Chapter XIX). Profoundly stirred by the course of affairs, leaders in the Democratic left-wing protested vehemently against the income-tax decision and the injunction, and carried their objections to the convention.

In response to their demands, the chairman of the committee on resolutions brought in a platform containing two sharp attacks on the federal judiciary: "We declare that it is the duty of Congress to use all the constitutional power which remains after that decision, or which may come from its reversal by the Court as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of the government." Then referring particularly to the recent railway strike in Chicago, the platform added: "We denounce arbitrary interference by federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which federal judges, in contempt of the laws of the states and rights of citizens, become at once legislators, judges, and executioners."

In vain did Senator Hill of New York protest against these planks, denouncing them as foolish, ridiculous, unnecessary, revolutionary, and unprecedented in the history of the party. With fierce directness, William Jennings Bryan replied to Hill in defense of the party's position: "They criticize us for our criticism of the Supreme Court of the United States. My friends, we have made no criticism. We have simply called attention to what you know. If you want criticism, read the dissenting opinions of the court. That will give you criticisms."

With this turn in fortune's wheel, Republican leaders now assumed the rôle of defenders of the Supreme Court. Democratic attacks on the decision in the income-tax case they denounced as assaults on fundamental American institutions. The proposal to reconstruct the Court and secure a reversal of the opinion they assailed as an attempt to drag the judiciary into the mire of politics. Although for a time after the victory of McKinley the sound of the conflict died away, the issue did not disappear. In fact the question remained open until the Sixteenth Amendment to the Constitution displaced by orderly procedure the opinion of the Court and gave to Congress the power which that tribunal had denied to it. In this conflict the Supreme Court was overruled by popular verdict in a constitutional amendment.

Conflict between the President Roosevelt and the Supreme Court. The next great judicial controversy arose shortly after the Supreme Court declared substantially all the National Industrial Recovery Act null and void in the spring of 1935. President Roosevelt, at a press conference, spoke with "some asperity" of the Court's recent decision and expressed the opinion that the Court had interpreted the Constitution in the light of a "horse and buggy" philosophy. Immediately a widespread discussion of the decision and the Court's position in the American system opened in Congress and outside.

The controversy over the judiciary and the Constitution was widened by other decisions of the Supreme Court invalidating New Deal legislation, especially the Agricultural Adjustment Act early in 1936, and it was carried into the campaign of 1936. The Republican candidate, Alfred M. Landon, declared that he would press for a federal amendment empowering states to regulate the working conditions of women and children if such regulation could not be effected within the Constitution as it now stands. In their platform the Democrats promised to continue their policies and to seek a "clarifying amendment" if necessary. Neither party

however proposed any limitations on the exercise of judicial power in accordance with historic practices.

The growing tension over the federal judiciary broke into an open conflict on February 5, 1937, when President Roosevelt submitted to Congress a plan for the reorganization of the whole judicial system, including an authorization to appoint new justices (up to six) to the Supreme Court when justices after reaching the age of seventy fail to resign within six months. This plan was referred by the Senate to its judiciary committee which held hearings for several weeks and gave friends and foes of the measure ample opportunity to present their views. Meanwhile throughout the country a lively and acrimonious debate proceeded.

At the close of its hearing the Senate committee by a small majority made a report condemning the project in severe terms. After a bitter debate the plan was dropped in the Senate and the House of Representatives refused to act on it at all. Congress did pass however a bill allowing justices to retire on full salary after reaching the age of seventy-five and another bill limiting the powers of lower courts to interfere with federal legislation and to pass upon the constitutionality of acts of Congress. Seldom in American history had a President received a more crushing defeat on a bill.

In the meantime significant events were happening in the Supreme Court itself. On March 29, 1937, the Court sustained the validity of a state of Washington minimum wage law. In so doing it reversed, in effect, its decision of 1936 in the New York minimum wage case. Furthermore it also expressly reversed the decision of the Court against the minimum wage law of the District of Columbia (1923). In April, 1937, the Court sustained the Labor Relations Act, and in May the Court upheld the tax provisions of the Social Security Act and the Alabama unemployment insurance law.

Shortly afterward Justice Willis Van Devanter, who was seventy-eight years old, resigned from the Court, giving President Roosevelt his first chance to nominate a Supreme Court justice. In August the President nominated and the Senate accepted Senator Hugo Black, of Alabama, to fill the vacancy. As Senator Black had been a stanch supporter of New Deal measures, his appointment, combined with the more liberal opinions of the Court was regarded as a substantial offset to the President's defeat on his reorganization plan. The resignation of Justice George Sutherland in 1937 was followed by the appointment of Stanley

Reed who, as Solicitor General, had valiantly defended New Deal statutes before the Supreme Court. By the end of 1943 seven of the nine Supreme Court Justices—Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutlege, all Democrats of the New Deal persuasion—had been appointed by President Roosevelt. Only two members remained from the old days —Harlan F. Stone, who had been elevated by President Roosevelt to the position of Chief Justice, and Owen D. Roberts. Not without justification was it said that President Roosevelt had lost the battle but won the war.

The Responsibilities of the Judiciary Yet Remain Intact. At the very moment, however, Congress, which had rejected President Roosevelt's court bill, was doggedly resisting the extension of his executive powers and curtailing the powers conferred upon him by previous legislation. And the Supreme Court, though remembering the heated controversy through which it had just passed, still confronted its duty of discharging the high responsibilities conferred upon it as a coördinate Department of the Government. Like Congress and the President it had learned that extreme views and decisions were likely to produce equally strong reactions; but its judicial obligations remained intact and were unimpaired. That the Supreme Court would have a care for protecting life, liberty, and property against arbitrary and unlawful acts of Congress or the Executive, the Justices made strikingly evident in 1942, even amid the excitement of war, when they gave a hearing to the case of the Nazi saboteurs and reserved the right to inquire into the exercise of power even by high military authorities.[6]

REFERENCES

See Chapters V–VIII and C. A. Beard, *The Republic* (1943), Chapters XIII–XVII.

[6] R. E. Cushman, "The Case of the Nazi Saboteurs," *Political Science Review*, December, 1942, pp. 1082 ff

CHAPTER X

ADMINISTRATIVE AGENCIES

Apart from the functions assumed directly by the President and the obligations imposed on the judiciary and its auxiliaries, the task of carrying into force the Constitution, acts of Congress, executive orders, decrees, and treaties is entrusted to a large number of departments, commissions, and other agencies. Three of them—the Congressional Library, the Printing Office, and the Botanical Garden—are under the immediate supervision of Congress. In a sense the Comptroller General is also a legislative officer, for, although he is appointed by the President with the consent of the Senate, he can only be removed on a joint resolution of the two houses. All other administrative establishments and officials are, formally at least, arms of the executive branch of the Government. Yet a distinction has been made in theory, and to some extent in judicial decisions (p. 176), between officers such as post masters, who are clearly under presidential supervision, and quasi-legislative agencies, such as the Interstate Commerce Commission. The latter, it seems, are especially subject to congressional control at least in respect of qualifications and removals, and as bodies endowed with quasi-legislative power bear an intimate relation to Congress.

Nature and Types of Administrative Establishments

Constitutional Provisions. Federal administrative agencies are created by acts of Congress or executive orders. Unlike the fundamental laws of most states, the federal Constitution makes no direct provision for branches of administration. This omission leaves Congress free to create establishments for discharging the specific functions undertaken by the Government. That this will be done in due course the Constitution evidently assumes, for it authorizes the President to require in writing the opinion of the heads of executive departments, and also gives Congress power to vest in them the appointment of inferior officers. It is on this

slender basis that Congress creates departments, commissions, and other federal authorities, changes or abolishes them; or, as it has done on more than one occasion, empowers the President, within limitations, to create, alter, transfer, consolidate or abolish them.

Types of Federal Agencies. The hundreds of departments, bureaus, offices, and other establishments created for carrying federal law into effect may be classified in several ways, according to the point of view adopted.

In respect of historical development they may be divided into two large groups: (1) agencies embraced in the ten great departments headed by cabinet officers, and (2) independent agencies standing outside that hierarchy. Indeed this is a customary division with reference to their relations to the Chief Executive and to Congress. For nearly a century it was the practice of Congress, in establishing a new agency, to make it a department or to place it within the jurisdiction of a department already in existence.

Business, Service, and Regulatory Agencies. Considered in relations to functions, administrative agencies fall into three large classes. The first is sometimes called "business" or "proprietary" or "ministerial," because agencies in that class do not render services to the public directly but minister to the other agencies; that is, furnish money, supplies, and personnel to them so that they may the more expeditiously and efficiently discharge their obligations to the public. In this class come the Treasury Department, the Budget Bureau, purchasing or procurement agencies, and the Civil Service Commission.

The second class is primarily concerned with performing duties which serve or affect the public directly; for example the Departments of Agriculture, Commerce, and Labor. The third class, sometimes combined with the second, performs regulatory functions—regulates the conduct of private affairs; for example, the Interstate Commerce Commission which regulates railways, pipe lines, and other instrumentalities of transportation.

Bureaucratic, Commission, and Corporative Forms. With reference to internal construction and ordering, often related to functions performed, still another classification may be made for convenience of treatment.

The oldest type of administration in the Federal Government, still extensively used in law enforcement, is bureaucratic in form; that is, in the bureaucratic type, all agencies discharging kindred functions, such as enforcing laws pertaining to agriculture, are grouped in a single great de-

partment headed by a cabinet officer and graded into bureaus, divisions, and offices from the top downward, or are similarly organized in an independent establishment. Such an organization is somewhat rigid in nature. All employees are assigned specific duties; superior officers direct subordinates; everybody is governed by minute rules and closely scrutinized in doing work and spending money. Often, if not always, a bureaucratic organization is more or less bound by "red tape," routine in operation, and lacking in energy and initiative, especially when the head is "bureaucratic" in temper and outlook.

The second type, which appeared toward the close of the nineteenth century, is the commission—a body of three or more officials, with a chairman, who share the powers of administration or regulation and act together as equals in voting power over matters within their jurisdiction. Under the commission, of course, may be a large body of subordinates organized in bureaucratic forms.

For undertaking important economic functions, Congress has created from time to time a third type—the corporate form of administrative organization. Of such a type was the first United States Bank, established in 1791. In this corporation the Government and private parties held the stock and shared administrative responsibilities. This model was followed in 1816 when the second Bank was set up. More recently Congress has resorted to the use of purely government corporations for particular undertakings. Such a corporation is wholly owned by the Government and consists of one or more officers charged with specific operations. Among such federal corporations are the Reconstruction Finance Corporation, the Tennessee Valley Authority, the United States Housing Authority, and the Federal Deposit Insurance Corporation. Some federal corporations are attached to departments and others are independent. In any case managers of a federal corporation have a larger freedom than officers in a bureaucratic hierarchy; they can "cut red tape," move quickly under their own momentum, hire, fire, buy, sell, and issue lawful orders within their powers, subject to less bookkeeping control by financial officers and fewer orders from superior officers. The government corporation, as John McDiarmid says, "reaches maximum administrative efficiency when it is granted a large measure of freedom in management and in financial matters. If it is used for partisan purposes or is otherwise mismanaged, its very virtues become vices." [1]

[1] *Political Science Review*, December, 1937, pp. 1094 ff.; H. A. Van Dorn, *Government-Owned Corporations*; for British experience, W. A. Robson, *Public Enterprise*.

Strictly Logical Principles Not Followed in Creating Agencies. For many years, in fact until near the close of the nineteenth century, Congress followed the general rule of placing all new offices and agencies in some already established department or of creating a new department as functions expanded. At length however Congress departed from this rule and began to create "independent" agencies, standing outside the cabinet hierarchy, such as the Civil Service Commission in 1883 and the Interstate Commerce Commission in 1887. But these were peculiar agencies possessing regulative powers. Still later Congress dropped into the habit of establishing independent offices that might well have been put into one of the great departments. In such matters there has been little consistency. The logical rule that all kindred functions should be placed in a single department has not been followed. For instance, the Tennessee Valley Authority was given complete independence, while the United States Housing Authority was placed first in the Department of the Interior. Regulatory commissions are sometimes made independent and at other times associated with departments. In attempting to sketch the broad outlines of the federal administration however, it is convenient to begin with the great departments, of which there are ten, all standing in a special relation to the President—State, Treasury, War, Navy, Post Office, Justice, Agriculture, Interior, Commerce, and Labor.

The Heads of Departments

The Department Head a Political Appointee. At the head of each department is a secretary, or chief official, appointed by the President and Senate. He is essentially a political officer who expresses the policy of the party in power in the White House. Even when the President occasionally selects members of the opposition, he designates men who have been friendly to his cause. As a rule he chooses from his own party, and its interests rather than experience or technical competence must often control his decisions. In any case all sections of the country and various factions are likely to be represented in his Cabinet. Subject to such exigencies, he has a fairly free hand. His nominations, it is true, must be approved by the Senate but in practice that body nearly always accepts them. Rejections are sensations (p. 173). In general therefore it may be said that the President's "official family" is a group of associates upon whom he can rely for counsel and coöperation in making his administration a success.

With respect to political considerations in detail, two posts are generally filled for the President by strict party requirements. Custom, though not without variations, commands him to choose as Secretary of State the member of his organization who stands next to him in national esteem. For example, Wilson, in 1913, selected William Jennings Bryan who had been three times the presidential nominee of the Democrats and was, excepting the President himself, the most influential person in the party. On the other hand, the Post Office Department usually goes to a prominent worker in the presidential campaign, perhaps to the chairman of the national committee. And as for the rest, the necessity of finding official compensation for party leaders, conciliating all factions, and securing harmony with Congress materially limits the President's range of choice.

In such circumstances the head of a department is generally a layman in respect of its requirements. If he has had experience in politics, as is usually the case, it is experience that bears only a slight relation to the realities of his new position. He may have been a governor of a state, a candidate for President, or a "lame duck" defeated for reëlection to Congress, but seldom has he demonstrated in actual administration any marked capacities for the place to which he is assigned.

Department Head Subject to Law and to the President. Although in a strict sense the department head is a presidential appointee, his work is not prescribed minutely in executive orders, save in certain instances; it is defined more or less specifically by acts of Congress. He is responsible to the President for the faithful execution of the law; but the President cannot alter or diminish his statutory obligations or prevent Congress from formulating them in such detail as to leave little leeway. "The President," once declared John Sherman, a former head of the Treasury Department, "is intrusted by the Constitution and laws with important powers, and so by law are the heads of departments. The President has no more right to control or exercise the powers conferred by law upon them than they have to control him in the discharge of his duties. . . . If he violates or neglects his duty, he is subject to removal by the President or impeachment, . . . but the President cannot exercise or control the discretion reposed by law in . . . any head or subordinate of a department of the government."

Yet the President, as we have seen, has the power of removal and may exercise it for the purpose of directing his subordinates. He must, of course, follow the statutes, but some of them expressly confer upon him

discretionary authority and others are so general that he has a wide choice of ways and means. Accordingly in practice there are many variations from Sherman's theory, especially when a strong-willed President is determined to carry out a fixed policy. Indeed a logical application of the theory would amount to a decentralization of the administrative organization and a destruction of the President's responsibility for departmental policy.

Department Head as Administrator. The department head is, of course, an administrator. A large appointing power is conferred upon him by law. With respect to most minor positions within his sphere it is restricted by civil service rules which limit his choice to persons who have qualified by examination. Even where he is nominally free to choose at will he is actually compelled to give heed to party requirements, including the demands of Senators and Representatives for patronage. Although there are striking exceptions, the power of dismissal generally accompanies the power of appointment. In spite of many limits imposed upon him by law and custom, a heavy responsibility for efficient administration rests upon him.

Legislative Duties. The head of a department is also a legislator, for he enjoys a certain range of freedom in issuing orders pertaining to affairs under his charge. By a general act of Congress, he may "prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." And this broad provision is frequently supplemented by legislation giving him ordinance power over particular matters.

His legislative functions run even beyond these boundaries. Each cabinet officer maintains a more or less definite relation to Congress. He must submit to Congress annually certain specified reports on the activities of his department. Although the department heads are not allowed to participate formally in the debates of either house, they bring influence to bear in circuitous ways. They often appear before congressional committees to explain measures or to answer inquiries about legislation relating to their respective functions. They write letters to Senators and Representatives urging or opposing measures up for discussion. Indeed they sometimes transmit to Congress, on their own motion, elaborate drafts of bills which they wish to have enacted into law. It is always wise for them

to establish cordial relations with the chairmen of prominent committees, and thus obtain a friendly hearing for their policies.

Judicial Functions. Strange as it may seem, several cabinet officers exercise powers which appear judicial in character. Owing to the multiplication of official duties connected with such matters as immigration, the transmission of mails, agriculture, industry, and taxation, it has been necessary to give to the heads of certain departments high authority in hearing cases carried up from the lower administrative divisions under their control. For example, the immigration law provides that whenever an alien is excluded from the United States by officers at the port of entry, their decision may be reviewed by the Attorney General on appeal. Again, the Postmaster General may hear causes involving a closure of the mails to persons and concerns engaged in fraudulent transactions, and his determination of the facts is final. In all these controversies the ruling of a Secretary is conclusive unless he himself has exceeded his jurisdiction or otherwise violated the law.

Thus only administrative questions which raise a construction of statutes can be taken from a department into the courts. In upholding this doctrine, the Supreme Court explained its nature and utility: "If the ordinary daily transactions of the departments which involve an interference with private rights were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of government. . . . It is wisely indicated that the rights of the public must, in these particulars, override the rights of individuals, provided there be reserved to them an ultimate recourse to the judiciary."

Political Obligations. As may be imagined from what has been said about his political responsibilities, the departmental chief is not concerned with efficiency alone. He is constantly subjected to demands and interruptions which have no immediate bearing on the correct discharge of his obligations. "Washington wishes to see evidence of democracy about the departments," says a former officer of the Treasury, Frank Vanderlip. "Neither Senator nor Congressman is satisfied to cool his heels in an anteroom for any length of time, nor are political leaders who come to the capital on a mission likely to be pleased if the Secretary's engagements are such that an appointment cannot be made without notice or delay. . . . The Secretary of this great department must give heed to innumerable trifles such as would never reach the head of

even a comparatively small business organization. Requests come from people of importance, and they must be taken up with the care which the position of such persons demands rather than with any thought of their importance in relation to the administration of departmental affairs." In short, politics may override public business.

Departmental Organization

No System of Permanent Undersecretaries. On account of the lay character of departmental heads and the brevity of their tenure, as a general rule, it is desirable to have close to each of them a permanent official acquainted with all the work in hand. In England it is the custom to place this responsibility for technical competence on permanent undersecretaries who hold office during good behavior. In fact some of them grow so powerful through their practical experience that they, rather than the titular heads, are the real masters of the divisions in which they operate.

For various reasons the institution of permanent undersecretaries has not taken root in the Federal Government. The so-called assistant secretaries and undersecretaries, like their superiors, are generally temporary political appointees; thus the burden of preserving unity and continuity is ordinarily thrown upon subordinates of lower rank. In each department is usually found one or more employees of long service who are acquainted with the functions of their branch and can keep it going even in the absence of the head. Such for instance was Alvey Augustus Adee, who was appointed an Assistant Secretary of State in 1882, and labored in that capacity until his death in 1924. He was a living repository of the business of the Department of State and indeed was Acting Secretary on two occasions.

Internal Organization Not Logical in Form. Within themselves the great departments are not organized in a strictly hierarchical form, with bureaus, divisions, offices, and personnel logically classified and called by names that have the same meaning throughout the service. There are "departments" within the War Department. Nearly all the ten departments have bureaus but these bureaus vary greatly in the importance of their work and the number of their personnel. Hence, when the term "bureau" is employed, it does not carry any very definite significance. Nor is there any clear distinction between an office and a bureau; recently the title of Bureau of Education was changed to read the Office of

Education, although no alterations were made in the structure of that agency. In some departments the major portion of the business is distributed among bureaus; in others among assistant secretaries, offices, and services.

Selection of Bureau Chiefs. For continuity in technical methods and for competence, the head of each department must rely mainly on the chiefs of the great divisions which, as we have just said, differ in name. Upon them falls the real burden of keeping large branches of administration in constant operation amid all the fluctuations of politics and parties. Many division chiefs are appointed by the President with the consent of the Senate, without any material restrictions except perhaps that they must have had certain training and experience. Some are chosen by the President alone; and still others are selected by the heads of departments, sometimes subject to civil service rules. Theoretically therefore several division chiefs may be mere political appointees—spoilsmen, in other words.

Whatever the law, the spoils system has never been as bad as its terms permitted. Even Andrew Jackson did not put coon hunters in charge of engineering work nor oust all expert public servants to make room for partisans. Few division chiefs are purely political. The divisions subject to the merit principle are increasing; chiefs in this class are selected by promotion within the service, or after competitive examination, or after having demonstrated their capacity in kindred work on the outside. Other divisions—the public health service, the coast guard, and the coast and geodetic survey—by departmental tradition and rule are usually headed by officials who have risen through the hierarchy. In fact only a small number of the divisions may be called political—a class that now includes the bureau of the mint, the land office, and the patent office—and even they are by no means always entrusted to party workers. Almost all the technical divisions—entomology, plant industry, forestry, reclamation, chemistry, public roads, engraving and printing, and agricultural economics, for example—are now generally established by law or practice on a merit basis. Moreover experience has shown that it is possible to devise general examinations and other tests of achievement and capacity which guarantee reasonably well the selection of competent administrators. It is not necessary to rely on "automatic promotion," which often brings dead wood to the surface.

Tendency to Long Tenure. How has this state of affairs been brought about in the upper ranges of federal administration? Not entirely by

civil service rules. The highly specialized character of government functions in the modern age runs against mere job-hunting politics; the worst spoilsman in the White House would not put a real estate agent in charge of research in fixed nitrogen. If he were so inclined, the pressure of professional associations, organized outside of the Government, would make him uncomfortable. While the work of administration becomes more complicated, the development of technical education steadily increases the supply of trained men and women. To reënforce these new influences, the demands of enterprises that are regulated by the Government or make use of its various services tend to exclude partisan politics from the selection of scientific division chiefs. Hence technology brings some results which civil service reformers could scarcely hope to accomplish on moral and patriotic grounds alone.

Multiplication of Independent Agencies—Reorganizations

Rise of Independent Agencies. For almost a hundred years, as we have seen, Congress in creating new agencies placed them within existing departments. It also followed the principle that similar functions should be grouped in one organization headed by a single responsible officer in turn accountable to the chief executive. Except in some special matters, the rule was well observed until 1883, when an independent Civil Service Commission of three members was set up to administer the new merit system. This precedent was followed four years later by the formation of the Interstate Commerce Commission charged with the regulation of railways. In the course of time other agencies were erected outside the great departments, until by 1929, at the opening of the economic depression, there were twenty or more commissions, boards, and offices which were independent of cabinet secretaries and responsible to the President or Congress.

Proliferation of Agencies after 1933. In efforts to cope with the devastations of the continuing business depression, and for other reasons, Congress began in 1933 to create, in rapid succession, special agencies of federal administration, endowed with immense administrative, spending, and regulatory powers. Not content with its own creations it authorized the President to set up other agencies and confer general and special powers on them. In these circumstances literally scores of offices, boards, and commissions appeared in never ending profusion, known usually by their initials; for example, NIRA (National Industrial Re-

covery Administration), AAA (Agricultural Adjustment Administration), SEC (Securities and Exchange Commission), TVA (Tennessee Valley Administration), WPA (Works Projects Administration), NLRB (National Labor Relations Board), &c., &c., &c. At length it seemed as if practically all the possible combinations of the letters of the alphabet had been exhausted in naming these "alphabetical agencies" of the United States Government.

Duplications and Confusions. In 1933 more than half a million persons were employed by the various establishments and offices in performing the thousands of civil functions, in detail and in gross, established under the Federal Government. By 1938 it had risen to 840,000; by 1943, to about 3,000,000. As agencies and employees were added to the old groupings, as old establishments were divided and subdivided, Congress often paid little or no attention to the relations of the new functions which it authorized to the old functions already undertaken. As a result of this rapid growth and lack of planning, confusions, duplications of work, overlapping, waste, and conflicts of powers and jurisdictions marked the conduct of the federal administration. Rapid changes in duties and names added to the tumult, so that it was with difficulty that busy citizens could find out what was going on in the Government, what their duties were under the laws and executive orders, and whom they should consult if they had any business with the Government on any subject. Not without some reason did James M. Beck call it "Our Wonderland of Bureaucracy."

Growing Movement for "Scientific Administration." Meanwhile in all parts of the country, in connection with state and federal government, a movement in favor of drastic reforms in public administration was gathering momentum. In organized form this movement may be said to date from the establishment of the Bureau of Municipal Research in New York City in 1907—a private association for the improvement of government. In time similar bureaus were set up in other cities in many parts of the country; universities and colleges began to give instruction in public administration; research in all branches of the subject multiplied; books, articles, and pamphlets spread knowledge of it far and wide, and a large body of experts was trained in what was called for convenience "the science of public administration" or "the science of public management."

Principles of Public Administration. In the early stages of the movement for administrative reform, certain broad principles were worked

out, especially under the leadership of F. A. Cleveland, long director of the New York Bureau of Municipal Research. Chief among them, in summary form, were the following:

A complete annual budget, prepared by the executive and scrutinized by the legislature, to cover and set forth in a systematic manner the classes and items of expenditure for all governmental purposes.

A consolidation of all, or nearly all, the numerous offices, agencies, and establishments of administration in a few great departments of government, each headed by a responsible chief, in turn responsible to the Chief Executive.

The grouping of all functions of government, identical or similar in nature, in the same office or establishment, so as to prevent overlapping in authority and duplications in work.

The classification of all offices and employments according to the nature of their respective functions, and the establishment of a civil service authority or personnel agency empowered to select properly qualified persons for the various kinds of work to be done.

Extension of the merit system of civil service to all government officials and employees, except the political officers at the top in whom are vested policy-making functions. This means permanent tenure for the major portion of the public employees—a bureaucracy, in short, of specialists permanently dedicated to public administration.

The creation of special agencies for research and inquiry to serve the heads of departments in their work of supervision and the Chief Executive as the responsible head of the entire administrative organization.

A reorganization of legislative committees and procedures in such a way as to correspond to the shape and structures of the administration.[2]

Attempts to Apply Principles of Management to the Federal Administration. As the movement for improved administration gathered force repeated efforts were made to bring about a reconstruction of the federal system—under Presidents Taft, Harding, Coolidge, and Hoover—but they came to little or nothing. Undeterred by previous failures, President Franklin D. Roosevelt, in 1936, appointed a special Committee on Administrative Management and charged it with the duty of surveying the whole federal administration and submitting proposals for reconstruction. In January of the following year the President transmitted the report of the Committee to Congress. After a long and bitter debate, Congress passed the Government Reorganization Act, approved, April 30, 1939.

The Government Reorganization Act of 1939. This act authorized the

[2] For a brief historical summary, C. A. Beard, *Public Policy and the General Welfare*, Chapter X.

President to prepare comprehensive reorganization plans for transfers, consolidations, or abolitions and submit the same to Congress. Plans had to be filed prior to January 21, 1941. Plans took effect upon the expiration of sixty calendar days after submission to Congress or, in case of an earlier adjournment, sixty days from the beginning of the next session, unless within the sixty day period Congress passed a concurrent resolution disapproving the said plans or plan. The Act placed specific limitations on the President's powers in this respect. The President could not transfer or abolish an executive department or its functions; nor could he transfer or abolish certain specified agencies, such as the Federal Trade Commission, the Federal Power Commission, the Interstate Commerce Commission, and the Civil Service Commission. Nor could he change the name of any executive department or designate any agency as a department. The Act authorized the President to appoint six administrative assistants as his aides in administration.

Presidential Operations under the Act. In accordance with the terms of the new law, President Roosevelt in 1939 and 1940 submitted to Congress four large plans making numerous changes in the structure of the federal administration, and received congressional sanction for them.[3] In these plans, he set up new agencies, abolished a few agencies, and transferred or consolidated other agencies. But before the new arrangements could be perfected and tested, preparations for war and war itself came upon the country. Then the President, under acts of Congress or under his own authority as Chief Executive and as Commander-in-Chief, began the creation of new agencies for war purposes or in aid of war efforts and made additional transfers, consolidations, and divisions among agencies commonly regarded as essentially civilian. This process of creation, transfer, abolition, and reorganization proceeds apace. Few divisions of the Executive Department long remain unaffected by it and hence any exact picture of the federal administration at a given moment is likely to be out of date within a few days or a few weeks and to be useless for all practical purposes and misinforming besides.[4]

General Structure of the Federal Administration. Although any detailed description of the federal administration at the moment is useless

[3] For brief summaries of the President's plans, see the *Political Science Review*, June and December, 1939, and June, 1940.

[4] For more details see the latest issue of *United States Government Manual*, published three times a year. Appendix A of the *Manual* for the summer of 1943—twenty-seven pages in fine print—gives the reader a fair impression of the whirlwind of creations, transfers, and changes made in federal administration in recent years and months.

for practical purposes, the outlines of the general structure are fairly well fixed and may be sketched in summary form, as follows:

I. The Executive Office of the President, including his secretaries, aides, and the Bureau of the Budget.

II. The Emergency War Agencies (See below, Chapter XIV on War Powers)

III. The ten Cabinet Departments named above, with the Department of Labor now reduced to a skeleton.

IV. Two high ranking agencies that are almost departmental in position —the Federal Security Agency and the Federal Works Agency. The Federal Loan Agency created by the President in Plan I of 1939 disappeared in 1942 when its functions were divided among other agencies by executive orders.

V. Numerous Commissions and Boards independent of Departments and other division of the administration; for example, Federal Communications Commission, Federal Power Commission, Federal Trade Commission, Interstate Commerce Commission, National Capital Park and Planning Commission, National Labor Relations Board, Railroad Retirement Board, Securities and Exchange Commission, Civil Service Commission, Employees' Compensation Commission, Maritime Commission, Tariff Commission.

VI. Miscellaneous Agencies; such as Federal Deposit Insurance Corporation, Federal Reserve System, General Accounting Office, National Archives, Smithsonian Institution, Tennessee Valley Authority, Veterans Administration.

Many of the federal administrative agencies, such as the Departments and the Interstate Commerce Commission, are established under acts of Congress and thus have a degree of permanence. Others created by executive orders may be altered, consolidated, or abolished at any moment under presidential discretion and impulse.

Special Position of Agencies with Large Legislative, Judicial, and Discretionary Powers

The Commissions. Many of the federal commissions, such as the Interstate Commerce Commission and the Federal Power Commission, are more than mere executive or enforcing authorities. Some of them are in effect legislative bodies, projections of Congress itself; the statutes governing them are general in character and it is their duty to amplify the laws, to supply details, to add provisions. If we care to split hairs, they

are not subordinate legislatures, for the lawyer tells us that constitutional power cannot be delegated; but in reality they are. Since this is true, Congress may rightfully be more concerned about their work than the President himself.

Besides being executive and legislative bodies, some of these commissions exercise what is in substance judicial power. Legally, of course, the Constitution vests all judicial power in the Supreme Court and such inferior courts as Congress may create; so theorists speak of certain functions discharged by regulatory bodies as being "quasi-judicial," that is, "almost" judicial. But we may safely say that some commissions have duties which are for practical purposes judicial in nature. They hear complaints, listen to arguments of counsel, read briefs, make decisions, and render opinions based on law and facts. And from their important rulings, especially those touching the rights of property, parties aggrieved may appeal to the federal courts, just as they may appeal from the findings of lower courts to the higher tribunals. Accordingly, if there is any reason for taking the federal courts out of presidential politics and making them to some degree independent of the chief executive, there are also grounds for throwing similar safeguards around the quasi-judicial commissions.

Efforts to Preserve Independence of Certain Agencies. In creating these law-making and semi-judicial bodies, Congress has sought to allow them a certain security against the President by giving to their members terms longer than his or overlapping terms, so that on coming to office he cannot completely reconstruct all such bodies by filling them with his own appointees. Members of the Federal Trade Commission and the Interstate Commerce Commission hold office for seven years, with overlapping terms. Other safeguards are found in law and practice. Whereas the heads of departments usually do not have fixed terms and their nomination is almost universally approved by the Senate without objections, appointments to the quasi-legislative and quasi-judicial commissions suggested to the Senate are nearly always carefully scrutinized before confirmation. More than once the President in making selections for such posts has been compelled to defer to critical Senators. He cannot remove incumbents at will (p. 177), and the consent of the Senate is necessary to the installation of their successors and may be employed against action to oust. Moreover both houses of Congress ordinarily keep a far stricter watch on the operation of these agencies than they do on

purely executive authorities. All this merely illustrates again the difficulties which arise when efforts are made to split the work of government into strictly executive, legislative, and judicial divisions.

Experiences of Commissioners. Nominally positions in the great commissions of the Federal Government are political in character, that is, the occupants are appointed by the President and Senate. Many commissioners have in fact come up through the route of party politics. E. Pendleton Herring's study of 143 federal commissioners shows however that a surprisingly large number of them have had long experience in the public service, state or federal or both.[5] He found 108 posts in state governments and 103 federal positions among the offices previously occupied by the commissioners. For example, it has been a frequent practice to select for membership of the Interstate Commerce Commission men who have served on state public service commissions. Sometimes Democrats or Republicans defeated in efforts to win reëlections to Congress have been given berths in commissions, but on the whole commissioners have had previous administrative or judicial experience.

The Making of Administrative Law by Agencies. In recent years the practice of giving commissions and agencies the power to make regulatory, judicial, and discretionary decisions of their own has grown rapidly, especially in matters affecting railways, agricultural marketing, drugs and foods, electrical utilities, wages and hours, communications, and industries doing business with the government. Whether these functions are exercised by boards, such as the Federal Power Commission, or by department heads, such as the Secretary of Agriculture, the duty of discharging them involves the making of rules and the issuing of orders within the limits of the statutes. Often an act of Congress contains only a few paragraphs or pages, while the regulations promulgated under it fill hundreds of pages. Although there is no sharp line between statutory law and administrative law, it is convenient at least to call these subsidiary regulations, or orders of federal agencies, "administrative." Whatever name may be given to them, they constitute a huge body of federal law, vitally bearing on life, property, liberty, industry, agriculture, and commerce.

Rise of "Administrative Tribunals." To collect facts necessary for the issuance of orders and to hear appeals or complaints lodged against orders, many "tribunals" or agencies have been established under various names, in a somewhat haphazard fashion from year to year. After mak-

[5] *Federal Commissioners: A Study of Their Careers and Qualifications* (1936).

ing a long and profound study of this development,[6] Frederick F. Blachly has classified the tribunals as follows: (1) legislative courts, set up as instruments "for carrying out the legislative powers of Congress." An example is the Court of Customs and Patent Appeals which reviews decisions made in administering tariff and patent laws. (2) Administrative tribunals which have the power to hear appeals against the decisions of some administrative agency. The Tax Court, formerly the Board of Tax Appeals, for instance, hears taxpayers who are dissatisfied with the rulings of the Treasury Department on their income tax returns. (3) Regulatory authorities which issue orders subject to review by the regular courts. The Federal Trade Commission is such an authority. (4) Judicial agencies of regulatory bodies. Before the Federal Power Commission issues a license to a corporation permitting it to use federal waters for power production, it employs a "trial examiner" to hear the applicant and take evidence bearing on the subject; and the trial examiner operates in a semi-judicial manner. The National Labor Relations Board also employs examiners for preliminary hearings. (5) Administrative appellate authorities who decide matters of fact not reviewable by the regular courts. The Department of Agriculture, for example, has a Board of Tea Appeals which hears appeals from decisions of tea examiners who rule on the qualities of imported tea. (6) Advisory adjudicating authorities which hold hearings and advise department heads in making decisions on cases before them.

Vital Issues of Administrative Law. The various federal agencies just listed make numerous rulings from day to day, which deeply involve the rights of persons and property. In many cases there is no appeal to the courts at all. When the Veterans' Administration refuses to grant a pension to an applicant, that settles the matter, for no judicial review is provided in such cases. If every person dissatisfied with an official ruling could go to the courts and drag his dispute out over a period of years, with the aid of able lawyers, public business would be clogged with law suits. As a general principle the courts do not entertain appeals on mere questions of fact decided by administrative officers, but only appeals alleging that the officer in question has violated the law under which he is operating or has infringed some constitutional right (p. 235).

Recently there has grown up a demand for freedom of appeal to the regular courts against the decisions of administrative agencies which have regulatory or semi-judicial powers. The Supreme Court has shown

[6] *Working Papers on Administrative Adjudication* (75th Cong., 3rd Session).

some sympathy with the idea. But such a provision certainly would seriously hamper the conduct of the Government's business. Less drastic proposals call for standardizing the forms and procedures of administrative agencies having semi-judicial powers and for the establishment of regular "administrative courts" to hear appeals from their decisions. Indeed legislation looking in this direction has already been proposed.

Rights of Federal Employees Involved. The conduct of administrative tribunals affects federal employees as well as private persons. Many of the so-called tribunals pass upon the rights of employees in matters of removal or demotion, and as a general rule employees have no recourse to the courts when they feel that an adverse decision has been unjust or unlawful. Here too the power of the Government to act quickly is brought into question, and the hands of federal officers would often be tied if every employee discharged for neglect of duty could set out on a tour of the courts for relief. Nevertheless the growing sentiment relative to "the rights of the job" has produced a demand for some kind of judicial safeguard against the decisions of administrative chiefs and reviewing bodies. Here the issue of administrative tribunals merges in the larger issue of an efficient and loyal personnel in the public service.

Classes of Federal Employees in the Executive Service

Number. In the discharge of their functions the departments, commissions, and agencies of the civil administration have at their command nearly 3,000,000 officers and employees (2,964,405 in September, 1943), ranging from administrators and skilled technicians to casual laborers.

Two Types of Appointments. Considered with respect to methods of appointment, the offices and employments of the civil administration may be divided into two broad classes: (1) those which are "political" in character, that is, filled at the pleasure of the appointing officer, often, if not usually, with a view to rewarding ardent workers in the party to which he belongs; and (2) those which can only be occupied by persons who have complied with the requirements of certain examinations or preëstablished standards.

There was a time when all positions in the executive service were theoretically and to a large extent practically treated as "political." In other words, they were subject to the spoils system and given to party workers without special regard for their competence and without applying any regular test to their abilities.

The Civil Service Act and Extensions. After some tentative experiments in reforming such abuses, Congress passed in 1883 the Civil Service Act, which is still the fundamental law governing occupations of the second class just mentioned. This Act provides for a Civil Service Commission of three persons, no more than two of the same party, appointed by the President and Senate. The Commission aids the President, at his request, in preparing suitable rules for competitive examinations designed to measure the fitness of applicants for offices already classified or to be classified. In addition it renders general assistance to the President in dealing with problems arising under the Act.

With a view to immediate application, the Civil Service Act ordered the Secretary of the Treasury and the Postmaster General to classify certain positions within their respective jurisdictions for transfer to the merit régime. At the same time it provided that the heads of specified departments and establishments should, at the direction of the President, apply the merit system to their employees. In other words, the Act itself brought a few offices under the system, and left the extension of it to the discretion of Congress and the President.

From time to time extensions were made either by new legislation or executive order. By an act passed in 1938, for example, Congress placed the first, second, and third class postmasters in the classified civil service; and by two orders issued that year President Roosevelt widened its scope, by prescribing that all positions in the executive branch not already in the competitive class must be placed there on and after February 1, 1939, save those appointments expressly excepted by statute and those requiring ratification by the Senate.

When the Civil Service Act went into force in 1883 it covered only about fourteen thousand places. After the turn of the century, the number was greatly increased, mainly by executive orders, and it reached approximately 530,000 by 1938. By the Ramspeck Act which went into force on January 1, 1942, many New Deal positions that had been outside the merit system were brought within its scope—a number estimated at "well over 100,000." [7] At that time the chairman of the Civil Service Commission stated that more than eighty per cent of the regular civil employees of the Government belonged to the competitive class.

Appointments Exempt from Merit System. Notwithstanding this extraordinary development, thousands of federal employees are still on a political basis, some of them, it is true, only nominally; that is to say,

[7] H. Zink, *Government and Politics*, p. 522 and notes.

their appointment is made without reference to the competitive examinations of the Civil Service Commission. Two groups of federal positions are exempt from the merit requirements for testing applicants. One embraces a number of places within the classified service which are not put on the competitive list for various technical reasons. The second group lies entirely outside of the classified service and may be called "political" in the strict sense of the term. In its distinctions the federal appointment system is not severely logical.

There is indeed no uniformity of practice even in the case of the so-called political offices. In certain instances new men are chosen for partisan reasons whenever there is a change of administration and in others the incumbents really enjoy permanent tenure by virtue of tradition and necessity (p. 237). This is due to the fact that federal employments have never been systematically divided into classes that are truly political—or policy-determining—in character and those that are professional and technical. Some high posts are under the merit system and some minor positions are not.

Exemption of Technical Positions Criticized. Undoubtedly the exemption of purely administrative and technical positions from the operation of the competitive principle produces many unfortunate results. When the chief of a technical bureau or division is a political appointee, selected on account of his party views, it is almost impossible to exclude political considerations from the assignment of duties to employees and other matters essential to efficiency. Even though the head sincerely desires to improve the service, his actions on salaries and promotions are always open to suspicion. Being a political appointee he may have to give time to partisan affairs to the neglect of his official duties, and he may be drafted into partisan work by a superior. Perhaps more significant than these evils is the fact that the appointment of politicians to technical offices limits the career of ambitious subordinates who enter by the merit route; no matter how hard and intelligently they work, they cannot reach the top. Political appointments also usually exclude outside experts who are not partisans.

Change after 1933. To some extent the situation with respect to purely political appointment was altered by the business depression that opened in 1929. As long as business was prosperous and government treated as a "necessary evil," it was natural that official service should hold a low place in public esteem. As long as young men and women could look forward confidently to distinction and fortune in business and

associated professions, it was natural also that they should regard with disfavor more modest and less lucrative opportunities in government bureaus and offices. But when thousands of engineers, lawyers, doctors, and college graduates were unemployed and opportunities for fame and fortune in business diminished—to the point of disappearance in many cases, then public service gained a new attractiveness. As the Federal Government was called upon to lend money and credit to banks, railways, industries, farmers, and home owners, and to put forth strenuous efforts to raise up business from a state of collapse, a new significance was given to the rôle of government in national life.

Use of Trained Men and Women. In formulating a "recovery program" and carrying it into execution, the administration of Franklin D. Roosevelt had to deal with all the great problems of business, agriculture, and engineering which had once been almost the sole concern of private interests. It undertook new functions of vital importance—functions different from the old routine performances of administration. It needed new blood, new life, and new capacities—something more than the talents of traditional clerks and engineers. In the circumstances, the demand for highly trained men and women increased, and the public service became more attractive to enterprising and talented youth.

Classes of Employees under Merit System. Taking into account the nature of the work performed by federal employees coming within the scope of the civil service acts, the various positions are distributed among five great "classes," each containing a number of "grades." At the head of the list is the Professional and Scientific Service requiring for admission a special training equivalent to graduation from a college or university. It calls for the application of the principles of a profession or science in the performance of routine, advisory, administrative, or research work. Immediately below is the Subprofessional Service. As the name implies, places in this class carry with them subordinate duties connected with the work of the Professional and Scientific Service. The third group is the Clerical, Administrative, and Fiscal Service. In this division are to be found all minor posts commonly associated with office, business, or financial administration. In the fourth class—the Custodial Service—are included occupations involving the care of public buildings, the transportation of persons and property, or the transmission of official papers. The fifth class is the Clerical-Mechanical Service, embracing all positions, outside of recognized trades or crafts, which require skill and experience either in machine operation or in the inspection or

verification of products in the Government Printing Office, the Bureau of Engraving and Printing, and the Mail Equipment Shops.

Employment Methods

Examinations. In applying the competitive idea to positions brought under its jurisdiction, the Civil Service Commission prepares a large variety of examinations to test the fitness of candidates for the different types of offices. To administer the system there has been established at Washington a division of examining and personnel utilization which has under its supervision local examining officials stationed at numerous points in the states and territories, reasonably convenient for persons in quest of federal employment.

Examinations, according to the law, must be practical in character and calculated to measure fairly the relative capacity of applicants to discharge the duties of the branch to which they seek admission. In preparing examination papers it is the custom of the Commission to invite the coöperation of the departments; if a technical position is to be filled, the department concerned usually notifies the Commission and indeed may furnish the specific questions.

Any citizen of the United States, except certain small classes such as the physically incapacitated and revolutionists, may offer himself for an examination if he can meet the preliminary conditions. For a long time aliens were often admitted to government employment, but recently the requirement of citizenship has been rigidly enforced, save for very special reasons. Applicants for examination are not charged a fee, although the Civil Service Commission has recommended a nominal charge to exclude ill-prepared persons who try the tests in a gambling spirit—nothing to lose and possibly something to gain.

Lists of Eligibles. Through the periodical holding of examinations the Civil Service Commission maintains lists of eligibles for all positions coming under the merit system, so that it can furnish satisfactory candidates when called upon by the several establishments. On the same day, there may be demands for accountants, stenographers, expert chemists, patent examiners, draftsmen, interpreters, and postal clerks.

Appointment. When notified of a vacancy by an appointing officer, the Commission selects from the proper register and transmits to him the names of three candidates at the head of the roll, who are if possible residents of the state to which the appointment falls. From these three the

appointing officer selects one and returns the other names to the Commission to be replaced upon the list. If he refuses to accept any of the three, he must give satisfactory reasons and is supplied with a new quota. The successful candidate is put on probation for a short period; then if his record is good he is given permanent tenure.

Exceptions. It should be noted in passing that there are important exceptions to the above rules. Preference is given to persons honorably discharged from the military or naval service. And appointments in the departments at Washington must be apportioned among the states, territories, and the District of Columbia on the basis of population. Naturally the latter principle cannot be strictly followed, and it affords a pretext for clamoring by candidates and Congressmen from states that fail to secure their share of places.

Promotion. Promotions in, as well as appointments to, the federal service are to some extent based upon competition. Examinations are held to test candidates for advancement and a list of eligibles is kept. In fact however no reasoned system of advancement has been worked out to inspire employees to develop their latent powers with a view to rising in the scale. As a matter of practice the appointing officer has a right to decide whether he will fill a given vacancy by open competition or by selection from within the service—a right often challenged as contrary to good administration.

Removal. The process of removal from the federal service is relatively simple. The law provides that a person may be discharged from a competitive position "for such causes as will promote the efficiency of the service." When the President or head of an executive department is convinced that one of his subordinates in the classified service is incompetent, he may oust such employee after giving due notice. While the power thus conferred is broad, it is frequently said that incapable men are protected by the regulations against dismissal. In reply the Civil Service Commission insists that "the power of removal for unfitness is with the head of the office. The appointing officer being responsible for the efficient performance of the work of his office, it rests with him to determine whether such cause exists as to require the removal of an employee in order to promote the efficiency or discipline of his office."

In short, the administrative head enjoys great freedom in this respect. As a rule the courts will not interfere with him. They take the position that the power of appointment generally involves the right of removal and that the Civil Service Act limits the right in only one instance—

an employee cannot be dismissed merely because he has refused to give money or service to a political party. When however a large number of employees of the same political faith are discharged at the same time, partisan motives are suspected and the officer responsible for the action must convince the Commission that a just cause exists in each case; but even here the courts will not attack the discretion of directing officers.

Retirement Pensions. In 1920 a federal retirement system was established to provide pensions for all persons in the classified service and certain others who on account of age or disability are unfit for "useful and efficient" labor. Under this scheme as later modified the age of retirement in the normal course is fixed at various points according to the nature of the work done. Everyone who benefits from the arrangement must contribute a part of his salary to the pension fund, and on his withdrawal after a period of active employment he receives an allowance based on the length of his service and the amount of his salary. In addition to being an act of tardy justice to old and faithful public servants, the project contributes to efficiency. Prior to its adoption hundreds of aged people were kept on federal pay-rolls by warm-hearted department heads because their discharge would be an act of cruelty. Work was thus entrusted to employees whose competence had departed, while young and ambitious subordinates, finding their careers blocked, left to seek better opportunities in professional or business life.

Partisanship and Political Activities

Efforts to Exclude Partisanship. From decisions relative to promotions, removals, and reductions in rank it is very difficult to exclude all partisan considerations, but attempts are made to protect employees in the classified service against many party pressures and also to prevent them from engaging in undue political activities. The original civil service law provides that no person in the employ of the Government is for that reason under any obligation to contribute to political funds or to assume any political duties, and that he shall not be removed or otherwise prejudiced for refusing to do so. Moreover no one in the federal service has a right to use his authority to control the political actions of anybody. No recommendation by a Congressman, except as to the character or residence of an applicant, can be legally received or considered by officials responsible for conducting examinations or making appointments under the Civil Service Act. Members of Congress and executive, judicial, mili-

tary, and naval officers are forbidden to seek or accept political assistance or contributions from employees in the classified service. The practice of soliciting campaign funds in buildings occupied by federal agencies is prohibited. However, as far as the law is concerned, employees in the classified service may make contributions to persons or committees of persons who hold no office under the United States; in fact many of them do, either voluntarily or upon assessment by political managers.

Definition of Partisan Activities. Political activity in the broadest sense is placed under the supervision of the Civil Service Commission by a regulation providing that "all persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns." This rule has been construed by the Commission to forbid the use of official positions for the benefit of any political party; and since its adoption it has been interpreted to prohibit the following types of political action: "Service on political committees, service as delegates to county, state, or district conventions of a political party, although it was understood that they were not 'to take or use any political activity in going to these conventions or otherwise violate the civil service rules'; continued political activity and leadership; the publication of a newspaper in the interest of a political party; membership in a club taking an active part in political campaigns and management; the circulation of petitions having a political object; service as a commissioner of elections in a community where it was notorious that a commissioner of elections must be an active politician."

The Political Activity Act. By an act of 1939 (p. 78), bearing the name of its author, Senator Hatch, Congress laid many new restraints on the political activities of federal employees. No person deriving money from federal sources can belong to a political party or organization which advocates the overthrow of our constitutional form of government. With exceptions, no person employed by the Federal Government may use his official position to influence or interfere with elections or take an active part in political management or campaigns. The exceptions are the President, persons employed in his executive office, the Vice President, heads and assistant heads of departments, and officers appointed by the President with the consent of the Senate, who determine policies in foreign relations or in nation-wide administration of federal laws. Federal employees however retain the right to vote and express their opinions

on political subjects. In signing the bill President Roosevelt characterized its language as vague and sweeping, but the Act certainly has had a certain restraining effect on federal employees all over the country and has put the fear of retribution into them. By resolution the Judicial Conference, held at the Supreme Court building in the autumn of 1943, warned judicial employees to observe the terms of the Hatch Act (p. 202). A second Hatch Act, of 1940, applied the principles of the Political Activity Act to state and local administrative employees engaged in operations wholly or partly financed from federal funds. Responsibility for the enforcement of the Hatch Act of 1939 is vested in the Civil Service Commission. One of the Commission's divisions coördinates the work of enforcement and conducts hearings on alleged violations.

Restraints on "Subversive" Activities. Far more disturbing to the administration of the civil service than partisan activities in the old style (conflicts of Democrats and Republicans over the spoils of office) are recent dissensions over what are loosely called "subversive" activities. These activities are nowhere defined in federal law. Hence in a strict sense they are not illegal and constitute no specific bar to federal employment. Advocating the overthrow of government and belonging to organizations committed to such advocacy are, as noted, unlawful, and form legal grounds for excluding persons engaged in such activities from federal employment. But "subversive" activities in general are of another type. They are not necessarily partisan activities in the old sense but are activities displeasing and frightening to right-wing members of the Democratic and Republican parties and to such patriotic bodies as the Daughters of the American Revolution. They range from such grave offenses as reading *The New Republic* or *The Nation* to joining the Lawyers Guild, praising too ardently the more radical measures of the New Deal, or taking part in any association which may be sponsored or influenced by Communists.

On November 3, 1943, the Civil Service Commission announced that it had issued instructions to its examiners advising them not to inquire into the relations of applicants to a number of activities coming under the head of subversive, when questioning such applicants as to their worthiness for federal employment. In terms of law the Commission's instructions were strictly correct but they raised a storm of protest in the House of Representatives and certain newspapers. If these protests are to be taken at face value, then the Civil Service Commission is bound to exclude from federal employment a member of "the Washington Book-

shop" or any other organization not "patriotic" enough to suit the right-wing members of the Democratic or the Republican party.[8] In fact speeches and actions in Congress during the year 1943 indicate that even federal employees who hold what may be correctly called "liberal" views of American politics are likely to be denounced in Congress or have their salaries cut off, and that the Civil Service Commission, in administering the civil service acts will be in constant trouble if it tries to adhere to the letter of the acts in respect of partisan activities.

Organizations of Federal Employees. Efficient administration must also take into account another phase of activity among federal employees, namely, the formation of unions, the federation of unions, and the participation of such organizations in politics to secure higher wages and better labor conditions generally. On this matter President Theodore Roosevelt took a firm stand by forbidding employees either individually or through associations to solicit an increase of pay or favorable legislation before Congress or any of its committees. But within a few years his orders were reversed by an act of Congress expressly proclaiming the right of federal employees and their organizations to resort to such tactics and prohibiting any interference with their exercise of the privilege.

Skilled workmen in federal employment have long been members of trade unions affiliated with the American Federation of Labor or the Congress of Industrial Organizations, and through those two labor bodies they bring pressure to bear on Congress. Other federal employees are organized in special unions and associated with the National Federation of Federal Employees or the United Federal Workers of America. Through direct organization and through affiliation with unionized labor outside of the service, federal employees can concentrate heavy forces upon Congress in support of favorable legislation. Indeed the National Federation of Federal Employees boasts that it has defeated unfriendly Representatives seeking reëlection to the House, secured the passage of important laws, and obtained the presidential veto of other measures. It tells federal employees that the way "to get on is to get together."

Owing to its extent and ramifications, the authority enjoyed by unions of federal employees raises many problems in politics and administration. As yet these organizations do not proclaim the right to strike and tie up the government service; on the contrary their charters of affiliation with the American Federation of Labor expressly recognize their special obligations to the public, and so do the charters issued by the

[8] *Congressional Record*, December 2, 1943, pp. 10357 ff.

Congress of Industrial Organizations. But their political activities are wide-reaching and may easily interfere with the course of legislation and administration. Thus far, they have been able to remedy many evils, for it is notorious that in some respects the Federal Government has not always been a "model employer." If, on the other hand, they exert their power selfishly and come into open collision with the Government they may do great damage to the morale and efficiency of the entire federal force. Their very existence suggests the possibility of a formal system of coöperation between the Government and organizations of its employees, with a view to a continuous and sympathetic adjustment of controversies.

This leads inevitably into the larger aspects of personnel administration. The movement for a scientific treatment of this question, which has already produced considerable effect in states and cities, has reached Washington. Traces of it are now to be found in the reports of the Civil Service Commission, the proceedings of committees of Congress, the report of the President's Committee on Administrative Management, reforms introduced by enlightened department heads, and debates on civil service measures. The technique of this science, still in a formative stage, is most highly developed in private industry, but its influence is now widely felt in governmental circles where it doubtless has a future of great significance.

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CHAPTER XI

TAXATION AND FINANCE

Public Finance Affects All Branches of Economy. Among the ancillary functions of government, namely, functions necessary to the support of all branches of government, is that of providing money by laying taxes and making appropriation. But this function is more than incidental to the conduct of government. Its exercise involves every phase of agriculture, industry, and commerce, and affects fundamentally the distribution of wealth in society. In laying taxes, Congress may burden one class of the community for the advantage of another. In making appropriations it may use the money taken from one class or section for the benefit of another class or section. Besides, in regulating currency and banking, it controls the very lifeblood of modern industry and commerce and may in this sphere, as in that of taxation and appropriation, enrich one group and impoverish another.

Not since the early days of the Government under the Constitution have federal taxes been laid for the sole purpose of securing revenue and providing for the bare expenses of the Government. Nor has the power of Congress over the currency been exercised solely with reference to creating and maintaining a sound and stable currency for the transactions of private business and the operations of government, federal and local. Both the taxing and the currency powers have been continuously involved in the conflicts of economic and political interests in the country and have been employed with a view to affecting private enterprise and the distribution of wealth. At the present time taxing, banking, and currency powers are extensively used to promote, control, stimulate, and regulate numerous branches of the national economy, especially with reference to a level of wealth production and to the prevention of devastating panics and depressions.[1] This practice, it is true, encounters a running fire of criticism in Congress and outside, but it is not likely to be abandoned soon, if ever.

[1] See below, pp. 270; and Chapter XV on Government and National Economy.

The Power of Congress to Tax

Wide Scope of Taxing Power. Under the Constitution Congress has a broad and general power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." Subject to certain rules, considered later, there is apparently no legal limit to the *rate* of any tax which may be imposed. On one occasion, Congress put a tax of ten per cent on state bank notes and drove them entirely out of circulation. In speaking of this drastic measure, the Supreme Court said that it was not within the province of the judiciary to prescribe to the legislative department limitations on the exercise of its acknowledged powers. If the taxing function is exercised oppressively, the Court declared, the remedy for the wrong rests with the people who choose the legislature. From various judicial decisions it appears that as long as Congress conforms to the restrictions mentioned below it can prescribe any rate of taxation—even one confiscatory in nature.

Limits on Taxing Power. But on the taxing power so generously conferred, the Constitution imposes some limitations. Three are prohibitive in character and protect the states against discriminations. Congress cannot lay any tax or duty on articles exported from any state. In the regulation of commerce and revenue it must give no preference to the ports of one state over those of another; nor can it compel vessels bound to or from one state to enter, clear, or pay duties in another. Owing to the explicit nature of the restraints thus devised, there has been little debate as to their meaning and extent.

Indirect Taxes Must Be Uniform. This cannot be said of two fundamental limitations of the Constitution respecting the taxes which Congress may lawfully lay. The first of them, dealing with "indirect taxes," provides that all duties, imposts, and excises shall be uniform throughout the United States. This leaves to the courts the task of deciding whether any particular tax comes within the class described and complies with the requirement of uniformity. As on other doubtful matters, the opinion of the Supreme Court has varied. At one time it held that a tax on income, gains, and profits by the year was in the nature of an excise or duty; but several years later it declared unconstitutional nearly all the income tax schedules contained in the revenue act of 1894, on the ground that they were direct in character and did not fall within the category of duties, imposts, or excises.

Yet it is fairly well established that indirect taxes include customs or tariff duties imposed on goods entering the United States, taxes on whiskey, tobacco, and other commodities, on the sale, transfer, or transportation of merchandise, on business transactions, on checks, mortgages, and other legal papers, on inheritances, and apparently on incomes not derived from real or personal property. However, border-line cases are constantly arising, especially as the changing nature of modern industry, commerce, and property gives new facets to the forms and substances of capital and wealth.

In seeking to fix the metes and bounds of indirect taxes the Supreme Court, of course, must define the term "uniform." Generally speaking, a uniform tax, according to that tribunal, is one which falls with the same weight upon the same object wherever found within the United States. For example, a tax levied on passengers coming from foreign countries to the United States was held to be uniform, although it was principally collected at a few ports. Again, an inheritance tax is uniform when it is imposed equally upon all inheritances of the same amount and character, though taxable estates of a given size may occur in only a few states.

Direct Taxes Must Be Apportioned. The second fundamental limitation on the taxes which Congress may lawfully lay applies to direct taxes; the Constitution stipulates that capitation and other direct taxes, except on income, must be apportioned among the several states according to their respective numbers, excluding Indians not taxed. What taxes are direct? In answering this question the Supreme Court has not adhered to the terms of the economists. At first it was generally understood that there were two kinds of direct taxes—a capitation or poll tax and a tax on land. In 1895 the term was widened; the Supreme Court held that taxes on *income* from real and personal property were also direct and therefore legal only when apportioned among the states as ordered by the Constitution. As the higher taxable incomes were concentrated mainly in a few states, such an apportionment was impossible; hence the decision amounted to a prohibition. The ruling was countered however in 1913 by the adoption of the Sixteenth Amendment authorizing Congress to lay income taxes without reference to population.

No Tax on State Instrumentalities. In addition to the express constitutional limitations, there is an important implied restriction on the taxing power: Congress cannot tax the instrumentalities or the property of any state or of any of its political subdivisions. This principle was laid

down long ago, in 1819, by the Supreme Court in the case of McCulloch v. Maryland, in which it declared invalid a tax imposed on a branch of the United States Bank by the state of Maryland. The theory of the decision was that the United States is an indestructible union of indestructible states, that the power to tax is the power to destroy, and that if one government could tax the instrumentalities of the other the federation could not be preserved under the Constitution. According to this theory, as later applied, the United States could not lay taxes on the salaries of state and local officials or on the income from state and local bonds; and on the other hand a state could not tax the salaries of federal officials or income from the bonds of the Federal Government.

In recent years however the Supreme Court has narrowed its interpretation of the term "instrumentalities" and declared that it will inquire whether any state or federal tax does in effect cripple the power of the Federal Government or the state government to carry on its necessary functions. In 1939 it ruled that states could tax the salaries of federal officials and intimated that state and local employees were no longer exempt from federal taxes. Now the Federal Government lays income taxes on the salaries of state and local employees and states may in turn tax the salaries of federal employees. But income from state and local bonds is still exempt from federal taxes and states cannot impose taxes on the income from federal bonds or on the bonds themselves. There are still limits on federal taxation of state instrumentalities but the term "instrumentalities" is strictly construed to mean that the Federal Government must not do anything to cripple seriously state and local governments in the discharge of their necessary functions.

Limits as to "Purpose" of Tax. Likewise controversial and also revealing tendencies in development is the question of purpose in federal taxation, and here are involved fundamental matters of economic and social policy. The clause of the Constitution which gives Congress the power to lay and collect taxes, duties, imposts, and excises adds the words: "to pay the debts and provide for the common defense and general welfare of the United States." Obviously this is a limitation in respect of purpose, but the term "general welfare" is vague enough to cover almost any tax. Vague as it is, it disposes of the contention that taxes can only be laid to raise revenue—a theory long held by the Democratic party with reference to tariffs on imports.

In fact the Supreme Court has declined to hold that tax laws must always bring income into the federal treasury. When Congress in 1866 laid

a tax of ten per cent on the notes of state banks for the purpose of driving them out of circulation—not with any idea of raising revenue—the Supreme Court sustained the law. Again, when in 1902 in the interest of dairy organizations Congress imposed a high tax on oleomargarine colored as butter, to prevent its sale in such a guise, the Court said that this was a revenue measure and that the Court would not go into the motives of Congress in passing it. A similar position was taken with regard to a law of 1912 which laid a prohibitory tax on phosphorus matches found dangerous to health. A still more striking example is the Narcotic Drug Act of 1914, which subjected the sale of narcotics to close federal scrutiny through a nominal tax on dealers. This Act was sustained by the Supreme Court but with four out of the nine judges dissenting.

Reasoning from such judicial decisions Congress concluded in 1919 that it could restrict child labor throughout the United States by imposing a tax on transactions of certain industries which employed children under a fixed age limit. Here the Supreme Court called a temporary halt by declaring the act null and void as an improper use of the taxing power.

Casting aside earlier doctrines, it inquired into the purpose of the law and said: "A court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulative effect and purpose are palpable." Then the Court added that taxes are imposed "in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. . . . But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty."

By many competent students this decision was greeted as a dangerous departure from precedents. And as a matter of fact the Supreme Court has in effect overruled that opinion in more recent decisions. For example, it sustained in 1937 the Social Security Act which uses the taxing power to induce states to establish old age and unemployment insurance systems and went far in its opinion toward sustaining the old doctrine of Alexander Hamilton that Congress may tax and spend "for the general welfare." It merely warned Congress against displaying "arbitrary power" in this respect.[2]

[2] *American Year Book*, 1937, pp. 49–58.

Taxation Applicable to Social Purposes. Whatever may be the views of the Supreme Court at any time fundamental purposes other than that of raising revenue do enter into taxation. Used previously in an emergency, the income tax appeared during the agrarian upheaval near the close of the nineteenth century as a measure deliberately designed to effect a more equitable distribution of wealth. As its advocates expressly declared, the income-tax section of the tariff act passed in 1894 was intended to shift a part of the burden of taxation from the consuming masses to accumulated wealth. On that assumption the issue was fought to a conclusion in Congress. On that assumption also Joseph Choate assailed the income tax before the Supreme Court. When the Court, by a narrow margin, held invalid most of the income taxes levied by the act, and later when the Sixteenth Amendment was proposed, the question of the distribution of wealth was uppermost in the discussion.

Furthermore, nearly all the Presidents for a quarter of a century have recognized the social principle involved in income and inheritance taxes. Theodore Roosevelt defended them on the ground that they would promote equality of opportunity. Wilson expressed similar views. While repudiating socialism, Herbert Hoover, as Secretary of Commerce, declared his belief that "the present inheritance, income, and excess profits taxes tend to a better distribution of wealth." President Franklin D. Roosevelt was still more emphatic in 1936 and under his administration Congress materially increased the burden of income and inheritance taxes, especially in the upper ranges, even before war need for immense revenues became pressing in 1940.

The Federal Tax Structure

For the purpose of realizing certain social and economic doctrines as well as of raising revenues, Congress has erected a complicated tax structure. The revenue laws differ with respect to the sources or forms of wealth drawn upon for revenue, and the form and extent of the taxes levied. But in general the system embraces four fundamental categories.

Taxes on Consumption. First in the list come those taxes which bear on consumption. They include (1) customs duties protecting American industry against foreign competition and (2) miscellaneous internal revenue taxes such as those on tobacco and alcoholic liquors, and manufacturers' excise taxes on a wide variety of articles. Though the tariff often

attracts far the larger share of public attention, and formerly provided the main portion of federal revenues, it has now dropped to a minor place as a source of federal revenues. Miscellaneous internal taxes on consumption, the sale of goods, operations, and transactions now constitute the principal source of federal revenue, next to taxes on incomes.

Income Taxation. The second principal part of the federal fiscal program embraces taxes somewhat proportioned to the incomes of persons, corporations, and other organizations liable to such taxes. These are also of two types: (1) taxes which take money from all payers and confer no direct and corresponding benefits upon them and (2) taxes on incomes and payrolls for pension, unemployment, and social security purposes in general.

In both letter and spirit, federal legislation laying taxes of the first class is based on assumptions as to the just and proper apportionment of taxes with reference to the ability to pay and as to a proper distribution of wealth in the country. The controlling principles of such taxation are as follows:

Single persons with incomes below a certain level are wholly exempt.
Married persons are allowed a higher level of exemption.
Persons with families or dependents are allowed certain deductions in calculating their net income for tax purposes.
A relatively low fixed rate of tax, called "the normal tax," is applied to the total net taxable income of all persons subject to the tax.
The income tax is "progressive," that is, starting at a certain level of income a surtax is added to the normal tax and the rate of the surtax rises rapidly with the amount of the taxable income—to eighty-two per cent of all such income over $200,000 in 1943.

In raising money for the Global War the exemptions allowed to single persons and married couples were reduced to what amounted to a bare living standard and thus millions of people who had never before paid a federal income tax were brought within the scope of the tax. Besides, employers (with exceptions) were required to withhold, from the wages and salaries they paid, the income taxes due to the federal Treasury. So for the first time millions of people felt the burden of income taxes. Incidentally the bookkeeping transactions of the Treasury and its agents became enormously complicated and, to make matters more difficult for them, a "victory tax" was temporarily added to the normal and the surtaxes on incomes. But early in 1944 Congressional leaders promised a drastic simplification of income-tax returns.

Between 1913 and 1943 the income tax payer each year reported on his

income for the previous year and paid taxes on it. In 1943 Congress altered this rule and provided that the payer must report on March 15 of each year on his estimated income for the current year and pay on the estimated income, subject to later corrections up or down. This change was made by "forgiving" the taxpayer three-fourths of his tax for 1942 or 1943, whichever was smaller, and thus putting him on a pay-as-you-go basis for the future. This alteration also added to the complexity of the Treasury's bookkeeping but it placed the tax on income as earned instead of income of the previous year, all of which might have been spent long before tax day.

Certain principles are applied to income taxes on corporations and other organizations. Here too the evidence of the working out of a social policy appears in exemptions, rates, and "progressiveness." Organizations classed as coöperative or non-profit making associations—labor, agricultural, fraternal, mutual benefit, and similar types of organizations—are exempt even though their "business" runs into large figures. The rates applied to the taxable income of a corporation varies with the amount of its income—normal tax plus surtax; and then to this tax is added an "excess profits" tax, rising with the amount of excess profits—to ninety-five per cent in 1944.

Estate and Gift Taxes. A third great category of federal taxes embraces taxes on the estates of deceased persons and on gifts. These taxes are also roughly proportioned to the amount of money involved. Estates and gifts below certain amounts—materially reduced in recent years—are wholly exempt from such taxes. To estates and gifts above the exemption levels progressive rates, beginning at low percentages, are levied. Here again social principles are involved, especially the distribution of wealth; for it is an avowed purpose of such taxation to break up or materially reduce great estates, to force heirs from a life of idle enjoyment to a life of industry and self-help, and to curtail the power of the "plutocracy" in the affairs of the country.

Sale of Bonds and Other Securities. For many years the budget of the United States has been "unbalanced," that is, the tax revenues from all sources have not been sufficient to meet the expenditures of the Government. Hence supplementary revenues have been necessary and they have been obtained by selling federal bonds and other securities to banks, corporations, private persons, and other buyers. In time of war, the receipts from the annual sale of securities may exceed, and recently have far exceeded, the amount annually received from taxation.

Miscellaneous Revenues and Taxes. Included in this group are taxes laid for regulative or prohibitive purposes (p. 262), and revenues derived from special sources, such as the sale of government property, canal tolls, and rentals of public lands or buildings. Relatively speaking the amount derived from such sources is small and does not affect the annual budget very much, one way or the other.

Administration of Revenues and Debts

Agencies of Collection. Revenues accruing to the Federal Government under the tax laws are collected by the Treasury Department through two great services—one in charge of customs duties and the other internal revenues. For efficient administration the country is divided into separate customs and internal revenue districts, each with its commissioner and force of agents. To facilitate quick decisions on controversial points special tribunals have been erected. The Court of Customs and Patent Appeals and the United States Customs Court make rulings on disputes involving the classification of imports and the rates imposed by customs officials—with appeal to the regular courts on problems of constitutionality and treaty provisions. Income and inheritance tax cases can be carried to the Tax Court of the United States for review and settlement. Federal revenues from the post office, the sale of land, and other miscellaneous sources are usually collected and accounted for by the special agency in charge.

Custody of Funds. Tax revenues are kept in the Treasury at Washington and in banks belonging to the Federal Reserve System (p. 272) designated by the Secretary of the Treasury. Here they are held until paid out on warrants issued under congressional appropriation acts. The safety of federal deposits in banks is guaranteed by United States bonds and other prime securities placed in pledge.

The Federal Debt. Until the declaration of war on Germany in April, 1917, the United States was one of the few countries not staggering under the burden of a rapidly growing debt. In 1916, the total interest-bearing debt of the Federal Government was only $971,562,590, or $9.88 per capita. But with the necessities of war financing the debt rose enormously, so that three years later it reached the imposing sum of $25,234,496,274, or approximately $237.75 per capita.

In managing the huge federal debt, the Treasury Department made

special efforts, scarcely strenuous enough, to reduce the principal after 1921. Aside from retirements, the burden was also eased somewhat by refundings at lower interest rates, thereby cutting down the annual interest charges. On December 31, 1930, the gross debt reached the lowest level in the post-war years when it dropped to $16,026,087,000.

However, as revenues fell off and expenditures enlarged during the depression after 1929, the gross debt mounted rapidly again. By the close of the fiscal year in June, 1934, the gross debt had risen to $27,053,000,000 and in September, 1938, it stood at $38,407,000,000; in 1942 at $72,000,000,000; in 1943, at $136,600,000,000.

Foreign Government Debts. By various separate agreements the debts owed to the Government of the United States by its associates in the World War (1917–18), except the debts of Russia and Armenia, were all funded and arrangements made for repayment in installments extending over a long period of years. The terms varied. In general, each debtor was supposed to repay according to capacity. For a few years the several powers paid their installments as provided in the funding projects, some of them without grumbling, others making public and private complaints against the "hardness" of the United States. Many of these repayments had been made possible by American loans to the Germans who were paying reparations to the Allied Powers which, in turn, paid a portion of the reparation funds to the United States. That is, it worked out that way in practical effect.

But after the business depression stopped American loans to foreign countries and increased the difficulties in all international payments, President Hoover suddenly declared a year's moratorium on international debt payments, in June, 1931. When, on the expiration of the moratorium, efforts were made again to collect, protests hard and long were made. For a time, to avoid outright default, some nations made "token" payments, which were merely a part of the amount due. Gradually they ceased paying altogether, and by June, 1933, all of them, except Finland, had defaulted on their obligations. In November, 1937, the total of the funded and unfunded indebtedness of foreign governments to the United States with the payments on principal deducted, amounted to $12,400,000,000. Congress refused to cancel or further reduce the war debts, but soon it was generally recognized that they would never be paid. When in 1941 the Federal Government began to underwrite expenditures of various countries at war with the Axis Powers or deemed

useful to "the defense of the United States," under the Lend-Lease Act (p. 213), its claims against foreign governments were increased by tens of billions, with little or no prospect of recovering any considerable proportion of the total amount outstanding.

Appropriation Methods—the Budget and Accounting System

Former Practices. No money can be paid out of the Treasury of the United States except under the authority of an act of Congress. Until 1921 the country had no budget, or regular plan of revenues and expenditures. The President was not required to lay any annual program of revenues and expenditures before Congress, and it was long the practice for the Treasury merely to transmit to Congress a collection of the estimated needs of the various executive departments and agencies. In Congress the work of preparing appropriation bills was divided among many committees; appropriation bills were pushed through both houses one after another; revenue bills were prepared by separate committees; and not until the end of the session was it possible to calculate with exactness how much money had been voted and how much or what revenues would be needed or received to pay the bills of the Government. While the expenditures of the Government were relatively small and federal taxes were light, little attention was paid to this disorderly way of conducting financial business, but soon after the opening of the twentieth century protests against it began to mount in volume and in 1921 the agitation resulted in the Budget and Accounting Act.

The Budget Act Provisions. This Act created a Budget Bureau, now in the President's Executive Office, headed by a director appointed by the President. It imposes upon the President the duty of laying before Congress at the opening of each regular session a consolidated budget statement setting forth, among other things, the revenues and expenditures for the previous fiscal year, proposed revenues and expenditures for the coming year, and the condition of the public debt. If his budget shows a deficit, then the President must recommend measures to meet the difference; if it reveals a surplus, then he may make suggestions with respect to tax reduction. The data for the President's budget are collected by the director of the Budget Bureau from the departments and other spending agencies. They are reviewed, consolidated, and pruned by the head of the Bureau and laid before the President. After he has surveyed the consolidated estimates, and made his own changes, he lays the whole

budget before Congress in a special message. From time to time he may lay additional revenue and expenditure proposals before Congress by special messages.

Under this arrangement the President presents annually to Congress —in January of each year—a budget which consists of three principal parts and such supporting or additional documents as he deems fitting and proper. The three parts are: (1) proposed appropriations for the coming fiscal year; (2) proposed revenue measures to cover the outlays; and (3) proposed means of financing the expected deficit, either by new taxes or borrowings. Congress is in no way bound by the President's figures as to expenditures or taxes but at all events it does have before it near the opening of its annual session an official program of outlays and receipts to serve as a starting point for its work, if nothing more.

New Conception of the Budget System. Since the passage of the Budget Act in 1921 radical changes have come about in the conception of the budget system and its function in government. The theory then generally prevailing was to the effect that the budget system is concerned only with "public" finance and operates as if above, outside, or on the edges of the national or private economy. Under that theory budget makers, in making plans for taxing and spending, had to take into account the state of private economy but they had no fundamental responsibility for adapting their operations to the function of promoting and maintaining a high level of production and employment in that economy. The theory of course was not quite so simple. The taxation of incomes and inheritances, for instance, was used to encourage a wider distribution of wealth and customs duties to promote manufacturing industries. But on the whole the theory was commonly accepted as valid.

After 1921, however, especially after the great depression of 1929 opened, marked signs of new practices and a new corresponding theory of "public" finance came into view. Beginning in President Hoover's administration the Federal Government assumed certain responsibilities for promoting a recovery of business prosperity, providing employment for the idle, and affording relief to the poverty-stricken. After the inauguration of President Roosevelt in 1933 this program was enlarged in every direction; federal taxing and spending were deliberately used to stimulate industry, agriculture, and employment; and the federal budget system became entangled in the operations of private economy from center to periphery. In time a new theory was evolved to the effect "that in fiscal policy—in formulas of public expenditures, revenues, and loans

—is to be found the solution of the problem of controlling the fluctuations of the business cycle"; in short, of the problem of maintaining continuous prosperity for the American people.[3]

Other developments in knowledge and thought facilitated the growth of the new theory and practice. After 1921 American economists, by elaborate studies and analyses, made great advances in computing the size of the total national income from all branches of economy, and in estimating the several parts of that income as distributed among groups and classes of the people. Now for the first time in American history statesmen and the people had a fairly accurate and detailed picture of the total national economy and its state of well-being or ill-being. With the coming of the Global War in 1941 further drastic changes occurred in American economy. The total annual income of the country rose to an unprecedented height—approximately $150,000,000,000 in 1943, or about three times the amount in the lowest depression year after 1929. But owing to the concentration of national energies on producing war materials, the supply of consumer goods did not keep pace with the rise in employment and wages; so that there was great danger of a run-away inflation. Then the role of taxation in controlling "prosperity," as well as "depression," received an emphasis novel in the history of public finance.

Then was evolved the idea (and to some extent practice) that the federal budget should be made "the Nation's Budget," and should show, besides the receipts and expenditures of the Federal Government, the total income and outlays of all the people and business concerns of the United States. This would present a complete over-all view of the state and tendencies of the national economy. On that basis, the taxing and spending program of the Federal Government, according to this idea, should be adapted to the function of promoting stability and orderly processes of production in the national economy.[4] This new conception of the federal budget system and many practices connected with it are under the fire of sharp criticism from economic theorists and practitioners, but "public" finances have become so deeply entangled with private economy that a full return to the theory and practice of 1921 is highly improbable.

[3] For a brief basic treatment of the new budget conception, see R. M. Haig, "The Background of Our War Finance," *Political Science Quarterly*, September, 1943; gives bibliography of recent writings on the subject.

[4] For a systematic exposition of the new budget conception and illustrative sample budgets based on it, see G. W. Ensley, "A Budget for the Nation," in *Social Research*, September, 1943. See also below, Chapter XV, on Government and National Economy.

Money and Banking

Conflicts of Interests. Likewise involved in the conflicts of interests and classes have been the various uses of the power over money and banking conferred upon Congress by the Constitution. It is true that the Constitution says little about money and does not mention banking at all. It gives to Congress the exclusive power to coin money, regulate the value thereof, and of foreign coin. It forbids states to coin money, emit bills of credit, and make anything but gold and silver coin a legal tender in the payment of debts. By implication, confirmed by practice, Congress enjoys the power to establish national banks, issue paper money, and do many other things connected with money and banking. These constitutional provisions for money and banking were the subjects of hot disputes at the time the Constitution was framed and launched, and ever since that time conflicts of political parties and economic interests in the United States have raged around the theory and practice of money and banking. Indeed a large part of American political history can be written in terms of these conflicts.

A "Scientific" Theory of Money and Banking. Abstractly speaking it is possible to construct a theory of money and banking as a mere mechanism that should not be a matter of dispute and should remain outside conflicts of interests. Such a theory, widely accepted in whole or part and to some extent applied in American history, runs as follows. The monetary unit should be based on the "intrinsic" values of the precious metals, gold or silver, or both in some ratio to each other. All paper money, whether issued by the United States Government, by national banks or by state banks, should be made redeemable in coin at face value, dollar for dollar. The banking business of receiving deposits, making loans, and carrying on other financial functions should be left in the hands of private concerns, chartered and regulated as to sound practices by the Federal Government or by state governments. In such a system, money is merely a medium of exchange; and neither the currency nor the banking business is to be in any way controlled or manipulated by government for the benefit of any classes or interests. In some respects American practice has conformed to this "scientific" theory, especially for a time after the establishment of the gold standard by act of Congress in 1900, but under every type of currency and banking legislation since 1789 conflicts of interests have existed. They are sharply reflected in the present system.

The Present Metallic Policy. While it still has some historic roots, the present policy of the Government as to the metallic base of money and the coinage of money dates from the upheaval of 1933. In that year the Government "went off" the former gold standard and changed the weightage of gold theoretically assigned to the dollar. It ceased to make its own obligations and those of private contracts payable in gold dollars of standard weight and fineness. It called all gold coins and bullion (except for commercial purposes), into the Federal Treasury and stored this gold in its own vaults. Hence gold coins no longer circulate lawfully and paper money is no longer redeemable in gold.

Efforts were made in 1933 and afterward to force the free coinage of silver at the ratio of sixteen to one—sixteen ounces of silver valued arbitrarily as equivalent to one ounce of gold. Members of Congress from farming and silver-producing states fought hard in Congress to compel the adoption of this policy but in vain. They were only able to drive through a provision directing the Treasury to buy and store large amounts of silver and issue silver certificates based on such purchases.

The metallic money of the United States in circulation no longer includes gold coins. It consists only of silver dollars, subsidiary silver pieces, nickels, and pennies. Apart from silver dollars and the fractional currency, the money provided for public and private transactions is composed of paper notes, varying, as we shall see, in sources of issue. Included among them, of course, are the silver certificates, legal tender for all debts public and private, based on silver purchases mentioned above.

Central Control in the Federal Banking System. The fundamental law of the federal banking system and all local banks officially associated with it is the Federal Reserve Act of 1913 as amended many times since that date. At the apex of the whole structure stands the Board of Governors of the Federal Reserve System, composed of seven members, all appointed by the President with the consent of the Senate. Theoretically private bankers as such have no influence over their selection or removal. The conflict of interests which entered into the enactment of the law is recognized in the provision that the President, in choosing Governors, must have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests and geographical subdivisions of the country.

Centralizing Functions of the Board. The banking law gives to the Board of Governors high centralizing functions. It has a voice in choosing the governing board of each subordinate regional Reserve Bank, de-

scribed below, and may remove or suspend any of its officers or directors. It controls the issue of Reserve currency. In connection with representatives of the regional Reserve Banks, the Board of Governors controls the buying and selling of federal securities by member banks in the open market, with a view to checking, within limits, the expansion and contraction of credit. It may increase or diminish the proportion of cash reserves held by member banks against deposits which customers may withdraw at will, thus affecting the extension or restraint of credit, that is, loans. The Board also supervises the transactions of banks under its jurisdiction and scrutinizes their books and accounts in minute detail.

Federal Reserve Districts. If however the concept of centralization prevails in the character and powers of the Board of Governors, there is an element of regional policy in the organization of local banks. Under the law the country has been divided into twelve districts, each with a federal Reserve Bank; and individual banks scattered throughout the districts are drawn into the general structure. All the old national banks desirous of keeping their charters had to become members; state banks may voluntarily join the network. Even without joining the Reserve system, state banks, like federal banks, may insure their deposits, up to $5,000 each, under the Federal Deposit Insurance Corporation.

With respect to the administration of local Reserve banks a curious blend of traditions prevails. Government banking and control by bankers themselves representing the opposing school are intermingled. Each member bank is managed by its own board of directors elected by the stockholders. Here immediate management by private financial interests is undisputed. On the other hand the federal Reserve Bank in each of the twelve districts is governed by a body composed of different classes of directors, numbering nine in all. Three of them are chosen by the federal Board of Governors; three are elected by the member banks of the district to represent primarily finance; and the remainder are selected in the same way from among men "actively engaged in their district in commerce, agriculture, or some other industrial pursuit." In other words, banking and currency are not to be dominated wholly by financiers, but by a combination of public officials, bankers, and spokesmen of business and agriculture.

The National Paper Currency. As things now stand the principal class of paper currency in general circulation consists of Federal Reserve notes issued in various denominations under the authority of the Board of Governors of the Federal Reserve system. These notes are the obliga-

tions of the Federal Government and are also secured by deposits of gold certificates and other prime securities put up as pledges for credits by banks in the Federal Reserve system through the agency of several Federal Reserve district banks. In addition to Federal Reserve notes there are in circulation—besides certain silver and other minor coins—silver certificates, United States notes, Treasury notes, and some old National Bank notes, and Federal Reserve Bank notes now in process of retirement. Under present legislation all paper money in circulation is legal tender for all purposes, public and private, and it is no longer possible to obtain gold from the Treasury in exchange for any kind of notes.

Increasing Control of the Government over the Currency. When all the measures of recent years are pieced together it becomes evident that the Federal Government is extending its powers over the currency and the issue of every kind of paper. This tendency was accelerated by the transfer of gold and silver from banks and private owners to the Treasury. In former times the paper money of the United States was payable in gold—a commodity largely owned by private parties, stored in banks, and shifted from country to country with the movement of trade and the transactions of financiers. When in a time of crisis the Government needed gold for the Treasury to meet the demands for that metal in exchange for paper currency, it had often been compelled to go hat in hand to bankers to borrow the gold, perhaps only to have it withdrawn from the Treasury again by private persons demanding gold for paper. This state of affairs placed the Government more or less at the mercy of large bankers who had gold in their vaults or could easily assemble it from various quarters, including Europe.

When, for example, in 1895, the Treasury gold reserve held against paper money was low, President Cleveland called upon J. P. Morgan for help. With the aid of the Rothschilds in London, Morgan could command the gold that the Government needed and to get it President Cleveland issued, with the aid of the Morgan house, a large block of bonds on the sale of which the bankers made a handsome profit. As the expert financial writer, A. D. Noyes, said, the terms of the Morgan house "were extremely harsh; they measured with little mercy the emergency of the Treasury."

Now under recent acts of Congress, the Government itself holds about all the gold in its own vaults, while the bankers have paper; and private parties can no longer take gold away from the Government on demand. In other words the Government has emancipated itself from the grip

of bankers and as compared with the state of things in 1895 this constitutes a financial revolution. The Government may shake its own credit by loose financing but bankers and hoarders of gold can no longer dictate to it or undermine its stability. Bankers may, to be sure, refuse to buy bonds from the Government in need of loans to meet deficits, but such a buyers' strike would be more likely to end in a nationalization of banks of issue than in a return to the gold standard of the old style. In that case the Government would issue all paper money directly. Whatever the future may hold, it is not probable that the Government will soon, if ever, surrender the gold it holds and again base its currency on gold as a commodity owned by banks and private parties.

The Government in Banking Business. In addition to organizing the system of federal reserve banks, engaged in receiving deposits and lending money, the Federal Government has gone directly into the banking business itself on a gigantic scale. It operates a nation-wide chain of savings banks under the auspices of the Post Office Department, at which sums strictly limited in amount can be deposited for safe keeping. It has created agencies for lending money to farmers at low rates of interest on farm mortgages. These institutions had been established before the great depression of 1929 disrupted the economy of the country. Then under President Hoover the Federal Government, through the Reconstruction Finance Corporation, began to lend money to banks, railway companies, insurance companies, and other financial concerns. Under President Franklin D. Roosevelt, lending operations were widened to include loans to industries, states, cities, towns, home owners, and nearly every other class in the nation that could furnish security or at least some semblance of security for funds advanced. Through the Federal Deposit Insurance Corporation, the Government will insure bank deposits up to a certain amount on specific conditions.

Responsibilities of the Treasury Department. Although the Department of the Treasury is only one among the many agencies of the Government which are engaged in operations pertaining to finance, it carries the chief responsibilities connected with the collection and disbursement of money under acts of Congress. Through the Bureau of Customs and the Bureau of Internal Revenue it collects nearly all the taxes laid for revenue purposes. It guards the public moneys, keeps accounts, and manages the paying out of money under appropriation acts. It supervises national banks, the minting of coins, the engraving and printing of federal bonds, Federal Reserve notes, and other evidences

of values issued under the authority of the United States. Through its procurement division, the Treasury Department acts as a general purchasing agent of the Government, buys supplies bewildering in variety, provides storage, and distributes materials as required by numerous departments and agencies of the Government. It maintains a Secret Service to run down persons who counterfeit United States bonds, notes, and other papers of value and to discharge other important police functions. The work of receiving and disbursing public funds is committed to the Office of the Treasurer of the United States in the Treasury Department. Upon the Secretary of the Treasury and his aides falls the burden of preparing plans for taxation and drafts of tax bills, and of defending and explaining them before the committees of the House and the Senate in charge of revenue measures. Upon the Secretary also devolves the responsibility for leadership in planning and managing campaigns for the sale of federal bonds and other securities issued to meet national outlays not covered by taxation.

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CHAPTER XII

CONTROL AND DIRECTION OF FOREIGN AFFAIRS

Security a Prime National Interest. Towering above all other purposes of government is that of maintaining national security in a world of ambitious, aggressive, and warring States and regulating intercourse with them in time of peace and in time of war. "Security against foreign danger," said Madison in the *Federalist*, Number 41, "is one of the primitive objects of civil society. It is an avowed and essential object of the American Union." Without security no people can devote itself to the development of its resources and the enrichment of its civilization. Nor, it should be added, without commerce and intercourse with other nations, can it make the most of its resources and enjoy the benefits of achievements wrought by all mankind. Of necessity the function of maintaining the security of the United States involves many agencies, activities, and powers; and, under the Constitution, all great branches of the Federal Government have grave responsibilities connected with the efficient discharge of the function. In the last resort, when negotiation and diplomacy have failed, the duty of waging war devolves upon the armed forces of the nation.

The Fateful Nature of Foreign Affairs. No other single function of the Federal Government is more closely interwoven with the life, liberty, and happiness of the American people than that of conducting relations with other countries. This has been true from the beginning of our history. It was in a large measure the skillful work of Benjamin Franklin at the court of Louis XVI which drew France to the support of the United States and made certain the outcome of the War for Independence. It was the actions of President McKinley that turned the diplomatic dispute with Spain into war and steered the United States out upon a course leading to the seizure of territories in the Far East. The great rôle played by President Wilson in the World War and by President Franklin D. Roosevelt in the Global War is a matter of common knowledge that calls for no comment here.

The control and direction of foreign affairs may work for war or peace. Diplomacy may order events in such a fashion as to make war inevitable. Or it may dissipate enmities and prevent armed contests. If the peace and security of the United States are won for a long period of time to come, either by unilateral action or in coöperation with other countries, that good fortune will be ascribed to diplomacy—to the successful control and direction of foreign affairs. If, on the other hand, in the long flow of time, the United States becomes involved in a conflict with an overwhelming coalition of foreign powers and is brought face to face with ruin, that misfortune, too, will be laid at the door of those who control and direct foreign affairs under the policies they have chosen and formulated.

Definitions of Terms. Affair, as its origin in the French phrase *a faire* indicates, relates to action. An affair is something which one has to do or does. It is a business, an operation, or transaction carried on by one person or by two or more persons or governments in relation to one another. It is concerned with practical and substantial matters, such as the exchange of goods or with practical relations such as immigration, emigration, or the handling of foreign ships coming into and leaving the harbors of the United States. Behind the conduct of affairs are ideas or policies as to how it should be carried on, but the essence of any affair lies in action with reference to tangible and intangible matters.

Policy, on the other hand, while it may be concerned with action, is rather a system, principle, rule, or procedure to be followed. In its bad sense it means political cunning, craftiness, dissimulation. Although cunning is seldom absent from the formulation and execution of a program for the conduct of foreign affairs, policy as used in this respect generally means merely the course, procedure, or line pursued in the direction of foreign affairs. In actual life the influences of affairs and policies are reciprocal. Every transaction or affair is more or less controlled by previously formulated policy. In every policy, action is implied or explicit. To the firmest policy there are usually exceptions in conduct of affairs.

Policies and Affairs Called Foreign Are Entangled in Domestic Policies and Affairs. It is a common custom to treat foreign affairs as if they were "external" affairs, as if they lay somewhere beyond the borders of the United States, in the Atlantic or the Pacific or in foreign countries, near or distant. This notion appears in the phrase "politics stops at the water's edge," a maxim that is not true in fact, however celebrated in orations. Some foreign affairs of the United States do originate in the actions

of foreign governments but by no means all so originate. Many affairs with foreign governments originate in actions taken in the United States in the pursuit of a policy deemed domestic. For example, the regulation of immigration has long been recognized in international law as a matter coming within the domestic sphere belonging of right to each nation; but acts of Congress excluding practically all Orientals from the United States have raised innumerable "foreign" affairs for the Government of the United States to handle.

Again, the steps which the Government of the United States may take with reference to any action of a foreign government or governments are not determined by the mere nature of that foreign action. As President Wilson said on August 18, 1914, about the war that had just broken out in Europe: "The effect of the war upon the United States will depend upon what American citizens say or do. . . . The spirit of the nation in this critical matter will be determined largely by what individuals and society and those gathered in public meetings do and say, upon what newspapers and magazines contain, upon what our ministers utter in their pulpits, and men proclaim as their opinion on the streets." Foreign and domestic affairs are in fact parts of the same thing or, to put it in another way, they are closely interrelated.

Constitutional Provisions. Although the Fathers of the Republic well understood the significance of foreign affairs and diplomacy, the Constitution which they framed does not specifically state how and by whom the foreign affairs of the United States are to be conducted. It does not even mention "foreign affairs." It provides for the exercise of numerous powers which bear directly or indirectly on foreign affairs and distributes such power among the executive, legislative, and judicial departments of the Government. It provides directly that the President shall have power to make treaties, but with the advice and consent of the Senate, two-thirds of the members present concurring. It likewise declares explicitly that he shall appoint ambassadors, consuls, and other public ministers, with the approval of the Senate. Any other authority over foreign relations accrues to him from his position as chief executive and commander-in-chief of the armed forces, and from the provision that he is to receive foreign ambassadors and ministers accredited to the United States. Evidently the framers of our fundamental law intended to make the Senate a kind of council on foreign affairs.

Out of these meager constitutional provisions and out of practice has been evolved the rule that the President is the official representative of

the nation in foreign affairs. It would be improper therefore for a foreign government to address a dispatch to Congress or for Congress to open official communications with the head of another nation.

The President Is Not Master of Foreign Affairs and Policies. Another common saying which breaks down under scrutiny is that the President, under the Constitution, conducts foreign affairs and formulates foreign policies. That is another partial truth, less than half a truth, in any case misleading. Plenary power over "foreign affairs" and "foreign policies" as such is not vested in any department of the Federal Government. Only one power in this relation is vested in the President alone: "he shall receive ambassadors and other public ministers" from foreign countries. Practice and acts of Congress, not any explicit mandates in the Constitution, make him the direct organ of the United States for receiving official communications from foreign governments and sending official communications to them. An act of Congress designates the Department of State as his special agency for the transaction of such business.

The President may take many actions coming under the head of foreign affairs but Congress may refuse to support any of them by resolution of protest or by withholding appropriations of money if they are necessary for giving effect to such actions. The President may formulate foreign policies for the United States, as did President Wilson, but the Senate or Congress and the people may reject them. Congress also may formulate foreign policies by resolution—policies in line with or opposed to those of the President. But neither the President alone nor Congress nor the President and Congress together can, under the Constitution, make any foreign policy, good or bad, binding on the people and on subsequent Presidents and Congresses. That absolute power exists nowhere under the Constitution; and in the nature of changing things, cannot be vested in any organ of government.

Fundamental Powers over Foreign Affairs Vested in Congress. While by tradition and practice the President's powers over foreign affairs are large, those explicitly vested in Congress are also fundamental. They include the power to

appropriate money for the support of the Government,
regulate foreign commerce,
control immigration and emigration,
provide for the naturalization and deportation of aliens,
raise and support armies and navies,
make rules for the government of the armed forces,
define and provide for punishing offenses against the law of nations,

make rules for captures on land and water,
declare war,
and make all laws necessary and proper for carrying the above powers into effect.

In the Senate alone is vested special powers over foreign relations. The President can only make treaties by and with the advice and consent of the Senate, two-thirds of the Senators present concurring. The President nominates ambassadors, other public ministers, and consuls and with the advice and consent of the Senate he appoints them. The executive power is vested in the President but that is the power to carry laws into effect, not to make and enforce laws of his own.

Yet the President's Powers over Foreign Affairs Are Immense. Despite the language of the Constitution, the powers of the President in the conduct of foreign relations are very great. He has made many executive agreements with foreign governments far more fateful for the American nation than innumerable treaties that have been duly ratified by the Senate (below, p. 295); and until Congress stops him by positive action he may continue to do so. Congress may repudiate a President's foreign policies and the Senate may defeat treaties incorporating his policies; but such policies are not confined to official pronouncements or formal treaties. They are also enunciated by the President personally, or through the Secretary of State, in innumerable letters, dispatches, and oral communications with foreign agents and governments, which may not be made public until years afterward, if ever. Such private enunciations directed to detailed questions may be in fact far more fateful for the nation than such grand assertions as the Monroe Doctrine or President Wilson's Fourteen Points.

In negotiations over particular matters the President may proclaim policies and even take actions which make war highly probable if not inevitable or in effect force Congress to declare an existing war. President Polk ordered American troops into territory in dispute with Mexico; Mexicans attacked them as "invaders"; then Polk declared that war existed "by act of Mexico." In dealing with Germany between 1914 and 1917 President Wilson laid down principles which, unless Germany surrendered to them, made war a logical, if not a necessary, consequence. Other examples can be found in American history. Whatever the Constitution may say, Presidents exercise immense powers over foreign affairs. In the exercise of these powers, he operates personally, as we have seen (above, p. 182) or through the Department of State at his pleasure.

The Department of State

Department Expressly Subject to the President. In the organization of the Department of State the position of the President as official spokesman of the nation is expressly recognized. The act creating it provides that the Secretary shall perform such duties as the President may entrust to him relative to correspondence, commissions, and instructions to the public ministers and consuls sent out from the United States and also pertaining to negotiations with public ministers from foreign countries.

Thus the Department is the legal organ of communication between the President and other countries and is recognized as such by foreign powers, for it is to the Secretary of State that they address their formal notes to the Government of the United States. When the French minister in 1793 directed a letter to the President, the Secretary made a ruling to the effect that it was not proper for diplomatic representatives to institute correspondence immediately with the chief executive. Yet it would be a great mistake to lay too much stress on this ceremony. Many questions, as we have seen, are taken up directly with foreign powers by the President personally or through his special agents abroad or through their representatives in Washington. About the only safe generalization is that the State Department is the agency through which foreign business is ordinarily transacted.

The Secretary Is the President's Personal Representative. In a peculiar sense the Secretary of State is the President's personal selection; the Senate would scarcely dare to reject any nomination for that office. Usually the Secretary is a figure of great significance in the President's party—a man acceptable to the voters behind the administration. Seldom has a Secretary been chosen from among the officials who have grown up in the service. Sometimes it happens however that the Secretary is drawn from the diplomatic ranks; Jefferson was serving as minister in Paris when President Washington called him home to take charge of the Department; John Hay was promoted from the American embassy in London. Generally some outstanding leader in domestic politics is made head of the Department because he is too influential to be passed over, not on account of his knowledge of foreign affairs. Wilson selected Bryan partly because he could not be ignored and partly to enlist his support for a legislative program. The fact that Cordell Hull had long served in Congress and possessed great influence in that body doubtless had weight

when President Roosevelt selected him to serve as Secretary of State in 1933.

Divisions of the Department. To take care of the enormous mass of business that passes through its hands and to provide expert counsel for the Secretary, the Department of State is organized in great divisions, headed by specialists. Four of these are regional, a unit being assigned to cover the problems arising in each of the following areas: The American Republics, Europe, the Near East and Africa, and the Far East. Other divisions or offices deal with such matters as the issuance of passports, so important for travelers, with foreign service buildings, consular business, records, and foreign service administration and personnel.

Other Departments Represented Abroad. While much emphasis has rightly been laid on the Department of State as the organ of communication between the United States and foreign countries, it should be remembered that it is not the sole branch of the Federal Government which has agents abroad. The War and Navy Departments have their representatives in all important countries—military and naval attachés—theoretically affiliated with American embassies and legations but practically enjoying a general commission to find out all they can and report directly to their respective heads at home. Though supposed to observe military and naval affairs primarily, the most active of the attachés cover a wider range—not overlooking politics and opportunities to sell goods. Equally alive to its interests the Department of Commerce usually has agents of its own traveling or stationed abroad. The Department of Justice has its immigration officials in many foreign ports of embarkation; the Department of Agriculture a number of experts in its field.

Diplomatic and Consular Representatives in Foreign Countries

Classes of Diplomatic Agents. The representatives of the United States in foreign countries who come immediately under the direction of the State Department fall into two general groups: diplomatic and consular.

According to ceremonial ranking, the first of these groups is divided into four classes: ambassadors, envoys and special commissioners, ministers resident, and chargés d'affaires.

For over a century the United States did not send ambassadors; it was represented abroad only by agents falling within the other three classes. But in 1893 Congress provided that our representative in any foreign

country should have the same rank as the representative of that country in the United States. Therefore, whenever a nation sends an ambassador to us, we return the honor, subject to the consent of Congress.

Method of Appointment. All diplomatic representatives of the United States are nominated by the President and appointed by and with the advice and consent of the Senate. In spite of the thorough knowledge and experience necessary to efficiency in the diplomatic service, our official agents, especially ambassadors and ministers, are often selected without regard to such qualifications, in exchange perhaps for political service and large contributions to campaign funds. As Secretary Hay once remarked, "A quiet legation is a stuffed mattress which the political acrobat wants always to see ready under him, in case of a slip." Besides, owing to the small salaries paid and the expenses of entertaining, only rich men can afford to take the post in many a capital. The term of office is uncertain and liable to be brief; for, whenever a shift of party occurs at Washington, many changes take place in our representation abroad. There is no automatic arrangement for prolonged tenure of office throughout this division of federal activities, beginning with the lower grades of the diplomatic service and ending with a position at the head of one of the foremost embassies in Europe; but, as we shall see below (p. 288), by the Rogers Act of 1924 provision is made for a permanent group of "foreign service officers" from which the President makes many appointments, chiefly to posts of minor importance.

In choosing diplomatic officers, the President always ascertains in advance whether each particular appointee is personally acceptable to the government of the country to which it is proposed to send him. After his confirmation, the ambassador or minister is given a formal letter of credence, and on arriving at his post he at once enters into communication with the authority in charge of foreign affairs. Ordinarily he is received in audience by the head of the government to which he is accredited, with the ceremonials dictated by the custom of the country.

Retirement. A diplomatic mission abroad may be closed by various methods. An ambassador or minister may exercise his constitutional right of resigning at pleasure, or he may be recalled by the President. In an extreme case, his retirement may be requested by the government of the country in which he is stationed.

Diplomatic Immunities. Every diplomatic officer enjoys, under the rules of international law, several peculiar privileges and immunities. Any injury or affront to him is an offense against the country which he repre-

sents and the principle of international comity. The house in which he resides may not be entered or disturbed by anyone against his will and he is entitled to special protection while traveling on land or sea. He and his official family, including even his domestic servants, are exempt from criminal and civil processes.

Diplomatic Duties. The duties of an ambassador or minister are not confined to the transmission of instructions from his Government. Official communications may indeed constitute a relatively unimportant part of his business. He should cultivate friendly personal relations with the officers of the country to which he is sent, so that on proper occasions he may have easy access to them and may converse freely with them. It is therefore necessary for him to adapt himself to the mode of life of the official classes in the nation to which he is assigned. To do this, he must study its sensibilities, prejudices, form of government, and spirit of public affairs. When issues arise between the United States and its government, he must endeavor to adjust matters as informally and genially as possible, without resorting to official representations. Thus the real successes of diplomacy may be unknown save to the few immediately involved in them. A diplomat does his duty by discharging innumerable daily obligations that attract no attention; and he may be regarded as successful just in proportion to the tranquillity which he is able to maintain in the relations of his Government with the country in question.

Long practice has established a certain code for the general guidance of the diplomatic representative. He is not supposed to act as an agent for the collection of private claims against private persons and companies abroad, but he often does press the claims of American creditors against the government to which he is accredited. While theoretically he is not primarily concerned with the advancement of American commercial interests, in fact more than one ambassador has devoted himself largely to that form of enterprise. It is the duty to the diplomatic officer scrupulously to abstain from interfering in local political controversies. It is not deemed advisable for him to make public addresses except on ceremonial occasions, and even then he should be extremely cautious in referring to politics in any form.[1]

[1] Every American diplomatic representative abroad has a staff of assistants, varying in number according to the quantity of business in the country to which he is accredited. The first secretary of an embassy or legation should be a man of long diplomatic experience, well acquainted with the officials and the customs of the country in which he resides. Owing to his special qualifications, he assumes, as *chargé d'affaires ad interim*, all the duties of the minister in case of the absence of

Classes of Consuls. As we have said, the United States is also represented abroad by a consular personnel. Highest in rank are the consuls-general and consuls, the former having charge of entire consular systems in particular countries or in large portions of the same, and the latter handling affairs in innumerable sub-areas. Subordinate to the above executives are the various vice-consuls and consular agents. To make sure that consular officers are performing their duties properly, traveling inspectors visit them from time to time. All consuls are appointed by the President with the approval of the Senate, subject to the rules of the merit system provided by the Foreign Service Act discussed below (p. 288).

Consular Powers and Duties. The specific powers and duties of the consular officer are enumerated in the "Consular Circular of the United States." First and foremost, he is a commercial representative. He must certify the invoices of goods intended for exportation to the United States; and to do this correctly he must have a wide knowledge of the character and value of local commodities. He must, perforce, be an expert with respect to every detail of our tariff system in order that he may coöperate with officials at home in securing a correct valuation of imports and in preventing violations of the customs law. An equally important responsibility placed upon the consul is that of reporting trade opportunities and aiding in the extension and increase of American business through sales, loans, investments, and concessions.

In connection with shipping the consul has many obligations. When an American vessel touches at a foreign port, the master must deposit his register with the local consul of the United States, and before clearing he must secure the return of his papers. The consul has a limited jurisdiction over disputes between the masters, officers, and men of American ships; he hears the complaints of American seamen and gives relief to them when they are in distress. With reference to important matters intrusted to his control, he is expected to make periodical reports to the State Department, some of which are transmitted to the Department of Commerce for publication.

The consul has numerous functions of a miscellaneous character. He administers oaths, takes depositions, authenticates public documents,

that official. He enjoys also the privileges and immunities of a diplomatic representative in international law. There is a tendency to attach more importance to the office of secretary of a legation, and to make that branch of the public service more attractive. There are usually two or three additional secretaries and a number of clerks and interpreters.

acknowledges deeds and other instruments, acts as a witness to marriages which occur in the consulate, and administers, under certain circumstances, the property of citizens of the United States dying abroad.

The Development of the Personnel for the Foreign Service

Application of Civil Service Principles. Owing to the technical knowledge required for the discharge of diplomatic and consular duties, it was recognized long ago that the use of the foreign service to reward party workers was open to pointed objections. After some experiments in subjecting consular and minor diplomatic offices to civil service rules, Congress, by the Rogers Act of 1924, merged the two divisions into "the United States Foreign Service." This Service is divided into classes and provision is made for admission by examination and for promotion from the lower to the higher ranks. Members of the Service may be assigned to duty in either branch at the discretion of the President. Theoretically the power of the President and Senate to appoint consular and diplomatic officials remains intact, but in practice a large proportion of the selections is now made under the civil service rules. Already many ambassadors and ministers, usually to countries of minor rank, have been taken from the "career men," as the members of the Service are called, and precedents are set for a more extensive use of the system.

Criticisms of Practice. This reform, of course, has not escaped criticism. Few there are, it is true, who can deny the importance of having trained and experienced men in the consular and diplomatic services, where matters of marked complexity must be handled; but there is cogency in the argument that ambassadors and ministers to the great nations should be selected from citizens of wider business and political experience and larger economic independence than are usually to be found among civil employees even of long standing. When however concessions are made to the critical, it cannot be denied that the Rogers Act of 1924 marked a signal step forward. If dangers lurk in the creation of a permanent bureaucracy, the President may break the routine by selecting citizens of affairs not subjected to its discipline, particularly when international situations calling for special qualities arise. It will not be forgotten that the diplomats who got Europe into the World War and the Global War were all "trained" and "seasoned"; so-called "shirt-sleeves" diplomacy could not have done much worse.

The Treaty-Making Power

Constitutional Provisions. The Constitution of the United States provides that the President, by and with the advice and consent of the Senate, two-thirds of the Senators present concurring, may make treaties; and that treaties so adopted shall stand as the law of the land. No express limitations are placed on this power; and the question has been raised whether the Government in negotiating treaties with foreign countries may deal with subjects not intrusted to its jurisdiction by the federal Constitution.

Jefferson's Rules. With respect to this point Jefferson laid down four rules: a treaty must concern foreign nations; the treaty-making power is intended to comprehend only those matters which are usually covered by treaty and cannot be otherwise regulated; the rights reserved to the states are excluded from the scope of the treaty-making authority, for the President and Senate ought not to be allowed to do, by way of treaty, what the whole Federal Government is forbidden to do in any way; and finally the President and Senate should not negotiate treaties on topics of legislation in which participation is given by the Constitution to the House of Representatives. Confirming Jefferson's strict interpretation, the Supreme Court once said that whenever an act of Congress would be unconstitutional as invading the reserved rights of the states, a treaty to the same effect would likewise be invalid.

Practice Expresses a Broader View. In practice these severe limitations are not recognized. Indeed the courts have sustained a number of treaties relative to matters which are entirely outside the immediate scope of federal legislative power. For example, many years ago a Russian died in Cambridge, Massachusetts, leaving personal property, and according to the law of that commonwealth a local officer undertook to settle the affairs of the deceased. Thereupon the Russian consul for the district intervened and claimed that, by a treaty between his country and the United States, he had the right to administer the estate in question. On appeal to the courts his contention was upheld.

It is also maintained on good authority that the Federal Government can intervene in the administration of the criminal law of a state whenever the treaty rights of foreigners residing within its jurisdiction are involved. In a message bearing on this point President Benjamin Harrison once said: "It would, I believe, be entirely competent for Congress to

make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts."

Invasions of State Power Perplexing. Undoubtedly the power of the Federal Government to make treaties pertaining to matters which are clearly within the sphere of state legislation may raise perplexing questions. An excellent example of the importance of the problem was afforded many years ago by a long dispute over the exclusion of certain Japanese from the regular public schools of San Francisco, which, Japan claimed, was an infringement of treaty provisions. There is no doubt that federal authorities as such have no power whatever to interfere with the public schools of a state; the state may prescribe such conditions of admission as it sees fit, subject perhaps to the due process clause of the Fourteenth Amendment (Chapter XXI). President Theodore Roosevelt however declared that the action of San Francisco did violate the treaty rights of the Japanese in America and by a firm stand in the case brought about a settlement.

Another phase of the subject has been examined by the Supreme Court in a case involving a treaty with Great Britain framed to prevent local hunters from indiscriminately killing birds migrating between Canada and the United States. In this instance a state, Missouri, protested against the restriction, claiming that control over wild game within its borders belonged to the state legislature and not the President and Senate in the exercise of their treaty-making power. But in a clear-cut decision the Supreme Court supported the validity of the limitation imposed by the treaty on Missouri's authority.

Summary. Hence it may be said that while there are constitutional limits on the treaty-making power, they are indefinite in nature. Beyond question, the President and Senate may conclude with foreign countries agreements touching domestic matters over which the Federal Government normally has no jurisdiction. Such agreements have been sustained by the courts. But this does not imply that the judiciary would not intervene if some vital issue of American life or property were adversely affected by a formal treaty.

The Negotiation of Treaties

Initial Steps. In the negotiation of treaties, as well as executive agreements and conventions (p. 295), the President has a choice of many devices. He may go abroad and take part in the operation himself as did

President Wilson when he participated in the formulation of the treaty of 1919 that concluded the World War. He may commit the undertaking to the Secretary of State; he may employ an ambassador, minister, or *chargé d'affaires*, or, if he likes, he may select a commission or some private person peculiarly fitted for the task by skill or acquaintance with the language and customs of the country with which the transaction is to be effected.

Right of Senate to Be Consulted Directly. The extent to which the Senate under its right to advise and consent may participate in the actual drafting of treaties is by no means settled. On the one hand, it has been maintained that it is the constitutional privilege of the President to direct this phase of the work without any interference from the Senate, and that he is merely bound to submit the final document for approval or rejection. On the other hand, it is claimed that the Senate should share in treaty-making at all stages, and may even advise the President to undertake a particular negotiation.

Certainly the framers of the Constitution believed that the President should or could consult the Senate at various steps in the procedure. President Washington once stated to a Senate committee that in all such affairs even oral communications were necessary. He contended that in the course of the business there must naturally arise many issues requiring not only consideration but sometimes an extended discussion which would make written exchanges with the Senate tedious and unsatisfactory. Early in his first administration, he visited the Senate to lay before it papers relating to the preparation of a treaty with an Indian tribe. He made a brief statement and then put several queries to the members, inviting them to reply in the form of affirmation or negation. Somewhat perplexed by the situation the Senate postponed action but finally drew up answers. Although Washington later ceased to make personal visits to the Senate, he frequently directed messages to it asking its advice in connection with the exercise of his treaty-making powers.

Practice of Consultation. In later times it became a custom for the Secretary of State to consult influential Senators, especially the members of the committee on foreign relations, respecting the advisability of opening conferences with the representatives of foreign powers on particular problems. The Secretary of State, frequently asks Senators what they think of various propositions, whether the subject matter is a proper one for negotiation, and whether other provisions should be incorporated.

Whatever law or custom may prescribe, it is wise for a President to be sure of senatorial consent, if possible, before he commits himself to any significant agreement with a foreign power. The constitutional rule requiring the approval of two-thirds of the Senators present for ratification nearly always makes it necessary for him to go outside his own party for support. If the opposition can make an issue out of a treaty, it will almost certainly do so. As Woodrow Wilson once remarked: "The President really has no voice at all in the conclusions of the Senate with reference to his diplomatic transactions. . . . His only power of compelling compliance on the part of the Senate lies in his initiative in negotiation, which affords him a chance to get the country into such scrapes, so pledged in view of the world to certain courses of action, that the Senate hesitates to bring about the appearance of dishonor which would follow its refusal to ratify the rash promises or to support the indiscreet threats of the Department of State."

Long after he wrote these lines, President Wilson dramatically illustrated their truth during his conflict with the Senate over the treaty of Versailles. In the negotiation of that instrument he assumed full responsibility. He did not include among his associates on the peace commission any Senators, either of his own party or the opposition. And on his return with the document, he simply called a senatorial conference and explained to it in more or less detail the various sections of the historic paper. Had he limited the settlement to mere terms of peace, his Republican foes might have hesitated to prevent the formal ending of the war, but he insisted on including in it the Covenant of the League of Nations, involving important changes in future international relations. Even if the Covenant had been acceptable in all respects, the opportunity would have been too good for his critics to neglect. At all events, his treaty went down to defeat in the Senate. Profiting by this experience, President Harding put two Senators, a Republican and a Democrat, on his delegation at the Washington arms conference of 1921–22, and President Hoover followed this example in making up the American commission for the London naval conference of 1930. Discretion in this relation is evidently the better part of valor.

Congress May Propose Treaties. For practical purposes therefore we may say that the Senate must often be consulted informally during the course of treaty negotiations; otherwise its approval may not be forthcoming. It sometimes seeks to originate transactions with foreign countries; and a claim to the right of sharing in such initiation is occasionally

made by the House of Representatives. For example, the two chambers once adopted a resolution requesting the President to open negotiations with foreign powers with a view to making arbitration agreements providing for the peaceful settlement of international disputes. With the suggestion the President later complied. Congress even passed an act in 1902 advising the President relative to the terms it wished to see incorporated in a treaty. In reality it is unwise for him to ignore the possible action of the House of Representatives in the case of any treaty calling for an appropriation of money or legislation to put it into effect.

In this sphere, as in so many others, the spirit of coöperation, barter, and compromise is necessary. However independent in theory the several branches of the Government may be, none of them can proceed entirely without reference to its neighbors. Doubtless great inconveniences arise from the fact that the President cannot make any kind of international commitments he likes on his own authority; still, unless we are to believe in executive infallibility, mistakes equally serious might be made if he did not have to ask for senatorial approval.

Senate Action on Treaties. After the terms of a treaty are all adjusted with a foreign power, the final draft is laid before the Senate, and it may be approved, amended, or rejected. Like nominations to federal offices, such agreements were once generally acted upon in secret. But in practice, the transactions were invariably reported by the newspapers, and controversies arising in this connection led in 1929 to the adoption of a Senate rule providing for open sessions unless otherwise specifically decided (p. 100). A treaty rejected by the Senate may be returned to it by the President for reconsideration.

Final Steps. When a treaty is approved by the Senate, it is sent to the President, who ordinarily completes the process by the formal exchange of ratifications with a representative of the foreign country in question. If he sees fit however he may refuse to take the final step, and thus prevent a duly signed and ratified treaty from going into effect. This power of stopping the procedure rests on the assumption that, through agents of the Federal Government abroad, the President has access to sources of information closed to the Senate, and may discover at a late hour reasons for halting the business.

If a treaty is substantially amended by the Senate, the President may abandon it altogether or he may induce the foreign power concerned to accept the proposed change and bring about the concluding ceremonies of ratification. Often the Senate approves a treaty with "reserva-

tions." On some occasions such declarations really amount to material alterations in the original instrument; at other times reservations merely exclude certain American rights from the scope of the treaty or interpret its provisions with more precision or make some high-sounding announcement pleasing to American ears. In cases of this nature the President and the foreign power engaged in negotiations must decide whether the Senate's action is important enough to call for a reopening of the whole matter. When a treaty is at last completed, it is made a part of the law of the land by an official proclamation.

Abrogation of Treaties. Once consummated, how may a treaty be broken if it does not provide for its own termination? Under international law, each party to the contract may put an end to it by formally denouncing it. What branch of the United States Government can exercise that power? History gives a confused answer. One precedent indicates that the President may do it on his own authority; another, that he may take such action with the approval of Congress in a joint resolution; and a third, that Congress may abrogate a treaty in effect by legislation. Ordinarily a treaty which has the appearance of permanence and contains no word as to its life will be modified or nullified by the substitution of a new agreement through the regular channels of negotiation. Arbitrary action in the form of outright denunciation by one party, in the absence of specific provision for unilateral termination, is generally viewed as contrary to international courtesy.

Criticism of the Two-Thirds Rule for the Senate. As the relations of the United States to foreign governments became more intimate and complicated, Presidents encountered increasing difficulty in securing the approval of important treaties at the hands of the Senate under the provision of the Constitution that requires the concurrence of two thirds of the Senators present for ratification. In application this rule makes it possible for one third of the Senators plus one, who may represent a minority of the people, to defeat a treaty which commands the approval of an overwhelming majority of the people. Thus it runs contrary to the democratic theory of majority rule and it has been severely criticized, especially since the Senate's rejection of the Versailles treaty of 1919, sponsored by President Wilson, and hence the refusal of the United States to join the League of Nations on which he had set his heart.

Undoubtedly the two-thirds rule is open to grave objections on various grounds but no proposed substitute for it commands universal approval in the country. The substitute most generally accepted perhaps is a con-

stitutional amendment providing that treaties may be ratified by a simple majority in both houses of Congress. Whether the Senate could be induced to cast a two-thirds vote for such an amendment remains however highly problematical. Nor is there any guarantee that, in view of the frequent deadlocks between the House and the Senate, any such procedure would work better in practice or assure better protection for the vital interests of the nation. Here, as in many other cases of constitutional government, it is not easy to find an ideal solution of the problem that will turn out as expected and always promote the general welfare.

The Senate and Executive Agreements. As we have seen (above, p. 295), all contracts with foreign governments do not take the form of treaties which must be submitted to the Senate. The President, under specific acts of Congress or under the general and perhaps loose terms of certain laws or on his own motion or under his executive or war power, may make executive agreements which are not laid before the Senate for consideration but are put into effect when duly completed. Such agreements made by the President under the terms of general laws or on his own motion may at any time awaken hostility in the Senate. If they are important and vitally affect American rights and interests, the Senate may protest against them and demand the right to pass upon them. Indeed protests may be made in the House of Representatives if an executive agreement calls for large appropriations of money at its hands.

After the outbreak of the Global War, in fact before the United States entered it, under the Lend-Lease Act of 1941, the Executive Department began to frame numerous agreements with foreign governments, individually and collectively, involving sums of money running into the billions and to make large commitments respecting the foreign commerce and other interests of the United States—commitments running even after the close of the war. An official in the State Department went so far as to say that the two-thirds rule governing the Senate's approval of treaties is "undemocratic . . . also a peril to the national welfare." Not only that—he went on to claim that the President has power to make executive agreements on any subjects which may be dealt with by "the treaty-making power." [2]

On such principles, the Secretary of State, Cordell Hull, proceeded freely with the negotiation of executive agreements until he was brought up sharply by the Senate Committee on foreign relations. An angry dispute occurred in 1943 and for a moment Secretary of Hull seemed to

[2] *Congressional Record*, June 1, 1943.

defy the committee. Later however he thought better of the business, especially as Senators in the committee and on the floor of the Senate announced that they would not stand idly by and tolerate the exercise of such unlimited powers on the part of the Executive. Another conference was held, at the State Department, and a working agreement was reached, according to which the State Department promised henceforward to follow constitutional processes in negotiating any and all kinds of important agreements with foreign governments. In part this concession was wrung from the Secretary of State by the introduction of a resolution in the Senate, on July 6, 1943, threatening an official investigation of his conduct in respect of an important agreement with the United States then pending.[3] It would seem therefore that, in final analysis, a strong opposition in the Senate can prevent any usurpation of authority by the President in making executive agreements. Ultimately the power to determine what shall be the nature of the matters to be handled by executive agreements and by treaties remains in the Senate or at least in Congress.

That neither house of Congress was prepared to surrender its prerogatives in respect of treaty making was made decidedly evident in the resolutions adopted in 1943 with reference to the possible coöperation of the United States in some future world organization (p. 320). The House resolution explicitly stated that provision for such coöperation in any case must be "through constitutional processes," that is, not merely by executive fiat. The Senate resolution was even more explicit. It declared that pursuant to the Constitution of the United States, any treaty made to effect the purposes of the resolution (in respect of endorsing the idea of a world organization) must have the approval of the Senate in the regular form, two-thirds of the Senators present concurring.[4] On its face, this seems conclusive.

International Coöperation

Permanent Agencies of Coöperation. Thus far American international problems have been treated as if they involved only specific cases handled by diplomatic and consular negotiations at home and abroad. Important as are actions of this character, they by no means cover the whole field of foreign affairs. Under the pressure of technological and commercial

[3] *Congressional Record*, July 8, 1943.
[4] *Congressional Record*, November 3, 1943, p. 9175.

development, a second type of agency for managing relations has been evolved in the form of permanent bodies for the conduct of specific international undertakings. The bodies thus formed are not occasional diplomatic assemblies, but permanent organizations which take over from the contracting parties definite phases of work that are international in nature and scope. As a great power, the United States has inevitably been drawn into some of these organizations and has helped to give direction to them.

The League of Nations. The most general international union that has been created up to the present is the League of Nations, now in a dormant condition. By the ratification of the peace treaty with Germany at the close of that conflict, or through subsequent arrangements, nearly all countries bound themselves together in the League and assigned to it certain functions in connection with their common relations. Formally the League is composed of three bodies: a permanent secretariat, located at Geneva; an Assembly consisting of one delegate from each country, dominion, or colony included in the association; and a Council embracing representatives of certain powers, chosen by the Assembly.

Development of American Attitude. To the League of Nations the United States has borne a peculiar relation which, if at the moment academic in nature, offers some instructions on foreign affairs. President Wilson was largely instrumental in the establishment of this association and expected that the United States would join it; but the Senate, by refusing to ratify the Treaty of Versailles, failed to take that step. Furthermore the Government of the United States, under President Harding, at first ignored communications from the Secretary-General of the League. Not until the new organization had been in operation for many months did the Department of State choose a more courteous course and at least reply to letters directed to it by the League secretariat, if formally and negatively.

When at length the League commenced to hold conferences dealing with serious problems in which the United States was obviously concerned, the Federal Government began to send official representatives to act "in an unofficial and consultative capacity." Later, it authorized regular representatives to attend particular conventions held under League auspices. For example, in 1927 the Government of the United States was officially represented at meetings on economic affairs, transit and communications, import and export prohibitions and restrictions, and preliminary disarmament arrangements.

Policy of Limited Coöperation. Carrying forward this policy President Hoover indicated his willingness to "coöperate with the League's endeavors to promote scientific, economic, and social welfare, and secure limitation of armaments." In 1929 the Senate set important precedents by ratifying two conventions drawn up by the League with respect to abolishing slavery and controlling restrictions on international trade. As a matter of fact, the United States officially participated in the meeting at which the latter agreement was formulated. Moreover during the same year American delegates took part in conferences on other international questions held under League auspices. Under Franklin D. Roosevelt the United States joined the International Labor Organization, associated with the League. Although such transactions involved no commitment to the political guarantees of the League of Nations, they showed that the United States was prepared to work with it to some extent in adjusting international relations.

The Pan-American Union. A second international association, known as the Pan-American Union, has been established to deal with problems arising in North and South America. The governing board of this Union consists of the Secretary of State, representing the United States, and delegates chosen by the member countries. Conferences are held from time to time at which resolutions and agreements are adopted for subsequent ratification by the affiliated nations. Already treaties thus formulated provide for a specific degree of protection to copyrights, patents, and trade marks and for the submission of international disputes to arbitration and conciliation. The Union also endeavors to promote closer cultural and commercial relations among the several nations by maintaining at Washington a central office which serves as a clearing house for the collection and dissemination of information.

The Hague Tribunal of Arbitration. A number of special international institutions have been created and endowed with limited functions. Two judicial bodies have been established to hear disputes that arise between nations. The first of these, the Court of Arbitration, was founded at The Hague as a result of a conference held in 1899. It consists of a large panel of judges, chosen by the nations participating in the convention, from which a special tribunal is selected whenever two countries decide to submit a dispute to the Court. With respect to methods, the Court seeks to settle conflicts between nations by effecting compromises or adjustments rather than by rendering decisions under the forms of international law. Consequently its procedure is more conciliatory than

judicial in the strict sense of the word. The signatory nations, of which the United States is one, are not compelled to submit any controversies to it, but they may do so by specific arrangement.

The World Court. The second international judicial body is the World Court, a product of the League of Nations. It is a permanent tribunal of judges elected by the Assembly and Council of the League from among the distinguished jurists of the world. Its seat is also at The Hague, where, until the outbreak of war in 1939, sessions were held regularly every year. Although the World Court was founded by the League of Nations, governments not affiliated with the League were invited to join it, and the United States took the question under consideration. After many negotiations and long discussions, the Senate rejected, in January, 1935, the final draft of an agreement for entering the Court.

Special International Organizations. Although the United States refused to join the League of Nations and the World Court, it is represented in many special international executive bodies which have been created by treaty and operate regularly in time of peace.[5] Some of these institutions are primarily concerned with the collection and dissemination of technical information. The International Bureau for the Publication of Customs Tariffs, as its name implies, belongs to this class. Other governmental agencies of an international character seek to secure uniformity throughout the world in specific matters. Thus the International Bureau of Weights and Measures is responsible for the development and maintenance of universal metric standards with which the national standards of the several contracting countries are compared. In this way the Bureau prevents the endless confusion which would result from differences in the measurement systems of nations.

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CHAPTER XIII

AMERICAN FOREIGN POLICIES

Concerning no subject of American Government are there more confusions and divergences of opinion than as to American foreign policies, as to what they actually are or should be. From time to time critics declare that the United States has no foreign policy. Defenders of the administration in power, with equal heat, deny the allegation and make speeches or statements purporting to summarize the axioms or principles of American foreign policy. Again, in other quarters, it is asserted that the policy of the United States is to have no explicit foreign policy but to speak and act in foreign affairs from day to day as expediency and the interests of the United States may dictate in the circumstances. Furthermore, as the posture of international affairs often changes rapidly, even violently, in a few days or months, various points in American official declarations respecting policy may be so emphasized or so played down that the whole seems to take new forms. And to add to the difficulties and complexities of this situation, there is no tribunal in the United States—neither the President nor the Senate nor Congress nor the Supreme Court—to which a final appeal may be made for an official and binding formulation and definition of American foreign policy to be universally accepted and applied.

Difficulties in Formulating a Workable Foreign Policy. It is easy, of course, for individuals and associations who have no responsibility for carrying their plans into effect to draft schemes for conducting the foreign affairs of the United States and indeed the whole world. Perhaps no other country on the earth has so many citizens and societies engaged in framing and discussing grand designs for running the world. In fact the American output of such designs is enormous and they range from world federations in which the United States is to be reduced to the status of a semi-autonomous province all the way to alliances with the great Powers for the purpose of enforcing peace on other nations by arms. But as a matter of fact framing a workable foreign policy which the

people of the United States and other nations will accept and apply is more difficult than the arm-chair draftsmanship of paper plans. In any realistic operation it is necessary to take into account not only American affairs and interests but also the histories, customs, interests, races, propensities, institutions, and policies of all the other nations, at least of several of the most powerful among them. The age-long tendencies of foreign governments and their historic friendships, enmities, and wars must be brought into consideration. What these governments have done, are now doing, and will probably do in the imaginable contingencies of the future must be reckoned with in formulating a workable foreign policy for the United States.

How Can We Discover What Official Foreign Policy Is? The Government of the United States, subject to the terms of the Constitution, can alone formulate and give effect to a foreign policy for our country, and at no time have the President, Congress, and the Supreme Court united in performing this task. In no single document is American foreign policy summed up. In searching for the declared and applied foreign policies of the United States we must study innumerable sources of information: messages, declarations, speeches, diplomatic notes, and other pronouncements by Presidents and Secretaries of State; acts and resolutions of Congress and resolutions of the separate houses; speeches in Congress explaining acts and resolutions; and decisions and opinions of the Supreme Court in cases brought before it for adjudication. These may be called our principal historical sources of information. But from day to day, especially in time of war or high tensions in foreign affairs, modifications of old statements are made and new formulations of policy are presented by the President and Congress. They may be weighty at the moment and seem to bear the stamp of permanence; yet they may be rejected or reversed as the result of a new election or of changes in the attitudes and actions of foreign governments. In such circumstances it is prudent not to be too certain respecting the validity or permanence of any policy proclaimed yesterday or today; but a survey of historical and current sources of information shows that certain types of foreign policy for America have been officially proclaimed and applied, more or less, in practice.

Types of American Foreign Policy. Numerous and complicated are the documents bearing on American foreign policy. Life-long students of the subject have found in them not one single American foreign policy but several policies or types of policy, which have appeared from time to

time in the long course of American history. These types are not sharply separated from one another, like eggs in a basket. They overlap both in time and in nature. Each, except when distorted or carried to extremes, is a program of emphasis rather than a program wholly exclusive in character. Old types of policy originated in the early days of the Republic have by no means disappeared from our theory and practice. New types do not necessarily preclude a continuance of features appearing in the old. For purposes of convenience the principal types may be characterized as follows:

Continentalism, originating in Washington's administrations.
Hemispheric Security, the Monroe Doctrine of 1823 added to continentalism.
Imperialism, put into effect at the close of the nineteenth century.
Collective Security, announced by President Wilson, temporarily rejected; reaffirmed in a general form by President Franklin D. Roosevelt (1937–44) and by resolutions of the House of Representatives and Senate in 1943.

As extremes, continentalism has been caricatured by its critics as "a blind isolationism"; and collective security, by its critics, as "starry-eyed internationalism." Although extreme views are proper objects of study, it is the central emphasis of each type of policy that deserves especial consideration as likely to exert the most influence in the future whatever the "settlement" at the close of the Global War.

The Policy of Continentalism

Washington's Formulation. Although Washington did not call his foreign policy "continentalism" or characterize it by any single term, the word is convenient for summary purposes. His primary care in the conduct of American foreign relations was to protect the security and independence of the young Republic in its continental home separated by three thousand miles of water from warring Europe. His policy was summed up in his Farewell Address, in which appeared the following terse statement: "Europe has a set of primary interests which have to us none, or a very remote, relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. . . . It is our true policy to steer clear of permanent alliances with any portion of the foreign world." Washington did not, however, put a ban on temporary understandings or on commitments for limited purposes if made immediately in the interest of the United States in this hemis-

phere. Neither did his successors who followed the same policy for many years—Adams, Jefferson, Madison, Monroe, and John Quincy Adams, for instance. They too were ready at any moment to negotiate with France or England or to welcome and parallel any actions that either of these countries might take, if the interests of the United States in this hemisphere were thus protected or advanced in this hemisphere.

Continentalism Not Exclusiveness. The policy announced by Washington and long followed in practice did not mean turning the United States into a hermit nation indifferent to the rest of the world. On the contrary, it expressly accepted grave responsibilities for the United States in upholding international law and courtesies, in promoting commerce and friendship with all nations, and in maintaining close contacts with them through regular diplomatic and consular channels. It meant neutrality in the midst of their wars which did not jeopardize American interests in this hemisphere and watchfulness respecting all European conflicts which were likely to be projected into the western world and imperil American interests here. Otherwise there was to be abstention from what Jefferson called "the eternal wars" of Europe and from European alliances and diplomatic contests connected with wars in that ancient home of rivalries and armed conflicts.

Continentalism Is Called Isolationism. Americans who opposed joining the League of Nations, as advocated by President Wilson in 1919, often appealed to Washington's doctrines for support. Especially they objected to such a permanent "entanglement" in the vicissitudes of European politics. For this they were called "isolationists" by their critics and in time they accepted what was a term of opprobium as a title of honor. Some among them went so far in their rejection of coöperation with the League as to be almost "insulationists" in fact. But few if any of them rejected all programs for coöperation with other nations in the promotion of international peace. For example, the Harding administration, called isolationist, organized the Washington conference of 1921–22, and entered into treaty relations with great powers for the reduction of naval armaments and the peaceful adjustment of conflicts in the Orient.

Neutrality Legislation as a Form of Continentalism. In its efforts to prevent the United States from being drawn through commercial interests into the next European war, then looming on the horizon, Congress in 1935 enacted legislation designed to preserve American neutrality and to hold America aloof from the scene of belligerency. This legisla-

tion, subsequently renewed and amended, provided in general that, when the President found a war in progress abroad and so declared, the sale of munitions and the lending of money to belligerents must stop; citizens must travel in war zones at their own risk; and American ships must stay out of war zones. At a special session of Congress, called by President Roosevelt in September, 1939, after war had broken out in Europe, Congress repealed the arms embargo, and later the rest of the neutrality provisions were swept into the discard. As tested by time and events neutrality legislation proved to be as futile as the Kellogg-Briand Peace Pact of 1928 by which all the great nations of the earth solemnly bound themselves to renounce war as an instrument of public policy and settle disputes, "of whatever origin they may be," by "pacific means." Yet the statement, often made, that the "isolationism" of the neutrality laws "failed" when the trial came is not correct. Speaking accurately by the historical record it did not fail; it was abandoned by the Congress of the United States under the leadership of President Franklin D. Roosevelt, and another policy was substituted for it.

Hemispheric Security

The Monroe Doctrine Declared (1823). Supplementing continentalism and widening its range of precaution was the celebrated doctrine enunciated by President James Monroe in a message to Congress in 1823. This doctrine originated in a threat of Spain, with the aid of certain despotic powers of Europe, to recover dominion over her American colonies which had declared their independence, and to reëstablish her historic monopoly over their trade. This was a double thrust at the United States. The restoration of the monarchical principle in Latin America would be a menace to republican institutions. A renewed commercial monopoly centering in Spain would cut off the lucrative business which citizens of the United States had built up with her former colonies.

Alarmed by the course of affairs, President Monroe, in his message to Congress of December, 1823, called attention to the impending dangers, adding these significant words: "We owe it therefore to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But

with the governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principles acknowledged, we could not view any interposition for the purpose of oppressing them or controlling in any other manner their destiny by any European power in any other light than as a manifestation of an unfriendly disposition toward the United States." In the same message there appeared another significant declaration, called forth by a decree of the Russian Tsar claiming the northwest shore of North America. With regard to this contention President Monroe said, "that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers."

While warning Old World powers against intervention in the affairs of this hemisphere, President Monroe reiterated the continental doctrine, correlative to it, namely, that the United States would in turn refrain from interfering in European wars: "In the wars of the European powers in matters relating to themselves we have never taken any part; nor does it comport with our policy to do so."

Secretary Olney's Interpretation of the Monroe Doctrine. A somewhat precise definition of the Monroe Doctrine was made by Richard Olney, as Secretary of State under President Cleveland, in 1895, when a dispute between Great Britain and Venezuela over territorial boundaries reached a dangerous stage. Secretary Olney said that the United States would not help a Latin-American government to escape its just obligations to any European country under international law, but he declared that the United States would not permit any European country or combination of countries "forcibly to deprive an American state of the right and power of self-government and of shaping for itself its own political fortunes and destinies."

Theodore Roosevelt's Imperialistic Interpretation. If the United States was to uphold the right of Latin-American States to self-government, did it have any obligation to see that those States conducted themselves "properly" in paying their debts, protecting foreign investors, and maintaining order for the transaction of business? President Theodore Roosevelt maintained in 1904 that the United States had such a responsibility: "If a nation shows that it knows how to act with decency in industrial and political matters, if it keeps order and pays its obligations, then it need fear no interference from the United States. Brutal wrongdoing or impotence which results in the general loosening of the

ties of civilized society may finally require intervention by some civilized nation, and in the western hemisphere the United States cannot ignore its duty." And under Wilson, Harding, and Coolidge, the armed forces of the United States were landed or kept in Nicaragua, Haiti, and Santo Domingo and practically governed these countries from time to time.

Under this interpretation the Monroe Doctrine in practice, as David Y. Thomas pointed out,[1] was employed to cover the following elements: European powers are forbidden to take any territory in the western hemisphere; the smaller States in Latin-America, especially in the Caribbean region, must pay their debts, not overlooking, of course, American creditors; the Government of the United States is likely to intervene in one form or another to secure the discharge of such debts; the protection of the Panama Canal and American islands in the West Indies brings the entire Caribbean region within the sphere of our national supremacy; the extensive interests of American capitalists in Central America will be protected by our Government; and "Pan-Americanism will be favored," that is, there will be friendly coöperation between the United States and the powers to the southward as far as compatible with the safety and economic advantage of the United States.

Criticism of the Doctrine. It is proper to add that Latin-American States have looked upon the Monroe Doctrine with mixed feelings. When engaged in a controversy with a first-class European power, they sometimes welcomed the shelter of that historic protection. But ordinarily most of their leaders have regarded the Doctrine as a subterfuge which excludes European powers from territorial aggression in the western hemisphere while permitting the United States to assume authority over any desirable territory, such as Panama, Haiti, Santo Domingo, and Nicaragua, in case of a disturbance. Naturally the statesmen of the United States and those of Latin-American countries did not always see eye to eye on matters of policy in this connection.

The "Good Neighbor" Policy of Franklin D. Roosevelt. Early in his administrations President Franklin D. Roosevelt not only modified the Monroe Doctrine as it had been interpreted previously but supplemented it by a new doctrine. Shortly after his inauguration in 1933, he sought to reverse the broad trend in the use of the Monroe Doctrine that had been in evidence since the war with Spain in 1898, and announced that he would follow the principle of "the good neighbor." When a revolutionary upheaval reached an acute stage in Cuba in the autumn of

[1] *One Hundred Years of the Monroe Doctrine.*

that year he did not send American troops to "restore order," as he was entitled to do under the Platt Amendment of 1901 (p. 313), authorizing the United States to intervene in such cases. Instead of dispatching American armed forces to Cuba, he called the diplomatic representatives of Latin-American nations into conference and explained to them that it was the policy of the United States to keep them fully informed, and that the United States had no desire to intervene in Cuba. Notwithstanding many provocations and strong demands for American intervention, the United States followed the principle thus declared and resorted to diplomatic pressure only.

Subsequently President Roosevelt made three specific commitments bearing upon practices formerly pursued under the Monroe Doctrine. First of all, he declared that the definite policy of the United States "from now on" is one opposed to armed intervention. Second, he took the position that the maintenance of law and orderly processes of government in this hemisphere is primarily the concern of each individual nation within its own borders. And third, that when orderly processes of government break down so as to affect other nations in the western world, it becomes the concern of the whole region "in which we are all neighbors."

Translating this attitude into action, President Roosevelt withdrew the American marines and authorities from Haiti; and the United States signed a new treaty with Cuba in which the American right to intervene in Cuba under the Platt amendment was abolished. Elsewhere with respect to American relations with Latin America, the United States gave evidence of its desire to overcome the prejudices created in the past by practices associated with the Monroe Doctrine. Notable among these efforts to give substantial effect to the policy of the good neighbor was the signing of treaties at the Pan-American Conference at Montevideo in the winter of 1933–1934 pledging a pacific settlement of controversies by coöperative action. In a conference at Buenos Aires in 1936 the cooperative principle was reaffirmed by the signature of three conventions: "to coördinate, extend, and assure the fulfillment of the existing treaties between the American states, . . . to maintain, preserve, and reëstablish peace," and to strengthen the rule that "no State has the right to intervene in the external or internal affairs of others." At later conferences these principles were reaffirmed and amplified.

The Latest Phase. After the collapse of the League of Nations and the rise of concerted efforts by Germany, Italy, and Japan to carry on

propaganda and make trouble in all quarters of the world, the good neighbor policy for the western hemisphere assumed a new significance. This significance was recognized at the Pan-American conference held at Lima late in 1938. At this conference twenty-one republics agreed at declaring that they will "defend the peace of the continents and work together in the cause of universal accord," and also that they will work together to preserve the peace of this hemisphere. Under the terms of the agreement, in case of danger of armed aggression from across the seas, the foreign ministers of the several countries will consult on methods of joint defense. Although the conference failed to take any action in respect of German or Italian propaganda in Latin America or possible attempts of European dictators to exercise coercion in Latin America, it did strike indirectly at such methods by affirming its faith in "individual liberty without religious or racial prejudices."

On the whole the resolutions of the conference fell short of the continental solidarity which Secretary Hull hoped to see established, but they represented a decided step in the direction of more cordial relations and greater unity of action in the western hemisphere as against overseas interference. Inasmuch as President Roosevelt had publicly declared in August, 1938, that the United States would not stand idly by in case the forces of some other empire invaded Canada, it seemed at the close of that year that he had succeeded in forming a kind of hemispheric front against intervention by foreign powers from other quarters of the world. Making extensive and discriminating use of his powers under the Lend-Lease Act of 1941, before and during the Global War, he bound nearly all the Latin-American nations closer to the United States by making loans and grants of money and by strengthening the ties of cultural relations. Only one of the most powerful among those nations, Argentina, remained wholly aloof and kept up close, if not friendly, relations with the Axis aggressors in Europe and Asia. To the charge often made, even on the floor of the Senate, that President Roosevelt was in effect merely buying up Latin-American dictators, the reply could be made that their friendship during the Global War was more than worth the price.

The Policy of Imperial Expansion

The Old Idea of Continental Limitations. Although by a series of bold strokes, opening with the Louisiana purchase in 1803 and closing with the Alaska purchase in 1867, the dominion of the United States

was extended to the Pacific Ocean, it seemed to be generally assumed that the United States would not follow the example of other great powers in acquiring distant territories inhabited by peoples alien in race and traditions to American civilization. But as the nineteenth century drew to a close, a new spirit appeared in various quarters. The continental domain had been settled, in a way at least, and all the good free land had been taken up by farmers. Then voices were heard declaring that America had "grown up," had "come of age," must acquire trading posts overseas, must enlarge its foreign trade, and must assume new responsibilities as a "great power."

Reasons Offered to Justify Change. Why should the United States set out on this course so foreign to its traditions? Various answers were given by those who sponsored the idea. Some were sentimental. Others were practical. Having grown up, the American nation was under obligation to help backward peoples, to establish order among them, civilize and Christianize them, and extend "the blessings of liberty and self-government" to them. Great Britain, France, and Germany were doing such things; the United States should not shirk its moral responsibilities. Another answer was: "Manifest Destiny." The United States had expanded and it was fated to keep on expanding. Chief among the "practical" answers was the contention that American industry and agriculture simply must have more markets in foreign places or sink down in the scale of prosperity, and that such markets could be won by acquiring territories, colonies, and trading posts overseas.

Navy Officers Urge Expansion. This idea of colonial expansion was not entirely new, to be sure. American naval officers cruising around in distant waters had early advocated seizing islands and other places and using them as naval bases and points for the support of trade. They had pressed their views on the State Department and found some sympathy there. Yet the great majority of the American people, doubtless, never heard of such plans or gave little thought to them until near the end of the nineteenth century. All the while the idea of expansion was being spread around among citizens of prominence and influence. They urged Congress to prepare for the next steps by building a bigger navy, and in the eighties the New Navy was begun, without much flourish or advertisement as to purposes. In this movement leadership was later taken by three young politicians, Theodore Roosevelt, Henry Cabot Lodge, and Albert J. Beveridge; by a naval officer, Alfred Thayer Mahan; and by an army officer, Leonard Wood. Politicians of the old school

were alarmed by it and yet were driven along by the currents of opinion raised by the agitators for a bigger navy and imperial expansion.

Senator Beveridge States the Case. At length an opportunity to apply the new doctrine came with the war against Spain "for the liberation of Cuba." Then the young advocates of the new course took advantage of the occasion to expound their larger plan. One of them, Beveridge, set it forth in the following language in 1898 to a group of Boston businessmen: "American factories are making more than the American people can use; American soil is producing more than they can consume. Fate has written our policy for us; the trade of the world must and shall be ours. And we will get it as our mother [England] has told us how. We will establish trading-posts throughout the world as distributing-points for American products. We will cover the ocean with our merchant marine. We will build a navy to the measure of our greatness. Great colonies governing themselves, flying our flag and trading with us, will grow about our posts of trade. Our institutions will follow our flag on the wings of our commerce. And American law, American order, American civilization, and the American flag will plant themselves on shores hitherto bloody and benighted, but by those agencies of God henceforth to be made beautiful and bright." [2]

Overseas Possessions Acquired. Under the impetus of the new ideas and interests, the United States embarked on the policy of "expansion" commonly called "imperialism." To Tutuila (Samoa), acquired previously, were added in 1898 Hawaii, Puerto Rico, the Philippine Islands, Guam, and a protectorate over Cuba; in 1904 control over the Panama Canal Zone; and in 1917 the Virgin Islands, formerly owned by Denmark. To such operations, no doubt, there was a large opposition in the United States all along, but it was at first overborne in elections. It was then generally assumed that the United States had set out permanently on a new course as a world power competing with other world powers for territories and trade. Although "imperialism" was criticised by members of all parties and the supremacy of economic objectives was denied, there was no uncertainty as to the substance of "dollar diplomacy" as President Taft called it.

"The Open Door" in the Far East. In connection with expansion across the Pacific Ocean, indeed shortly after the annexation of the

[2] Address in Boston, April 27, 1898. Bowers, *Beveridge and the Progressive Era*, p. 69. Mr. Bowers states that this flight of eloquence was cheered by "hard-headed businessmen" who had been a bit cynical over the sentimental project of freeing Cuba.

Philippines, the Government of the United States enunciated a special doctrine of Oriental policy, known as the Open Door. This doctrine, old in origins, was given formal expression by John Hay as Secretary of State, at the end of the nineteenth century, in a note to the great powers then operating in China. The note suggested a solution of their conflicts over trade and concessions in China which would "bring about permanent peace and safety in China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese empire." Though the doctrine had a fine ring, the great powers really had little use for it and, as Tyler Dennett has said, it was in substance a form of American intervention in China for it insisted that Americans should have equal trading rights against countries that were trying to get monopolies in China.

At all events, Charles E. Hughes, as Secretary of State under President Harding, deemed the doctrine so important that he had it incorporated in the Nine Power Pact of 1922 which bound the United States, Japan, Great Britain, France, and five other countries to "respect the sovereignty, the independence, and the territorial and administrative integrity of China," and to refrain from seeking special rights and privileges in China which would abridge the rights of other States. Despite the solemnity of the treaty duly signed, Japan flouted it in 1931 by seizing Manchukuo and later by practically annexing other sections of China. When in 1938 the United States informed Japan that she was violating American rights set forth in the treaty, the Japanese government replied that it did not intend to exclude Americans from Chinese business but hinted broadly that changes in the Orient had made the Open Door doctrine obsolete for all practical purposes. Although Great Britain and France also addressed notes to Japan on the subject, they were little inclined, if in fact they were able, to give the United States any military or naval support in exerting pressure on Japan. Nor indeed was the Government of the United States then willing to risk a war with Japan on such grounds.

The "Open Door" in President Franklin D. Roosevelt's Oriental Policy. After it became more clearly evident that Japan intended to pursue unabated her policy of aggression in Asia, President Roosevelt finally took a firm stand on certain principles which, he insisted, must form the basis of any settlement with that country. The acceptance of

these principles by the Japanese government he made a condition precedent to a conference proposed to him in August, 1941, by the Japanese prime minister. They included respect by Japan for the rule of "equal opportunity and fair treatment" for Americans as well as other nations engaged in commercial operations in China and for the sovereignty, independence, and integrity of China. These principles had formed the primary substance of the Open Door policy. They were now supplemented by other principles: "respect for the territorial integrity and sovereignty of each and all nations . . . [and] non-disturbance of the *status quo* in the Pacific except as the *status quo* might be altered by peaceful means." As the Japanese prime minister apparently would not agree to abide by these principles, negotiations, though continued, ended in a deadlock which was only broken by the smashing attack on Pearl Harbor, December 7, 1941.[3]

Intervention in Latin-American Countries. Apart from the annexation of the Philippines and the promotion of commercial interests in the Orient, the policy of imperial expansion also covered armed intervention from time to time in various countries of the Caribbean region. When the actions of such countries were regarded as seriously interfering with American trading and commercial interests, the President deliberately sent armed forces to the scene of trouble to assume temporary supervision. To districts over which dominion of this nature was exercised the term "protectorate" was sometimes applied. Theoretically the governments affected were free but actually they had to conduct their affairs with an eye to pleasing the guardian power.

Subordination of Cuba. In the case of one protectorate, the island of Cuba, the superior position of the United States was sanctioned by a formal agreement extending from 1903 to 1934. In the joint resolution of Congress demanding the withdrawal of Spain from Cuba in 1898, it was publicly declared that the United States disclaimed any intention of exercising control over the Island except for the pacification thereof and that when this task was accomplished the government of the Island would be left to the people. However in 1901 a provision known as the "Platt Amendment" was incorporated in the army appropriation act, which directed the President to turn the control of Cuba over to the inhabitants as soon as they established a regular government and ex-

[3] *Peace and War: United States Foreign Policy, 1931–1941* (U. S. State Department Publication), Jan. 2, 1942.

pressly recognized in their constitution, among other things, the right of the United States to intervene in certain circumstances, particularly to maintain order.

And this stipulation, until repealed in 1934 (p. 308), was by no means theoretical. In the summer of 1906, when discontented natives revolted, repeated appeals from American citizens in Cuba induced the President to act under the Platt Amendment. Military forces were sent to the Island, and responsibility for the entire administration was assumed by an American officer representing the United States. After an occupation lasting until January, 1909, the government was turned over to a newly elected native president and congress.

Reaction against Imperialism under President Franklin D. Roosevelt

Doubts about the Advantages of Overseas Empire. For many years after the United States embarked on the policy of expansion in distant regions, the national elections were generally taken to mean that the American people wholeheartedly approved the policy of "civilizing and Christianizing" backward places and of entering into full naval competition with the great imperial powers of Europe. No trend in American politics seemed to be more permanent. Then a reaction set in. There had been from the beginning a strong opposition to this departure from accepted tradition; and it was augmented by increasing discontent with results.

High hopes of securing ever larger markets for American industry and agriculture were dashed by the paralysis of business after the panic opened in 1929. Instead of outlets for goods, competition was developed, especially in the Philippines. While some American merchants, shipowners, and manufacturers found a profitable business in those islands, American farmers cried out against the competition of Philippine cocoanut oil, tobacco, sugar, and other products with domestic animal fats, tobacco, and sugar. Members of the American Federation of Labor objected to the flood of colored laborers from the insular possessions who poured into the United States to work at low wages in competition with white labor. Americans of "Nordic" stock looked with alarm upon the immigration of "our little brown brothers" and the frequent race riots which flared up in various parts of the country as a result of this influx. Then financial scandals in Cuba were unearthed by Senate investigating

committees. "Imperialism" had not brought the promised "prosperity" and it had brought unexpected troubles.

Independence Offered to the Philippines. In these circumstances Congress, which had once cheered "the new policy" to the echo, began to display doubts and to reverse itself in some particulars. During President Hoover's administration it passed, over his veto, a bill for granting independence to the Philippines. When the latter rejected the terms of the tender, Congress passed a modified bill with the approval of Franklin D. Roosevelt, in March, 1934. This measure authorized the Filipinos to call a convention and draw up a republican constitution for their own government. It then stipulated that at the expiration of ten years from the inauguration of their new government, the sovereignty of the United States shall be withdrawn. The Act requested the President to negotiate with foreign powers for the perpetual neutralization of the Islands after independence is achieved. Pending the granting of independence, the quantity of certain products admitted free to the United States was to be limited and the number of immigrants to be reduced to fifty per year. The fate of American naval and coaling stations was left to future negotiations. Thus provision was made for what some call "the next step in liberty" and others denounce as "scuttling the ship" and "betraying our moral obligation." Shortly after the passage of the Independence Act, the Philippine legislature accepted its terms and called a constitutional convention which drafted a republican constitution for the Islands and opened the way for independence in 1946. So things stood when Japan attacked the Islands in 1941.

The Right of Intervention in Cuba Terminated. A few weeks after the passage of the Philippines independence bill, the United States Senate ratified a treaty for the abolition of the intervention clauses of the Platt Amendment of 1901, forced upon Cuba in 1903 (above, p. 314). The treaty, negotiated by President Franklin D. Roosevelt, abrogated the provision that the United States might intervene in Cuba at any time to keep order, preserve its independence, and uphold financial arrangements in the Island. Under the terms of the new order, factions in Cuba are allowed to solve their own problems and American investors and property owners in Cuba are to look to the government of the Island and the good offices of the United States Government, not to American armed forces to protect their interests in time of trouble.

Right of Armed Intervention Questioned. Less than a month after the abrogation of the Platt Amendment, the Senate of the United States

ratified two treaties which had been drawn up and signed at the Pan-American Conference held in December, 1933. The first of these treaties condemned recourse to war, advocated the peaceful settlement of disputes, and pledged coöperation among the signatory governments in case controversies arise. In ratifying it however the Senate declared that the United States did not thereby waive any of its rights under other treaties or international law—the Monroe Doctrine, perhaps. The second treaty asserted that no State has any right to intervene in the external or internal affairs of any other State. Here, too, the United States Senate made a reservation, namely, that the United States would continue to pursue the policies adopted after March 4, 1933, set forth in President Franklin D. Roosevelt's addresses since that time, and in the address of Secretary Hull before the Pan-American Conference on December 15, 1933. In this way the right of the United States to intervene in Latin-American countries is renounced, subject to reservations sufficiently general in character to cover almost any emergency.

Uncertain Future of Imperialism. Events of the past few years have clouded the future of imperialism. There are no large territories to be annexed by the United States, without incurring the risk of a war with some great power. The intention to acquire more territory by conquest has been repudiated by American Presidents. Naval rivalry continues on a large scale, but there is a revulsion of sentiment against using the Navy to seize distant islands and force trade on backward peoples.

Yet there is still a strong pressure in the country for economic expansion. It is made manifest by continued emphasis on the utility of a larger export trade in draining off American "surpluses," by the quest for new investment opportunities, by the search for raw materials such as oil, and by demands for continental defense in spite of the promises of collective security. Indeed after the Global War broke out members of the Roosevelt administration and advocates of collective security in Congress openly declared that the United States should take advantage of the War to secure new naval and air bases in places as far apart as Africa and islands in the southwest Pacific, as well as hold the bases in the New World recently rented from Britain. Furthermore the statement of the British premier, Winston Churchill, that the British Empire would be held intact and outside interference with its affairs rejected, was often cited in Congress as evidence that the United States should also insist upon pushing American commercial and imperial interests during and

after the War. It could not be correctly said then in 1944, as was often alleged, that American imperialism was dead and buried.

Peculiar Position of the Caribbean Region. In scanning the future, it is wise to make a discrimination between American expansion in the Caribbean and in the Far East. The former region bears a direct relation to the problem of national security, that is, the exclusion of all great naval powers from that area. But it is the expressed hope of the statesmen who sponsored the new Pan-American treaties of 1933 (p. 316) that stabilization can be effected in the Caribbean region by cooperation among the United States and Latin-American governments, thus obviating unilateral or single-handed intervention by the former country in the traditional style. Even so, the Caribbean is, as often called, "an American lake" and supremacy over it is not likely to be surrendered by the United States. The Caribbean region was emphasized in 1940 when President Roosevelt completed a personal transaction with Premier Churchill, by which he "traded" fifty over-age destroyers for air and naval bases in this hemisphere, to be held for a long term of years. Such American bases were to be constructed not only in Newfoundland and the Bermuda islands, but also in the Bahamas, Jamaica, St. Lucia, Trinidad, Antigua, and British Guiana. If held permanently, the newly acquired Caribbean air and naval bases, added to others already in the possession of the United States, would indeed transform the Caribbean region into an American stronghold for defense and for any operations southward that might be decided upon by the Government of the United States in the presence of new contingencies.

Policy of Collective Security

An Attempt at Definition. Unlike the policies of continentalism, isolationism, and imperialism, the policy of collective security has never been stated in a brief official document, comparable to Washington's Farewell Address or Monroe's message of 1823; nor has it yet been applied as a practical working policy for the United States. Hence a brief definition of collective security is more difficult to formulate. Such an effort must be made however in order that a discussion of American foreign policies may proceed effectively, that citizens who discuss these policies may "talk to the point" and not past one another in confusion.

The essentials of the collective security thesis are as follows: The na-

tions of the earth have been brought close together by modern means of communication and intercourse; peace is indivisible; it is impossible for the United States to stand alone and remain at peace in a warring world; hence to attain peace and security the United States must join some kind of world organization or limited association of nations empowered to suppress disturbers of world peace and maintain peace by collective action among the nations. There are many differences of opinion as to the form and nature of the proposed world organization or association and as to the powers to be surrendered to it. Numerous implications are also involved in the formation of such collectivity of nations. But the above definition seems to give the fundamentals inherent in a policy of collective security.

Official Origins of the Policy of Collective Security. Although President Wilson did not summarize his doctrines under the phrase "collective security," he was the first President to adopt and announce the essential principles of this policy. In messages and addresses delivered before and after the United States entered the World War in 1917, he declared that the world is so closely united "that it cannot be taken to pieces" and that peace can only be won for the United States by an organization of nations endowed with authority to adjust disputes among nations and to take common action against peace-breakers everywhere. President Wilson not only declared these principles. He was influential in reducing them to concrete proposals in the Covenant of the League of Nations (p. 297) which formed an integral part of the Versailles treaty of 1919 containing the terms of settlement with defeated Germany.

Rejection and Revival of the Collective Security Policy. The necessary two-thirds vote for the ratification of the Versailles treaty were not mustered in the Senate of the United States and for various reasons the United States did not become a member of the League of Nations. Indeed for a time the country seemed to be in an isolationist mood; and Congress by overwhelming majorities from both political parties repeatedly expressed a resolve "to stay out of the next war." This resolve it embodied in successive Neutrality Acts designed to restrain Americans from selling munitions to belligerents, from traveling and carrying on commerce in the danger zones of the next European or Asiatic war. President Franklin D. Roosevelt signed these measures and also declared that he too wished to insulate the United States from war. But in 1937 he expressed other views. In an address at Chicago in October, 1937,

he declared in effect that the United States could not keep out of the war when it came and called for collective action among the nations to suppress or "quarantine" aggressors, meaning Germany, Italy, and Japan. Subsequently, however, even in the campaign of 1940, President Roosevelt did not proclaim anew the doctrine of collective security as the American foreign policy. On the contrary he indicated in the campaign that it was his intention to keep the country out of the war, which had begun to rage in 1939.

President Roosevelt's Later Attitude toward Collective Security. At no time, either before or after the United States became involved in the Global War, did President Roosevelt elaborate the idea of collective security as American policy and work out in detail any plan for the organization of the world to attain this objective at the close of the war. His concrete steps from 1939 onward were in the direction of collective action against the three Axis powers, that is, collaboration with the Allies at war with them. His demand for the repeal of the embargo on the export of munitions in September, 1939, was based on that program. That he did not intend to pursue a policy of strict neutrality in the war, he made perfectly clear early in 1941 by pressing for the passage of the Lend-Lease Act under which he could sell, lease, or give implements of war to any and all nations at war with the Axis; that is, actively aid them in their collective struggle against the aggressors. In August, 1941, he joined the British prime minister, Winston Churchill, in signing "the Atlantic Charter," in which the belief was expressed that "pending the establishment of a wider and permanent system of general security," the aggressor nations should be defeated and disarmed.

In documents signed by President Roosevelt or the Secretary of State after the United States became involved in the war, appeared definite intimations that the United States would pursue a policy of continuous coöperation with other nations in maintaining a system of collective security in some form. There were hints of it in the agreement signed by many governments, known as the United Nations, in January, 1942. In the Moscow Declaration issued on November 1, 1943, the governments of Russia, Great Britain, the United States, and China pledged themselves to coöperation "pending . . . the inauguration of a system of general security." No specific reference to collective security appeared in the Declaration signed at Teheran on December 1, 1943, by Roosevelt, Stalin, and Churchill, but in a "Statement on Iran" it was announced that the governments of the United States, Russia, and Great Britain

"count upon the participation of Iran, together with all other peace-loving nations, in the establishment of international peace, security, and prosperity after the war, in accordance with the principles of the Atlantic Charter, to which all four governments have continued to subscribe." Yet in none of these state papers, in no official pronouncement, did President Roosevelt give even the outlines of a post-war organization of the nations, in which the policy of collective security was to be realized and the United States was to function as a collaborator.

Congressional Formulations of a Collective Security Policy. While President Roosevelt continued to refrain from giving the country a bill of particulars as to a world organization for collective security, advocates of such a foreign policy for the United States labored in Congress to effect the formulation and adoption of a commitment to a collective security policy. Their labors bore fruit in two resolutions—one by the House of Representatives and the other by the Senate.

The House resolution, bearing the name of its sponsor, J. W. Fulbright of Arkansas, was adopted by an overwhelming vote in September, 1943. It read as follows: "Resolved by the House of Representatives (the Senate concurring), That the Congress hereby expresses itself as favoring the creation of appropriate international machinery with power adequate to establish and to maintain a just and lasting peace, among the nations of the world, and as favoring participation of the United States therein through its constitutional processes." Supporters of the measure insisted that it was definite but many die-hard isolationalists voted for it, after saying on the floor of the House that it was merely a pious wish or meant nothing at all.

Attempts to induce the Senate to concur in the Fulbright resolution were defeated, as were attempts to force other resolutions of the kind through that body. The Senate insisted on taking independent action and on reserving its right to pass upon any treaty that might be made to realize a policy of collective security. After several days of debate, the Senate passed early in November, 1943, a resolution composed of five paragraphs. The first was a pledge to wage war until a complete victory is achieved. The second referred to coöperation with comrades-in-arms in securing a "just and honorable" peace. The third declared that the United States acting through its constitutional processes should join with free and sovereign nations in the establishment and maintenance of international authority with power to prevent aggression and preserve the peace of the world. The fourth paragraph repeated the language of the

Moscow Declaration which "recognizes the necessity" that a "general international organization" of nations, large and small, be established. Finally, the Senate resolution declared specificially that "any treaty made to effect the purposes of this resolution" must be made by and with the advice and consent of the Senate, two thirds of the Senators concurring.

Like the House resolution the Senate resolution was passed by an overwhelming majority, only a few intransigents holding out against it to the end. As in the case of the House debates on the Fulbright resolution, the debates in the Senate on its resolution showed that members held widely varying opinions as to its meaning. Some thought it was definite; others maintained that it made no definite commitment whatever. In view of the language used during the debates in the House and the Senate, it was impossible for the people of the United States to discover how far Congress was willing to go in the direction of binding the country to join any particular kind of organization or association pledged to collective action in the maintenance of world peace and conduct of international relations.

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CHAPTER XIV

THE WAR POWER

War Power Subject to the Constitution. Although the power for war may be discussed in the abstract, it so happens that the war power of the United States Government, like all its other powers, is subject to the provisions and limitations of the Constitution. Hence a discussion of this power in concrete terms, properly opens with constitutional considerations.

Under the Constitution, it is true, the war powers of the Government are immense, particularly as to the use of human beings, money, and materials for war purposes, but it is decidedly limited in other respects. Grave responsibilities in this relation are imposed on Congress and it is morally bound to fulfill them. The President as Commander-in-chief also enjoys great power in peace and war; yet he cannot constitutionally, under the guise of war necessity, abolish Congress and prevent the Supreme Court from functioning, on the ground that they do not agree with his war policies. Neither can he abrogate the periodical elections provided by the Constitution, for the purpose of keeping himself in power. Even during the Civil War, when the outlook was dark, President Lincoln insisted that the presidential election of 1864 be held in regular form and prepared to coöperate with his successor in case of his defeat. Even military tribunals exercising war power are not wholly emancipated from the power of the Supreme Court to inquire into the correctness of their proceedings (p. 228).

Theory of War Power Underlying the Constitution. The framers of the Constitution were neither pacifists nor militarists. If we may take the document they drafted and *The Federalist* as representing their views, they sought to reduce the chances of war, domestic and foreign; but they had no ardent expectations that war would disappear from the earth in any appreciable time. They believed that military establishments were requisites of any efficient government and yet they did not look upon war as a good in itself or upon military valor as the one supreme virtue

of men. So they gave great attention to the subject of the war power in shaping the provisions of the Constitution and based these provisions upon the following propositions which were deemed axiomatic:

Safety against dangers from foreign arms and influence and against domestic violence seem to be the first "among the many objects to which a wise and free people find it necessary to direct their attention" (*The Federalist*, No. 3).

War is among the persistent and constant features of human history. "To judge from the history of mankind, we shall be compelled to conclude that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace; and that to model our political systems upon speculations of lasting tranquility, is to calculate upon the weaker springs of the human character" (No. 34). "It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it" (No. 3). "Seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body" (No. 28).

Given these fundamentals, preparations for war and the fighting of wars must be fully provided for in the Constitution.

Yet military establishments are heavy burdens on the productive activities of the nation and are dangerous to civil liberties and republican or popular government. "The liberties of Rome proved the final victim to her military triumphs; and . . . the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution" (No. 41).

In the exercise of this circumspection and precaution, provisions for military establishments and war must be accompanied by carefully devised checks against militarism, that is, against the triumph of military men over civilians and the transformation of war power into an end in itself.

Large War Powers Conferred on the Government. With due reference to such considerations, the Constitution vests large war powers in Congress and the President. It gives Congress unlimited power to raise and support armies, to provide and maintain a navy, to make rules for the government of the land and naval forces, to provide for organizing and arming the militia, and to declare war. It vests in the President the high power of commanding the armed forces. Although the Constitution refers twice to "defense" as an objective of the Government, it leaves Congress free to declare any kind of war, defensive or aggressive, without regard to objectives. Every man, every woman, every dollar, every

piece of property, all material resources may be drawn upon in building armed forces and waging war.

Civilian Supremacy and Limitations in Respect of War Power. Aware that in times past liberty had often been destroyed by military dictatorships, the framers of the Constitution sought to establish firmly the supremacy of the civil branches of the Government over the military arm.

This supremacy is asserted in numerous provisions. The direction of foreign policy, upon which wars depend, is vested mainly in the President and Senate. The power to declare war is assigned to Congress. Likewise the power to raise and support armies is intrusted entirely to it, with an express condition that "no appropriation of money to that use shall be for a longer term than two years." To Congress is granted by the Constitution the authority to make rules for the government and regulation of the land and naval forces, to arrange for organizing arming, and disciplining the militia of the states, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. In a word, the size of the military and naval forces, their structure, and their use in war are to be determined by Congress. Finally, a civil officer, the President, is made Commander-in-chief of the Army and Navy in war and peace.

Objectives of War Power and Preparations

The Idea of Adequate Defense. While the territory and ambitions of the United States were limited to the continental home of the American people, it was customary to speak of war power and preparations for war as in the interest of "adequate defense." No other phrase fell more frequently from the lips of army and navy authorities in their calls upon Congress for grants of money. Statesmen constantly insisted that provision for "adequate defense" was the supreme objective in preparations for war. Yet the slogan was never closely scrutinized. Our forces must be adequate, but adequate to what purpose, against what foreign powers? Although it is sometimes stated that "America can whip creation," even the most optimistic can scarcely hope to defeat any possible combination of countries that might be aligned against the United States. Hence in the most extensive preparations there inheres a large measure of inadequacy.

The Idea of Defense. Nor is the term "defense" self-explanatory. Defense of what? Defense of the people residing in the continental

United States? Defense of all the races and nationalities inhabiting American dependencies? Defense of American citizens in any country on the globe where disorders threaten their persons and property? Defense of American merchant vessels throughout the world? Defense of American investments wherever they may be endangered? Although a former Secretary of the Navy once declared that the arms of the Government must be strong enough to defend all these territories, persons, things, and intangibles, it cannot be said as yet that this theory has been formally adopted as a national resolve. If it were accepted, nothing very precise would be settled.

Preparations Depend upon Policies to Be Pursued. It is scarcely necessary to cite other illustrations to show that preparations for war, immediate or distant, depend upon and should be related to the foreign policies pursued by the Government, and the activities of citizens at home and abroad, especially in commerce and finance. Until foreign policy is clearly defined military men cannot make their reckonings with any degree of accuracy. On the other hand, if they are given a free rein in accumulating engines of war, they may in fact so change the attitude of foreign countries as to work a revolution in the position of the civil government in spite of its intentions.

Since preparedness should depend upon the Federal Government's foreign policy and involves complicated situations, it is obviously impossible for military and naval officers to claim any final authority on the subject. At best their expertness is limited to machines and technics. It is their business to determine, as well as they can, what engines of war are necessary for defense and offense under specific conditions. It is the business of the American people to decide what kind of foreign tactics is to be pursued. Unfortunately there has never been and is not now a coördination of armed forces with diplomacy. The size of the army and navy in time of peace has been determined largely by sentiment, tradition, interested lobbies, and guesswork. Doubtless the War and Navy Departments have conducted their studies and made their preparations on assumptions as to possible wars, but they have not known just how the diplomatic operations of the Government would turn out in the long run.

What Foreign Policy Is to Control Preparations? At the very beginning of any informed discussion respecting military preparations, the question of their relations to the foreign policy of the Government must be raised. Is the policy to be continentalism, isolationism, imperialism,

or collective security (above, pp. 303–321)? Or is it to be a mixture of all four policies? Certainly any preparations for war should be adequate to support and assure the effectiveness of the policy or policies chosen. Otherwise the risk of defeat in war would be increased.

Even the policy of collective security, as generally defined, does not imply complete disarmament. According to that policy, to be sure, armaments are to be reduced in peace-time to some level or levels, but not abolished entirely. Indeed such a policy usually contemplates the maintenance of a kind of international armed force for the suppression of aggressors; and all or certain nations are supposed to supply armed contingents, that is, to maintain armed forces subject to international agreements as to nature and size. Even if a policy of collective security be definitively settled upon after the Global War, a question might arise as to the willingness of the American people to abandon national defense completely and rely for their national security solely upon an international armed force commanded by an international authority. That is to say, in a democratic system, popular temper must be taken into account in official determinations respecting foreign policies and military preparations to implement such policies.

War Is Not an Exact Science. To make matters more complicated, neither defense nor attack—even where possible enemies are agreed upon and the persons and things to be protected are well known—is an exact science. No doubt military preparations must bear some material relation to natural configurations: rivers, mountains, and seas, but inventiveness continually introduces new devices which render obsolete the best calculations. The airplane, for example, scorns the highest mountain barriers and the widest waters. Tradition and accepted practice at a given moment prescribe certain military equipment and maneuvers but, as the surprising developments of the recent wars demonstrate, hopes respecting the efficiency of fighting gear can be rendered futile almost over night. A man with a test tube in a distant laboratory may upset the designs of the most competent general at a battle front. At no time has warfare, with its variable human factors, been a question of mere mathematics; in the modern age its claim to precision has become still more dubious.

It is not only research and mechanical inventions that have introduced bewilderment into the "science of national defense." Modern wars are conflicts of civilizations as well as of military engines. Railways, industries, finance, newspapers, education, religion, propaganda, and even art

are all involved in it. Strength at the front depends upon organizing and productive abilities behind the lines, upon capacities of endurance among the people, upon ideas circulating among them. The conduct of a civil government may undermine, even inadvertently, the strength of its military forces. In turn the methods of the military director may destroy the faith and economy of those upon whom he depends for support. The great care which the belligerents in modern wars take to formulate moral "aims" to encourage their friends and disconcert their foes is proof that thought, no less than machines, figures in armed combats, especially in this age of literacy and education.

Peace Footing and Organization

While the adoption of a foreign policy of collective security after the settlement of the Global War is possible, it is not likely that armed forces of the United States will be dispensed with or that their peacetime footing and organization will be materially altered, save perhaps by the adoption of conscription or universal service as a permanent method of recruitment. At all events it is highly improbable that the historical practices of the United States in respect of preparations of war will be wholly abandoned.

Branches of the Armed Service. The armed forces are divided into two branches—military and naval—each with a highly complicated organization based on functions and equipment. The formation of a third branch—an air service—is now extensively discussed but formidable objections are launched against it. At the same time the unification of the army and navy under a single Department of War or National Defense is also being discussed. But for the moment the historic services—army and navy—remain intact.

The army personnel of the United States consists of the Regular Army, the National Guard (formerly, state militia), and the Organized Reserves. In time of peace it is customary to recruit men for these forces by relying upon volunteers. The number of officers and enlisted personnel in the Regular Army is determined from time to time by acts of Congress. The number of effectives in the National Guard depends upon the size of the state contingents which compose it. Although each state retains a certain control over its own contingent of the Guard, all contingents are organized, equipped, and disciplined in accordance with federal standards and are subject to the supervision of the War Depart-

ment. At any time the Guard may be called into national service and it is therefore for practical purposes an integral part of the federal military system. Guardsmen may be used by state authorities to suppress local disturbances but the former independence of "the state militia" has been completely subordinated to federal military requirements.

The Navy personnel of the United States consists of its officers and enlisted men for the various branches, the Marine Corps (available for service on land as well as water), and the Coast Guard.

Organized Reserves. Supplementing the Regular Army and the National Guard are the Officers' Reserve Corps, the Organized Reserves, and the Enlisted Reserve Corps. In the naval system are included the Naval Reserve and the Reserve Officers' Training Corps. These reserves receive training as prescribed by their respective Departments. They are normally recruited from volunteers and are relied upon to supply properly trained men on call for war.

Training of Officers. To supply officers for the Army a Military Academy is maintained at West Point; while a Naval Academy at Annapolis performs a similar service for the Navy. For advanced work the Government conducts the Naval War College at Newport and the Army War College at Washington, D. C.

In choosing men for training at West Point and Annapolis, provisions are made for preventing favoritism to any section of the country or any single class. Civilian control over practically the whole selective process makes it impossible for military or naval authorities to confine the choice of men to their own circles, and prevents the erection of a hereditary caste. As a further guarantee against centralization, the great majority of admissions to both institutions are distributed among states, congressional districts, and territories, and in these instances the selection is determined by a Senator, Representative, or territorial delegate. For his guidance, he may prescribe a competitive examination or he may use his own discretion. Other appointments are made by the President and the Vice-President. Then come special arrangements. Under legislative enactment, a number of places are allotted to the sons of veterans who were killed in action or died of wounds or diseases contracted in war. Finally, to encourage students taking military training elsewhere, certain openings are made at West Point for "honor graduates" from colleges and other institutions offering military courses under Army officers and for men selected from the enlisted ranks of the Regular Army and the National Guard.

Supplementary Expedients for Training Officers. Between the World War and the Global War, the historic military and naval academies were supplemented by a national system for the training of officers. Units of the Senior Reserve Officers' Training Corps were formed in colleges and universities granting degrees and in military schools of various types. In other institutions units of the Junior Reserve Officers' Corps were established. To institutional training of these young men was added training in military camps during the summer months. A similar system was established for the Navy. A great deal of money was spent on these expedients; but their effectiveness in producing competent officers for combat duty was questioned all along in Congress and outside. The merits of the dispute over their utility was never settled, but it was certain that at the opening of the Global War, the United States was woefully lacking in the number and quality of its younger officers. Hence the future of these supplementary expedients remains problematical.

War Footing and War

At best definitions of war powers conferred upon the Government by the Constitution and descriptions of war preparations in time of peace give a pale impression of war powers in practice and war as actuality. Nor indeed does any particular war necessarily bring into being the exercise of all the war powers vested in the Government or all the utilities and practices of war that are potential in the Government and the nation upon which it depends for support. Every war has its own particular features—of enemy forces, terrain, waters, implements, requirements, and issues. What has been done in any past war or all past wars together is not an inexorable index to what may or will be done in any future war, with its enemy forces, terrain, waters, implements, requirements, and issues. But experience is one guide to what may be expected when the United States passes from peace-time preparations to war footing and to war as actuality. Generalizations from this experience furnish certain principles upon which may be based, with some degree of assurance, expectations and calculations relative to war footing and war operations.

Increase in the Legislative Power of Congress. Theoretically war does not add anything to the powers vested in Congress by the Constitution. In reality the necessities, real and alleged, of war are so vast and so exigent that Congress may and does exercise in war time immeasurable powers which would not be endured by the people or supported by the Supreme

Court if exercised in time of peace. Gross violations of the plain letter of the Constitution might not be attempted or tolerated under the guise of war necessity. For instance, it is not likely that in any crisis the Congress would attempt, on a war pretext, to deprive any state of its equal representation in the Senate even if its Senators voted against the war and against measures proposed for the prosecution of the war. But in view of legislation enacted by Congress in the Civil War, the World War, and the Global War, it may be said with assurance that in war time Congress may exercise any and all powers over life, liberty, and property which are not palpable and flagrant violations of specific and indubitable provisions of the Constitution. Congress may take by taxation any quantity of money which the economy of the nation will yield. It may not only conscript men and women for combat duty but also for war industries. It may bring individuals, the press, and all institutions for the dissemination of knowledge and opinion under official control and may penalize all persons who, in official judgment, materially hamper war efforts by deeds or by spoken or written words. All these things Congress may do and yet follow constitutional forms.

Increase in the Power of the President. Even more marked is the increase in the power over life, liberty, property, and opinion which the President commands in time of war. This increase derives from specific sources. The first are the provisions of the Constitution which vest in him the executive power and make him Commander-in-chief, thus endowing him in war time with all the indefinite and mighty powers of such a supreme official. A second source is special war legislation enacted by Congress, assigning to the President as Chief Executive and as head of the armed forces huge grants of money, in lump sums to be spent at his discretion, and conferring upon him indefinite powers over life, liberty, and property to be exercised at his discretion.

The President's war power as Commander-in-chief is nowhere defined in the Constitution and, being immeasurable, is the dark continent of American Government. This power he possesses in his own official right. A hint of its scope may be given by citing two illustrations. During the Civil War President Lincoln, by mere proclamation under his war power, declared free all the slaves in all places then under arms against the Government of the United States. In time of peace neither the President nor Congress had any power to interfere with slavery in any state where it lawfully existed. The second illustration was provided by President Franklin D. Roosevelt in 1942 early in the Global War. In a public ad-

dress he declared that if Congress did not repeal a provision of law which it had duly and constitutionally passed he would act on his own authority and in effect treat it as repealed.[1] In this connection President Roosevelt made a statement of high significance: "When the war is won, the powers under which I act automatically revert to the people—to whom they belong." Thus he seemed to regard his powers as derived from the people, not from the Constitution which is supposed to be the supreme expression of popular will.

The extent to which Congress may go in conferring large discretionary power by legislation is illustrated by the Lend-Lease Act of March 11, 1941, passed on demand from the Executive Department. Though the United States was not then at war, the bill was voted in contemplation of war. It was entitled an act "to promote the defense of the United States." It authorized the President to sell, transfer, exchange, lend, lease or otherwise dispose of ships, aircraft, implements of war, and other goods to "the government of any country whose defense the President deems vital to the defense of the United States." Such transactions with other nations the President was empowered to conduct on terms, conditions, and agreements satisfactory to himself. To effect the purposes of the law billions of dollars were placed at the President's disposal, and under the Act he made executive agreements with numerous governments, which were broad in language and covered general commercial and economic policies to be pursued by the Government of the United States during and after the Global War (p. 409).

Man Power for Combat Duty. It is now settled in practice that in a war of any magnitude, the Government of the United States will resort to the conscription of able-bodied men for combat services. The traditional method of relying upon volunteers has been followed only in minor wars, such as the Mexican War of 1845 and the Spanish War of 1898. Conscription was resorted to in the War of 1812, by both sides in the Civil War, in the World War, and in the Global War. Conscription Acts fix certain age limits for the men inducted, make certain exemptions, provide for the classification of men according to age, the number, and nature of their dependents, their occupations in relation to war needs, and other considerations besides physical fitness for combat duty. Forces raised under selective service legislation may be supplemented by volunteers and by special corps of women volunteers, such as the military and naval auxiliaries composed of women enrolled for

[1] E. S. Corwin, *Political Science Review*, February, 1943, pp. 18 ff.

the Global War. It may now be regarded as definitely established that in war time the Government will have at its command for combat duty all able-bodied men as designated by law. Indeed in 1940 while the United States was still at peace, Congress passed the Selective Service Act of that year—the first peace-time conscription law in the history of the country. Hence a precedent has been set for compulsory military service as a permanent policy in peace as well as war.

Command over War Production Industries. For practical purposes the power of the Government to force the production of war materials and commandeer the output in war time is limited only by the physical and human resources of the country. The Government may compel peace-time industries to convert their plants into war industries, to build new plants, and turn out war materials in amounts and according to specifications fixed by official authorities. In order to expedite this process during the Global War, the Government made loans to industrial corporations, and financed the extension of old plants and the construction of new plants. Besides ordering and stimulating war production, the Government may commandeer and allocate the distribution of all materials directly or indirectly useful to war production and war purposes —every branch of industry, agriculture, business, and transportation. In case of strikes, delays, or neglect of duty the Government may seize and operate industrial plants directly, with safeguards for the property rights of owners.

Control over Man Power and Woman Power for War Industries. Although up to the present, the Government has not registered every man and every woman capable of work and forced them to labor in certain positions or jobs, it undoubtedly can exercise that power in war time. Bills to effect such drastic control over labor have more than once been introduced in Congress. In this sphere of war activity, it has been the practice to combine coercion with voluntary arrangements or to intermingle coercion and volunteering. During the Global War, for instance, many men engaged in industries deemed essential to war efforts were given a deferred status in respect of conscription and men in non-essential industries were drawn upon more heavily for combat service. The "work or fight" rule has not been made the law of the land but the coercive principle implied in it is widely applied. Strikes by labor organizations are not absolutely forbidden; but by the Connally-Smith Act of 1943 penalties were laid on labor leaders who fomented strikes, and labor organizations were forbidden to make contributions to the

campaign funds of political parties. Furthermore by legislation and executive orders the conditions and terms on which labor could lawfully call and conduct strikes were materially circumscribed. Strikes and threats of strikes frequently occurred but the Government, keeping ultimate power in reserve, resorted to negotiation rather than the use of force in settling disputes.

Control over Economy in General. A seemingly inevitable result of war activities is a severe dislocation of peace-time economy. The enormous outlays of the Government for war purposes induce an immediate rise in employment, wages, and prices. If this rise is allowed to take its "natural" course there will alternate jumps in wages and prices until economy gets out of hand in a dangerous inflation. In recognition of this tendency various controls on wages and prices were established in the World War and after it was over a proposal was often advanced, as a precaution for the next war, to "freeze" prices and wages at a given level immediately on the outbreak of the next war. But no such proposal was accepted and put into force at the beginning of the Global War in 1941. It is true that a general level of wages was fixed, subject to corrections designed to meet injustices in limited areas of industry, and that the prices of many prime commodities have been fixed from time to time. It is true also that provision has been made for rationing numerous commodities among consumers according to their needs. Thus a "ceiling" was put on certain wage and price schedules. But there was no agreement at the beginning of the war on fixed levels all around, and conflicts over prices and wages continued to rage from the outset. Although government control continued to be in many respects highly effective, it attained no ideal objective of complete "stabilization."

Control over Freedom of Expression. It is not only physical and material resources that are mobilized in war time. Public opinion and agencies connected with the expression of opinions are also brought under regimentation. With the coöperation of the press, the publication of news respecting the war is controlled by the principle that nothing useful to the enemy or hampering to war activities of the Government shall be given to the public. Mails going out of the country and coming into it are scrutinized and censored by the Post Office Department. Telegraphic, radio, and other means of communication with foreign countries are placed under censorship. An official agency conducts propaganda on the home front in support of war efforts and abroad to weaken the enemy and rally friends to the American cause. The national police and detec-

tive force, under the Federal Bureau of Investigation, is enlarged and ordered to keep track of activities called "subversive," to run down persons openly opposing the war or deliberately giving aid and comfort to the enemy. Prosecutions are launched by the Department of Justice and by local prosecuting officers against the violators of laws enacted to control the expression of opinion and to prevent various activities deemed hampering to the prosecution of the war or favorable to the cause of the enemy.

Beginning with the World War and continuing the practice in the Global War, Congress enacted special statutes covering sabotage, espionage, and sedition, as well as measures protecting the armed forces against outside activities and publications likely to stir up mutiny or disloyalty. Sabotage legislation imposes penalties on persons who break machinery or in any way deliberately seek to interfere with or slow down production and transportation. Espionage legislation penalizes efforts (1) to convey information to any foreign government for the purpose of injuring the United States; (2) to interfere with the operations of the American forces; or (3) to cause disloyalty or disobedience among the armed forces. While sabotage and espionage legislation to some extent involve freedom of press and speech, it is especially directed to the activities immediately affecting the production of war goods and the efficiency of the armed forces for war purposes.

Broader in scope are acts of Congress relative to sedition. Between 1798, when the Sedition Act of that year evoked a storm of national protest, and 1918, during the World War, Congress refrained from enacting such laws against criticisms of public officials and the American form of government. But in 1918 it departed from that practice by passing the Sedition Act, approved May 16 of that year. This Act penalized all persons "who use abusive language about the Government or institutions of the country . . . and who by word or act favor the cause of an enemy country." The Sedition Act was not renewed in its original form during the Global War. But by Title I of the Alien Registration Act of 1940, Congress laid heavy penalties on persons who advocate the overthrow of government by revolution or are members of any organization or association engaged in the advocacy of such doctrines (p. 22).

Federal Organization for Direction of War Activities. War activities fall into two broad classes: (1) planning and conduct of war on land and sea and in the air, including the supply of materials to the respective fronts or war areas; and (2) civilian operations controlled by law in sup-

port of combat activities. Both classes of activities, military and civilian, by express terms of the Constitution, come under the general direction of the President as Commander-in-chief and as the supreme Executive of the Government, subject of course to the provisions of the Constitution and laws of Congress duly enacted.

For the planning and conduct of combat activities, the President has as immediate agencies the War Department and the Department of the Navy. He operates in consultation with the heads of the two Departments and designated representatives of the Army and the Navy. For the Army he has at his side the Chief of Staff, who is head of the General Staff. For the Navy, he relies upon the chief of Staff of the Fleet who serves as the principal adviser of the Secretary of the Navy as well as the President. Coöperation between the War Department and the Department of the Navy is facilitated by joint boards dealing with common interests in general and with aeronautics, economy, munitions, welfare, and recreation.

Administrative coöperation between the two branches of war is also facilitated by the Joint Chiefs of Staff, headed by a single Chief of Staff immediately subject to the President as Commander-in-chief. The President is also free to create new agencies within the law and to draw upon any officials, officers, and other agencies for aid in the discharge of his over-all responsibilities.

For the direction of civilian activities in support of combat activities at various stages of the Global War numerous special agencies were created, principally by presidential order, and entrusted with the discharge of particular functions. Among these special agencies the following are the most important. In general their functions are indicated by their respective titles:

War Manpower Commission, including Selective Service System for administration of selective service acts and enrollments for the armed forces.

Office of Production Management—war production industries.

Office of Economic Stabilization—control over rents, prices, wages, and other factors involved in stabilization of the economy.

Office of Price Administration—prices and rationing.

War Labor Board—adjustments of labor disputes.

Office of Lend-Lease Administration—allocation of supplies to foreign governments under the Lend-Lease Act.

Office of Defense Transportation.

Office of Petroleum Coordinator.

Federal Housing Administration—provision of housing for war workers.

War Shipping Administration.

Office of Civilian Defense—organization and promotion of citizen activities in local protection and the promotion of war activities.

Office of War Information—information and propaganda.

Office of Censorship.

Office of Coordinators of Health, Welfare, and Related Defense Activities.

Financing the War. Modern warfare, of necessity totalitarian in nature and involving all able-bodied adults and all branches of economy, is expensive. The expenditures of the Government on account of the World War during the years 1917–1921 amounted to $26,300,000,000 and the total cost, including bonus and final payments for pensions, is estimated at about $100,000,000,000. In comparison the expenses of the Global War made those of the World War look trivial. Before the first year of the Global War had come to an end, Congress had authorized expenditures totalling $240,000,000,000, the national debt had passed the one-hundred-billion-dollar mark, plans for mounting outlays were under way. Estimates of total costs made in the course of the war were mere guesses but they ran as high as $500,000,000,000.

In raising money for the Global War, Congress resorted to the two historic expedients: direct and indirect taxes and the sale of government bonds or securities in various forms (above, p. 267). The chief novelties in the new war taxes are three in number: (1) the reduction in the exemptions allowed to single and married persons in respect of income taxes and the addition to the income tax roll of millions of persons who had never before been compelled to pay such taxes; (2) the withholding of income taxes on wages and salaries at the source and employer responsibility for collections; and (3) the special weight of income and other taxes on persons and corporations. In respect of weight, for example, the tax on the "excess profits" of corporations in 1943 ran as high as ninety per cent, and the unmarried person who had a taxable income of $200,000 that year was liable for a tax to the amount of $160,589.80, subject to minor deductions.

Provisions for Veterans. Besides regular compensation for officers and privates on active duty, graded according to rank and service, the Government provides other rewards and aids. Chief among these are allowances to the dependents of those in service and low-cost insurance for war risks. Supplementing such forms of assistance are regular pensions and hospitalization.

In the course of our history certain forms of pension legislation have

been well established. At the close of each war it is customary to grant pensions immediately to the dependents of men who lost their lives and to honorably discharged members of the services who suffer from wounds, sickness, or disabilities acquired in the line of duty. As veterans advance in years Congress generally extends the pension system to include all who suffer from disabilities not due to willful misconduct and to their dependents. Years after the close of the World War, Congress, in 1924, voted additional compensation—a national bonus—to veterans of that conflict, in amounts proportioned to their respective terms of service. For veterans suffering from injuries or ailments incurred in active duty provisions are made for free hospitalization and medical treatment.

At the present time Congress has under consideration many proposals for supplementing the usual provisions made for veterans. These proposals run from free education and training for civilian occupations to "separation allowances" to be paid annually or monthly to veterans for a given period of time or until they have found employment. In any event it is fully understood that the process of demobilization must be regularized and geared into the orderly resumption of civilian production and employment. On February 4, 1944, President Roosevelt signed the Muster Pay Bill which provided for monthly payments to veterans for a short period after their discharge from the services; and about the same time Congress took up the discussion of a more elaborate system—a kind of "bill of rights" for veterans to promote their easy transition to civilian life.

The management of the whole complicated system of pensions, compensation, insurance, and other aids to veterans is vested in the Veterans Administration, in coöperation with the Public Health Service and other social security agencies of the Government. The Veterans Administration is an independent agency of the Government, headed by an administrator appointed by the President with the consent of the Senate.

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CHAPTER XV

GOVERNMENT AND NATIONAL ECONOMY

The Bearing of Government on Economy. Nearly all that government does has some connection with economic institutions and activities, either direct or remote, that is, with property, the use of property, professions and callings, corporations, trade unions, banking, railways, and agriculture, for example. First of all, it must be remembered that the law defines what shall be deemed private property, such as lands, houses, and personal goods; it has forbidden private property in human beings by abolishing slavery. And it defines what shall be treated as public property; for instance, highways, schools, forest reservations, navigable waters, and water power on the public domain. Even if government owned no property and confined its operations solely to keeping order through armies and police forces, it would be carrying on activities related to property and would affect that property directly by laying taxes upon it for the support of public agencies. It is, accordingly, impossible to draw a sharp line in practice between government on the one side and private economic institutions and activities upon the other. No such line exists in fact. And the profoundest and most experienced thinkers America has produced, including James Madison, Alexander Hamilton, Thomas Jefferson, and Daniel Webster, have understood and expounded this axiom of politics and economics.

Theories Respecting the Relations of Government and Economy

The Economic Conceptions in the Constitution. Although the Constitution of the United States leaves to the states the general power of declaring what shall be treated as private property, except the power to turn human beings into slaves, it authorizes Congress to make laws affecting the use of property in ways which involve the general interest or welfare. Subject to certain limitations, Congress can use and has used

the taxing power to influence the course of industry, agriculture, and commerce and to affect the distribution of wealth among the people (pp. 261–263). It can intervene in foreign and interstate commerce by regulating both branches of such enterprise. Daniel Webster was undoubtedly right when, after an examination of the writings of the Fathers, he found it "everywhere held up as the main reason for the adoption of the Constitution that it would give the general government the power to regulate commerce and trade." Other provisions of the Constitution impinge upon economic activities; for instance, those respecting the coinage of money, the establishment of post offices and post roads, the promotion of science and the useful arts through patent and copyright legislation, and prohibitions laid on states, forbidding them to lay taxes on exports and imports, emit bills of credit, and otherwise interfere with general interests. In one sense the Constitution is itself an economic document. Certainly with economics left out, it would be a shadow.

Economic Views of the Fathers. The leading members of the convention which drafted the Constitution were nearly all mercantilist in economic theory; that is, they accepted the doctrine that government can and should be used to regulate and promote economic activities in the interest of society. Although Adam Smith had published in 1776 his *Wealth of Nations* advocating a minimum government interference with domestic and foreign trade, his doctrines were not followed by any government anywhere in 1787 nor did the theory come into general vogue until many years later. Far from incorporating Smith's ideas in the Constitution, the framers laid great emphasis on the power to regulate interstate and foreign commerce and the use of government to control and promote the general interests of the Union. Their spirit was well expressed by the first annual message of George Washington. He had presided over the convention which drafted the Constitution and in the Congress before him were included a large number of men who had taken part in formulating it. Surely, they knew the spirit of the Constitution. In advising the Senators and Representatives respecting their first duties under the Constitution, Washington said to them: "The advancement of agriculture, commerce, and manufactures by all proper means will not, I trust, need recommendation. . . . Nor am I less persuaded that you will agree with me in opinion that there is nothing which can better deserve your patronage than the promotion of science and literature." Certainly this is no conception that confines government to the

bare functions of keeping order, protecting property, and providing national defense against foreign foes.

The *Laissez Faire* Theory of Politics. Near the middle of the nineteenth century however a different conception of government came into circulation, especially in England, the idea of *laissez faire*, framed by British economists who had taken over and elaborated a French doctrine into a system. As the French words indicated, *laissez faire* meant "let alone," that is, government should refrain from interfering with property, the making and selling of goods, the employment of labor, or the social conditions resulting from such activities. In the course of time this idea came to appeal strongly to Southern planters and Western farmers in the United States. Leaders among them arrived at the conclusion that agriculture would be better off if no protective tariffs were imposed on imports and they could freely exchange their produce for the manufactured goods of Britain and the Old World. In its platforms adopted between 1844 and 1860, the Democratic party, then largely under the domination of planters, expressed the *laissez faire* theory in planks which denied the constitutional and moral right of the Federal Government to interfere with economic institutions and activities, including the institution of slavery, even in the territories subject to federal authority. In 1856 it went so far as to proclaim that the time had come for the people to declare themselves in favor of "progressive free trade throughout the world."

The economic theory to which the Democratic party had committed itself was succinctly stated by James Parton in his *Life of Andrew Jackson*, published on the very eve of the Civil War which was to oust the party from power for a long period of time. "The party who hold to the Jeffersonian creed," Parton declared, "are of opinion that the office of government is solely to maintain justice between man and man, and between the nation and other nations. It should have nothing to do with carrying letters, supporting schools, digging canals, constructing railroads, or establishing scientific institutions. Its business is simply to suppress villains, foreign and domestic. The people are to be left absolutely free to work out their welfare in their own way; free, especially in all departments of industry, from the paralysing touch of government patronage." Overlooking the fact that Jefferson was the founder of a state university, an advocate of public education, and believer in the use of government to promote highways and other internal improvements, this creed, formulated for the party by the biographer of Jackson, fairly summar-

ized the political economy widely accepted by Democrats near the middle of the nineteenth century.

Recent Formulations of the *Laissez Faire* Doctrine. After political economy became a subject of instruction in colleges and universities, most, though not all, professors of the science accepted British economics as valid truth applicable also in the United States; and huge treatises built upon the *laissez faire* maxims were written for the edification of youth and the people in general. The penchant for this kind of thinking was also strengthened by the doctrines of Charles Darwin, interpreted to mean that all life is a bitter struggle for existence, in which the fittest survive, the race goes to the strongest, and yet, on the whole, the results are beneficent. When in 1931 industry and agriculture were prostrate and about ten or twelve million Americans were hanging on to the edges of the struggle for existence, a Senate committee asked leading business men to explain the situation and give advice as to methods of getting out of the devastating crisis. A great banker, Albert H. Wiggin, then president of the Chase National Bank, told the committee that "human nature is human nature," that "we are bound to have conditions of crisis once in so often."

Thereupon Mr. Wiggin handed the members of the committee a memorandum in which Dr. Benjamin Anderson, economist for the Chase Bank, summed up the whole *laissez faire* creed in less than a printed page. In this document, Dr. Anderson opposed efforts of government to plan and direct economic activities and declared that under the capitalist system "of free, private enterprise with free movement of labor and capital from industry to industry, the tendency is for an automatic balance to be maintained and for goods and services to be supplied in right proportions. A social order is created, a social coöperation is worked out, largely unconscious and largely automatic, under the play of impersonal forces of market prices and wages." In other words, *laissez faire* by 1931 was assumed to be a kind of "natural" law, akin to the law of gravitation and sufficiently perfect in operation to make government intervention unnecessary.

The Idea of Planning in Economy. In the same year that Dr. Anderson's memorandum on "free capitalism" was presented to the Senate committee, Gerard Swope, head of a great industry, the General Electric Company, in an address before the electrical manufacturers in New York City, deplored the plight of competent workers unable to find employment and declared: "That this condition has ever been present in

such periods detracts nothing from its wrongness. That industry must evolve and make effective those measures which will first ameliorate and ultimately eliminate these conditions must be the reaction of everyone who gives thought to what is taking place. I say that industry must do this thing, because it will be done." In short Mr. Swope intimated that unless business leaders could prevent the unconscious and automatic operations of the market from precipitating millions into unemployment and misery, government would try to do it. In keeping with this belief, he set forth a plan for stabilizing industry and making provisions against the hazards of panics and depressions. During the same year, the United States Chamber of Commerce also proposed an extended plan for accomplishing the same results with the aid and coöperation of the Federal Government; and the American Federation of Labor drew up a report calling for measures of "national planning" to steady industry and prevent unemployment.[1] Three years previously leaders in agriculture had drafted and pushed through Congress a scheme of agricultural marketing and crop control which was in fact a form of government intervention in economy designed to overcome the depression in agriculture (Chapter XVIII).

The American View. In the light of pronouncements by great leaders in government and politics and in economic practice, we are warranted in concluding that the American nation has never been unreservedly committed to the doctrine of *laissez faire*. In general the American view is that whatever citizens can do better for themselves, either as individuals or in associations, government should not undertake; but that government, besides assuming various obligations respecting defense, property, and order, should provide as far as possible the conditions favorable to the prosperity of industry, agriculture, and labor, and should cope with the evils of economic depressions and the hazards of accidents, sickness, and old age dependency. Herbert Hoover doubtless expressed the American view when he said: "In our individualism we have long since abandoned the *laissez faire* of the eighteenth century—the notion that it is 'every man for himself and the devil take the hindmost.' . . . Ever since the Industrial Age began we have devised and enforced thousands of regulations in prevention of economic domination or abuse of our liberties through growing instruments of business. Furthermore the sense of public responsibility for the general welfare has successively produced

[1] For these and other documents on national planning and control see Charles A. Beard, ed., *America Faces the Future* (1932).

public education, public health, public works, public stimulation of scientific research, and in 1929 for the first time embraced the responsibility for public action in the battle against depression. That is hardly *laissez faire*." [2] This conception Franklin D. Roosevelt reënforced and elaborated in numerous addresses, especially in his second inaugural,[3] and the platforms of both the major parties in subsequent political campaigns confirmed it and added details and specifications.

Practice in Relation to Government and Economy

Increase in Government Functions Affecting Economy. Without much reference to any systematic theories, the people have resorted to the use of government—federal, state, and local—for the accomplishment of general purposes, more or less since the establishment of the Republic. Within a short time after the adoption of the Constitution, the Federal Government began to promote economic activities by protecting domestic industries against foreign competition, concessions to coastwise and overseas shipping, the construction of highways, and the organization of the United States Bank to enlarge the amount of liquid capital available for business enterprise. Despite a reaction near the middle of the nineteenth century, this policy was steadily developed until the crisis of 1929 and then rapidly expanded in various directions. In the states, the use of government for social ends followed the growth of industries and the swift rise of great urban communities, as thinly-settled and self-sufficing regions disappeared. Municipalities installed water works, sewers, paved streets, and systems for lighting streets; they chartered corporations for furnishing services to the public, such as transportation and electric power; they built schools, constructed docks and harbor facilities; and they made provision for public health. As urban communities and factories multiplied, state governments enacted factory legislation, devised public safety measures, provided compensation for persons injured in industry, and passed laws relative to tenement house conditions, city and regional planning, minimum wages, mothers' pensions, preventive medicine, child hygiene, industrial insurance, and the construction of hospitals, asylums, and sanatoria.

The practical way in which the public looked at such activities is well illustrated by the following statement by Theodore Roosevelt: "The

[2] Wilbur and Hyde, *The Hoover Policies*, pp. 7 ff.
[3] *The Public Papers and Addresses of Franklin D. Roosevelt.*

government has been forced to take the place of the individual in a hundred different ways; in, for instance, such matters as the prevention of fires, the construction of drainage systems, the supply of water, light, and transportation. In a primitive community, every man or family looks after his or its interests in all these matters. In a city it would be an absurdity to expect every man to continue to do this, or to say that he had lost the power of individual initiative because he had relegated any or all of these matters to the province of public officers." Here, it is evident, is no theory at all respecting individualism or collectivism—just a pragmatic view of government as an agency to be employed in serving human purposes, as simple and largely self-sufficing communities were transformed by industries and science into complex and interdependent communities.

The Shift from Community to National Economy. In the course of time, economic activities which had once been almost entirely local so transcended state boundaries that every branch of industry, commerce, and agriculture became national in its connections. Self-sufficing states, like self-sufficing farms and villages, disappeared with the expansion of manufacturing and transportation. Even the corner-store merchant bought goods from all parts of the country—oranges from California or Florida, shoes from New England, cotton goods from South Carolina. All large-scale industries produced for the national market. Farmers specialized in raising cotton, corn, wheat, and other staples, and exchanged their produce for manufactures turned out in distant cities. All were tied together by the railway, the telephone and telegraph, the radio, and aviation. A major disturbance in one branch of economy affected all other branches. If, owing to a market collapse, two or three great factories closed in a city and turned thousands of employees into the streets, there was little, if anything, that the people of the city could do to overcome the misfortune. A farmer might be industrious and prudent but a severe decline in the prices of his produce might put him in bankruptcy. As the United States Chamber of Commerce summarily described the situation in 1931: "We have left the period of extreme individualism and are living in a period in which national economy must be recognized as the controlling factor. Under our form of industry a large part of the national income is distributed through the instrumentality of industry and business, the distribution being in the form of wages, salaries, rents, interest, and dividends."

Nationalized Economy Accompanied by Federal Acts. With the interlacing and nationalization of private economic activities went a spread of public functions. In 1887 Congress began to regulate the practices of railways engaged in interstate commerce. Long before the launching of "the New Deal" in 1933 the functions of the post office had been expanded to include rural free delivery, savings deposits, and parcel post. In the administration of President Wilson Congress had created a Shipping Board with enormous powers over the business of shipping and shipbuilding; it had established a Farm Loan Board for rural banking, charged with the supervision of loans to farmers; and it had created the Federal Trade Commission with authority to inquire into, regulate, and report on the conduct of great business corporations. Before 1933, Congress had established a Bureau of Mines, a Forest Service, a Bureau of Public Roads, and a Children's Bureau; in aid of agricultural marketing, it had enacted a cotton futures law, a grain standards law, and a warehouse law. By the pure food law of 1906 it had sought to safeguard the nation against deleterious foods and drugs. And before 1933 coöperation between the Federal Government and the states had been established in connection with highways, agricultural extension, vocational education, the eradication of agricultural pests, the conservation of forests, the development of electric power, and numerous other activities affecting national economy. A few brief references to a voluminous record illustrate the growth of federal participation in economy.

Promotion of Business Enterprise and Control over It. It is not necessary to cite the long list of federal statutes designed to promote industry by protective tariffs, subsidies, bounties, and measures to expand domestic and foreign commerce. For more than a hundred years such legislation bulked large in the activities of the Federal Government. It was under the stimulus of grants of land and loans of money that transcontinental railways were built and put into operation. Nor is it necessary to retell the history of federal laws respecting the regulation of railways and other utilities engaged in interstate commerce—beginning with the Interstate Commerce Act of 1887. With the growth of gigantic corporations on a national scale and the appearance of controversies over the concentration of wealth and the control of prices, Congress began to intervene by forbidding and penalizing combinations in restraint of trade. The first anti-trust law was enacted in 1890 under Republican auspices and it was expanded under the administration of President Wil-

son. Convinced that mere prohibitions were not enough, Congress established in 1914 the Federal Trade Commission charged with certain regulatory duties. The creation of the Federal Power Commission in 1920 was followed by the extension of federal intervention in the production and distribution of electric power.

While this expansion of federal functions was going on, there were, no doubt, many protests against "interference with business," but such objections were overridden and the Government continued the policy of promoting and regulating business enterprise.

Growth of Intervention in Agriculture. Although federal intervention in agriculture directly did not begin in 1789 when federal intervention in manufacturing and commerce was started, it has been fairly continuous since the middle of the nineteenth century. The Government intervened in 1862 by throwing its entire arable domain into competition with Eastern agriculture under the Homestead Act which gave public lands to individuals as free homesteads. In 1865 it intervened in one important branch of agriculture by destroying its labor system—slavery. It established the Department of Agriculture, fostered experiment stations, put tariffs on foreign agricultural produce, and at times sought to manage the currency with reference to agricultural prices. Later under Democratic auspices in 1916 it set up agencies for lending money to farmers —agencies which were modified and extended under Republican administrations. Finally in 1929, by the Agricultural Marketing Act, sponsored by President Hoover, the Federal Government put a climax on hundreds of statutes and executive orders by attempting to control the marketing of farm produce and to raise prices.

Labor Relations. If less intimate than its relations to industry and agriculture, the contacts of the Federal Government with labor have been fairly continuous, especially since the industrial crisis which opened in 1873. A whole volume would be required to describe these contacts and give the statutes, court orders, and executive measures coming under this head. The creation of the Department of Labor in 1913 was itself a recognition that certain important issues were here involved. From time to time Presidents intervened both officially and unofficially in labor disputes. Long ago Congress created agencies of mediation and conciliation. Judicial injunctions and anti-injunction legislation have marked the course of this development. With respect to labor employed in interstate commerce on the railways, Congress has intervened under both

Republican and Democratic auspices by regulating hours, recognizing the right of collective bargaining, and providing agencies for dealing with strikes, threatened and actual.

Treatment of Natural Resources. The beginning of legislation relative to the conservation of natural resources may be placed in 1891 when Congress authorized the President to set aside and withhold from sale public lands covered with timber and underbrush. Up until that time, despite the protests of far-seeing statesmen like John Quincy Adams, the Government had pursued the policy of selling or giving away its natural resources or allowing them to be stolen, and had created agencies of survey to assist private persons in locating and exploiting resources at their pleasure. Under President Cleveland, and still more extensively under President Theodore Roosevelt, the idea of conserving resources was developed and applied. Provision for the federal purchase of forest lands in the Eastern states was made in 1911 during the administration of President Taft. The outright sale of public power sites to private concerns was stopped long ago. The policy of developing them under federal auspices was started as early as 1920. The statute for the development of the Colorado River power at the Boulder Dam, enacted under President Hoover, marked a distinct step in the evolution of public control.

Historic Relief Practices. Remote as it may seem from federal functions narrowly conceived, yet certainly connected with providing for "the general welfare," the use of federal funds for the relief of people in distress is not new. It is difficult to make an all-inclusive definition of "relief." If the term is taken in the dictionary sense as giving aid, comfort, and satisfaction, then many of the measures enacted by Congress for the benefit of industry, agriculture, and labor may be called "relief" measures. If we include intervention for the purpose of enabling citizens to attain satisfactions otherwise unattainable, then the protective tariff may be called the most continuous relief provision in the history of congressional legislation. If we take the term "relief" in its generic sense, we find that the appropriation of funds for the relief of American victims of droughts, floods, earthquakes, and other physical disasters has been practiced by Congress for years under Republican and Democratic auspices alike. Such relief has even been given to famine-stricken regions of foreign countries. The idea of affording relief to the unemployed through public works was accepted and developed at a conference dur-

ing Harding's administration, under the leadership of Herbert C. Hoover, as Secretary of Commerce. Indeed a complete program called "the Hoover plan" was formulated in this period.

Although President Hoover opposed direct federal appropriations for the aid of the unemployed, he approved a bill making loans to states and municipalities unable to carry that burden. Whether in the face of the growing distress, President Hoover himself would have stood absolutely against direct federal assistance to the unemployed is at least problematical. In view of the fact that the American Relief Association, of which he was chairman from 1919 onward, disbursed $100,000,000 appropriated by Congress for relieving misery in Europe and that at one time it had 10,000,000 persons in Russia on its relief roll, we may assume that he would have relaxed his opposition to providing for hungry Americans by direct federal grants and activities had he been reëlected in 1932, for he himself declared that nobody should starve. At all events he rejected the idea that the misery of the unemployed poor is wholly due to their improvidence, and insisted that they are entitled to some kind of assistance from public agencies as well as private charity.

The Idea of Mitigating Depression Evils. Nor can it be truly said that efforts to overcome the stresses and strains of business depressions first came after 1933. A concentrated attempt to prevent the industrial crisis of 1929 from following its "natural" course to the bitter end was inaugurated under President Hoover. The idea that the Government should do something to mitigate the evils of violent oscillations in economy had been put forward in President Harding's administration during an official conference on unemployment directed by Mr. Hoover, while he was Secretary of Commerce. And as President Mr. Hoover himself resorted to many measures of mitigation during the early years of the crisis. Among them was the establishment of the Reconstruction Finance Corporation for the purpose of making loans to railways and banks in difficulty. Another was the attempt to speed public works for the purpose of providing employment. A third was an effort to save home owners from the loss of their property through the foreclosure of mortgages, by authorizing federal loans to building and loan associations.

Taken collectively these precedents set under President Hoover marked a stage in the development of a new attitude on the part of government toward the demoralizing effects of industrial crises. In the panics of 1873 and 1893 economic affairs were allowed to take their own course on the whole, without much direct intervention on the part of the Federal

Government. Owners of railways, industrial plants, farms, and homes who were heavily in debt and could not meet their obligations were merciless "liquidated." They were put through bankruptcy courts and their property was sold at figures low enough to permit the new owners to operate it on some level of performance. Thus debts and "surplus" capital were wiped out. There was no direct government interference with prices. In their struggle for existence industries slashed the prices of their goods, as farm prices sank in the balance. It was wholesale interference with this "natural" process which made the recovery program begun under President Hoover a novel feature of governmental activities.

Closer Integration of Government and Economy in Recent Times

New Deal Measures (1933–1938). Under Franklin D. Roosevelt, several specific acts of the Hoover administration were continued, expanded, and supplemented. On his inauguration in 1933 President Roosevelt confronted an almost complete collapse of the banking system, a general stagnation in business, millions of people unemployed, and poverty haunting every section of the country. Among all classes of the people, opinion was almost unanimous, without respect to party affiliations, that the Federal Government must act boldly and on a broad front to promote economic recovery and overcome at least the worst of social distresses. Leaders in business, banking, manufacturing, agriculture, and organized labor looked to President Roosevelt for planning and proposing measures which would open the banks, create confidence, and restore prosperity in every branch of economy. In these circumstances President Roosevelt and his aides developed a whole program of legislation and administrative action known as the New Deal. It was not anti-capitalistic but it amounted to a wholesale intervention of the Federal Government in the conduct of economic enterprises.

Considered as to its essentials the New Deal program consisted of six principal parts:

Stimulating and stabilizing business and industrial enterprises by the National Industrial Recovery Act of 1933—a measure supported by great business interests. This measure provided for organizing all major branches of business and industry into self-governing associations—each with its code of fair practices, standard labor relations, and price practices under the supervision of federal authorities. This represented a close partnership between

business and government. Practically all the Act was declared unconstitutional by the Supreme Court in 1935.

Controlling and subsidizing agriculture by the Agricultural Adjustment Act of 1933—a measure drafted to suit the demands of agricultural interests. At the time huge surpluses of agricultural produce had accumulated and prices were extremely low. The Adjustment Act was designed to curtail output and adjust supply to demand. This design was attained by organizing farmers, cutting down the acreage used for the production of several prime staples, and paying subsidies to farmers in proportion to the extent of land taken out of use for the production of such surplus crops.

The regulation of electrical and other public utility corporations, stock exchanges, and other forms of business enterprise with a view to reducing the charges for their services or preventing undue speculation, stock-watering, and other practices which extracted large sums of money from the people.

Labor legislation empowering industrial workers to form unions, elect their own officers, and engage in collective bargaining with their employers. Similar legislation designed to limit the hours and increase wages in substandard industries.

Social security legislation facilitating the establishment of old age pensions, old age insurance, unemployment insurance, and various forms of assistance for types of dependents.

Aids to the unemployed by large expenditures for public works, federal and state; and for all kinds of "projects" ranging from the construction of forest trails to musical concerts—all under federal supervision and in conjunction with state and local authorities.

Failure of the New Deal to Attain Full Recovery. Under the New Deal program, the regulating, operating, and promotive activities of the Federal Government involved it deeper and deeper in the affairs of private economy and of the states, including their political subdivisions. From year to year federal expenditures far exceeded the tax revenues and the budget remained unbalanced. Although national economy rose substantially from the worst trough of the depression, full production was not attained, the number of persons employed on government projects remained large; in January, 1937, the National Industrial Conference Board estimated the number of unemployed persons at 8,300,000. Whatever the merits of the New Deal, it was far from the goal of full production and employment in 1939, when war broke out in Europe. Yet it had materially augmented the economic responsibilities of the Federal Government, while multiplying its entanglements in private enterprise and increasing the dependence of capital, labor, and agriculture on government policies.

Economic Consequences of War Functions. While preparing for war and especially after it became involved in the Global War, the Government of the United States, in the exercise of its war functions, so interlinked its authority and activities with industry, agriculture, labor, and finance as to work consequences little short of revolutionary. Judging by the experiences with the war of 1917–1918, many of the immediate results in the form of price, wage, and rationing regimentation might prove temporary and be abolished or materially relaxed at the end of the Global War, but other consequences in theory and practice promised to be more lasting. The debts and taxes to be borne by national economy were lifted to figures staggering to the imagination. War appropriations running into the hundreds of billions supplied private enterprise with such a demand for goods that in major branches it not only rose quickly to its full production capacity but was compelled to make plant extensions on a scale far outrunning anything of the kind achieved during its long history, at least in so short a time. Moreover billions of capital for plant extensions were supplied by the Government from taxes and borrowings. In 1939 the capital investment in manufacturing plants stood at approximately fifty billion dollars—the accumulations of decades; within three years new plants or extensions of plants represented an additional capital investment of about twenty-two billion dollars. By 1943 the dollar value of the national output had risen from about fifty billions, as it stood in the depth of the preceding depression, to about one hundred and fifty billions. "Full employment," the dream which the New Deal had not realized, was now reached in the major industries and the country was actually short of man power and woman power for war production.

New Problems of Government and Economy. While the war production boom was on, far-sighted persons in government and private enterprise discerned at hand and ahead still more baffling problems in the relations of government and national economy. Few if any thought that America could ever return to the simplicities of any preceding period in its history. At the end of the war tens of millions of men and women would be released from the armed forces and war production industries; the debts of the Government would be enormous and heavy taxes needed to discharge interest and principal; a business slump comparable to that of the worst depression year—to an annual production of fifty or sixty billions a year—would be little short of disastrous; the unrest created by fifteen or twenty million people out of work would represent political dynamite. The country had now witnessed, under the stimulus of gov-

ernment buying for war needs, an unprecedented increase in the power of industry, agriculture, and labor to create wealth. Would it be politically or morally possible for the people quietly to accept a return to the miseries of 1933 and tolerate the spectacle of one half or two thirds of its productive plant idle, when men and women were unemployed and suffered from want? Few men and women in any walk of life were so indifferent to the fortunes of the American Republic as to overlook the gravity of the economic consequences bound to flow from the war, the war economy, and the war government.

Efforts to Forecast and Plan in Government and Economy. In these circumstances both government and economy are on the threshold of a trying age in which government and private economy will face unquestionable issues of greater magnitude than any yet confronted in the history of the Republic. Leaders in political affairs, in industry, agriculture, and organized labor who look beyond petty advantages seek to discover the shapes of things to come and to prepare plans for coping with them. If we leave aside such ambitious designs as socialism, communism, or fascism and consider only those plans which command a large following, we find in contemporary speculations as to the future two large theories of government and national economy. Both of them turn on the assumption that the major task ahead, in the interest of popular government and private economy, is full production and full employment for the people of the United States.

The first theory advanced is that private enterprise, driven by the acquisitive propulsions of the profit motive, can and will achieve the goal of high production and high employment, if released from the hampering restraints of government and set free to operate by competitive methods. Advocates of this theory recognize however that government cannot be entirely eliminated from the operations of the national economy and that a certain degree of coöperation between government and economic enterprises will be necessary in the future as in the past. They differ among themselves as to the nature, number, and kinds of government activities that are necessary to the attainment of high production and high employment by private enterprise.

The second theory of government and economy for the future leaves a large area of freedom for private enterprise but holds that government supervision and activities are necessary to keep private enterprise running at a high tempo in providing production and employment. Among other things such government intervention in economy must have a

care for maintaining the national income at a high level and can do this by the management of its fiscal operations relative to taxes, expenditures, currency, and banking.[4] Under this theory, to cite concrete illustrations, certain plans should be followed: public expenditures, especially for public works, should be timed to provide extensive employment when private production lags; government should rightly borrow money in times of business depression to provide relief for the hungry, and postpone heavy taxation to meet the costs until a period of prosperity returns; forms of taxation should be devised and applied with a view to stimulating business recovery or heading off a dangerous inflationary boom, as the case may be; public borrowing and spending should be deliberately shaped in such a fashion as to serve as a balance wheel and keep the productive activities of private enterprise on a high level. To sum up in the words of the economist, Abba P. Lerner, the aim of the fiscal policy of government should be to "keep the total rate of spending in the country on goods and services neither greater nor less than that rate which at current prices will buy all the goods that it is possible to produce." [5] This theory, like the theory of "free enterprise," is sharply challenged by many competent economists and yet numerous practices in recent years have conformed to it.

Probable Outcomes and Policies. Judging by the practical experiences and tendencies of government and economy over many years, it is highly probable that no theory of their relations will be carried out to its logical extreme or conclusion. Elements of many theories and many varieties of practice will be blended in the coming history of government and economy. Numerous elements appear in the present picture. Some may be extended, others contracted, and new combinations effected.

Governments—federal, state, and local—own and operate various utilities and resources. In many cases they own and lease property to private enterprise. There are several government corporations engaged in economic operations. Mixed corporations in which government owns a part of the stock and private parties the rest, as in the case of the first and Second United States Bank, represent possible combinations of government and private enterprise. Government has and probably will continue to bear heavy responsibilities for education, social security, and other phases of general welfare. Government does and doubtless will

[4] See above, Chapter X, Taxation and Finance.

[5] For statement of the second theory see R. M. Haig, *Political Science Quarterly*, September, 1943, pp. 321 ff., especially pp. 330 ff.

regulate the public utilities that remain in private hands. It does and doubtless will regulate the standards and services of special industries that are in the nature of public service enterprises. Side by side with government ownership and government regulation, private enterprises operate and will continue to operate with a high degree of freedom and immense productive efficiency.

The goal of political and economic statesmanship, according to conceptions now generally prevalent, is and should be to assure the largest possible individual liberty compatible with national security, the general welfare, and the maintenance of high production and high employment. The attainment of this goal, according to such conceptions, will require forms of continuous coöperation among government, capital, labor, and agriculture.

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CHAPTER XVI

NATURAL RESOURCES AND THE NATIONAL DOMAIN

The civilization of the United States, including government and its functions, is conditioned and in part determined by the natural resources of the country—soil, waters, forests, and minerals. At the outset of its career as an independent republic, the United States held vast areas of unsettled land in the territory beyond the Alleghenies and the Appalachians; and from time to time wholesale additions were made by purchase and conquest. An estate of two million eight hundred twenty-five thousand square miles—an empire almost equal to the entire continent of Australia—has been owned by the Federal Government in the course of its career.

Stages in Development of Federal Policy

The Period of Rapid Disposal. With respect to the use of this natural heritage, the history of public policy falls into three rather distinct periods. In the beginning the Federal Government operated on the theory that all its lands, forests, minerals, and water-power sites, except on navigable rivers, should be sold or given away as rapidly as possible to private persons and corporations, these resources to be exploited as they might see fit, subject to little or no regulation and to light taxation. After the adoption of the Homestead Act in 1862 it began to give away arable land in 160 acre lots to actual settlers. It gave millions of acres of arable land to the states for educational and other purposes. It granted millions to railway companies and added more millions in stone, timber, and mineral lands. Other forests and mineral lands it sold at low prices to individuals and corporations. And its various agencies created to deal with surveying and studying natural resources were designed to facilitate this wholesale transfer to private hands. Besides the hundreds of millions of acres disposed of legally, other millions were

seized fraudulently by prospectors, lumber companies, and pioneers of westward advance.

Defense of Policy. The swift transfer to private hands was defended on the ground that this was the quickest way to "develop the country," to get the resources into profitable use. And it was commonly assumed that, as each person or corporation acquiring a piece of the public domain put it into use in his or its interest, the wealth and well-being of the whole nation were automatically increased. To a considerable extent this was true, but it was far from the whole truth. For example, as each farmer who received a homestead from the Government cut down the trees and planted corn, the annual production of corn was increased by so much. But when thousands of farmers in the same region did likewise, soil erosion began on a large scale and the water level was lowered, to the impoverishment of the region and the nation. Again when timber companies cut immature trees, ruined smaller trees, and left wastes to be burnt over by fire, instead of cutting only ripe timber, safeguarding small trees, and replanting, the wealth of the nation was curtailed as individuals enriched themselves. At last these obvious facts, long pointed out by foresters and competent engineers, were recognized near the opening of the twentieth century, after all the good arable land and most of the heritage in forests and minerals had been granted away.

The Period of Conservation. About that time the second period of public policy in respect of the national heritage of resources opened under the leadership of President Theodore Roosevelt and we are now in the midst of its unfolding. The new period was characterized by growing interest in the conservation of resources and their economical use. Its opening was signalized by withholding forest and mineral lands from sale to private interests, and by creating federal agencies to conserve the national domain rather than to hasten the transfer to private hands. Step by step other features were added. Provision was made for reserving to the Federal Government all rights to mineral resources beneath the soil when arable and semi-arable lands were given away or sold. Then water power sites were withdrawn from sale and arrangements made for leasing them on a rental basis. Another stage was reached in 1911 when the Government began to buy lands for reforestation, in the East as well as the West.

Extension of Conservation. All this bore on the conservation and use of the domain in public ownership. But soon it was seen that the public domain was only a small part of the heritage and that something more

than mere cultivation of this area was necessary to assure a steady supply of timber, to prevent soil erosion, to stop the wasteful use of oil and natural gas, to preserve conditions favorable to rainfall, to keep whole regions from drying up as the water supply diminished. If there was to be a real conservation of natural resources, policies covering both public and private property were evidently necessary. Official recognition of this fact came with the inauguration of Franklin D. Roosevelt. Then what may be called the third stage in the control of natural resources was opened. This stage was marked by four general tendencies: (1) comprehensive surveys of the great regions of the country, their resources, and their requirements; (2) the development, under federal auspices, of certain regions, such as the Tennessee Valley (p. 366), bringing water power, forestry, and land uses under a common program; (3) more extended coöperation with state authorities in matters of planning and conservation; and (4) coöperation with private parties, especially farmers, in protecting and rebuilding resources.

The Conservation of Forests

Uses of Forests. Forests are highly valuable not only for their direct contribution to the welfare of the nation, but also for their indirect bearing on the preservation of other resources. The primary use made of the forests is, of course, to obtain timber. But their utility does not end here, for they serve as reservations for livestock grazing as well as game life. They are necessary for the prevention of soil waste and the maintenance of natural waterways—two related functions. They help to conserve earth by absorbing the rain so that it seeps into the ground instead of rushing over the surface, eroding the soil and flooding the lowlands.

The Old Federal Domain. At present the forest resources of the United States are divided into two parts: publicly owned and privately owned. The Federal Government is the chief single holder of public lands, although some states and cities have embarked on forestry projects. Land for the federal system was first secured by the reservation of public property from sale, not by purchase. In 1891 Congress delegated to the President the power to set aside as national forests those portions of the federal domain deemed suitable. By 1910 the total holdings amounted to approximately one hundred seventy-two million acres—a figure which was constantly modified as new surveys reclassified the public lands more nearly on the basis of their true economic character.

Federal Purchases of New Forest Lands. As long as it relied solely upon the public domain, the Federal Government could establish forests on an extensive scale only in the West where almost all its land was to be found; but at length conservation burst sectional bounds. In 1911 the beginnings of a national program was authorized by Congress with the enactment of the Appalachian forest reserve law, providing for the purchase of land for federal forests on the watersheds of navigable streams. Within a few years its scope was widened by an act authorizing the purchase of other lands useful for timber production, and more recently by legislation authorizing the federal administration to buy huge blocks of submarginal land.

Forest Administration. The actual administration of the national timberlands has been vested in the Forest Service, a branch of the Department of Agriculture. Having 160 national forests embracing over 176,000,000 acres under its supervision and confronting a complex of interests pressing for favoritism, the ways of the Forest Service are not smooth. It must wage war on plant and insect pests, cut fire breaks, fight fires, build roads, combat timber thieves, and keep out other intruders likely to damage the property committed to its care. It grows young trees and sets out new stock in huge areas now denuded or burnt over. It carries on research in forestry and the lumber industry, in part for the benefit of private enterprise and in part for the promotion of its own work.

Marketing Products. Since the steady production of timber is one prime aim, the Forest Service, in a number of places, raises regular crops of trees so that local saw-mills may operate at uniform speed with assurance of a steady timber supply for an indefinite future. In such regions timber is sold to private concerns at an even rate, purchasers being required in some cases to pay in advance for replanting. Neighboring business is thereby stabilized—affording a fine contrast to the haphazard methods, often followed, of cutting and sawing for two or three years until a district is "skinned off" and then shutting down—for fifty or a hundred years until a new growth has matured.

In practice an adoption of continuous and full production throughout the national forests is impossible as a normal policy, simply because it would bring hot protests from the owners of private timberlands. Although the Forest Service turns out millions of board feet every year, it estimates that several times the amount could be obtained, without mortgaging the future, by cutting the existing trees as they mature and thus saving them from decay. Hence the country has long faced this

anomalous situation—private concerns sawing their timber faster than it grows and exploiting huge areas by wasteful methods, while millions of feet of logs have rotted on the ground in the national reserves. At the same time the public is being taxed to buy and replant areas so denuded by private parties, in order to make provision against the coming shortage.

Grazing Rights. National forests are valuable not only for the production of timber but also for the grazing of livestock. At first the owners of animals were allowed to turn their herds into the public domain without paying for the privilege and subject to very little regulation. Gradually however the Forest Service has undertaken to control this practice and prevent the destruction of herbage by over-use. It now limits the number of animals admitted to a figure determined by the capacity of the land. It also requires the owners to pay a fair price to the Government for their rights and stipulates that in certain circumstances they must possess an acreage of their own on which to produce supplementary forage.

Private Interests and State Action. Since the major portion of the timber land of the United States is in private hands, forestry is at present primarily a private problem. If the owners of such land would take up the burden of replanting, there would be little cause for governmental action. But, with some notable exceptions, they have not bothered much about the future. The Secretary of Agriculture has reported that "the greater part of the lumber annually produced is cut from private lands on which the appearance of new growth is at best a matter of accident, is likely to be long delayed, or may never occur. . . . Private initiative cannot be depended upon to secure the requisite conservation."

Finding private owners naturally bent on immediate advantages, conservationists turned to the states as well as the Federal Government for help. Their appeals bore fruit. Joint national and state action has reached the point where federal money is supplied to furnish nursery stock at, or below, cost to residents of the several states for private planting. Congressional appropriations are also made for extension training in this sphere, including field demonstrations of the best practices. To protect growth already under way, federal aid has been granted to states for the prevention and fighting of fires in both public and private forests.

Present State of Forestry. As things now stand, forestry—federal, state, and private—seems to be near the close of an epoch and at the opening of a new period. The battle to keep large areas in federal hands has been

won and the question of efficient use of that heritage becomes pressing. At the same time the lumber business in some regions often falls into economic distress owing to "overproduction." Finding their resources declining, timber companies in many cases have stopped paying taxes on their cutover and poorer holdings and allowed them to go by default to state and local governments. Great regions which could be transformed into productive forests lie barren or only partly developed—at least 155,000,000 acres, according to estimates in the *Yearbook of Agriculture for 1938*. The idea of balancing forest yield with timber cutting, the goal of scientific management, is yet far from attainment. In some sections of the country, forests are too large for the local lumber demand and in other sections the forests are too small. Meanwhile conflicts of interests rage, within the lumber industry among competitors, between the industry and public authorities, and between the federal and state officials pulling at cross purposes. In these circumstances the consensus of expert opinion indicates the necessity for even more unified action on a national scale with regional requirements taken into account. Whether this can be effected by the consolidation of the private timber interests under federal supervision and control or will lead to government forestry on a gigantic scale, remains the chief forest problem of the time.[1]

Federal Mineral Lands

Classes of Lands. Although most of the mineral resources of the country have been transferred to private parties, the Federal Government still holds large areas of land more or less rich in minerals. A portion of this land is within the domain permanently reserved from sale, as forests and parks. Another portion, composed principally of arid and semi-arid land, is in the class still on sale for grazing, stone quarrying, and other purposes. Under the direction of the Geological Survey and the General Land Office a thorough-going classification of this remaining land has been made and the nature of its mineral resources indicated as far as scientific research, constantly carried on, will permit.

Sub-Surface Rights Reserved. Formerly it was the practice of the Government in granting away land to farmers, railway companies, and other private parties to convey the sub-surface minerals along with the surface of the soil. This practice has now been discontinued. Areas still offered for sale are subject to the reservation that federal ownership of

[1] A. N. Pack, *Forestry, An Economic Challenge*, especially pp. 130 ff.

all mineral rights beneath the soil is specifically retained. If there is evidence of valuable minerals on public property, the Department of the Interior may issue permits enabling private prospectors to carry on investigations. If deposits are found, the Department may grant to private persons or concerns the privilege of exploiting them on a royalty basis, that is, on payment of a certain percentage of the returns.

Electric Power

How the Government Became Involved. The National Government became involved in the utilization of water power as an outgrowth of its attention to collateral problems rather than on account of a direct interest in this great natural resource as such. The types of contacts so established between other phases of its work and the development of hydro-electric enterprises are many and varied. For years the War Department, in connection with the promotion of navigation on inland waters, has given attention to such obstructions as dams, mill races, and power projects likely to interfere with interstate transportation. Under its authority to regulate interstate commerce, Congress has vested in the Department supervisory control over all structures, including water-power plants, in so far as they affect navigation.

Another relation to the power issue has been created in the West where the Federal Government, as a great landowner, has been called upon to formulate a policy with regard to the use of power sites on its public lands. Through the promotion of irrigation it has also become interested in the generation of power as a by-product of its supply units. A still newer form of federal activity in the water-power field arose out of the construction of the Muscle Shoals plant by the Federal Government during the World War for the manufacture of chemicals of value in munitions. Finally, with the growth of great companies engaged in transmitting electricity across state boundaries, problems in the regulation of interstate commerce were presented to Congress. It was amid such circumstances that federal control over the development of electric power attained the dignity of a major economic and political issue.

Federal Power Commission. Despite the number and complexity of the contacts between federal agencies and electric-power interests, general legislation covering their relations is of comparatively recent origin. Not until 1920 did the Federal Government undertake the comprehensive regulation of hydro-electric construction on public lands and on lo-

cations affecting navigation. In that year Congress passed the Federal Water Power Act creating a Federal Power Commission—now composed of five members appointed by the President with the consent of the Senate. Among other things the Commission is charged with the duty of developing well-balanced plans for the utilization of all waters affecting navigation or passing through the public lands; that is, waters clearly under federal jurisdiction.

Under this authority the Commission has prepared, in coöperation with other federal agencies and certain states, a number of valuable reports on specific rivers. To insure general conformity with the plans which it adopts, a system of compulsory licensing has been inaugurated. Before any organization, whether a city, state, or private concern, can erect a hydro-electric plant on a site coming within the scope of the Act, it must secure a license for the purpose. Such permits are issued by the Commission only when it is satisfied that the project in question is properly designed. In every case preference must be given to states and municipalities applying for the right to construct their own plants, provided the Commission is convinced of their utility. Licenses so issued run for definite terms, on condition that the site is developed within a fixed time; and the right of the Government to recover possession is specifically reserved.

Federal Regulation of Electrical Rates and Services. Federal control over the licensing and construction of power plants on the public domain and along navigable streams only touched the fringes of the problem created by the enormous growth of private companies engaged in interstate transmission of electric power and in consolidating local power concerns on a regional or national scale. In fact after the passage of the Water Power Act in 1920 occurred an astounding development of the whole electrical industry. That industry began with the construction and operation of local plants to serve single cities or communities. As time went on local plants expanded the areas of their operations; they were often united by outright purchase or by merger or through the agency of the holding company—a concern that buys control over local companies and supervises their finances and operations. By 1930 the country was covered by networks of gigantic electrical corporations owning and operating plants in many localities. In the meantime by unions and mergers, these corporations achieved remarkable economies in operation; by building great power lines and tying local distributing plants into a common system they were able to furnish steadier service and more

competent direction of operations. Yet this truly remarkable development was accompanied by many acts that aroused popular resentment: high rates, the issue of stocks and bonds that became worthless or of little value, propaganda against public control and ownership, and lobbying scandals. Even so, it made the electrical industry largely interstate in character, as current was transmitted across state boundaries and holding companies spread all over the country. Out of this situation grew a popular agitation for the regulation of holding companies and the interstate operations of electric power concerns.

The Federal Power or Holding Company Act of 1935. The struggle which accompanied this agitation for federal control over electric utilities culminated in the Wheeler-Rayburn Holding Company Act of August 26, 1935, after a spectacular battle—one of the most intense in the history of federal legislation. Two principal features are to be noted: (1) the Act vests in the Federal Power Commission the right to regulate rates, facilities, and the issue of securities of concerns engaged in the interstate transmission of electrical power; (2) the Act attacks "holding companies," that is, companies that buy up and control other companies, which may also be holding companies. In fact, there were at the time holding companies that owned holding companies that owned other holding companies two or more layers above the bottom companies that actually produced and distributed electric current. The Act provided that, within three years, super-holding concerns were to be dissolved under the supervision of the Securities and Exchange Commission. Thereafter holding companies were to limit their operations to "single integrated systems and the business directly connected with the supply of power service to consumers." Only one exception is allowed to this rule, called by its critics "the death sentence": a holding company may exist if it is necessary to tie together a group of operating power plants in a single region and to promote efficient operation.

Rural Electrification. Despite the rapid expansion of power lines in rural regions by private enterprise, many sections of the country remained without electric services. To provide for supplying such services, Congress passed the Norris-Rayburn Rural Electrification Act in 1936. This measure created the Rural Electrification Administration, headed by an administrator appointed by the President and Senate. It authorized funds for a ten-year program and empowered the administrator to make loans to persons, corporations, states and their subdivisions and to coöperative associations for the purpose of constructing and operating

generating plants and distributing systems in rural areas, on a self-liquidating basis.

The Muscle Shoals Plant. Besides problems connected with the regulation of private concerns, the Federal Government has been compelled to face questions of public ownership in certain cases. During the World War the United States Government constructed a large factory at Muscle Shoals for the production of nitrates indispensable to the manufacture of munitions. Power to operate this factory was derived from a combination of hydro-electric and steam plants capable of supplying enormous quantities of electricity. At the close of the war the disposal of this equipment became a matter of national concern.

Tennessee Valley Development. Under the insistent leadership of Senator George W. Norris, Congress passed in succession two bills providing for public operation of Muscle Shoals only to have them vetoed—one by President Coolidge and the other by President Hoover. Finally, in 1933, with the hearty approval of President Franklin D. Roosevelt, Congress enacted a still more extended measure combining the development and operation of the Muscle Shoals plant with the improvement of the whole Tennessee Valley. The new Act created a public corporation known as the Tennessee Valley Authority, composed of three directors. It empowered the Authority to build dams, power houses, and transmission lines, and to produce and sell fertilizer and electricity, either directly or through private contractors, to private persons and concerns, states, counties, and municipalities. In addition the Authority was instructed to promote forestry, prevent soil erosion, and advance industry, agriculture, and welfare throughout the region. By a supplementary act passed in 1935 Congress increased the powers of the Tennessee Valley Authority and authorized it to lend money to state and local bodies for the purpose of acquiring facilities for electrical distribution—in other words, to buy up private concerns in the region.

The Boulder Dam Project. A second project calling directly for federal action arose out of the potentialities of the Colorado River for power and irrigation in seven states: Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming. Owing to the extent and variety of the interests involved, both public and private, the enterprise was the subject of many hearings and debates in Congress. Advocates of public ownership insisted that the Federal Government should itself construct the dam and the plant and distribute electric power through state and municipal agencies at a charge calculated to cover

merely the cost of production. Their opponents contended that the site should be leased to a private company under federal regulation. The outcome was a compromise in the Boulder Canyon Act of 1928, supplemented by a compact among certain states formally sanctioned by Congress in 1930.

Like all compromises this Act is vague in its terms, shifting a large part of the responsibility to the Secretary of the Interior. Subject to the approval of the states concerned, he was authorized to construct, operate, and maintain a dam and incidental works at Black Canyon on the Colorado River. The water so impounded he could by contract employ for irrigation, domestic uses, and the generation of electricity to be delivered at the switchboard to public bodies and private corporations at rates covering expenses of operation and upkeep. In making contracts for the use of water and the generation or sale of electrical energy, the Secretary, with due regard to the public interest, was required to give preference to states for use within their borders.

Scarcely was the Act signed by the President when a terrific struggle began. Applications for power filed by public bodies, particularly cities in southern California, were sufficient to exhaust the entire amount assumed to be available on the completion of the project. Yet private utility corporations also demanded a share "in the public interest." Beset on all sides the Secretary of the Interior allotted a small portion of the output to private companies, and the remainder to states and cities. About the same time he announced that he would not himself build the power plant but would lease the falling water at the dam, thus raising objections among advocates of public ownership who expected him to apply the principle of government construction. In the summer of 1930 work on the project was at last begun and by 1938 the plant was delivering power to distant cities.

"Recovery" Projects. Through other relations the Federal Government was drawn into the development of water resources. As the business depression deepened after the stock market crash of 1929, steel, cement, and other construction industries sank low in the scale of capacity operation, and a demand arose for federal action designed to set them in motion and relieve unemployment. In this connection the Public Works Administration, established in 1933, allotted over $80,000,000 for the construction of two immense power plants—one the Grand Coulée on the Columbia River about seventy miles west of Spokane and the other at Bonneville, Oregon, east of Portland. Both

projects were to develop electric power and were regarded as "yardsticks" for measuring the costs of producing electric power.

By 1943 the two plants were operating at about one half their estimated total capacity. A large part of the power is sold to public bodies and to coöperative associations which, in turn, distribute it to consumers "with emphasis on non-profit distribution." Other quantities of power are sold to military and naval establishments and defense installations, and to war industries in the region. Coupled with war production, these two national plants signalized a coming industrial transformation in the far northwest, but what would happen at the end of the Global War remained problematical at the opening of 1944.

Loans for Building Plants. Still another relation between the Federal Government and the power industry was established as a part of the recovery program adopted in 1933. Under a general authorization of Congress, the Public Works Administration began to lend money to municipalities for the purpose of building new plants. Despite the protests of existing electric power interests against such public competition, large grants for this purpose have been made from the federal treasury and the practice has been upheld by federal courts. Thus the Federal Government acquired an interest in power production entirely apart from the public domain, navigable waters, and interstate commerce.

Fish and Game Resources

Practical Issues. Despite the limited view, widely held, that wild life now exists merely to provide recreation for sportsmen, the fish and game resources of the country supply a large amount of food stuff and if properly developed could become a far more important item in national economy. Moreover birds have a decided economic value, for they bear an intimate relation to the extermination of insect pests which prey on forests, orchards, and growing crops. For reasons wholly practical therefore the conservation of wild animal resources becomes an essential part of the planning and use of natural resources as a whole.

Depletion of Resources. The supply of fish is certain to be quickly depleted unless attention is given to conservation. If fishing becomes too intensive, it outstrips the natural rate of propagation, thereby making certain species scarce and bringing economic loss in the long run. An example of this process is to be found in the halibut fisheries of the northern Pacific, off the coasts of the United States, Canada, and

Alaska. While operations in these waters are now conducted over an area three times larger and with an equipment two and a half times greater than at the close of the last century, they net annually less than half the former output. The Federal Government, of course, has control over its nationals on board American vessels off the coast and power over navigable inland waterways. It is therefore in a position to take vigorous action leading to the conservation of fish and in fact it employs its authority to good advantage in the promotion of that work.

Fish and Wild Life Service. To the Fish and Wild Life Service in the Department of the Interior, established in 1940 by a consolidation of other agencies, are assigned important functions in this relation. For the purpose of obtaining fish for restocking depleted waters, the Service conducts a number of hatcheries of its own and coöperates with the states and private parties in the management of others. Supplies from these sources are shipped to various points where conditions of survival are favorable. Besides furnishing new stock, the Service seeks to protect against misuse of the supply already in existence.

Seal Fishery. Should the Government go beyond aiding private parties in obtaining an adequate supply of fish and engage directly in commercial operations when business enterprise fails properly to conserve the wealth placed at its disposal? In general the answer has been in the negative but there is a noteworthy exception. The Pribilof Islands, when acquired with the purchase of Alaska from Russia, had been for years of immense value as breeding grounds for fur-seals and from 1870 to 1910 they were exploited by two private companies under lease from the Government. At the end of that period the seal herd on the Islands was approaching extinction and the need for remedial measures was pressing. Apparently unable to cope with the evil in any other way, the Federal Government finally terminated the leasing system and assumed the task of reviving the industry on the basis of a national monopoly. As a result of the program thus inaugurated, the herd was built up until it contained five times as many as in all the other herds of the world combined. In normal times the yearly output of furs is brought to the United States and sold at public auction.

Game Reserves. Once considered "inexhaustible," the supply of wild birds and big game has almost reached the vanishing point in many places where the advancing tide of civilization has upset nature's balance. As a counter measure, the Federal Government has established national game and bird reserves in various parts of the country. The major por-

tion of these reserves are administered by the Fish and Wild Life Service in the Department of the Interior, but some are operated by other agencies in connection with their usual work. The Forest Service, for example, watches over beavers, deer, and other creatures in the national forests; while the national parks, monuments, and military reservations often furnish selected spots for the harboring of wild life.

Game Protection. The Federal Government cannot, of course, provide for more than a fraction of the wild life of the country on its own bird and game preserves. Under the pressure of conservationists however it has taken steps to extend its supervision to wild animals on lands not federally owned, through the exercise of its jurisdiction over other matters. For example, its power over interstate commerce is employed in some instances to reinforce local legislation. To give an illustration, Congress has made it a federal offense knowingly to ship game out of a state if it has been killed contrary to state law. Through a system of federal game wardens, the work of tracking down violations coming under this head is carried on.

Protection of Migratory Birds. Besides supporting the enforcement of local game laws, the Federal Government assumes special responsibilities with respect to birds. The majority of our wild fowl breed north of the United States and probably ninety per cent of them winter in the southern part of the United States or in Mexico. Birds, then, cannot be truthfully said to be "residents" of any one country or state, subject solely to its jurisdiction; they are actually international travelers.

In coping with this peculiar situation, the United States and Canada have undertaken by formal arrangement to protect migratory birds as joint wards. In conformity with this agreement federal game laws now control all wild fowl in the United States. Detailed regulations, enforced by federal game wardens in coöperation with the states, prohibit the sale of these birds on the market, specify the seasons in which they may be hunted, and control the number of animals that may be shot in a day—rules aimed at preventing their extermination. States are not permitted to pass laws of their own dealing with this subject unless their provisions are still more rigorous.

The Lands and Rights of Indians

Preservation of Tribal Institutions. Among the great areas of land subject to federal jurisdiction are the Indian reservations embracing

approximately eighty-two thousand square miles. The practice of setting aside specific districts of the public domain for the Indians was gradually adopted as the rush of the white man across the continent made impossible their further retreat. In the conflict between modern civilization and tribal custom, this proved to be the only alternative to their extinction or assimilation. Once established, the Indian reservations, often rich in mineral resources, timber, and water power, presented thorny problems to the Federal Government.

As soon as the right to separate tribal existence on the reservations had been granted to the Indians, questions inevitably arose respecting their government and property. The simplest policy, at least for the moment, was to grant them a certain financial support and allow them to continue in their old ways. In the long run however the maintenance of primitive societies with large landed interests in the midst of highly developed industrial regions proved exceedingly difficult.

Attempt to Individualize Indians. At length the Government evolved a definite policy looking to the final incorporation of the Indians in American civilization and the conversion of their tribal lands into individual and private property under the American system. The controlling principle of administration in this connection was to prepare the Indian for life as a regular citizen of the United States, in the hope that he might find greater satisfaction in adapting himself to the prevailing culture than in attempting to follow the footsteps of his ancestors.

The development of this new program was marked by clear steps. In 1871 the practice of regarding Indian tribes as nations, by making treaties with them, was abandoned and all Indians and their property were brought directly under the legislative power of Congress. By a series of laws beginning in 1887 the President was authorized to cause parts of reservations to be surveyed and to allot lands in private holdings to individual Indians, subject to certain restrictions as to inheritance and alienation. Finally in 1924, after experimenting with the process of gradual naturalization, Congress declared all Indians born within the territorial limits of the United States to be American citizens. Thus legal provision was made for the possible dissolution of tribal institutions and the absorption of the Indians, with their property, by the neighboring communities.

Continued Supervision of Property. But the process was slow. During the transition stage, the Federal Government had to administer the vast

estates of the Indians, presumably for their benefit, and sought to instruct them in citizenship. The management of this business is vested in the Office of Indian Affairs in the Department of the Interior, aided by the Board of Indian Commissioners, appointed by the President and the Senate, acting as an inspectional and advisory body.

An important task of the Bureau is, of course, the supervision of the Indian Reservations. These tracts, being classed as federal lands, are not subject to the jurisdiction of the respective states within which they lie, but are in effect treated as independent "colonies." As trustee, the Office scrutinizes the leasing of forests, water power, mineral lands, and other natural resources on the reservations, turning the income over to the Indians entitled to it or holding it in trust where collective ownership obtains. When the lands and revenues available for the Indians are not sufficient for their support, and sometimes in accordance with historic treaties, Congress makes additional provisions for them in the form of supplies and grants.

It is needless to say that in connection with the administration of Indian lands and resources, as in the case of the public domain in general, numerous scandals and frauds have occurred. Indeed, if the friends of the Indian are correct in their contentions, he has been the helpless victim of exploitation from the beginning. Yet it would be a mistake to overlook such conscientious efforts as have been made by the Federal Government to conserve the property of the Indians and assure them the benefits of it. In the operation there has been a perpetual strife between the trustees in charge of their interests and white men eager to seize, distribute, and develop their patrimony. And it early appeared that struggle would probably continue until the Indians were absorbed into the general body politic.

Education. For this outcome the Federal Government tried to prepare them by a system of education. Under authority of congressional acts schools have been established for Indians, at least for instruction in elementary subjects and agriculture. As a stimulus to attendance, pressure could be brought to bear on parents by withholding rations and allowances for their children of school age who were not actually in classes whenever facilities for education were available in the neighborhood. Furthermore the Office of Indian Affairs made special efforts to secure the enrollment of Indians in state public schools.

Failures in Policy. Involving a clash between two rival cultures, the education of the Indian was fraught with troubles. It became apparent

at an early date that many of them, on completing their schooling, were returning home to their tribes where group influences quickly carried them back into their old modes of life. Obviously individualistic education could make little progress under such handicaps. Partly for this reason the practice of partitioning tribal lands into separate holdings was extensively applied on a number of reservations. Then as an additional step in the promotion of independence, responsible Indians were given the right to sell their land freely just like other citizens. Thus the magic spell of individual ownership was cast over tribal institutions. But the spell did not produce the expected results. It was too easy for an Indian to sell his land for a small sum in "ready cash" and, after spending his money, seek public support.

For a long time Indian administration stood between two worlds—one dying and the other not yet created. The Federal Government held vast resources in trust for its wards and sought to prepare them for outright private ownership. But it did not dare to divide this property at once among the Indians, give them freedom to sell it as they would, and allow them to take their chances in competition with their white neighbors. Suffering and poverty would immediately follow. Yet without dissolving tribal institutions the Government attempted to educate the Indians out of the ancient habits and to provide them with various aids and props against the buffets of fortune. What proportion of the Indians, numbering about 350,000, could establish themselves successfully in the outside world was a matter of pure speculation.

A Return to Tribal Policies. Then suddenly in 1933, with the advent of President Franklin D. Roosevelt and the appointment of John Collier as Indian Commissioner, a reversal of policy was announced. Efforts to destroy tribal institutions and industries root and branch, and to thrust the Indians as individual citizens into the main stream of American life, were discontinued. Instead, the attention of the Government was directed to fostering Indian community institutions and industries, and to educating the youth in the handicrafts and arts long cherished by the elders. In short, an attempt was made to preserve and develop Indian community life on a higher scale, with the aid of technical resources provided by white civilization.

As a result of the new experiment the Indian program now includes both tribalism and individualism as objectives of the Indian administration. As officially stated it embraces "the economic development of the Indians, both tribally and as individuals, through the effective use of

their resources and the acquisition of new resources necessary to provide subsistence; a land-use program, involving land consolidation, acquisition, and management, to the end that all Indians able and willing to work on the land will have the opportunity to do so; forestry and grazing, including sustained-yield forest management . . . ; irrigation, including construction, operation, and maintenance; construction and maintenance of bridges on Indian lands; construction and upkeep of buildings on about 200 Indian reservations." The Indian Office also operates schools of its own and supervises the education of Indian children in other schools. It provides and maintains hospitals for the reservations and directs activities connected with the improvement of health and sanitation.

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CHAPTER XVII

COMMUNICATION AND TRANSPORTATION

Rapid communication and transportation have made possible the development of natural resources on a continental scale and the transformation of local enterprises into a national economy. They have facilitated travel, the circulation of literature, the spread of ideas, the development of American civilization. Without foreseeing the inventions that were to revolutionize communication and transportation, the framers of the Constitution realized that these two functions, exercised on a nation-wide basis, were necessary to the strengthening of the Union and the elevation of provincial standards of life. George Washington appreciated their significance and devoted time and money to promoting the construction of the Potomac Canal. During Jefferson's administration, the Secretary of the Treasury, Albert Gallatin, made a national plan of waterways and roads and Congress authorized the building of a national highway into the West. All through the years of the Republic, problems of communication and transportation have attracted the ingenuity of inventors, occupied the energies of private enterprise, and engaged the powers of government. Marvelous achievements, often marred by waste and scandal unfortunately, have marked the process of development and at the end of more than a century the Federal Government confronts graver problems in communication and transportation than ever before in its history.

Postal Services

Constitutional Provisions. Precedents suggested to the draftsmen of the Constitution that the power to control the carriage of mail should be placed in the hands of the Federal Government. For centuries before 1787 the transmission of mail, an offshoot from the dispatch of official messages and military orders, had been treated by European governments as a public function and this example had been followed in the

American colonies and under the Articles of Confederation. It was therefore without controversy that a clause was inserted in the Constitution empowering Congress to establish post offices and post roads. "Nothing which tends to facilitate the intercourse between the states," wrote Madison in the *Federalist*, "can be deemed unworthy of the public care."

Post Roads. Although the meaning of the term "post offices" has seldom been called in question, no agreement has been reached as to "post roads." The interpretation of the latter phrase was at an early date drawn into controversy during a partisan debate over the power of Congress to build national roads—to make internal improvements; since that time the development of new technical agencies of transportation has raised additional doubts on the subject. Advocates of a strict interpretation of the Constitution have contended that Congress can merely indicate the routes over which mails shall be carried. With equal force others have insisted that the National Government may build and operate them. As a matter of fact during the first half of the nineteenth century it did construct a number of roads, although only in part for the avowed object of facilitating the carriage of mails. And in our own times the improvement of the postal service has been one of the arguments put forward to support federal aid for highways and aviation.

Moreover there is high legal authority for the broad theory illustrated by practice. Long ago a learned Justice, Joseph Story, declared that there was no reason why Congress could not build and operate roads for the purpose of carrying mails. "If it be the right and duty of Congress," he said, "to provide adequate means for the transportation of the mails wherever the public good requires it, what limit is there to these means other than that they are appropriate to the end?" Under this generous interpretation, Congress might make certain phases of transportation a government monopoly.

Monopoly over Mails. Whatever the outcome of the dispute as to the power of Congress in other fields of communication, it enjoys an undoubted monopoly over the mails. This function is not only assigned to national authorities; its assumption by private parties is entirely forbidden. But what is the mail matter that comes within the scope of the federal monopoly? The Supreme Court has answered by saying in effect that it is limited to letters, papers, and other things so reckoned when the Constitution was written. And in practice Congress has narrowed

its range by excluding from the mails certain written and printed matter considered objectionable on various grounds. Books, papers, and articles thus denied admission may be carried however by private parties, unless otherwise forbidden by congressional regulations.

The Postal System. Under its authority over post offices, post roads, commerce, and foreign relations, the Federal Government has established postal communications throughout the United States and, by affiliations with the Universal Postal Union, all parts of the civilized world. Within the states and territories directly subject to its jurisdiction, it has built up a huge and complicated system of services, progressively keeping pace with the requirements of American life. It began in 1789 with seventy-five post offices, one for every fifty thousand inhabitants, in round figures; at the close of the nineteenth century it was operating more than seventy thousand post offices or about one for every thousand people—a number later reduced, to about 43,000 by 1943, with the growth of the rural free delivery mentioned below.

Mail Delivery. Besides establishing post offices, the Government has brought its services to the doors of citizens. In the old days, every person had to go to the post office to get his mail. At length in 1863 free delivery was instituted in cities of fifty thousand inhabitants and upwards. Steadily the figure has been reduced. At the present time the law authorizes this convenience in small communities, in which the receipts of the post office warrant it. To secure these advantages however a city or town must provide certain essential conveniences for postmen, such as house numbers and paved streets. In 1885 the "special delivery" of mail was inaugurated; on the payment of a small sum a letter will be delivered by messenger immediately after its arrival in the city of destination.

In keeping with the expansion of its urban activities, the Post Office Department inaugurated in 1896 free delivery in rural districts. In 1937 nearly 1,370,000 miles, organized in about 34,000 routes, were covered by this service, reaching approximately twenty-five million people. Incidentally, the rural free delivery system has exercised a profound influence on country life. In addition to carrying letters to the gates of farm yards, it has been a powerful factor in the improvement of roads and in increasing the circulation of newspapers and books in remote regions.

Other Postal Functions. While widening the range of its deliveries, the Post Office has steadily added to the number of its functions. In 1855 it provided for the registry of mail; now it is possible for anyone,

by paying a small fee, to secure the registration of a letter at every point in its journey, a return receipt from the addressee, and insurance, thus practically guaranteeing delivery. The registration of mail was supplemented in 1864 by a money-order system which now provides for the transmission of money throughout the Universal Postal Union.

If money as well as letters and papers can be carried by the post office at a low rate, why not parcels? For a long time this question was urgently asked. With the great increase in the commerce of the country, the demand for special arrangements for carrying parcels at low rates spread widely. Naturally it was opposed by the express companies and by country merchants who feared the competition of the great department stores and mail order houses in the cities. But in 1912 Congress was forced by public opinion to establish a system for the transmission of packages at moderate rates.

Another radical departure was made in 1910 when Congress in response to a long agitation enacted a bill authorizing the establishment of savings banks in connection with post offices. This proposition was strenuously attacked as unconstitutional, paternalistic, and injurious to private bankers. On the other hand its defenders laid stress upon the encouragement of thrift and the importance of affording absolute security to small depositors. Within a short time after the opening of the first post-office banks, a large number of people began to use the new facilities, proving that Congress had responded to a popular need.

Methods of Postal Operations. In the discharge of its functions, the Post Office Department operates partly by direct methods—buying and managing equipment and employing its own servants—and partly through contracts with common carriers and private undertakings. In the case of some contracts competitive bidding is possible but in others the Government must make the best terms it can with enterprises occupying strategic positions. And in fact throughout its history, the Post Office Department, in adjusting its outlays, has been compelled to reckon with other than strictly business considerations, in particular the promotion of highways, stage lines, railways, the merchant marine, and aviation. Hence on the expenditure side of its program, the Post Office Department is made liable for many costs which should properly come under the head of subsidies, aids, and bonuses to private business.

Use of the Post Office for Subsidy Purposes. Congress has used the power over post offices and post roads to promote the high-seas merchant marine and aviation, two branches of private enterprise which profess

inability to operate profitably without receiving grants of money from the federal treasury. Many investigations, wastes, and charges of corruption accompanied the appropriation of money to shipping concerns for the carriage of mail granted under the shipping acts of 1920 and 1928; but in one form or another the practice was continued for many years. After startling disclosures had been made by a Senate committee, Congress in 1936 abolished, as of June 30, 1937, all mail subsidies to shipping concerns and substituted straight grants of money to shipbuilders and operators. An inquiry into air-mail subsidies and the revelation of abuses connected with them also led Congress to make a wholesale revision of such legislation in 1938 and to pass the Civil Aeronautics Act. This measure created the Civil Aeronautics Authority and empowered it to fix the air-mail rates which the Postmaster General is to pay.

Politics in Building Program. Even in the erection or renting of the structures necessary to its operations, the Post Office Department is not always free to consider mere efficiency. As a rule, the moment a town begins to take on metropolitan airs, it demands a federal building appropriate to its pretensions, and brings pressure to bear on the local Congressman to secure an appropriation of money for the purpose. Inasmuch as such favors are often distributed among Senators and Representatives in return for party services (p. 112), grants are not always made on the basis of strict postal requirements. In the smaller towns and cities, the Post Office encounters the renting problem and is extremely fortunate if it can lease a building on sound economic principles without reference to politicians or to local manipulators.

Favors in Mail Rates. On the side of revenues, no less than on the expenditure side, the Post Office Department is subject to pressure from many directions. Hence it cannot easily put its operations on a paying basis. As a carrier of "intelligence," it is expected to promote intelligence by doing its work at a low cost. In 1792 its rate for handling an ordinary letter within the United States ranged from six cents for thirty miles to twenty-five cents for more than four hundred and fifty miles, but by various reductions the figure has been brought down to the nominal sum of three cents.

Furthermore "to encourage the diffusion of knowledge among the people," Congress has fixed especially low rates for newspapers and periodicals and for journals issued by educational institutions, churches, fraternal orders, and certain social organizations not conducted for profit.

It has even provided that all publications entered as second-class matter shall be carried free of charge within the county of origin, if delivered to the subscribers at their post offices. In a similar spirit a reduction has been made in the postage on books sent by public libraries on loan to readers—a concession extended to publishers and other shippers of books in 1938. Although the poundage and zone rates on the "advertising portions" of periodicals are higher than on the "reading matter," the diffusion of knowledge has not yet been subjected to the simple principle of collecting full transportation costs.

This is not all. The Post Office Department handles two large groups of mail matter without any charge whatever. The first group consists of materials pertaining to official business sent by the officers and agencies of the Federal Government. The second group comprises special matter carried for private parties and state institutions. In the latter class fall literature for the blind which does not contain advertising and the publications of agricultural colleges and experiment stations.

Postal Censorship. In addition to carrying on its vast technical operations, the Post Office Department has to deal with many ticklish questions in business, ethics, and opinions. It is required by Congress to exclude from the mails the letters and papers of persons and corporations practicing fraud and deception and also all indecent, libelous, immoral, and treasonable matter. If an individual or company attempts, by dishonest methods, to procure money or property through the use of the mails, the Department must intervene. It instructs the postmaster at the place where the imposture originates to stamp on all letters addressed to the offender the word "fraudulent" and to return them to the writers if their addresses are given. On issues of fact the decision of the Postmaster General in fraud order cases is not subject to judicial review; but the question whether any particular scheme is in reality fraudulent under the law may be taken into the courts.

In time of war, of course, the jurisdiction of the Post Office Department over matters of opinion is even more extensive. Under the provisions of the espionage and sedition legislation (p. 334), the postal authorities exclude from the mails periodicals suspected of "dangerous" tendencies and open and read the letters of persons whom they distrust. To assure the strict enforcement of the terms of the law, a Draconian control over all postal services is exercised and peremptory orders closing the mails to newspapers and magazines deemed "subversive" are issued by the Post Office Department.

Electric Communication

Leadership of Private Enterprise. Having no historic association with government comparable to that of the Post Office, wire communication has been developed in the United States by private enterprise. It is true that the first long-distance telegraph line—between Washington and Baltimore—was built and operated for a time at the expense of the Federal Government. But after a brief trial the Government refused to buy the patents and withdrew from the field, declaring that the business would never pay. Hence the promoters of telegraphy were compelled to rely mainly upon private capital. When, about thirty years after Morse's epoch-making achievement, Alexander Graham Bell introduced the telephone, communication by telegraph had already been established by many companies on a nation-wide scale and the new invention was developed by similar methods.

Federal Aid. Although our telegraph systems have been promoted mainly as private undertakings, the Government has materially assisted by favorable legislation. For instance, it has authorized telegraph companies to construct and maintain lines through the public domain and along the military or post roads of the United States. In return for its favors Congress has required companies taking advantage of them to give priority to government messages at rates fixed by the Postmaster General and has reserved the right to purchase such lines at an appraised value. In addition, all railroad concerns to which the Government has granted certain forms of aid must maintain telegraph lines and coöperate with telegraph companies on certain conditions.

Regulation. Since the more important telegraph and telephone lines cross state boundaries, this branch of communication comes within the power of Congress to regulate interstate commerce. The actual function of regulation is delegated by law to the Federal Communications Commission created in 1934 by consolidating under one body many functions previously exercised by other agencies. This regulation is controlled by certain general principles. Companies engaged in interstate and foreign communications by wire or radio are designated "common carriers." The services and facilities they offer the public must be adequate and easily accessible. Charges must be "just and reasonable"; and there must be no discrimination between customers within any one class of service. Schedules of charges must be filed with the Commission and made public before such carriers may participate in the communications busi-

ness; and thereafter no changes in the rates or operations can be made except after notice to the Commission and to the public. Whenever it appears that there has been unfair treatment or that unreasonable charges have been made, the Commission may hold hearings, prescribe rules, and fix new rates. The Commission has power to value the property of the carrier, to require inventories from it, and to inquire into its management. Extensions and new construction of facilities cannot be undertaken unless a certificate of public convenience and necessity is obtained from the Commission. All carriers are required to render periodical reports, to furnish other information, and to permit access to all books, papers, accounts, records, and memoranda.

Mergers and Consolidations. A separate section of the Communications Act vests in the Commission the function of supervising the consolidation of companies. The unification of telegraph and telephone systems introduces the element of monopoly—and runs against competition which is commonly supposed to be an automatic guarantor of low charges and efficient service. In foreign countries unity has generally been achieved under government ownership and operation. In the United States unity is being accomplished by private initiative through mergers and consolidations, under government supervision. In the case of companies desirous of merging in such a way that the consolidated company become subject to the Communications Act, the transaction must have the approval of the Commission. Upon any such application, the Commission grants public hearings to interested parties, including the Governors and public service commissions of the states affected, and only gives its permission when it finds that the proposed consolidation will be to the advantage of the persons to whom the service is rendered and in the public interest.

Cable Lines. Cable lines to foreign countries are supervised by the Federal Government. No submarine cable directly or indirectly connecting the United States with any foreign land or one portion of the United States with another through waters beyond its boundaries can be brought to shore or operated without a license issued under the authority of the President. He may withhold or revoke cable licenses, after due notice and hearing, whenever such action will assist in securing or maintaining rights for the landing or operation of American cables in foreign countries or will promote the security of the United States. In granting licenses the President cannot confer exclusive privileges and must take care to assure "just and reasonable rates and service." Jurisdiction over

the transmission of messages by cable lines is vested in the Federal Communications Commission.

Federal Wires. In addition to regulating telephone, telegraph, and cable companies, the Government has installed wires of its own. For example, the Coast Guard manages the telephone lines which tie together its widely scattered stations. While traffic over such wires is primarily intended to aid the Government in performing its duties, private citizens may use them for commercial messages, subject to the priority of public business, at rates prescribed by the federal agency in charge of the particular system.

Radio Regulation a Federal Matter. Radio apparatus may be utilized in a variety of ways, from guiding aircraft in foggy weather to flashing the latest news photo across the Atlantic. So great is the scope of this new means of communication indeed that the number of potential radio station-owners exceeds by a very substantial margin the number of powerful radio stations that can be operated on the more attractive frequencies without producing destructive interference. If chaos is to be avoided on the air, some governmental agency must decide who among the multitudes of applicants shall be allowed to transmit and on what terms.

The range of modern apparatus is so great that thousands of signals can be heard daily far beyond the confines of the state or country of their origin, bringing many branches of radio communication definitely within the federal domain of interstate and foreign commerce. For the same reason, small transmitters, though their messages cannot be picked up outside their own states, may nevertheless interfere with weak distant signals coming to nearby receivers and thus affect interstate and foreign commerce to such a degree as likewise to fall under federal control. Realizing the impossibility of determining which among thousands of radio transmitters in the United States actually affect interstate commerce, the Supreme Court has declared in simple language that they are all subject to congressional authority.

Domestic Regulatory Practices. The duty of determining who may operate domestic sending stations and under what terms has been vested in the Federal Communications Commission. In the special case of broadcasting, this means that the Commission may exert a very substantial control over what is said on the air. The Commission classifies radio stations; it allocates frequencies; it issues, revokes, and modifies licenses, subject to the provision that no license shall run for more than

three years or be issued to aliens, representatives of foreign governments, or even domestic corporations in which aliens control a large part of the stock, or to any person whose license has been revoked by a court for violation of the anti-trust laws. "If the Commission is able to determine from an examination of an application [for a license] that public interest, convenience, or necessity would be served by a grant thereof, it is required to grant such application without a hearing. If it cannot so determine, it must afford the applicant notice and an opportunity to be heard."

Recognizing the dangers to freedom of speech which lie in such a situation, Congress has provided two major safeguards. It has stipulated that whenever a radio broadcasting station accords privileges to one political candidate, it must offer services on equal terms to rival candidates, a provision frequently called into use. In the second place, when choosing among parties desiring to build stations, the Commission is to be guided by the public interest, convenience, and necessity, and by evidence bearing on ways in which these ends may be served. Practically of course it is difficult to apply the latter rule. What does the average broadcast listener really want to hear? In the absence of any truly comprehensive and current survey, the Commission can do little more than take samples and guess at the rest. Even if full data were at hand, the Commission would still be under obligation to weigh public wishes against the ideas of advertisers and other propagandists who support broadcasting. What sort of compromise best serves the public interest? Obviously no precise answer is possible. Amidst such intangibles, the Commission cannot very well avoid the responsibility for putting into practice some of its own ideas as to what should be said over the air, thereby raising the hue and cry of censorship.

Many circumstances connected with the radio business conspire to make difficulties for the Commission. The competition for licenses, which are necessarily limited in number, is fierce, owing to the amount of money that can be made out of advertising and the eternal quest of special interests for control over the making of public opinion. The large corporations which operate great chains of broadcasting stations are often engaged in conflicts among themselves and with the smaller stations. The contest over centralization and decentralization that is responsible for the anti-trust battles also rages in the radio business as in transportation and industry in general. In the competition between newspaper owners and radio owners for the profits of advertising, the

former in many cases have bought radio stations, and so protests arise against allowing newspapers to combine broadcasting with publishing. As the chief source of revenue for radio concerns is the advertising of great business corporations, the heads of such corporations, not unnaturally, take an interest in the speeches and "entertainment" for which their money pays. Perhaps no other agency of the Federal Government is so continuously "in hot water" as the Communications Commission. If its members were supermen and saints, they could not satisfy everybody.

International Radio Adjustments. While the Federal Government has a strong grip over domestic radio operations, it always plays a rather weak hand in the foreign field. Since, acting alone, it cannot prevent the penetration of its own territory by radio signals from other lands, it is compelled to do the next best thing, namely to bargain with other countries in attempts to reduce outside interference. With this aim in view, it has made agreements with various foreign governments to the effect that certain wave-lengths shall be reserved for specified services everywhere, when necessary to prevent foreign interference with domestic stations, and that other specific rules shall be observed in the interest of order in radio operations. The United States has also become a party to several regional understandings covering the two Americas.

Government Operation. Besides supervising the use of the radio by others, within the limitations set by international agreements, the Government employs this modern agency of communication itself. Under the law, the President of the United States has the power to set aside wave-lengths by executive order for the use of the Government, and his decrees take precedence over other assignments. In this fashion, a series of federal stations has been put on the air to handle official messages, for instance army and navy business. To some extent, service is also rendered to the general public, notably through the transmission of time signals and weather reports. Indeed certain federal stations are even available for the transmission of ordinary commercial traffic, when it can be handled without interfering with official business.

Communications in War Time. In time of war all communications by wire and radio are subordinated to the uses and control of the Government under the direction of the President. Whenever the President proclaims the existence of war or a threat of war or a state of public peril or disaster or other national emergency, he may suspend, use, or control, any station for radio communication "upon just compensation"

to be ascertained by him and certified to Congress so that it can provide for payment to the owners.

Inland and Coastwise Water Transportation

Constitutional Basis. The Constitution vests in Congress the power to regulate interstate and foreign commerce. Many years ago, the Supreme Court held that, since much of the country's commerce was conducted by water, Congress could reach out to regulate navigation. With the passage of time, the authority to regulate navigation was in its turn broadened to permit the actual construction and improvement of waterways by the National Government. As a result of this chain of reasoning the United States has been able to spend billions of dollars on river improvements.

An Issue in Politics. Although for a time after the development of railroads there was a relative decline in the use of waterways, and public interest in that phase of transportation fell off, the problem later came to the front again as a major issue. Carriage by water, especially of bulky freight, is in some circumstances cheaper than by rail and so may act as a regulator of freight rates. Moreover, when planned in relation to railroads, waterways may supplement them and play an important rôle in national economy.

Federal Projects. Administrative leadership in the improvement of rivers, lakes, and harbors has been vested in the War Department on the theory that waterways are essential to national defense and that the Army's experience in this field peculiarly fits it for this function. In carrying out the Government's program, as authorized by Congress, army engineers are constantly at work surveying new routes, supervising the deepening of old channels, and operating completed units.

In this connection the Secretary of War has large powers over the planning and execution of federal water projects and over all structures such as bridges, wharves, and piers bordering on navigable waters. The immediate task of supervising the planning and making of improvements for navigation, flood control, and power development on rivers and harbors is intrusted to the Office of the Chief of Engineers in the War Department. In carrying out the Government's program as authorized by Congress, army officers assume responsibility for making plans in detail, projecting new undertakings, and operating numerous units already constructed.

The Principal Undertakings. Outstanding among the numerous projects built or operated under federal supervision are the Panama Canal, the Mississippi River Improvement, and the Intercoastal Water Way along the eastern and southern coasts of the United States. The first connects the Atlantic and Pacific oceans through the Panama Canal Zone; the second is intended to control floods in the Mississippi basin and to unite the Great Lakes with New Orleans; and the third designed to enable small craft to travel from Maine to Mexico with a minimum exposure to the sea.

Of the three main developments the Panama Canal, opened in 1914, is of course the most spectacular. By forty-two miles of waterway this canal shortens the distance by ship from New York to San Francisco thousands of miles. Constructed at a cost of $367,000,000, exclusive of arrangements for military defense, it stands as a monument to the army engineers who built it. A railway, repair shops, warehouses, drydocks, and other equipment are operated in connection with it, in large part by electricity generated on the spot by water power. Responsibility for the administration of the Canal is vested in the governor of the Canal Zone, under the supervision of the Secretary of War.

Efforts to Stimulate Water Traffic. Notwithstanding the immense outlays for deepening and widening channels, the amount of traffic by internal waterways is relatively small. In discussing conditions on a single river which had been improved at great cost, President Harding publicly declared in 1923: "It is a very discouraging picture to contemplate the expenditure of fifty million dollars of public funds on an inland waterway when the tonnage on that waterway has diminished more than half, while the waterway itself is made better and better year by year. We have either wasted many hundreds of millions in blind folly or have been inexcusably remiss in turning our expenditures to practical account."

In response to such arguments, Congress has tried to show private citizens what they have missed by not making full use of the facilities furnished at such great expense. It has created the Inland Waterways Corporation under the management of the Department of Commerce and financed it by authorizing the purchase of stock, thus vesting outright ownership in the Federal Government. The Corporation operates fleets of vessels engaged in the carrying trade between Minneapolis, Chicago, and Kansas City and the Gulf of Mexico as well as along the Gulf from Alabama to New Orleans.

Joint Water and Rail Rates. It is the hope of the promoters of internal improvements that barge operations will serve not only communities located on the shores of the waterways but also distant centers through a union with rail facilities. To insure the assistance of the railroads in developing such traffic, Congress has passed a law which permits certain carriers by water to apply to the Interstate Commerce Commission for a certificate of public convenience and necessity requiring coöperation between the two forms of transportation. If the Commission finds the said service to be in the public interest, it must determine the joint rail-water rates between specified points and enforce them. In some cases the joint rail-water rates established by the Commission are as much as twenty per cent below the all-rail rates.

The Tolls Question. But if rail and water routes are to be placed on a truly comparable basis, the costs of the respective rights of way and general upkeep should be taken into account. While railroads build and maintain their tracks, and pay taxes on them besides, carriers by water are granted free use of the elaborate system created by the Federal Government for their benefit. Congress has definitely provided that, with one exception, no tolls or charges whatever shall be collected from any vessel using federal canals, locks, or other improvements in the interest of navigation. Vessels may now pass at will over these expensive routes while the public foots the bill through taxation.

The one exception just mentioned is the Panama Canal. Few have ventured to suggest that this gigantic enterprise, built at public expense, should be as free as the winds. But in this connection Congress is subject to a specific limitation. Under the terms of the Hay-Pauncefote treaty with Great Britain in 1901, it is explicitly provided that there shall be no discrimination against other nations in the matter of rates on that canal.

Coastwise Traffic Limited to American Ships. Although the national waterways improved and managed by the Federal Government are free and supported by national taxation, foreigners are not permitted to take full advantage of the gift. Congress has restricted all inland business and the entire coastwise trade to American vessels. It has expressly forbidden foreign ships to transport freight from any port of the continental United States to another, and made it impossible, by prohibitive penalties, for them to carry passengers between such points.

Control over Obstructions to Navigation. In connection with waterways, the Federal Government must control the works of man running

counter to the interests of navigation. This responsibility is vested in the War Department and involves supervision over the erection of dams, dikes, bridges, and causeways which span the navigable waters of the United States. Before construction can be started on such undertakings, approval of the plans must be obtained from the Department and in the case of waterways which do not lie entirely in a single state Congress must add its consent. Although primarily concerned with preventing the obstruction of traffic by bridges built under its jurisdiction, Congress has seized the opportunity to regulate the use of these structures after completion. More specifically, it has reserved the right to fix tolls, construct telephone or telegraph lines, and even require a railroad to permit the trains of other companies to pass over its bridges.

Pressure Politics. The subject of waterway improvements should not be left without reference to the doubtful utility of many of the inland projects. Beyond question hundreds of millions of dollars have been wasted in enterprises of this kind and few, if any, really pay their way in an economic sense, that is, if all construction and maintenance charges are reckoned in any consideration of the rates. Why then are so many undertaken?

The answer is not simple but the activities of powerful interests account for some of them. Alleging the requirements of national defense and eager to keep in practice, army engineers are usually ready to approve river and harbor enterprises. Shippers, naturally seeking low freight rates, regard waterways opened at public expense as a means of creating competition with railways and forcing them to reduce their charges for carrying goods. Chambers of commerce in towns and cities located on real or potential water routes lend vigorous support to federal activity in this sphere, for it means large outlays of money in their respective communities and brings additional transport facilities. Finally innumerable dredging companies, which make large profits from federal contracts, for obvious reasons insist that the good work should go forward. Under the impact of these forces, members of Congress vote for costly undertakings that never could be justified on mere grounds of practical economy.

High Seas Shipping

Former Congressional Neglect. In the case of shipping on the high seas, as well as inland water transportation, other factors than mere

economical freight rates and efficient services enter into consideration. There was a time, in the days of wooden ships, when American shipbuilders and masters could hold their own with rivals in every part of the world. And after the beginning of steam navigation, the Federal Government subsidized American vessels for a brief period to assist them in meeting foreign competition. But on the eve of the Civil War, under the pressure of agricultural interests, Congress abolished these aids to private enterprise, and most of the carrying trade between the United States and other countries passed into foreign hands. In spite of insistent demands Congress long refused to renew the practice of giving public support to transoceanic shipping.

World War Forces Action in 1916. After the outbreak of the World War in 1914 the Federal Government was drawn into a new and gigantic undertaking in this connection. When that conflict opened, the United States faced a dearth of ships to carry its produce to foreign markets. Thus it happened that farmers as well as manufacturers felt the pinch. Confronted by a real dilemma the Democratic party, which more than half a century before had helped to sweep the American flag from the high seas by withdrawing subsidies, laid aside its theories. In 1916 Congress created the Shipping Board and endowed it with enormous powers, including authority to purchase, construct, operate, and lease merchant ships. After America entered the war, the Emergency Fleet Corporation was established under the supervision of the Shipping Board and, with the aid of lavish grants from the public treasury, ships were built with a speed that astonished the world.

Disposal of Government Ships. When the war closed in 1918, leaving the Government with a huge fleet of vessels on its hands, the shipping problem took a new form. What was now to be done? Mercantile interests insisted that the Government should sell its boats to private corporations at a low figure and then grant them large subsidies from the federal treasury so that they could operate at a profit. But this was stoutly opposed, particularly in agrarian regions of the country, and every effort to get a direct public subsidy was defeated. After much thrusting and parrying, a compromise was reached in which the advocates of government support for the merchant marine secured substantially all their demands for financial aid, in one guise or another, through the enactment of the merchant marine laws of 1920 and 1928.

The Ship Subsidy Act of 1936. Under these earlier acts, despite the lavish outpourings of money in subsidies from the federal treasury, the

American oceanic marine declined relatively in strength and in its share of world trade; lobbies operated in Congress for the purpose of getting increases in the mail subsidies; officers of ship concerns were paid extravagant salaries and bonuses; and huge profits were made on small investments. All this was disclosed by a Senate inquiry into the business. After an acrimonious discussion Congress, by the Ship Subsidy Act of 1936, repealed or drastically modified previous legislation, abolished the Shipping Board, stopped the payment of special subsidies for the carriage of mail, and provided for direct and outright subsidies for shipbuilders and operators. Such subsidies to builders may run as high as fifty per cent of the construction cost of a ship but limits are placed on the salaries of company officers which may be included in the cost. The amount of the subsidy allowed to ship operators is based on the difference between the cost of operating American and foreign vessels engaged in competing for the same trade. The law is enforced by the Maritime Commission composed of five members appointed by the President with the consent of the Senate.

New Issues Raised by Expansion of Shipping in the Global War. The agitations that accompanied the adjustment of the high-seas shipping business after the World War had scarcely been settled when still greater problems appeared in connection with the immense expansion of American shipping to meet the needs of the Global War. American ship yards were expanded rapidly, new yards were built, partly with the aid of government money and credit, new ships were constructed with amazing rapidity, and the American mercantile marine outstripped all rivals. In the meantime former European competitors, such as Norway, Holland, Great Britain, and France, lagged far behind in construction and operation. The shipping business throughout the world was thoroughly dislocated by war at sea.

The Global War had not advanced far when it became evident that at its close the American mercantile marine would be larger than ever, the number of ships would far exceed the amount of the carrying trade in sight, and the former rivals for this trade would seek to recover their lost position as maritime powers. What will be done, when peace comes, with the ships built at the expense of the Government? Will arrangements be made with other nations for the allocation of international business? Or will unmitigated rivalry start again? How far shall the Government go in subsidizing American ships? What relations will be established between the Government and private shipping enterprise?

These and other complicated questions now loom on the horizon.

Other Aids to Shipping. Besides granting financial aid to shipping, the Federal Government renders other services. Through various agencies, particularly the Bureau of Lighthouses, the Coast and Geodetic Survey, and the Navy Department, it maps the coasts and inland waters of the United States, marks shoals, reefs, and other dangerous points, operates lighthouses, lightships, and radio beacons for the guidance of mariners, supplies them with authentic maps and guide books, and calculates the tides for given periods in the future.

Rail Transportation

Extensive Federal Aid. It is sometimes assumed by superficial thinkers that the Federal Government has made no great contributions to the development of railways and merely interferes with them by regulating their rates and services. It is true that many lines, especially those along the Atlantic seaboard connecting the larger cities, were built by private capital at its own risk, but to the railways of the West and Southwest the Federal Government and state and local governments made enormous gifts for promotion in the form of land, subsidies, underwritings, or special favors. To the first Pacific railroad companies alone, Congress granted more than one hundred million acres of land along their tracks, the free use of timber and stone for construction, and financial support in federal credits running upwards of sixty million dollars. On a conservative reckoning, the Federal Government had assigned to railway promoters prior to 1872 an area of land "almost equal to the New England states, New York, and Pennsylvania combined; nineteen different states had voted sums aggregating two hundred million dollars for the same purpose," to say nothing of the money supplied by municipalities. While aiding in construction, the Federal Government and local governments at first gave railroad proprietors a generous freedom in operating as they saw fit.

Abuses in Railway Business. Numerous abuses appeared. Stocks and bonds were issued in enormous amounts, often without any proper basis in material values; bankruptcies were frequent, ruining thousands of investors and enriching inside speculators; in some cases it was more profitable to "wreck" companies than to operate railways. The highest possible rates were often charged on the theory that the companies should collect "what the traffic will bear." There were also discrimina-

tions in many forms. Freight rates were made high to one shipper and low to another, enabling the beneficiary to ruin his competitor. Frequently the money paid in freight rates by favored shippers was returned to them in whole or in part in the shape of secret "rebates."

Federal Intervention. These abuses were widely known and advertised, but Congress did not move until after the states had begun to close in on railways by stringent legislation, fixing rates and charges. It was not until 1885, when the demand for reform forced action, that the Senate appointed a committee to investigate the whole railway situation. The report of this committee produced such a furor that two years later Congress enacted an interstate commerce law forbidding certain practices and providing for the regulation of others under the direction of an Interstate Commerce Commission. The original statute, the amendatory and supplementary measures, such as the Esch-Cummins Transportation Act of 1920, the Coördination Act of 1933, the decisions of the courts touching the subject, and the orders of the Commission constitute a formidable body of law which can only be briefly sketched here.

Interstate Commerce Commission. The administration of legislation respecting certain carriers is vested in the Interstate Commerce Commission, which is entirely independent of all other agencies of the Federal Government. The Commission, consisting of eleven members appointed by the President and Senate for terms of seven years, is a quasi-judicial body in that it hears complaints, issues orders, and makes decisions. In conducting inquiries it is aided by a large staff of accountants, engineers, and expert investigators. As things now stand, federal control is applied to concerns engaged in transporting passengers and freight (including motor carriers as well as rail and water carriers), or in pumping oil through pipe lines. All their business which is interstate in its nature comes within the purview of the Commission.

Prohibited Practices. A part of the law is negative in character and a part is positive. Common carriers are forbidden to issue free passes except under severe restrictions; they cannot grant rebates, drawbacks, and special rates, thus making lower charges to some persons than to others for the same service; competing lines are forbidden to combine, pool their receipts, and distribute among themselves the profits of such an operation—save under the strict supervision of the Commission. They cannot give any undue or unreasonable preference to any person, company, corporation, or locality. They are not allowed to transport any

commodity in which they have a direct property interest, except timber and its products—a provision intended to prevent a combination of railways with manufacturing or mining corporations

Positive Commands. On the positive side, the law requires all rates for services to be just and reasonable The accounts of common carriers must be kept according to uniform principles prescribed by the Commission Companies must print and keep open for public inspection schedules showing rates, fares, and charges for transportation and they cannot change such rates without notice to the Commission They must comply with the terms of the law respecting safety provisions, hours of labor for employees, compensation for employees injured in the course of duty, and pensions for superannuated employees Finally they must render annual reports to the Commission showing their exact financial status and the nature of their operations

Methods of Enforcement In the enforcement of these principles the Interstate Commerce Commission exercises extensive powers It is required to investigate the manner in which business is conducted by carriers coming under its jurisdiction, and on its request any district attorney of the United States must prosecute, in the proper court, offenders against the law The Commission can summon witnesses and compel the production of books, papers, and other documents relating to matters under investigation Any person, corporation, body politic, or municipal organization complaining of anything done or omitted by a common carrier, contrary to law, may apply to the Commission by a petition stating the facts, and the Commission must thereupon make an inquiry into the allegation After full hearings on such a complaint it may determine and prescribe just and reasonable rates and charges for the services rendered by the common carrier in question, as well as fair and proper regulations and practices Without its approval railroads cannot issue long-term securities, purchase or build extensions, or abandon old lines The Commission's orders are subject to review however by federal courts

Controversy over "Reasonable" Rates Exceedingly difficult in application is the provision that the rates of common carriers must be just and reasonable What criterion is to be applied in passing upon the justice and reasonableness of any particular set of charges? Fundamental to the answer of that question is the stipulation of the Fifth Amendment of the Constitution to the effect that no person shall be deprived of life, liberty, or property without due process of law and that private

property cannot be taken for public use without just compensation. According to repeated decisions of the Supreme Court, rates for transportation cannot be fixed by the Government at a point so low as to make it impossible for the carrier affected to earn a fair return on the value of its property. But what is that value—the cost of construction, cost of reproduction at present prices, amount of money put into the enterprise as a prudent investment, amount of stocks and bonds outstanding against it? For a long time no definite attempt was made to meet this issue, but finally in 1913 Congress instructed the Interstate Commerce Commission to make a physical valuation of the railways under its jurisdiction with a view to establishing a positive base for rate-making. The task was completed with respect to the major lines, but the results of the findings are of little practical value. In passing upon the "reasonableness" of rates fixed by the Interstate Commerce Commission, the Supreme Court continues to take into account, as regards capital value, many factors, such as reproduction costs, as well as original outlay and physical valuation; and it emphasizes the test of prudent investment.

Relations to Intrastate Rates. The problems confronting the Commission in the matter of rates are complicated by the fact that each state has the power to regulate railway rates and services *within* its borders. This is not a mere theory. All the states have enacted elaborate laws pertaining to railways and most of them have set up commissions with more or less drastic authority over intrastate business. Yet it is not easy to distinguish between shipments wholly within a state and those which "affect" interstate commerce. For example, can a state, through its railway commission, lower the rates on freight to some cities within its borders and raise them to other points still within its borders but close to cities in another state? A case of this character came up in 1914 involving the attempt of Texas to discriminate against Shreveport, Louisiana, in favor of Dallas and Houston; and in an important decision the Supreme Court of the United States declared that the federal Interstate Commerce Commission had the right to regulate even rates within a state when they clearly resulted in discriminations in interstate commerce.

Still more noteworthy is the case raised by Wisconsin, supported by forty-two other states, in 1922, dealing with the action of the Interstate Commerce Commission in increasing railway rates with a view to securing a "fair return" to the companies under the federal Transportation Act of 1920. Taking an independent position, Wisconsin declined to

raise rates on intrastate business as ordered by the Commission. Obviously the purpose of the Act would be defeated if each state insisted on keeping rates down within its jurisdiction, because interstate travelers could buy new tickets on crossing state boundaries and many shippers could avoid higher federal rates by a careful routing of goods. Furthermore low intrastate charges would reduce the revenues of the railway companies and make necessary higher interstate rates to offset the loss. Accordingly, under orders of the Commission and a decision of the Supreme Court, states were compelled to make their local rates conform to the schedules fixed under federal authority. Questions of this kind, constant controversies between state and national authorities, the conflicting and confused regulations of states, and the growing unity of transportation have led to the demand that the railway system of America be made national in operation and control.

Confusion over Railway Policy. Although the railway problem has been in politics for nearly a century and law after law has been passed with a view to solving it, no satisfactory disposition of the issue has been reached. The question is constantly agitated. Some railway companies are earning returns on a generous capitalization; some have paid no dividends for years; others are bankrupt and in the hands of receivers. Farmers, shippers, and regions, frequently clamor for still lower freight rates, and from time to time labor makes an appeal for higher wages. To make matters worse, many companies find it increasingly difficult to meet the competition of the automobile, the motor truck, aviation, and the waterways—all subsidized or aided indirectly or directly by grants from state and federal treasuries. Although railway companies would like to cut their operating costs by effecting consolidations among lines that are competing wastefully, Congress has insisted on severely limiting such merging of lines in order to protect railway workers in their jobs and on the hang-over theory that service-competition should be maintained among railways. Confusion was increased between 1936 and 1940 by a long and searching investigation made by the Senate Committee on Interstate Commerce, especially in respect of railway financing. The investigation revealed sharp practices among bankers and holding-company managers engaged in manipulating railway stocks and bonds and trying to bring about consolidations through the formation of supercorporations. In 1944 many of the great railway lines that had gone into bankruptcy during the depression were still in bankruptcy despite the

increase in railway earnings brought about by the war boom in the transportation business.

Highways, Motor Transportation, and Aviation

Evolution of Federal Policy. The advantages accruing to the public through highway construction have been so strongly emphasized in recent years that the casual observer may regard federal adventures in this field as a new development. But as far back as 1810, long before the advent of the railway, the Federal Government was spending money on a road to connect the seaboard with the Mississippi Valley and it continued the policy of lending assistance in this field until steam trains began to replace stage coaches. Then enthusiasm for highway undertakings declined and remained almost dormant until the internal combustion engine appeared. Then it revived and in 1916 Congress inaugurated a program of highway construction on an immense scale, this time with the support of the huge interests affected by motor transportation, and in a different form, namely, in close coöperation with the states. Within a few years all previous efforts had been outdistanced and a new era, of amazing significance to the social life of the entire nation, had been inaugurated.

Federal Aid to States. Through all the arrangements established by the Federal Aid Road Act of 1916 runs the coöperative idea. The Federal Government is committed to the promotion of a nation-wide net of arterial highways. It prepares specifications, supervises construction, and, except in the states in which it is the owner of a large public domain, pays fifty per cent of the costs, up to a fixed amount per mile. Subject to federal approval the states initiate plans, carry out construction, assume the balance of the outlay, and take the responsibility for continuous maintenance. In other words the Federal Government assures the application of standards and furnishes a part of the money while the states do the rest. To assure strict compliance with the terms of the law in detail the Bureau of Public Roads supervises all federal-aid highway construction.

Bus and Truck Regulation. Having participated in the construction of a national network of highways, the Federal Government faced a new problem in transportation. By 1934, it was estimated, the highway transportation system, including cost of roads and motor vehicles, represented

a capital outlay of more than $30,000,000,000—a sum greater than the book value investment in the tracks and rolling stock of steam railways. By that time highway traffic had become enormous and was accompanied by accidents, rate-cutting, discriminations in rates, and other abuses. In response to a growing public demand, Congress, by an act passed in 1935, placed interstate bus and truck carriers under the supervision of the Interstate Commerce Commission. Before starting in business such common carriers must secure certificates of convenience from the Commission, and submit to the Commission's regulations respecting rates, the issuance of securities, hours of labor, safety appliances, and services. In short, motor transportation is placed on about the same footing as rail transportation and subjected to similar principles of supervision in the public interest.

Aviation. In the field of aeronautics, the Federal Government assumes many responsibilities. It stimulates the aviation industry by purchasing large quantities of planes for the army and navy even in time of peace, and furnishes financial assistance in the form of lucrative air-mail contracts (p. 379). It maps, lights, and marks the great airways of the country. It provides emergency landing fields to take care of planes in difficulty. It licenses operators and planes and maintains a continuous inspection service to make sure that standards are upheld in the interest of safety. By an act passed in 1938 Congress created the Civil Aeronautics Authority and empowered it to regulate the rates, services, and operations of interstate aviation concerns on principles already applied to railways and motor transportation.

Present Status of Coördination in National Transportation. In recent years what is officially called "a new transportation policy" has been gradually evolved. In general it looks toward an efficient adjustment of all means of transportation with reference to meeting efficiently all national transportation needs. Its details are as follows: regulation of all modes of transportation so as to preserve the inherent advantages of each; promotion of safe, adequate, economical, and efficient services, including coöperation among the several kinds of carriers; reasonable charges for transportation services, without unjust discriminations or destructive competition among them; coöperation with the states and state officials in transportation matters under their jurisdiction; fair wages for railway workers and equitable working conditions. All the federal activities are directed "to the end of developing, coördinating, and preserving a national transportation system by water, highway, and

rail, as well as by other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." One question as to such policy remains highly controversial; namely, is railway, water, and motor transportation to be subjected to the merciless competition of the air transportation lines which owe their enormous expansion largely to federal expenditures for war and make use of landing facilities subsidized by government? Or is the air transportation business to be brought fully within the scope of the "new transportation policy" outlined above?

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CHAPTER XVIII

BUSINESS ENTERPRISE AND AGRICULTURE

The Government of the United States, as we have noted, has never been committed to the *laissez-faire* doctrine of classical economy. One of the prime purposes of the Fathers in framing the Constitution was to afford protection to American commerce and industry and, except for a brief time during the middle period of the nineteenth century when the country was dominated by Democrats under the lead of cotton planters, that purpose has been rather effectively realized. If, at the outset, agriculture received slight consideration at the hands of Congress, this was due to the fact that farmers and planters made no special demands upon the Federal Government, not to lack of power under the Constitution. As we have also seen, President Washington recommended to the first Congress the promotion of agriculture as well as commerce and manufacturing, and about the middle of the nineteenth century Congress began a long chain of enactments conceived in the interests of agriculture. Public opinion in the United States now differs over the nature and extent of government action in the spheres of commerce, industry, and agriculture rather than over the antithesis between action and no action at all respecting those branches of economy.

The Protective Tariff

The Country Committed to Protection. The two major political parties are now committed to government protection of manufacturing and agriculture through the agency of discriminating duties against competing imports from abroad. The language employed by each in stating its position varies, but the upshot is the same: the idea of free trade or tariffs for mere revenue purposes has been abandoned and protection adopted as the ruling principle despite all the rhetorical discourses on "lowering trade barriers." All imports which compete materially with American manufactures and agricultural produce are

to be taxed at the ports of entry. This means in effect that the bulk of commodities admitted free of duty consists of raw materials and other articles not produced in the United States or at least produced here only on a small scale.

Cost of Production Theory. One question remains: How shall the degree of protection—the rate of tax to be imposed on commodities imported—be discovered and determined? For more than a century each tariff bill was made by the dominant party in Congress under direct pressure from leaders in the economic undertakings affected by it. At length however a new controlling formula was evolved: "The duty fixed on each commodity shall be determined by the difference between the cost of production at home and abroad." In other words, the tariff is simply designed to place the American manufacturers on a level of equality with their foreign competitors; rates are not matters of mere opinion but can be automatically established when the difference in manufacturing costs is disclosed by scientific inquiry.

Though simple on its face, this theory raises perplexities in practice. Costs in industry depend on many variable factors, such as ingenuity in management, the size of the plant, and the modernity of the machinery. What shall be included under that head? Interest on unwise investment and overcapitalization? Expenses for lobbying, publicity, high freight rates, unproductive advertising? Assuming that these questions could be correctly answered, the Federal Government, in applying the new theory to tariffs, would have to command almost superhuman talents. If it is not to tax the American people to pay profits to bad managers, it must discover what efficiency in manufacturing really is, and that is more than some of the greatest corporation directors know. Hence the cost-of-production hypothesis does not provide exact criteria for fixing the rate to be charged on each article imported into the United States. In spite of all efforts to "take the tariff out of politics" and make it "scientific," it is still entangled in problems of human judgment, interest, and desire.

Flexibility Theory. Correlated with the cost-of-production doctrine is a second principle: the tariff must be flexible; costs of production change and provisions must be made for the continuous readjustment of rates. By the McKinley Act of 1890 the President was empowered to levy special duties on certain imports whenever he discovered that any country from which such commodities came imposed "unjust and unreasonable charges" on American goods. Since that time the creed of

"flexibility" has been growing in favor. It was incorporated in the tariff act of 1922 and with modifications in the law of 1930. Under the latter measure the function of drafting suggestions relative to raising and lowering rates, on the basis of differences in the costs of production at home and abroad, is vested in the Tariff Commission, composed of six members, not more than three from the same political party, appointed by the President and the Senate for overlapping terms.

In applying the law the Commission is to proceed upon request of the President, upon resolution of either or both houses of Congress, upon its own motion, or in its judgment upon application from an interested party. When it finds that a particular duty does not equalize the difference in the cost of producing a domestic article and similar foreign articles in the principal competing country, the Commission reports a change in the rate (not more than fifty per cent either way) to make up for the said difference. After inquiry, the Commission sends its recommendations to the President and if he approves they are made law by proclamation.

Reciprocal Trade Treaties. The principle of flexibility was reasserted in the Reciprocal Trade Act of 1934. Under this measure the President of the United States was authorized, for a period of three years, to make tariff agreements with foreign countries separately, to lower American rates not more than fifty per cent in exchange for concessions, and to put agreements into effect without submitting them to the Senate for ratification. When the Act expired in 1937 it renewed for another period of three years; it was renewed for three more years in 1940; and for two years in 1943.

In accordance with the terms of the Act, elaborate machinery was set up in the Department of State for the study of tariff regulations and negotiations were opened with many countries with a view to effecting agreements and reductions. By the close of 1937 tariff agreements had been concluded with sixteen foreign governments, including Belgium, Canada, Cuba, France, Sweden, and Switzerland; and a treaty with Great Britain was signed in 1938. By 1943 the number had been increased to twenty-seven. Under these agreements rates were lowered on many classes of commodities in exchange for concessions by the other contracting parties. As a general rule reductions to one country made under the law are extended to all other countries, unless otherwise specified, or exceptions are made, by presidential proclamation, of countries that discriminate against the United States. On the whole the reciprocal

treaties have made no very radical changes in tariff policies. Although they have awakened some protests among manufacturers and farmers, their terms have not been drastic enough to stir up a political revolt. Those who imagined that they would open wide trade channels, furnish outlets for American "surpluses," and bring prosperity were disappointed. If originally regarded in some quarters as being the opening wedge to a wholesale plan for levelling tariff schedules, the Reciprocal Act has not so worked out.

Unfair Importation Forbidden. It is not merely against lower costs of production abroad that American manufacturers are protected; the law throws up a screen by forbidding "unfair methods of competition" and "unfair acts" in the importation of commodities, the tendency of which is to destroy or injure substantially any industry efficiently operated in the United States. It is the duty of the Tariff Commission to investigate complaints coming under this head, affording the accused parties an opportunity to be heard. If convinced that the objections are well founded, the President may suspend the importation of the articles in controversy. Should a foreign nation make any "unjust discriminations" against commodities imported from the United States, the President may take certain steps in retaliation.

Tariff Commission Activities. To aid the President and American manufacturers in enforcing the protection afforded by law, the Tariff Commission is given full power to investigate the tariff relations between the United States and foreign countries, commercial treaties, economic alliances, the effect of export bounties and preferential transportation rates, and all conditions relating to competition of foreign industries with those of the United States.

The Commission is also instructed to study, at home and abroad, the cost of producing articles imported into the United States, to describe commodities imported into this country, and to ascertain selling prices of such goods. It must coöperate with other federal establishments in developing information and aid the President and the Department of State in the making of reciprocal trade agreements (p. 403). In the discharge of its duties it may summon witnesses, call for papers, and take testimony under oath. It must report to the President, the ways and means committee in the House of Representatives, and the finance committee of the Senate with respect to subjects on which they wish enlightenment.

Promotion of Foreign Commerce

Continuous Federal Interest. From its foundation the United States has promoted the foreign trade of its citizens. By an act passed in 1791 Congress extended extraordinary favors to Americans engaged in commerce with the Orient. The suppression of the Barbary pirates, the War of 1812, and the opening of China and Japan to American trade all gave signs of the Government's solicitude for the advancement of economic enterprise. One of the real reasons assigned by President McKinley for annexing the Philippine Islands was the development of new business opportunities. "Incidental to our tenure in the Philippines," he said, "is the commercial opportunity to which American statesmanship cannot be indifferent. It is just to use every legitimate means for the enlargement of American trade."

With the passage of time, the activities of the Federal Government on behalf of foreign trade grew more intensive, elaborate, and systematic. Indeed, after the opening of the twentieth century, a veritable economic revolution took place. American manufacturers had "saturated" the domestic market with goods and were searching for additional outlets in all quarters of the globe, multiplying their demands on the Government in the quest. Moreover the United States became a great creditor nation lending money by the billions in Europe, Asia, South America, and Australia. As a result political and diplomatic intervention in support of American undertakings abroad was organized into a fine art. Although the Johnson Act of 1934 forbade new loans to foreign governments in default on debts owed to the United States, the policy of using the Government of the United States to promote foreign commerce through various agencies and by various means was not abandoned. On the contrary it gathered force in national policy; and the Federal Government soon created new engines for expanding American trade in all parts of the world, even during the very height of the Global War (below, p. 408).

Collection of Information. A prerequisite to the promotion of American commerce abroad is, of course, accurate information on the economic conditions prevailing in foreign lands and the timely distribution of it among interested businessmen in the United States. This information must perforce embrace materials bearing on natural resources, commodities in use or in potential demand, wages or buying power, costs of

manufacturing, tariffs, bounties, subsidies, railway rates, and various aids to local enterprise, commercial legislation respecting alien traders and their agents, facilities for the collection of debts, various national tastes, borrowing capacity, and commodities offered in exchange for American goods. In short the advancement of trade calls for accurate, detailed, continuous pictures of every foreign country in which American goods are, or may be, sold. And these pictures are now provided by the Federal Government as far as war conditions permit. Indeed the work is done so well that its official reports on the economic conditions of many countries are more complete and contemporaneous than those provided by their own governments.

Innumerable statutes provide for the collection of these data. Even the tariff acts, designed to protect domestic industry against alien competition, thrust American scrutiny into the very centers of foreign manufacturing. The theory that rates should be based on the difference between the cost of production at home and abroad requires for its realization an examination into the wages, materials, manufacturing conditions, government subsidies, and all other factors entering into prices. And the Tariff Commission is constantly engaged in making such studies.

Consular Reports. Federal consular officers are in effect agents for the promotion of American business enterprise. On instructions from the Department of State, they make reports on the commerce and agriculture of the countries to which they are accredited. They must also furnish periodical statements on the market price of various articles of export and import in their respective regions, supply information showing where and through what channels markets may be opened for American products, and compile data respecting local rates of wages. To their general obligations are added particular duties. The Secretary of State forwards to consuls requests of the Department of Commerce for light on topics in which the latter is interested and transmits to it pertinent returns for publication and distribution.

Department of Commerce Agencies. In spite of the excellent work done by consular officers in this field, the Department of Commerce was not satisfied with their findings. So Congress created in 1927 a world-wide organization of special agents, paid attractive salaries, for the sole purpose of assisting in the advancement of American trade. As a part of the scheme, a new division known as the Foreign Commerce Service was established in the Bureau of Foreign and Domestic Commerce, and a staff of trained offices was recruited for action at home

and abroad. Their prime duties were to stimulate and forward business enterprise in the United States by investigating and reporting on commercial and industrial activities in foreign countries. In accordance with these arrangements trained investigators were dispatched to all parts of the earth. Although many of them were called home in 1933 after the business collapse, the Department of Commerce has continued to collect and disseminate information on foreign trade opportunities.

Diplomatic Activities. The collection and distribution of information respecting commodity markets are merely one phase of commercial promotion on the part of the Government. Through diplomatic and other channels it facilitates the winning of opportunities to lend American capital abroad and to sell American goods. It aids in adjusting controversies between American capitalists and foreign governments respecting investments and property. With a view to encouraging foreign governments to provide a fair field for American business interests within their several jurisdictions, certain effective provisions have been incorporated in the tariff law. Whenever any nation makes "unjust discriminations" against the importation or sale of American goods the President may retaliate (p. 404). Again, if it places the commerce of the United States directly or indirectly at a disadvantage as compared with that of other competitors, the President may also take counter measures.

Organization of Export Companies. While protecting American exporters against embarrassments abroad, the Federal Government assists them at home in organizing for the prosecution of their enterprises. By the Webb Act of 1918, Congress has exempted all combinations formed for the promotion of the export trade from the hobbles of the anti-trust laws, provided they do not restrain the business of any domestic exporter or interfere unduly with competition inside the United States. Associations created under this Act vary from loose confederations of concerns bound together by temporary agreements to great incorporated companies. "One of the primary purposes of the law," reports the Federal Trade Commission under whose jurisdiction these establishments come, "was to enable American exporters to operate on an equal footing with foreign combines. . . . The Webb law association is also in a position to present a solid front to the buying combines which might otherwise play one exporter off against another and beat the price down to an unprofitable basis."

Policies of Foreign Trade Promotion under President Franklin D. Roosevelt. Although under President Roosevelt coercive commercial

policies were officially branded as "imperialistic" and officially renounced, powerful industrial and agricultural interests still demanded the vigorous promotion of American foreign trade by the Federal Government. Indeed it was publicly declared in 1933 by Cordell Hull, the Secretary of State, that no nation could lift itself out of the depression by "its own bootstraps" and that the principal recourse for the recovery of prosperity was an expansion of foreign commerce. It was in this conviction that Secretary Hull zealously pushed operations under the Reciprocal Trade Act.

In evolving his foreign policies, President Roosevelt put forth many plans and took numerous actions directed to the advancement of American commerce in various parts of the world. In fact these plans and policies were part and parcel of his general scheme for collective security, waging war on the Axis powers, and preparing for settlements at the end of the war. At no point did they stand apart as purely commercial policies designed to promote the foreign trade of private interests in the United States. In various relations they were geared into his projects for promoting the general welfare of the world. In the Atlantic Charter, which he and Winston Churchill, the British premier, signed in 1941, in his message to Congress of that year, and in the Lend-Lease Act of 1941 as he interpreted it, President Roosevelt framed the outlines of the new American policy in foreign commerce. It includes many elements. "With due respect for their existing obligations," the signers of the Atlantic Charter agreed that they will endeavor to further the enjoyment by all states, great or small, "of access, on equal terms, to the trade and raw materials of the world which are needed for their economic prosperity." In his message to Congress in January, 1941, President Roosevelt set as an objective of American foreign policy the securing of four freedoms to all people everywhere in the world. Three pertained to freedom of speech, freedom of religious worship, and freedom from fear. To these he added: "Freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world."

Devices Proposed for Realizing the Roosevelt Commercial Policies. What are the schemes for realizing these policies? One of the agencies is the machinery for promoting foreign trade under the Reciprocal Trade Act. Another is the machinery, in the State Department, for administering the Lend-Lease Act. Under that Act Congress put at the disposal

of the President billions of dollars which he could turn over, in the form of credits or goods, to any and all countries which he deemed helpful in the defense of the United States. Whereas formerly, with Government aid and sanction, private bankers and persons lent billions abroad in the alleged interest of American commerce and industry, now the President could lend or lease many more billions in the interest of "defense." Furthermore he could fix the terms by which repayments, if any, should be made.

Through the machinery for administering the Lend-Lease Act, master agreements (not submitted to the Senate for approval) were made with various countries chosen as beneficiaries of the Act. In these agreements covenants were made as to the foreign commercial policy of the United States. In the master agreement with Great Britain, for example, it was provided that, in final settlements as to repayment of loans if any, the terms and conditions shall be such as not to burden commerce between the two countries, but to promote mutually advantageous economic relations between them and the betterment of world-wide economic relations. The two countries bound themselves to take action, in which other like-minded countries could join, directed to the expansion, by appropriate international and domestic measures, of production, employment, the exchange, and consumption of goods. Such action was also to be directed to the elimination of discriminatory treatment in international commerce, the reduction of tariffs and other trade barriers, and in general the attainment of the objectives of the Atlantic Charter.

Objections Brought against President Roosevelt's Commercial Policies. President Roosevelt had not advanced very far with his foreign trade policies, when loud protests were made in Congress and outside against the whole program. Critics said that he was setting up "a World Works Projects Administration" to finance, feed, and take care of the earth's multitudes at the expense of the United States. Senators and Representatives in Congress made two very pointed objections. One was that he had no authority whatever to use the Lend-Lease Act to promote any kind of permanent international arrangements as to tariffs, trade barriers, or other purely commercial affairs. The second was that, under the promotion program he had adopted on his own unauthorized motion, he was making fundamental agreements with other countries which of right could only be made by and with the advice and consent of the Senate, two thirds of the members present concurring.

Demands for a Return to Previous Policies. As commercial rivalry

between the United States and Great Britain continued and even intensified during the Global War, protests against President Roosevelt's policies mounted in American business circles and indeed in some official circles. Then demands arose for a return to former policies designed to promote American commercial interest in particular. It was said that the United States at the close of the Global War should insist on obtaining advantageous naval and air bases in various parts of the world and definite rights of commercial aviation. This demand savored of imperialism pure and simple. Demands were also made that the United States, in settlements under the Lend-Lease Act, should insist upon receiving large quantities of raw materials needed for American industries and obtaining numerous economic concessions or commercial privileges in other countries enjoying the benefits of the Act. In sum and substance, there are good reasons for believing, particularly in view of Republican victories in the elections of 1942 and 1943, that the foreign commercial policies announced by President Roosevelt may be materially modified if not repudiated in the coming years. Even so, it will not be easy to disentangle the commercial arrangements already made under the Lend-Lease Act. If the process of disentanglement is not accompanied by more bitterness than was stirred up by the actions of foreign governments in repudiating their debts incurred in the World War, the United States will be indeed fortunate.[1]

Promotion and Regulation of Domestic Industry

Early Non-Intervention. For a long time it was assumed in the official policy of the United States that domestic industries could take care of themselves and maintain a fair level of prosperity, if they were protected against foreign competition and subsidized in certain branches, such as merchant shipping. The assumption itself rested upon another assumption, namely, that competition among industries would hold the prices of their output down to a point near the cost of production and thus assure consumers the benefit of the lowest prices consistent with the continued operation of industries. But it was found that industries tended to combine in great trusts and corporations, to fix prices by agreement, and to drive competitors to the wall by various practices. Then Congress

[1] See *Hearings before the Committee on Foreign Affairs*, House of Representatives, 78th Congress, 1st Session, January and February, 1943. Extension of Lend-Lease Act

sought to maintain the old competitive order and give small business concerns a chance to prosper by enacting anti-trust legislation, on the theory that competition would promote production, prosperity, and employment.

Anti-Trust Legislation. The first of the anti-trust measures, the Sherman Act of 1890, is broad and general in its sweep. It forbids all contracts and combinations, in the form of trusts or otherwise, in restraint of trade or commerce among the several states, in the territories and District of Columbia, and with foreign nations. It lays open to punishment all persons who monopolize or attempt to monopolize or conspire to monopolize such commerce. By the terms of a law passed four years later, similar principles are applied to contracts and combinations in restraint of the import trade (p. 407).

With great elaboration in detail, the Clayton Anti-trust Act of 1914 sharpens the teeth of the Sherman law respecting the same spheres of commerce. It forbids discrimination in the prices charged to different purchasers of identical commodities, that is, discrimination not based on variations in quality, grade, and quantity. Likewise prohibited are concessions in the form of special reductions to customers on condition that they do not use or deal in the goods of a competitor, where the effect of such an arrangement is to lessen competition substantially.

In addition, efforts are made to prevent interlocking relations among banks, industrial corporations, and common carriers. Recognizing the fact that banks, in financing industries on a large scale, may control their management, the Clayton Act stipulates that no person may serve as a director, officer, or employee of more than one bank organized under the laws of the United States and having above five million dollars in capital, surpluses, and undivided profits. No corporation may acquire stock in another concern where the acquisition lessens competition or restrains trade. Any person injured by acts proscribed by the anti-trust measures may bring suit and recover damages.

Course of Business under Anti-Trust Legislation. Although the avowed policy of the Government of the United States was long that of dissolving and breaking up trusts and combinations in industry, practice did not entirely conform to the policy. A few great combinations were prosecuted and dissolved, but combination and concentration in industry went on in spite of the thunders of the law. By 1930 nearly one-half the business wealth of the country (apart from banking) was concentrated in the hands of 200 huge corporations and controlled by a few

thousand directors and managers.[2] Nor was the idea behind the policy of prosecution and dissolution universally accepted, even by federal officials, despite the existence of the anti-trust laws on the statute books. By way of objection many criticisms were advanced. It was said that the laws were not and could not be enforced. It was alleged that the tendency to combination was a "natural" and "inevitable" tendency of great industry, and that acceptance of this stubborn fact was required by a sense for realism in politics. It was asserted that harsh and merciless competition was not a good but an evil—an evil largely responsible for business panics and general instability of industry and employment.

Movement toward Regulation. On these and other grounds there grew up a movement to substitute "regulation" for the prosecution of trusts, or at least to temper prosecution with discrimination. This counter-movement found expression in 1914 when Congress established the Federal Trade Commission. It is true that the Commission was instructed to apply the drastic provisions of the anti-trust laws, but it was understood at the time that it was to supplement the prosecution of corporations by devices of regulation. It was authorized to prevent "any unfair method of competition" in interstate and foreign commerce by advisory and administrative operations, reserving actions in the law courts for special occasions. In the discharge of its obligations, the Commission has held numerous conferences, each composed of the representatives of a separate industry (fur, heavy sheet glass, and varnish, for example) and aided them in working out "fair-trade practices" to be executed by self-discipline in the industry. Many such "codes" of fair practices have been established by mutual agreement, but the powers of the Commission are limited and, despite official approval of such plans, parties to codes are liable to prosecution under the anti-trust laws.

Attempt at Large-Scale Regulation Blocked. Such was the posture of affairs when the great panic opened in 1929 and a cry went up for more stability in business and for a steadier employment of labor. The prosecution of large business concerns under the anti-trust laws certainly had not brought prosperity. Profoundly disturbed by the crisis Congress passed in 1933 the National Industrial Recovery Act which substituted coöperation in business, under codes drawn up for the several industries, for cut-throat competition and prosecution under the anti-trust acts. Indeed Congress conditionally suspended the anti-trust laws during the

[2] Berle and Means, *The Modern Corporation and Private Property*.

life of the Recovery Act. So a new experiment was made in the relations of the Government to business enterprise, but it soon ran into many difficulties and was definitely blocked in 1935 when the Supreme Court declared the Recovery Act unconstitutional (p. 15). President Roosevelt favored some kind of substitute but Congress decided instead, after many debates, to set up in 1938 a large committee to inquire into the monopoly problem—a committee composed of members of Congress and representatives from executive agencies. The committee, called the Temporary Committee on National Economic Policy, made an elaborate investigation of the subject and issued voluminous reports on the concentration in American business, "less-than-perfect competition," and kindred topics. In general animus it followed the "trust-busting line."

Another Season of Anti-Trust Prosecutions. In 1938 President Roosevelt appointed, to the office of Assistant Attorney General, Thurman Arnold, a professor of law at Yale University who had previously written a book poking fun at trust-busting. For five years Mr. Arnold waged a relentless war on combinations in restraint of trade, including trade unions. He operated on the theory that, by breaking up such combinations and restoring "free" competition, prosperity would be restored. In the course of five years he had instituted forty-four per cent of all the proceedings started under the anti-trust laws between 1890 and 1943. His activities produced outcries in various quarters and in 1943 he was gracefully retired to the post of associate justice in the Court of Appeals for the District of Columbia, in which post he combined judicial business with making occasional speeches against trusts and combinations in restraint of trade. On the ground of promoting war production the prosecution of trusts was relaxed with Mr. Arnold's retirement. If anything more than the repetition of previous experience in "trust busting" lay ahead, it was then impossible to discern its shape.

Financing Corporations. Although not usually associated in the public mind with the control of corporations, the Securities and Exchange Act of 1934 bears a distinct relation to stability and fair practices in industry. The major portion of American industry is owned and operated by corporations, and corporations obtain a considerable part of the money for their operations by the sale of stocks or bonds or both to the public —to investors. To permit the easy purchase and sale of securities, stock exchanges are maintained in the leading cities, the one in New York City being especially famous. If industries are to be financed according

of their methods must be maintained. If public confidence is to be maintained, then investors must be assured that their money is put to bona fide industrial uses and not channelled into the pockets of speculators, whether associated with the concerns issuing stocks and bonds or standing apart from them as mere operators in securities. This is obvious economics. Yet, according to revelations made during a Senate investigation into securities practices in 1932–34, it was evident that a large part of the securities business was concerned with mere money-making or gambling rather than with the orderly financing of industries.

Regulation of Stock Exchange Practices. It was with a view to correcting such abuses that the Act mentioned above was passed by Congress. Under this legislation any company about to offer stocks or bonds or both for sale to the public must prepare a statement showing the details of its organization, the nature of its business and management, the uses to be made of money raised by the sale of its securities, and the conditions under which the securities are being offered. Stock exchanges are subjected to regulation by the Federal Securities and Exchange Commission. The manipulation of stock prices and values is forbidden. The amount of money—margin—which an investor must put up when he buys a share of stock is fixed within certain limits. Stock exchanges are required to report to the Commission and to obey its rules made under the terms of the Act. Penalties for violations may be imposed by federal courts. By such legislation it was hoped that frenzies of speculation such as swept the country in 1928 could be avoided, and the issue and sale of securities confined largely to the economic purpose of financing industries and other enterprises, public and private.

Control over Patents and Copyrights. Intimately associated with business enterprise, although of broader significance, are the activities of the Federal Government in relation to patents, copyrights, trademarks, standards, surveys, and the collection of statistical data. Any person believing himself to be the original inventor of a machine, process, design, or certain living plants may, by application to the Patent Office in the Department of Commerce and establishment of his claims, secure a virtual monopoly over the exploitation of his achievement for a term of seventeen years. Literary and artistic products, such as books, maps, paintings, and music, can also be protected—by copyright under federal auspices—for a period of twenty-eight years, subject to the possibility of one renewal. Without express warrant from the Constitution, Congress has enacted legislation providing safeguards, in the form of registered

trademarks, for words, signs, and characters employed by manufacturers to distinguish their goods.

Collection of Business Information. Two clauses in the Constitution confer on Congress specific powers over standards and the collection of statistics. One permits it to fix the standards of weights and measures and the other to take a decennial census of the population; but legislation is by no means confined to these narrow spheres. While it has created the Bureau of Standards and authorized it to establish uniform weights and measures for varied purposes, it has entrusted to that agency other important functions. The Bureau develops "master specifications" for the materials purchased by the Government, defines a large number of commodities coming under federal regulation, and through voluntary arrangements makes its standards widely effective in private business and merchandising. Going still further afield, it aids industries in coming to agreements on the elimination of waste through the adoption of "simplified practices" relative to the size, weight, and types of commodities produced. It also promotes the invention and adoption of safety devices in industry. Through the Coast and Geodetic Survey and the Geological Survey, the Federal Government is constantly engaged in surveying and charting for innumerable purposes and has prepared a huge stock of highly useful maps pertaining to political and economic geography and to coast, river, and harbor configurations. Through the Census Bureau and other agencies it collects statistics on population, nationality, religion, occupations, wages, unemployment, agriculture, manufacturing output, and other data so indispensable to business enterprise.

Sources of Government "Interference" with Economy. No complaints are more common in politics than protests against government interference with economic affairs, as if government were a kind of strange entity apart from society that arbitrarily intervenes in economic transactions on its own motion for the mere purpose of intervening. As a matter of fact a large part of government interference springs directly out of the demands of economic interests represented by powerful lobbies in Washington (p. 136). Shippers, including manufacturers and farmers, insist on government regulation of railways so that they may have what they call fair rates and services. Anti-trust laws and prosecutions under them owe their origins in some measure to small business men who want to use the Government against their big corporative competitors. Protective tariffs are laid for the protection of American manufacturers against foreign competitors. Trade unions want the Government to help in forc-

ing collective bargaining on employers but object to being incorporated themselves and compelled to conduct the affairs of unions under federal legislation. Farmers are constantly appealing to the Government for "relief" and for laws promoting their interests. And so on throughout the long list of government "interferences." Few who protest against such interferences are without guilt in demanding some kind of aid and protection for themselves. As every civilized society has great diversity of interests, as James Madison pointed out in No. 10 of *The Federalist*, conflicts among them persist; government interferences of various kinds continue. So the real question always is in practice: What kinds of and how much interference and for whose benefit?

War Involvements in Economy. As the result of war the Government and industry have become more closely entangled than ever. Huge branches of industry are operating at capacity only on account of government demands for war materials. Old plants have been expanded and new plants, often enormous in size, have been built, wholly or in part, out of money supplied by the Government. New industries, such as the artificial rubber industry, have sprung into existence to supply materials which have been cut off from importation by war. At the close of the war the Government will own a great fleet of merchant ships, innumerable plants, and vast stocks of manufactured goods on hand; and millions of men and women released from the armed forces and war production will be seeking employment. In connection with these conditions additional problems arise in the relationships of government and economy, and it is highly probable that they will become more, rather than less, complicated. Therefore the idea of "no government interference with business" seems about as utopian as the idea of a return to the days of simple agriculture and petty handicrafts, and a discussion of the subject in such terms appears to be wholly academic.

Increasing Agricultural Production

Two Agricultural Functions. The functions of the Federal Government with respect to agriculture fall into two broad classes: (1) those connected with maintaining and increasing farm production, and (2) those designed to control production, facilitate market operations, and bring agricultural prices more closely into line with the prices of manufactured products. In the former class come the creation of new arable land by irrigation projects, the improvement of agricultural methods by

scientific research, war on pests and other foes of the farmer, and the financing of agricultural operations. The second class embraces the standardization of farm produce, the regulation of produce market practices, the promotion of coöperative marketing, the adjustment of production or acreage to market demands, and the channelling of wealth into agriculture by taxation and grants. Owing to the crisis in agriculture that opened in 1920 it is the second group of functions which has been developed and emphasized in the federal legislation of recent years.

Grants of Land to Farmers. Operating loosely on the theory that farmers and planters knew how to make the most efficient use of land in the production of wealth, the Federal Government early adopted the policy of turning its public domain as rapidly as possible into farms and plantations owned and operated by individuals. In the beginning it sold its holdings in large and small plots at low prices and then under the Homestead Act of 1862 it practically gave it away in small blocks to actual settlers. By 1890 almost all the good arable land which had come into its possession with westward expansion had been granted away to individuals and corporations under various acts of Congress. No more farms of rich soil were now to be had for the asking.[3] But there were still left on the public domain huge arid regions which could be redeemed for the plow by irrigation.

Irrigation Projects. At first the construction of the irrigation projects was left to private parties and to the states, with some national aid, but the technical difficulties and the economic uncertainty of the ventures proved to be serious deterrents. When at length it was found that local and private capital was insufficient Congress was urged to undertake the work with public funds and on a large scale. The war-cry of "make the desert bloom," at government risk, stirred the imagination, rallying several influential interests to the cause. Under tremendous pressure, Congress authorized the Secretary of the Interior in 1902 to begin the construction of irrigation projects on a large scale. Money was provided from the sale of public lands, royalties from oil leases on the national domain, and certain minor sources—to which were added receipts from the water rights on completed projects—making a kind of perpetual fund for the redemption of waste places.

Administrative duties connected with the irrigation program thus initiated are delegated to the Bureau of Reclamation in the Interior Department. Generally speaking the Bureau does not build units itself; it

[3] For land policy and railway grants, see pp. 357 ff.

lets the work on contract to private concerns and merely supervises the execution of plans in accordance with its specifications. Under its jurisdiction plants are built on favorable sites, and water is distributed to ditches in the parched soil to be reclaimed. The land thereby redeemed is sold in small plots to settlers who pay for it in installments, and so contribute to the fund for new schemes.

By 1943 the Bureau of Reclamation could report that it had in operation forty-five projects, 165 dams, and twenty-nine power plants. These facilities furnished 4,000,000 acres of irrigable land for cultivation and homes for about 1,000,000 people; and supplied water and power for about 4,000,000 people in addition to those on the irrigation projects.

Future of Irrigation. Apart from war needs and the conciliation of local interests, it is highly questionable whether the federal experiment in irrigation has proved profitable in terms of dollars and cents. On many projects the Government has lost money, especially on those which do not provide electric power for sale. With the country usually staggering under huge "surpluses" of agricultural produce in times called normal, the increase of production by irrigation can hardly be called "economical." Why should the Government encourage more production when it is paying subsidies to farmers in regions naturally watered for taking their land out of cultivation? But of course consistency is not always the controlling consideration in government and politics.

Improvement of Breeds and Crops. In connection with its function of enlarging the annual output of agricultural wealth, the Federal Government has sought to stimulate production by introducing new crops, improving old crops, and applying the scientific method to all branches of agriculture. Recognizing the fact that nature has not bestowed her favors equally on all countries, federal agents scour the world in search of plants which may prove successful in America. With materials gathered at home and abroad, the Department carries on a large amount of research work annually. Not only does it manage laboratories where plant and animal culture is studied but it owns and operates farms where new ideas may be tried out. Since this work is highly specialized it is distributed among several technical bureaus. Thus the Bureau of Animal Industry and the Bureau of Dairy Industry, through numerous subdivisions, investigate livestock problems; while the Bureau of Plant Industry, Soils, and Agricultural Engineering performs kindred duties with respect to crops.

Coöperation with State Experiment Stations. The Department how-

ever does not have sufficient facilities for performing all the necessary tests at its own establishments. Accordingly arrangements have been made for subsidizing numerous state and territorial experiment stations and tying them into a supplemental system to fill the gaps in the federal work. Owing to their wide geographical distribution, the local stations make possible the prosecution of studies under many conditions of climate and soil. And unity is given to their operations by the Office of Experiment Stations in the Department of Agriculture.

Spreading Information. The results of federal and state research are made available to the farmer through various agencies They are taught, of course, in the agricultural and mechanical colleges founded principally under the land grant act of 1862 extending national aid to the states. Since only a limited number of men and women can attend the higher institutions in person, an extension system has been evolved to reach those who live in remote places. Under a carefully planned arrangement, local agricultural colleges carry out the work with the advice, financial assistance, and supervision of the Department of Agriculture. Each year thousands of agents visit farming regions and conduct practical demonstrations in rural economics.

Control over Adulteration. But knowledge alone is not enough; those who possess it must have proper tools with which to work. In recognition of this fact the Federal Government supplements its activities in research and the distribution of information by regulating vital agricultural supplies. For example, congressional statutes forbid the importation of, and all interstate traffic in, unsound or adulterated seeds. In this way an attempt is made to keep the planting materials of the country up to a minimum level. Kindred protection is afforded to the raiser of livestock, for national legislation forbids the adulteration and misbranding of animal feed.

Natural Hazards to Agriculture

While man attempts to improve farm plants and animals, nature contrives to offset his efforts in many ways by letting loose disastrous forces. Some of these are inanimate, such as frosts, floods, or hurricanes. Others are living creatures, ranging from mountain lions to worms and fungi. Nor does nature wage her fight against the farmer unaided. Man, by introducing rapid means of transportation, has enabled the pests of the world to spread far and fast. Here too the Federal Government inter-

venes. Through an elaborate organization, it is intensively engaged in fighting the farmer's foes including those which technical development has distributed as world menaces. Now it wins; now it loses; with great uncertainty as to the future on many battle fronts.

Weather Bureau. In the struggle to protect agriculture from the ravages of the weather, the Federal Government undertakes a distinct service. It warns farmers of the approach of such unwelcome perils as frosts and storms. This function it discharges through the Weather Bureau in the Department of Commerce. Inasmuch as the probabilities of snow, rain, or frost in a given region are dependent on conditions at a distance, the Bureau has developed a nation-wide network to collect and distribute information. Federal observation stations are located at strategic points throughout the country and are tied together by a telegraph system established in coöperation with private companies. Over these lines dispatches are rushed from the recording posts to central offices where they are rapidly analyzed and used as the data for predictions. As soon as calculations are completed, forecasts are hurried out to many distribution points at which they are made available to the general public.

War on Destructive Animals and Pests. Nature also attacks agriculture with living things. The larger creatures—wild beasts—cause a huge economic loss each year to the farmers of the United States through depredations. Some animals, wild cats and wolves for example, devour livestock. Others, such as rats and gophers, live on plant crops. Together these flesh and vegetable eaters create a serious problem owing to their modes of operation. Some of them act singly. Others descend in great swarms, stripping large areas of crops or decimating flocks almost overnight.

Through the Fish and Wildlife Service in the Department of the Interior, the Federal Government comes to the aid of the farmer in his battle with destructive animals. The Service supervises campaigns against such pests by means of an experienced field force working with local agencies. By special arrangements states, counties, producers, and other interested parties not only coöperate in action but often meet the major share of the expenses of eradicating wild beasts in their respective neighborhoods.

Agencies for Action. Going down the scale in size from wild animals to insects, fungi, and bacteria, we find other enemies of the farmer in great profusion. All along the line, the advance on the farmer's little foes

is led by the Federal Government. In the Department of Agriculture, two units are responsible for dealing with separate phases of the problem. The first of these, the Bureau of Entomology and Plant Quarantine, is devoted to research in the economic relations of insects to farms. The second, the Bureau of Plant Industry, Soils, and Agricultural Engineering studies normal crops and searches for methods of dealing with injurious plant growths which assail them. After appropriate means of destruction are developed and thoroughly tested, they are described in pamphlets and made available to farmers. The task of carrying the results of laboratory research into the field where they can be made effective in the war on the farmer's foes is also largely a federal function. If a plague can be localized, then steps to eradicate it may be taken with fair prospects of success.

Government Financing of Agriculture

Decline in Demand and Prices. Bare land and the bare hands of labor are not enough to produce commodities on the soil. Nor is the produce of the soil always marketed easily at "fair" prices through the activities of commission merchants. In fact the problem of finding "good" markets for American agricultural produce at home or abroad became increasingly difficult after the opening of the twentieth century and the proportion of agricultural produce entering into the total export from the United States began to sink in the scale. For a time during the World War (1914–18) a release from this throttling process was afforded by the European demand for American agricultural produce, but after the war agriculture quickly dropped into a severe depression which continued unabated during the industrial "boom" and then was intensified by the industrial collapse after 1929. In these circumstances the Federal Government entered into new relations with agriculture.

First Steps in Federal Financing. Although the Government had long assisted industry by tariffs, bounties, subsidies, grants, and outright gifts, it had left agriculture to finance itself through borrowings from banks and private money lenders, often at high, even usurious, rates of interest. Frequently farmers without land, yet willing and competent to work land, could not secure farms on which to employ their talents. Sometimes farmers owning land under mortgage were unable to meet the high interest charges on their loans. This situation was recognized in 1916, during the administration of President Wilson, and Congress es-

tablished a system of land banks designed to provide money for farmers, on mortgages, at low rates of interest. Later this scheme was supplemented by banks for extending short-term credit to farmers, secured by crops and livestock on the way to the market. Such was the system prevailing when the great depression began in 1929 and farmers by the millions faced bankruptcy.

Later Measures. To cope with the now more desperate plight of farmers, Congress began in 1933 to reorganize and extend the whole farm credit system. A mere description of the new organization would occupy many pages of this volume, but its principal functions may be set forth briefly. At the head stands the Farm Credit Administration. The country is laid out into twelve districts, each with a Land Bank and various lending agencies. Old mortgages are being called in and new mortgages at lower interest rates are being substituted. In this way an effort is made to slow down and reverse the process of foreclosure under which farmers by the thousands were losing their homesteads. New money is being lent on mortgage. Money is also lent indirectly, through savings banks, coöperative associations, and other agencies, to farmers to provide short-term funds for production purposes: raising crops and livestock, for example. Finally, loans are made to farmers' coöperative associations for the purpose of enabling them to construct facilities for storing and marketing produce and to market their goods by credit extension—by selling on time payments.

Trends toward Federal Farm Banking. But certain trends appear in this development. The Federal Government is divorcing a large part of farm financing from private banks and money lenders, by supplying long-term and short-term credits through its own agencies. It is encouraging farmers to organize local loan associations in which they assume a certain responsibility for the local operations of federal lending agencies. It is strengthening farmers' coöperative societies formed to control marketing operations, to restrain individual farmers from dumping crops on the market at ruinous prices, and to introduce an orderly procedure into the grading, standardizing, and selling of farm produce.

Regulating Market Operations

Recognizing the importance of marketing for farmers, Congress has enacted many statutes designed to curb speculation on produce exchanges, provide accurate knowledge of market conditions, standardize

farm commodities according to quality grades, and regulate commission merchants.

Control over Dealings in Farm Produce. Among the market practices from which abuses arose was that of making contracts to buy or sell goods at a given price on some date fixed in the future—a practice known as dealing in "futures." The first attempt on the part of the Federal Government to control "futures" was in connection with cotton. In 1916 Congress passed the Cotton Futures Act, levying an internal revenue tax of two cents a pound on all contracts for delivery of cotton at a future date, unless they follow a prescribed form. This law however merely insured fairness in trading; it did not halt any overspeculation that might injure the farmer.

A more stringent policy was adopted with reference to grain. By the Grain Futures Act passed in 1922 Congress declared that "transactions in grain involving the sale thereof for future delivery . . . are affected with a national public interest" and placed all such transactions under federal control. This measure was amended and expanded in 1936 by the Commodity Exchange Act. The latter statute created a Commodity Exchange Commission, merged in the Food Distribution Administration in 1942, and gave it a wide and drastic power over all exchanges trading in wheat, cotton, rice, corn, oats, barley, butter, eggs, Irish potatoes, and other commodities. In spirit the Act was designed to stop mere speculation in produce, to prevent unfair practices on exchanges, and to assure to farmers markets controlled by legitimate supply and demand, rather than by cliques and individuals engaged in "plunging" and creating disorders for personal advantage.

Collection and Distribution of Market News. The prosperity of farmers acting singly or in groups depends to some extent on their knowledge of market conditions and their ability to take advantage of the right opportunities for disposing of their crops. At one time information respecting the demand for commodities was obtained by a short trip to town, but today conditions have changed. With the problem of long-distance transportation successfully solved, the grower found himself confronted by a truly bewildering array of buyers, both large and small, scattered throughout the United States and foreign lands. In order that farmers and their associations might keep in touch with the new complexities in demand and supply, something more was necessary than corner store reports and newspaper accounts arriving from a few scattered points one to three days late.

There was need for nation-wide market and crop news emanating from some unbiased agency not interested in making money through fraudulent reports. Moved by the insistence of farmers the Federal Government at length established an information service to meet their demand, under the Bureau of Agricultural Economics in the Department of Agriculture. This Bureau keeps a careful watch on growing crops, collects data on the areas under cultivation, estimates their probable yield, and makes other pertinent calculations. Its finding are then distributed in the form of market news and reports. The Bureau also follows produce to the doors of buyers. Arrivals of carload lots in the several trading centers, prices of commodities at shipping and receiving points, and many other significant facts are ascertained and reported.

Standardization of Produce. Efficient marketing and fair price determination cannot proceed at random; physical standards for commodities are necessary if buyers and sellers are to know what they are talking about. Agricultural produce is in no sense uniform. Apples may be large or small, sweet or sour, red or yellow, juicy or pulpy, to mention a few variables in a single article. A customer buying apples in a store can judge of their quality by actual examination. But the situation is very different when a New York dealer orders a carload from an Oregon grower whose stock of goods cannot be inspected but can only be described in words. Here the merchant and the producer must have some sort of understanding as to the nature of the commodity in question; otherwise the shipment of an inferior quality is possible, resulting in ill-will and confusion.

Out of the extension of the market from the community to the world and out of bitter experience arose a demand for national produce standards, scientifically established and open to all. Responding to a justifiable agitation, the Department of Agriculture has undertaken, according to the terms of various statutes, the classification of farm produce. In preparing rules in this field it acts with caution, subjecting them to a process of trial and error extending over several years before making them obligatory. After principles of classification have reached an advanced stage of development it is then possible to make them compulsory, wiping out all conflicting private canons.

Control over Marketing Perishable Produce. Misunderstanding as to the grades of farm produce is not the only difficulty arising out of the distance which modern transportation has created between producer and consumer. For a long time it was a common practice for unscrupu-

lous commission merchants to make false returns relative to the condition in which perishable commodities reached their destination. Thus a dealer, after receiving a shipment, might write back to the farmer who sent it and tell him that the goods had come in a state of decay which made it necessary to throw them away, whereas actually nothing was wrong and they had been sold at regular prices. Again, a buyer might declare that a consignment had spoiled when in reality it was all right but had arrived during a "glut" in the market which meant a loss instead of a profit, if duly paid for. In either case the grower did not relish a long and expensive trip to headquarters to check up and a trickster could usually assume that the victim would not appear.

Against evil practices of this nature Congress launched in 1927 the Produce Agency Act which forbids dealers in their capacity as agents to throw away, without just cause, perishable goods received from other states or to make false statements relative to the condition of such commodities on arrival. Producers believing themselves defrauded may now secure an investigation at any point by writing or telegraphing to the Department of Agriculture. On an appeal made in due course the Department will institute an inquiry and furnish a certificate setting forth the facts in the case.

A still closer federal control over marketing is assured by the Perishable Agricultural Commodities Act. Under this law no person can carry on a business as commission merchant, dealer, or broker in perishable agricultural commodities entering interstate and foreign commerce, without a license issued by the Secretary of Agriculture. In granting such privileges the Secretary must have a sharp eye for character and responsibility. Unfair conduct in this branch of business is elaborately defined and forbidden. Any party aggrieved by alleged unfair practices may apply to the Secretary for relief and damages, which may be allowed after hearing and inquiry. When he finds that holders of licenses have been guilty of violating the law, he may revoke their permits.

Control over Warehousing and Packing. In its efforts to standardize and organize the whole process of marketing produce, Congress has also provided, under the Warehouse Act, for the regulation of concerns engaged in the storage of agricultural commodities entering interstate or foreign commerce. The Federal Government has also undertaken to regulate the marketing of meat products in great detail. Under the Packers and Stockyards Act the supervision of certain facilities employed in interstate and foreign commerce is vested in the Department of Agri-

culture. Packers coming within the legal classification are subject to severe penalties when found guilty of attempts to monopolize business, manipulate prices, or discriminate unjustly against any person. In all cases involving stockyard rates, practices, or regulations which are alleged to be unjust, unreasonable, or discriminatory, the Secretary enjoys the power of preliminary review and may issue appropriate orders.

Coöperative Planning and Control in Agriculture

Problems of Farm Prices. It is one thing to finance farmers so that they can buy land, implements, and seeds, engage in production, grade and standardize their products, and market them in an orderly or cooperative fashion. It is quite another thing to find markets or purchasers for their products at prices yielding a fair return for the labor and capital employed in production. In times of depression, manufacturers may curtail their production, stop machines, and turn their workers out in the streets to shift for themselves or live on the grants of public and private relief. Thus they adjust their production more or less roughly to the demands of the market. Farmers cannot do this so readily. They furnish most of their own labor and they cannot always turn themselves off their farms to join dole lines in cities. Moreover farmers are not organized in great trusts and combinations capable of taking concerted action in maintaining prices and curtailing production. On the contrary, when prices fall they tend to produce more goods with a view to maintaining their former incomes in money. This situation has led to the discussion and adoption of plans for (1) controlling farm production, (2) putting the price levels of farm produce on a parity with price levels for manufactured goods, and (3) maintaining the annual income of farmers. Such operations are defended as acts of "justice to farmers," "saving farm homesteads," and channelling buying power into the hands of the farming population.

Acts for Controlling Production on Farms. The first comprehensive plan for effecting "a parity" between industry and agriculture was enacted into law under the administration of President Hoover—the Agricultural Marketing Act of 1929. As the depression in business and agriculture deepened, the principles of this Act were extended and supplemented by the Agricultural Adjustment Act of 1933 which was designed to cut down supplies by curtailing the production of certain great staples. When the latter act was declared unconstitutional by the Supreme Court

in 1936, Congress quickly passed the Soil Conservation Act intended to accomplish similar results by another process. Two years later, after the Supreme Court had apparently modified its views, a new Agricultural Adjustment Act was passed, giving an indication that the policy of crop control was to be continued. Administration of these and other measures reveals a resolve on the part of the Federal Government to maintain and carry out a comprehensive agricultural program consisting of several clear-cut and positive elements.

Crop Control and "the Ever Normal Granary." Among the outstanding features of the agricultural program are measures designed to control the production of certain staples and adjust it to national and export sales. Loans are made to farmers on crops for the purpose of encouraging production up to certain levels and securing the stability of an ever normal granary based on calculations as to the needs and requirements of the market, domestic and foreign. When the amount of any one of certain staple commodities such as cotton, corn, wheat, rice, sugar and tobacco, reaches the prescribed level, then the producers of that commodity may, by a two-thirds vote, arrange with the Department of Agriculture for a curtailment of the next crop. In this case each producer is given a production quota, that is, he is assigned an acreage of that commodity which he may produce—an acreage based on his average production per acre over a certain number of previous years. If he complies with the terms of the allotment, he receives a benefit payment proportioned, within limits, to the extent of his crop reduction. Under this arrangement the expansion or contraction of agricultural production is more or less adjusted to market demands—according to decisions of the War Food Administration as to emergency needs or other material increases in the demand for produce.

Conservation of the Soil. Prior to 1933 conservation was directed chiefly to natural resources under government control, and did not affect the enormous wastage of private land by bad tillage and erosion. From this policy of *laissez faire* the Soil Conservation Act of 1935 marked a radical departure in that it provided for a national soil conservation program under the Soil Conservation Service in the Department of Agriculture. The program is carried out in coöperation with state governments and farmers. Under the Act more than 800 conservation districts have been organized, embracing nearly 500,000,000 acres of land. In these districts farmers coöperate with federal and state agencies in preventing soil erosion, controlling floods, and promoting for-

estry. Besides the Service has bought up about 10,000,000 acres of eroded or submarginal land and is putting it to forest, grazing, and other uses.

Federal initiative is supplemented by state and individual initiative. Acting on a recommendation from President Roosevelt in 1937 many states have enacted a model zoning law drawn up by the Department of Agriculture. This law permits the farmers within a given natural water shed or drainage area to form a soil conservation district. At their own expense members of the district may apply common measures to stop soil erosion and otherwise conserve their resources. This prevents a few individuals from following tillage methods that injure their neighbors as well as themselves, and introduces the community spirit into conservation.

The Problem of Tenancy. Human life on the farm and land tenure, no less than crop control and soil erosion, began to receive serious consideration in the formation of agricultural policy after 1933. Between 1880 and 1930 the percentage of all farmers who were tenants, not owners, rose from 25.6 to 42.4 and many nominal owners became heavily indebted or stranded on marginal or wasted land unfit to sustain a decent family life. Taking account of this alarming tendency, Congress passed in 1937 the Farm Tenant Act, which empowers the Secretary of Agriculture to assist tenants and farm laborers in acquiring farms of their own on easy terms and subject to strict conditions as to usage and sale. The Secretary may also lend them money to get started on their way. The same Act authorizes a large appropriation for the purchase and retirement of huge areas of submarginal land that cannot be tilled to advantage, thereby correcting maladjustments in land use. By 1944 about 35,000 farmers had received loans for the purchase of small farms.

Coöperation among Farmers. By law the Secretary of Agriculture is required to encourage the formation of coöperative societies among farmers for the purpose of stabilizing market operations, effecting soil conservation, and promoting mutual aid in carrying out farm measures. Money is lent to coöperative marketing associations; through the Federal Farm Bureau, with its agents in every county, meetings are organized for the discussion of problems in the production of the various crops; and to a large extent the enforcement of crop control laws is carried out with the counsel and advice of the producers concerned. As a result farmers' organizations now rival trade unions in membership and power. There are local and national associations of producers in each branch and these are crowned by the National Grange and the National

Farm Bureau Federation. Although more or less independent, all work in connection with representatives of the Federal Government in the formulation and execution of farm policies and exert great influence in state and national politics.

Summary. The record of recent events marks the close of the old-fashioned farming according to which each family raised what it pleased, as much as it could or wished to raise, dumped its produce on the market at will, exploited the soil, borrowed money recklessly, and in an increasing number of cases dropped from farm ownership into tenancy or worse. The fall of agricultural prices after 1920 and the wastage of soil called for new policies and for concerted action. Now the Federal Government, which once gave land away to farmers and feverishly stimulated production, is working in conjunction with states and with farmers themselves to stabilize production on the land, to adjust production to consumers' needs, to foster coöperative and orderly marketing, to encourage the conservation and wise use of the soil, and to raise the standards of life in huge areas of poverty and degradation.

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CHAPTER XIX

LABOR AND IMMIGRATION

Rise of Organized Labor. Like many other functions assumed by the Federal Government, those pertaining to labor have grown out of economic developments rather than express authorizations of the Constitution. When that instrument was framed, mechanics and artisans had formed unions in some of the leading cities, but these little groups were not yet federated on a national scale. In the main their activities were confined within state boundaries and were subject to state jurisdiction. At that time furthermore labor did not play an important rôle in public affairs. Its existence is not mentioned in the fundamental law of the land, except perhaps in the provision for the return of runaway servants. Only after the construction of railway lines and the formation of huge industrial corporations on a nation-wide basis did labor take the continent for its sphere, by creating associations of the local unions in the great industries. Not until 1886, following several tentative experiments, was a general fusion of crafts firmly effected by the establishment of the American Federation of Labor; not until 1938 was the Congress of Industrial Organizations formally constituted.

Contacts of Labor and Government. In all its undertakings designed to raise wages, reduce hours, and improve working conditions, organized labor early found points of contact with the Federal Government. In its efforts to uphold American standards of living, it encountered immigration, subject entirely to federal jurisdiction. In dealing with concerns engaged in business extending beyond the boundaries of a single state, particularly in carrying on strikes, labor came under those clauses of the Constitution which confer upon Congress the power to regulate interstate commerce, to establish post offices and post roads, and to provide agencies, including troops, for the enforcement of federal law. Since the Federal Government has long been a large employer of labor itself, its standards of hours and wages have affected trade unions. Congress can appropriate money for purposes not mentioned in the Constitution—

the promotion of business enterprise, agriculture, and education, for example; so organized labor has appealed for assistance, especially in the collection of data bearing on wages, employment, and other industrial matters, in making known opportunities for employment, in coping with the distresses of unemployment, and in providing security for labor. When, under heavy pressure from business interests, Congress gave industries the power to make codes of fair practices by the National Industrial Recovery Act of 1933 (p. 412), labor insisted that the right of collective bargaining should be recognized. After the Supreme Court declared the Act unconstitutional, labor pressed for and secured other federal legislation respecting the right of collective bargaining, wages, hours, and other working conditions—all on the theory that labor relations were not purely local but directly affected interstate commerce—impeded or facilitated "the flow" of such commerce.

Immigration

Reason for Labor Opposition. The prime force in the movement for the restriction of immigration has been organized labor. It has not been alone in its activities in this relation but it has been persistent and effective in its exactions. And the reason is not difficult to find. The raising of wages by concerted efforts and the maintenance of standards depend very largely on control over the number of applicants available for employment. Whenever organized labor started a large-scale operation to increase wages or prevent reductions, it soon learned that its measures could be defeated by a tremendous influx of foreign workers who were willing to accept low wages. Again and again labor leaders built up strong unions only to find their projects nullified by a new wave of immigration.

Early Federal Policy. For nearly a hundred years the Federal Government kept the gates of the nation open to all comers. Manufacturers, hoping to keep wages down, and land speculators, seeking farmers to buy their holdings, approved and supported this policy. Indeed in 1864 Congress authorized the importation of laborers in large masses bound by contract to work for specific employers. And under this legislation corporations were formed to collect workers abroad for the American market. Although the law was soon repealed the practices sanctioned by it were long continued.

Against this free and easy immigration program American trade unions

began to make vigorous protests shortly after the Civil War. With growing determination they called for the abolition of the contract labor system, the total exclusion of Orientals, and the limitation of immigration from the Old World. In time other citizens joined in demanding a restriction of immigration and as a result bill after bill has been enacted by Congress. In their present form these statutes entirely exclude from the United States five broad classes of immigrants.

Classes of Immigrants Excluded. In the first place, contract laborers are denied admission. This class embraces all persons who have been induced to migrate to this country by promises of employment, or in consequence of agreements to perform labor in this country; and also persons who have come in response to advertisements for laborers printed abroad. The provisions of the law however do not apply to members of learned professions, ministers, nurses, or entertainers such as singers and actors, even though they come to America under previous arrangements. And the Secretary of Labor is empowered to permit the immigration of skilled artisans bound by agreements if the supply of similar workers in the United States is inadequate.

A second group of immigrants absolutely barred embraces persons from large specified regions of Asia and adjacent islands, including Japanese, Hindus, and other Oriental nationalities.[1] This measure of prohibition applies not only to laborers but all classes except "government officers, ministers or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students, authors, artists, merchants, and travelers for curiosity or pleasure," and their legal wives and children under sixteen. But if any member of the exempted group fails to maintain the status which entitles him to residence here, he may be deported.

A third class of immigrants denied admission embraces illiterates. An act of Congress passed in 1917 excludes all aliens over sixteen years of age, physically capable of reading, who cannot read some language or dialect. There are a few saving exceptions, but on the whole the test is rigidly applied.

Shifting from grounds directly involving labor conditions to the realm

[1] From 1882 to 1943 Chinese laborers were also entirely excluded; but in the latter year, Congress, in a gesture of friendship to China, put Chinese immigration on a quota basis (below, p. 434) and allowed the immigration of 105 Chinese a year. All members of this quota however must comply with the literacy and other tests applied to immigrants from other quota countries. In practice the new law will admit few, if any, Chinese laborers; and thus as far as American labor is concerned it will make little difference in the previous state of things.

of opinion, Congress has forbidden the entry of immigrants who harbor "dangerous thoughts." In this category come anarchists and all people who advise, advocate, or teach opposition to organized government, or who are affiliated with any society devoted to that kind of propaganda. Likewise rejected are aliens who write or distribute, or belong to associations engaged in publishing and circulating, printed matter advocating opposition to organized government, or the overthrow by force of the Federal Government or all forms of law, or the unlawful assault and killing of officers of any established government or the unlawful injury of property or sabotage.

Based on special considerations but still limiting the immigration of low grade labor are the provisions of law which debar, as undesirable, aliens who have certain physical or moral disabilities or are likely to become public charges. To this division belong all persons afflicted with epilepsy, tuberculosis, or any loathsome or dangerous contagious disease or who are of unsound mind, or suffer from physical or mental defects likely to affect adversely their power to earn a living. Aliens shut out on moral grounds include criminals, habitual drunkards, polygamists, and prostitutes.

All Immigration Limited (1924). Going beyond the exclusion of special nationalities and classes, the American Federation of Labor demanded a still more drastic cut in the quantity as well as the quality of immigrants. In such efforts it was aided more zealously than ever by citizens interested in Americanization and in holding down the growth of the population. As a result of pressure from many directions Congress enacted in 1924 a sweeping measure which, as amended and applied, limits to not more than 153,714 the total number of immigrants from Europe and certain parts of the Americas who may enter the United States annually.

The System of Quotas. In distributing this number among the various countries entitled to send emigrants, Congress has provided an elaborate quota system. With certain exceptions the total population of the continental United States for 1920 was divided into classes according to "national origins." On this basis an estimate was made showing the proportion which the people of English, German, Italian, and other national stocks in the United States respectively bore to the whole number of inhabitants included in the above census reckoning.

Thereupon each of the above countries from which immigrants may come was assigned an annual quota. This figure is the number bearing the same relation to one hundred fifty thousand which the number of

inhabitants of the particular national origin in the United States bears to the total population enumerated as just indicated—with the exception that no quota is to be less than one hundred.

Exceptions. Certain important exceptions must be noted. Two classes of aliens are admitted without reference to the numerical restriction. One group, defined as non-immigrant, is composed of government officials with their families and assistants; aliens, including seamen on duty, temporarily visiting the United States; legally admitted aliens who must pass through a foreign country while in transit from one part of the United States to another; and aliens carrying on trade provided for by existing treaties. The other group, defined as "non-quota immigrants," is composed of unmarried minor children and wives of citizens of the United States and husbands of American citizens married previous to June 1, 1928; lawfully admitted immigrants returning to America from a visit abroad; students over fifteen years old entering the country for study at an institution officially approved; former women citizens who lost their citizenship by marriage prior to September 22, 1922, but who are now unmarried.

Entirely outside of the quota system are all immigrants born in Canada, Newfoundland, Mexico, Cuba, Haiti, the Dominican Republic, the Canal Zone, or any independent country of Central or South America and their wives and unmarried children under eighteen. In spite of the strong demand for additional limitations these persons may enter the United States, if they otherwise comply with immigration laws.

Present Policy. It is evident from this legislation that the wide-open door of "the asylum for the oppressed of all nations" is definitely closed, marking a new stage in the economy of the world. It is also evident that the immigration quotas favor Great Britain and Ireland above all, and then Germany, for according to the present allotment these countries have about two-thirds of the quota immigrants admissible. In fact both the literacy test and the quota system, combined with specific exclusions, were designed to discriminate against immigrants from eastern and southern Europe and from most Oriental regions (p. 433).

Administration of Immigration Laws. For many years the enforcement of immigration legislation was in the hands of agencies in the Department of Labor, as if to emphasize the interest of American labor in the restriction of immigration. In 1940 however this responsibility was shifted to the Department of Justice. To some extent the shift was due to growing agitations against the influx of foreigners supposed to be en-

gaged in revolutionary or espionage activities dangerous to American security and institutions, particularly communists; perhaps to a less extent, against fascists. By the transfer of the Immigration and Naturalization Service to the Department of Justice this branch of law enforcement was brought into closer operating relations with the police and her investigational agencies of that Department.

The Commissioner of the Service has complete charge of administering all the laws bearing on the admission, exclusion, naturalization, and deportation of aliens. He inquires into violations of the laws and recommends prosecutions whenever they are deemed advisable. He supervises naturalization work in the specific courts authorized to naturalize aliens. To facilitate these operations, the country is laid out into numerous districts, each with its headquarters and staff of local officials. At each port of entry is stationed a commissioner of immigration and a staff of examining and record-keeping officials.

Inspection of Immigrants. Formerly the work of examining immigrants was conducted entirely at American ports, with the result that great hardships were inflicted on people who had to be sent back as legally unqualified. Here was an evil which the Government finally attacked by stationing special officers at its consulates in Great Britain and Ireland for the purpose of making preliminary inquiries into the fitness of applicants for admission. Proving successful in this instance, the practice was extended to several other countries, effecting a substantial reduction in the number of immigrants rejected on arrival in the United States.

After running the gantlet of inspectors in his native land and a scrutiny of his papers at the entry port, the immigrant is questioned with regard to his probable usefulness as an American citizen. If for any reason he is rejected by the local authorities at an American port of entry, he may appeal to the Commissioner of Immigration and Naturalization in Washington. To assist the Commissioner in hearing appeals, a Board of Immigration Appeals has been established in the Office of the Attorney General for the purpose of reviewing appeals in exclusion and deportation cases. If matters of laws, as distinguished from mere facts, are in dispute a person excluded or ordered deported may carry his case into the federal courts.

Checks on Illegal Entry. Immigrants who find themselves debarred by the numerous regulations do not always give up the struggle for entry. They may try some ingenious scheme for worming their way into the

United States. Sometimes they make use of "loopholes" in the law; for instance, that proviso which permits alien seamen to go ashore while their vessels are in port. Once on land sailors bent on settling in the United States "disappear" in the multitude. Not all aliens however can successfully pose as seamen, students, ministers, or other privileged immigrants for purposes of taking advantage of some quirk in the statutes. But such invaders may be smuggled in. Owing to the extent of our boundaries, intruders are frequently successful in escaping frontier guards. Even the border patrol created in 1924 as a special agency of the Immigration Service to check illegal entry is not strong enough to defeat all the stratagems of interlopers.

Deportation. In view of such circumstances Congress has vested in the Commissioner of Immigration a broad power to deport aliens who gain illegal admission to the United States. To this duty it has added full authority to expel alien revolutionists, anarchists, advocates of sabotage, violence, and assassination, and all foreigners who aid and abet them. Upon aliens arrested and held for deportation is imposed the burden of showing that they are not in the United States in violation of law. With respect to the facts in such cases the decisions of the immigration authorities are final. Only when issues are raised involving an interpretation of the law and constitutional rights will the courts review the findings of the immigration authorities.

Employment and the Law

Unemployment a Constant Problem. Although immigration is limited and guarded, the problem of unemployment in an overcrowded market has not been eliminated. On the contrary, owing partly to the growth of labor-saving machinery, there is nearly always present a large body of men and women out of work—at least temporarily, even in times of war booms. Coupled with this technical displacement of labor are the disturbances created by business depressions, the movement of farmers to the city, and the increasing number of young people seeking opportunities in the urban centers. Any quest for a solution of the problem thus raised runs into the field of legislation.

Elimination of Child Labor. With a view to restricting the labor supply, as well as on humanitarian grounds, trade unions have generally supported proposals of law designed to keep children out of mines, factories, and offices until they reach a fair degree of maturity. Jurisdiction

over the matter belongs however to the states, at least primarily, and many of them refuse to adopt high standards in this relation, thus making it difficult for businessmen in the advanced sections to meet the competition of backward regions. After a season of agitation advocates of child-labor prohibition induced Congress in 1916 to attempt the establishment of a national standard in certain fundamental industries, by excluding from interstate commerce the goods of concerns which employed children under a certain age limit; but the law was declared unconstitutional by the Supreme Court. A later act directed to the same object, this time in the form of a tax, was likewise held invalid (p. 262). As a next resort, an amendment to the Constitution was passed by Congress in 1924 but it failed to secure ratification. Despite this setback however Congress sought to ban child labor in many branches of industry by the National Wages and Hours Act of 1938 (p. 443) and in other ways.

Employment Service. To assist in bringing workers and opportunities together, Congress has established the United States Employment Service. This Service was first set up in the Department of Labor. In 1939 it was transferred to the Federal Security Agency and in 1942 it was transferred to the War Manpower Commission for the purpose of aiding in the more efficient use of manpower for war and war production. The ordinary functions of the Service are (1) to coöperate with state employment agencies in securing a registration of persons in need of employment and of employers seeking workers of various types and skills; and (2) to facilitate the movement of unemployed workers to places of employment. For purposes of easy coöperation with local authorities in its work the Service maintains a headquarters in each state. In addition to these duties the Service is responsible for supervising the administration of unemployment compensation laws (p. 471).

Emergency Employment Measures. One of the characteristics of modern industrial development has been the existence of unemployment on some scale even in prosperous times and large-scale unemployment in times of business depressions. Until the opening of the great depression in 1929 it was generally held that the Federal Government had no responsibility for coping with unemployment by direct action. Then a new formula gained popular currency in political and economic circles: If private industry cannot provide employment for labor, the Government should or will take measures of some kind to assure such provi-

sion. Under this theory the Government first resorted to emergency measures in 1933, on the assumption that within a short time business would revive and once more absorb the unemployed in private enterprises. With a view to "priming the pump," it allocated huge sums of money to be used in federal undertakings, and to be lent in part and given in part to state and local governments for their public works enterprises. It sought to stimulate private industry through the National Recovery Administration (p. 351). For the purpose of putting four million people at work immediately it organized the Civil Works Administration to employ them on temporary emergency undertakings. It placed more than 300,000 young men in the Civilian Conservation Corps' camps throughout the country and set them to building forest trails, planting trees, and otherwise improving public forests and parks.

Systematic Employment Measures. As it became painfully evident that private industry was not absorbing a large body of unemployed workers, the Roosevelt administration organized in 1935 a regular agency, the Works Progress Administration, to furnish direct employment to millions, granted it huge appropriations, and authorized it to formulate work projects for unemployed persons, according to their training, experience, and aptitudes—ranging from casual laborers to artists, musicians, actors, and writers. From year to year this Administration continued to provide opportunities for men and women who could find no room for themselves in private enterprise. For younger people, the National Youth Administration (abolished in 1943) developed opportunities for education and training in established institutions of learning. These measures were supplemented by the Social Security Act of 1935 which contained a limited provision for insuring certain classes of workers against unemployment for brief periods of time (p. 471).

The Problem as Yet Unsolved. None of these measures, whether emergency or systematic, came anywhere near the goal of "full employment." Millions were still unemployed in 1937. Not until the war boom of 1939 began did the "prosperity just around the corner" return. Even after millions were drawn into the armed forces and war industries, some unemployment existed in the numerous "non-essential" trades; and fear that peace would be followed by another crash, accompanied by large-scale unemployment, haunted politicians, industrial managers, labor leaders, and masses of workers in all branches of economic enterprise.

Working Conditions

Legislation on Safety and Welfare. Vital as are the problems growing out of unemployment, the conditions under which the daily tasks of labor are performed are certainly of equal concern. Although Congress has jurisdiction only over enterprises operating in interstate and foreign commerce, it has enacted many significant statutes, ranging from the regulation of the sailor's diet to restrictions on the hours of labor for train dispatchers. Its legislation in this field is supplemented by measures pertaining to safety in particular industries—to that protection for life and limb so essential in the age of dangerous machinery, inflammable materials, and explosive chemicals (pp. 461 ff.).

Railway Workers. With an eye to the interests of the public no less than the welfare of labor, Congress has applied certain regulations to nearly all common carriers under its control. It has, for example, forbidden railways normally to require or permit their employees to remain on duty for more than sixteen consecutive hours, or to return to work after such a stretch of labor before enjoying at least ten hours of rest. It has also provided that dispatchers and other workers concerned with directing the movement of trains shall not be allowed to serve for more than nine hours in any twenty-four hour period in places operated continuously, nor more than thirteen hours in places operated only in daytime, save in emergencies. This legislation was primarily due to revelations concerning accidents, causing great loss of life among passengers, that had occurred largely because weary workmen had fallen asleep at their posts.

Quite different in origin is the famous Adamson Act of 1916, driven through Congress by the railway unions. This law prescribes that eight hours shall be deemed a day's work and the measure of a day's work for the purpose of reckoning the compensation of all employees on interstate railways (with a few exceptions), who are actually engaged in the operation of trains. While considerations of public safety entered into the enactment of the statute in question, its prime purpose was to fix an eight-hour day for trainmen—to establish a fundamental trade union standard as the law of the land in this field.

Protection of Seamen. As a result of demands scarcely less insistent from the Seamen's Union, Congress has prescribed certain labor conditions for vessels coming within its jurisdiction. Since seamen must live on shipboard and cannot quit in mid-ocean if they are dissatisfied,

they could with even more propriety call upon the Federal Government for aid in fixing minimum standards. Taking their special situation into account, Congress has enacted an elaborate code of sea legislation. It has stipulated that American ships shall provide satisfactory food, water, and clothing for seamen and carry a suitable supply of medicine. With respect to food the law establishes a "minimum diet" by enumerating the articles and amount of each to be supplied daily to sailors. Guarantees as to food supply Congress has supplemented by regulations as to living quarters, management, wages, and hours. On long voyages a safe and warm room must be provided for the seamen. Corporal punishment is forbidden on board American vessels. If perchance an American seaman is destitute in a foreign land, the local consular officer of the United States may require the master of an American vessel to transport the unfortunate person to the home port to which the ship is bound, at federal expense.

Standards under Direct Federal Control. With respect to its own operations the Federal Government has established a "normal" seven-hour day for its clerical personnel and an eight-hour day for laborers and mechanics employed by the Federal Government or by the District of Columbia or by any contractor or subcontractor engaged in a public work of the United States or the District of Columbia, including river and harbor improvements. In connection with the leasing of federal mineral lands to private concerns, Congress has declared that the eight-hour day shall be observed by lessees for workers employed underground.

Standards for Government Supply Contractors. The Federal Government buys hundreds of millions of dollars' worth of supplies every year, ranging from monster battleships to thumb tacks and is thus an indirect employer of labor on a large scale. Assuming obligations in this respect Congress passed in 1936 the Government-Contracts Act which lays down labor terms for all contractors who make contracts with the Government in excess of $10,000. Such contractors are to pay the prevailing rate of wages in effect in the locality, to maintain an eight-hour day and a forty-four-hour week, and to exclude convict labor and the labor of males under sixteen and the labor of females under eighteen. The administration of the Act is vested in the Department of Labor.

Conditions in Special Industries. Under the Civil Air Authority Act of 1938 every air carrier must comply with wage schedules, maximum hour rules, and other working standards laid down by the National

Labor Relations Board. The working conditions of seamen on board vessels receiving government subsidies are subject to special supervision by the Maritime Commission (p. 391).

Compensation for Disabilities. In spite of all precautions in the form of safety regulations and appliances and reasonable hours of employment, accidents do happen. For a long time the Federal Government made no serious attempt to modify the ancient principle of the law, which threw upon every employee all "the necessary risks" of his occupation and allowed him to recover damages for injuries only when the employer had been personally responsible, usually by a law suit likely to prove costly and tedious. But in 1908 Congress made all railway common carriers, subject to its jurisdiction, liable to an action for damages for death or injury "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Furthermore it provided that employees of such concerns are not to be prevented from collecting reparation even when they themselves have been guilty of some contributory negligence. Similar rules were later applied to seamen on American vessels subject to federal jurisdiction. In 1927 Congress provided a system of compensation for longshoremen and harbor workers, on more modern lines than the arrangements for railway employees and seamen, and vested supervision over execution of the law in the United States Employees' Compensation Commission.

For employees engaged directly in federal services the Government has created a compensation project of its own. This scheme is administered by the Commission, just cited, which in the discharge of its duties makes use of the medical facilities of the United States Public Health Service. In accordance with the terms of the act, compensation is allowed in cases involving the death or injury of federal employees in the performance of duties, not due to willful misconduct or intoxication. Persons claiming compensation do not have to file suit in a court of law but are paid automatically when their claims are rightfully established before the Commission.

Pensions. Although pensions for persons engaged in industry may not be deemed in a strict sense a part of working conditions and are treated elsewhere in this volume (p. 471), they have a bearing on labor and some of them are paid in part out of the earnings of labor. A special act

of Congress lays a tax on railways for the purpose of creating a pension fund and out of this fund pensions are paid to employees who have reached the age of sixty-five or who have been retired for physical or mental infirmity, subject of course to a number of detailed specifications. Under the Social Security Act of 1935 contributions are made to the states in aid of old age pensions and a system of old-age insurance, resting on payroll taxes, is provided for numerous classes of industrial workers.

The Fair Labor Standards Act. This measure, sometimes known as the Wages and Hours Act of 1938 is the most comprehensive law dealing with labor conditions ever passed by Congress. The product of many years of discussion, the law is designed to establish in numerous fundamental industries standards of wages and hours for all parts of the country. The Act applies to employees engaged in producing, manufacturing, mining, handling, transporting, and in any manner working on goods moving in interstate commerce, or engaged in any process or occupation necessary to the production of such goods, or engaged in interstate transportation, transmission or communication. According to a ruling already made even a night watchman employed by a firm engaged in interstate commerce comes within the purview of the Act. There are however several classes specifically excepted from the terms of the law. They include agricultural workers, persons employed in retail establishments mainly engaged in intrastate trade, persons employed in the fishing and other special industries, and employees of interstate carriers whose working conditions come under other acts of Congress.

In making classifications, the Fair Labor Standards Act places an indirect ban on "oppressive child labor." The Administrator of the Act has defined this rule as applying to children under sixteen years of age, except children fourteen or fifteen years old in occupations other than manufacturing and mining, which have been determined by the chief of the federal Children's Bureau as not interfering with their schooling, health, or well being. In respect of women there shall be no classification on the basis of sex.

Owing to the fact that Southern representatives in Congress waged a strenuous fight on the bill, concessions were made to regions. In setting up classifications and making wage rates, the Administrator must take into account competitive conditions as affected by transportation, living, and production costs. He must also consider wages established by collective agreement between employers and representatives of employ-

ees chosen freely. Under these two provisions certain differences may be established for the several regions of the country.

By gradual steps, which began in October, 1938, the goal of a forty-hour week and a minimum wage of forty cents an hour was to be attained. The Act fixed the hours at forty-four for the first year, forty-two for the second, and forty for the third. It established wages at twenty-five cents an hour for the first year, thirty cents for the second, and forty for the third. Detailed applications of the law were left to an agency in the Department of Labor. This agency is known as the Wage and Hour Division (now united with the Public Contracts Division under a single administrator). It determines in the first instance what classes of workers come within the scope of the Act and what classes are still to be considered as local and within the jurisdiction of the several states. At the outset the number of employees affected by the law was estimated at about 11,000,000. Employers and employees aggrieved by any wage ruling may appeal to the federal courts for review. The burdens of the enforcement agency were eased by the boom which accompanied the Global War but this was at best only a temporary relief.

Industrial Disputes and Collective Bargaining

Where Direct Federal Powers Are Involved. Into that sphere in which labor and capital carry on controversies respecting hours, wages, and conditions of employment not fixed by law, the Federal Government frequently enters in various rôles. Over industrial disputes arising in interstate or foreign commerce, of course, it has authority by express constitutional warrant. Whenever a contest involves the execution of federal law or the discharge of a regular function, such as the carriage of mails, the Government likewise has a direct interest and full authority for intervention. Nor do labor conflicts within the jurisdiction of a state lie entirely beyond the scope of federal power. If a strike or lockout results in disorders, the President, on appeal from the proper authorities of the state, may employ federal troops. If the struggle concerns persons or corporations of two or more states, the assistance of federal courts in the form of writs of injunction (p. 447) may be invoked. Finally state legislation relative to picketing, strikes, and other trade union tactics may be declared void by federal courts under the Fourteenth Amendment.

Transportation Disputes. The interstate and foreign character of transportation operations gives legal sanction to almost any policy of federal

intervention in labor disputes between common carriers and their employees. Nevertheless, Congress has merely provided for the extension of the good offices of the Government without compelling either side to abide absolutely by the decisions made. As the law now stands, disputes between air line, railroad, express, or Pullman managements, doing an interstate, international, or intra-territorial business, and their employees can be brought before official bodies for discussion. By an elaborate procedure for terminating disputes, the possibility of resort to such drastic tactics as strikes is correspondingly reduced, though not eliminated.

The Railway Labor Act of 1926, as amended, prescribes certain conditions and methods of negotiation for railway and other carriers. The actual settlement of specified issues is in the first instance left to carriers and employees on whom the Act imposes the duty of making every reasonable effort to settle disputes by conciliatory methods, utilizing agencies of their own selection. If a settlement is not reached in this manner, the aggrieved party may refer the matter by petition to the National Mediation Board, an independent agency in the executive branch of the Government composed of three members appointed by the President of the United States with the consent of the Senate. On the other hand, the Mediation Board may offer its services without waiting for an appeal. In either case, the Board seeks to bring the disputants to the conference table and to reach an agreement by mediation, that is, a compact which both sides will accept without being compelled to do so by law.

Should such mediation fail, arbitration is the next recourse offered by the statutes, although resort even to it is not made compulsory. The parties are entitled to choose their own private arbitrators, or, if the dispute is over the meaning of specific labor agreements, they may turn the matter over to the National Railroad Adjustment Board. The Board is a federal instrumentality on which both carriers and employee organizations are accorded the same degree of representation.

If all such efforts fail, provisions in the Act hold any dispute in abeyance for a time so that the National Mediation Board may ask the President of the United States to appoint an Emergency Board in cases where the dispute threatens to interrupt interstate commerce. The Emergency Board may investigate and report, but even the conclusions of this special agency are not binding. The total effect of the law is to preserve the independence of the carriers and their employees to act as their discre-

tion dictates, but by elaborate provisions looking toward peaceful settlement, the Act seeks to avoid resort to coercive or drastic methods of settling disputes until the methods of negotiation have been exhausted

The Use of Force With respect to other circumstances in which federal authority may be invoked in labor disputes, the terms of federal law are more vigorous The Constitution provides that the United States shall protect each state against acts of domestic violence on request of its legislature or, if that body cannot be convened, of the governor Full power to take action in such cases has been delegated to the President by Congress Furthermore whenever unlawful combinations or assemblages of persons make it impracticable, in his judgment, to enforce federal laws by ordinary judicial proceedings, he may call upon the militia as well as the army and navy for the purpose of compelling obedience

Tender of Good Offices Over labor conflicts which are purely local in character and involve neither interstate commerce, nor the Constitution, nor the enforcement of federal laws, Congress does not exercise coercive powers[2] It realized however that many industrial struggles could be prevented or settled by conferences between the disputants arranged by liaison officers, offering their services on a purely voluntary basis Accordingly it authorized the Secretary of Labor to act as a mediator or to appoint commissioners of conciliation to serve in his stead, if in his judgment the interests of economic peace may require it Under this sanction a Division of Conciliation has been created in the Department of Labor Whenever a serious labor controversy arises, agents of the Division may seek to establish friendly relations with the contestants and effect a settlement by mediatory methods

Jurisdiction of Federal Courts Federal courts have jurisdiction over cases involving interstate commerce and the enforcement of federal statutes touching labor interests at many points Under the Constitution they likewise have jurisdiction over suits between citizens of different states (p 196) Since our great business corporations, which are "citizens" in this connection, usually have plants and offices in various parts of the country, they can as a rule find legal grounds for taking actions against trade unions and strikers into federal tribunals, even though no measures of national law are involved Accordingly the courts of the United

[2] The area of such local conflicts has been narrowed in recent times by acts of Congress and decisions of the Supreme Court which extend the range of interstate commerce (See National Labor Relations Act below, p 449)

States have numerous sanctions for hearing the causes of parties engaged in industrial contests.

The Injunction in Labor Disputes. Inasmuch as the writ of injunction constitutes a powerful weapon which the federal courts can bring to bear in labor disputes, this famous instrument deserves special consideration. Such a writ may take various forms. It may be a decree ordering a specified person or corporation to continue the performance of particular acts. Thus the employees of a railway may be commanded to continue handling the cars of a company on which they may wish to bring pressure. Again, an injunction may enjoin a party from altering certain existing conditions until the merits of the case have been decided. Sometimes the writ instructs a party to desist from particular practices or committing any wrongs for which no legal remedy is available. In ordinary circumstances anyone who disobeys an injunction may be summarily tried and punished for contempt of court.

Early Protests. Against actions of the federal courts in this connection trade union leaders long protested. As early as 1896 they made the subject an issue in national politics. During the great Pullman railway strike two years before, the federal district court in Chicago issued a general command to all persons concerned, ordering them not to interfere with the transmission of the mails or with interstate commerce in any form. For refusing to obey the decree Eugene V. Debs, director of the strike, was arrested, fined, and imprisoned. Thereupon Debs claimed the right to jury trial and contended that the federal judge could not impose a penalty which was not expressly provided by statute. On appeal, the Supreme Court upheld the power of the lower court to make the order in question, and ruled that imprisonment for contempt without jury trial did not violate the principle of due process of law. From that time forward vigorous efforts were made by organized labor to pledge the major political parties to a reform limiting the use of the injunction.

Injunction Legislation of 1914. In the main the Democrats took a more sympathetic interest in the restriction of injunctions than did the Republicans. After they came into office in 1913 they gave extended consideration to the demands of labor and in enacting the Clayton anti-trust law (p. 411), the following year, made numerous concessions to it. Since the Supreme Court had held that the Sherman Anti-Trust Act applied to trade unions as well as to other combinations in restraint of trade, Congress expressly exempted labor and farmers' organizations from

the operation of the legislation against trusts. Taking up the matter of injunctions specifically, it then provided that no restraining order of this character shall be granted by federal courts or judges in industrial disputes involving terms or conditions of work, except to prevent irreparable injury to property or property rights for which the law provides no adequate remedy. Furthermore, no such writ was to be used to prohibit persons singly or in concert from ceasing to work or from persuading others in a peaceful manner to take similar action. As an additional safeguard, Congress legalized jury trial in certain contempt cases. This law, which Samuel Gompers hailed as the "Magna Charta of Labor," in reality made little change in the use of the injunction.

The Anti-Injunction Act of 1932. Later injunctions laid severe restrictions on the right to carry on disputes; and the American Federation of Labor demanded from Congress a new statute limiting the powers of the federal courts in this respect. A result was the passage of the Norris-La Guardia Anti-Injunction Act of 1932. Under the terms of this measure no United States court may issue restraining orders or injunctions contrary to the declared policy of the Act or except in strict conformity with its provisions. The declaration of policy states that, while the worker should be free to decline to associate with his fellows, he should have full freedom to associate and organize, to designate representatives of his own choosing, and to negotiate the terms and conditions of his employment; and that the law was enacted expressly to limit the jurisdiction of United States courts so that the worker "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization, or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

All undertakings or promises contrary to the terms of the Act or to the policy it set forth were declared unenforceable. Specific among them are agreements whereby (*a*) either party promises not to join, become, or remain, a member of any labor organization or any employer organization; or whereby (*b*) either party promises to withdraw from any employment relation in the event that he joins, becomes, or remains a member of any labor organization or any employer organization. This section was expressly aimed to outlaw the "yellow dog" contract by which some employers bound their employees not to join trade unions.

After defining the terms "labor dispute" and "persons participating or interested" in a dispute, the Act declares that no United States court

shall issue restraining orders or injunctions in labor disputes to prohibit any person or persons participating or interested in the dispute from doing, singly or in concert, a large number of acts, such as, (*a*) ceasing or refusing to perform any work or remain in any relation of employment; (*b*) becoming or remaining a member of any labor organization or any employer organization; (*c*) giving publicity to any labor dispute whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; (*d*) assembling peaceably in promotion of their interests in a labor dispute; (*e*) agreeing with others to do or not to do any of the acts specified. Concerted action in any of these cases is not to be deemed unlawful combination or conspiracy against which the courts can issue restraining orders.

After providing for full hearings in open court, the Act declares that no injunction shall issue except after findings by the court to the effect that: (*a*) unlawful acts have been threatened and will be committed unless restrained, and then only against those responsible for the unlawful acts; (*b*) substantial and irreparable injury to complainant's property will follow; (*c*) as to each item of relief granted, greater injury will be inflicted upon complainant by denial of relief than will be inflicted upon defendants by granting relief; (*d*) complainant has no adequate remedy at law; and (*e*) public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Notice of hearings in these cases must be given to all persons against whom an injunction is sought but, upon an allegation of irreparable injury and by filing a proper indemnity bond, a complainant may secure a temporary order without notice which will be good for five days. The Act provides for a speedy review on appeal from cases where a temporary injunction has been issued. No injunction shall be issued for any complainant who has failed to comply with any law involved in the dispute, or who has failed to make every reasonable effort to settle the dispute by negotiation or with the aid of government machinery of mediation or voluntary arbitration. The Act also throws a number of safeguards around every person charged with contempt of court in labor disputes.

The National Labor Relations Act. It was one thing to recognize the right of collective bargaining between employers and employees; it was another thing to set up federal machinery to enforce collective bargaining. The latter step Congress took in 1935 by passing the Wagner-Connery Labor Relations Bill. This law accepts collective bargaining in

industry as the ruling principle. It forbids employers engaged in interstate commerce to interfere with employees in the process of collective bargaining, to dominate any union, that is, to set up company-controlled unions, to discriminate in employment between union and non-union workers, to discharge employees for making appeals under the Act, or to refuse to engage in bargaining with the representatives of employees duly chosen by them.

The administration of the Act is vested in the National Labor Relations Board composed of three members appointed by the President with the consent of the Senate. The Board may hold hearings, make investigations and, if necessary, supervise elections held by employees for the purpose of choosing their representatives. The Board may issue "cease and desist" orders against persons engaging in unfair labor practices and appeal to federal Circuit Courts for aid in giving effect to orders. On the other hand persons claiming to be aggrieved by final orders of the Board may appeal to such courts for relief.

In the enforcement of the Act, the Labor Relations Board ran into bewildering perplexities, which were accentuated by the fierce conflict between the American Federation of Labor, representing in the main craft unions, and the Congress of Industrial Organizations, representing especially industrial unions—that is, unions of all workers employed in and around plants without regard to skills or technical occupations. Although many employers early accepted the terms of the law, others resisted it in general and in detail. Difficulties were increased by the tactics used by employers in resorting to spies, armed forces, and strike breakers—as abundantly demonstrated by investigations into the violations of civil liberties made by a Senate sub-committee headed by Robert M. La Follette. They were augmented also by the tactics of several local unions, such as the resort to "sit down" strikes conducted on the premises of employers and to "labor rackets" of one kind or another. The Board managed to conduct its affairs in such a way as to secure the approval of the federal courts in a great majority of its cases at law, but it did not escape criticism. Although the Supreme Court sustained the Act, many employers demanded a repeal or a drastic amendment; and the American Federation of Labor joined them in calling for amendments, of a different kind.

Position of Organized Labor under New Federal Legislation. The new acts of Congress pertaining to organized labor, especially with reference

to wages, hours, and collective bargaining, had and were bound to have a profound effect on the position of all labor in national economy, law, government, and politics. In acquiring rights under this legislation—rights to be enforced by government agencies—organized labor was enabled to gain almost a monopoly in the leading branches of industry and to compel unorganized workers to join trade unions. In such respects, it won immense advantages—increased its membership, augmented the powers of its officials, and collected for the treasuries of national and local unions enormous sums of money in the form of initiation fees and regular dues.

But in acquiring these rights and benefits, enforced by government agencies, trade unions submitted themselves to the decisions of government agencies in innumerable cases. Wittingly or not, they became semi-official bodies. As long as collective bargaining had been mainly a matter of private arrangement between trade unions and employers, the organization, methods, and management of trade unions were generally regarded as private affairs, largely if not wholly outside the scope of government interference. But now industrial workers hold collective bargaining elections and choose their representatives under the auspices of a federal board. This federal board decides disputes between two or more unions claiming the right to control the workers in specific cases; trade unions by law have a privileged position among industrial workers; the rise of new and independent unions operating along their own lines is hampered by federal law; and the practices of trade unions which look to government agencies for the enforcement of rights become immediately a matter of public concern. Inasmuch as the members of any government labor board are appointed by the President of the United States, they are political appointees; and their decisions, whether favorable or adverse to unions, become inevitably involved in the controversies of politics and political parties.

Already the National Labor Relations Board has been subjected to the fire of political criticism. Changes in the labor laws are demanded. "Racketeering" and abuses in the labor movement, although often exaggerated, have led to proposals that trade unions be forced to incorporate and that the finances and internal management of trade unions be controlled by definite provisions of law. In several states laws pointed in this direction have been enacted; and the Connally-Smith Act of 1943 (p. 78), although only temporary, voiced a growing sentiment in im-

portant political circles. Organized labor, while increasing its power under government auspices, has multiplied its public responsibilities and entered upon a new stage in its history.

Research Work

If labor questions are to be intelligently treated on a national scale, central research agencies for the collection and distribution of pertinent information are indispensable. Accordingly various agencies have been created and charged with responsibility for gathering, analyzing, and disseminating industrial data. Among these fact-finding bodies the Bureau of Labor Statistics in the Department of Labor takes first rank. Its duty, as set forth in the law, is to assemble information on all phases of labor and on the means of promoting the material, social, intellectual, and moral prosperity of wage earners throughout the country. In discharging its obligations the Bureau makes studies covering such fundamental questions as unemployment, wages and hours of work, industrial disputes, the cost of living, industrial accidents, and labor legislation.

In the same Department the Children's Bureau investigates child welfare and naturally comes in contact with child labor in every form—still an important question in the United States. Inquiries related to the formulation of standards and policies tending to promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment are placed in charge of the Women's Bureau. Thus the duty of studying and reporting on affairs pertaining to the welfare of women in industry is vested in a permanent institution and is given official recognition in the Department of Labor.

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CHAPTER XX

GENERAL WELFARE AND SOCIAL SECURITY

Constitutional Provisions. In the rural age when the Constitution was framed, it was assumed that most legislation relative to public morals, public safety, and the care of the incapacitated or aged dependents would be undertaken by the states immediately concerned. At that time states and communities were largely self-sufficing, that is, they produced most of the goods needed by their inhabitants. Foreign and interstate commerce was by no means unimportant and it was not overlooked by the draftsmen of the Constitution. But the dependence of each state upon the other states for the livelihood, employment, and security of its people was relatively slight.

Even so, the framers of the Constitution did not confine the powers of the Federal Government to mere functions of defense, foreign affairs, and commercial regulation in a narrow sense, excluding all specific considerations of general welfare. A majority of them intended, as we have seen (p. 11), that Congress should deal with all subjects of general interest, with subjects common to all or most states, which the states acting separately were not competent to handle. Under that conception, when local interests become interlaced by commerce and intercourse in a general interest, Congress may act upon this interest in various ways deemed expedient. Nor did the framers exclude the humanities from such powers as were expressly conferred upon Congress; for example, they did not mean that Congress, in establishing post offices and post roads, could not take into account the fairness of the wages or the welfare of postal employees. In addition to allowing for such appropriate implications they explicitly stipulated that Congress could use at least the taxing power, if no other, "to provide for . . . the general welfare."

Legislation Followed Social Changes. As the largely self-sufficing economies of 1787 were transformed into an interdependent, national economy (p. 340), Congress exercised its powers in promoting public

health, safety, convenience, and welfare, with respect to certain classes of persons, such as sailors on the high seas, obviously under federal jurisdiction, and with respect to certain objectives, such as the health of immigrants, also clearly within the scope of federal powers, even narrowly interpreted. Through the years this stream of federal legislation pertaining to human welfare broadened, as enlightenment and human sympathy widened. More than a hundred years ago Congress made some provision for sick and stranded American sailors in foreign ports and about forty years ago it began to employ its power over interstate commerce to protect the American people against deleterious foods and drugs. As American society became more closely knit together, legislation of this type was extended to include a wide range of measures designed to promote public health, security, and safety.

Health

Broadly speaking, the health functions of the Federal Government may be divided into three main groups: the prevention of the spread of disease, the maintenance of hospitals for the sick and injured of certain classes, and coöperation with the states directly and through grants of money in promoting public health. To these should be added, perhaps, research in special problems of health, although this is not an end in itself but an aid to the discharge of other obligations.

Control over Immigrants. In connection with the regulation of foreign commerce, steps are taken to insure the country against the introduction of human diseases by incoming passengers, ships, and commodities. One phase of this defense is authorized by federal statutes excluding immigrants suffering from certain disorders, physical and mental (p. 433). Originally medical inspection to enforce this legislation was made only at ports of entry in the United States, and many immigrants who were rejected suffered hardships in deportation. As a remedy for this unsatisfactory state of affairs, federal consular officers were directed by act of Congress in 1924 to refuse passport visas, or permits for travel to the United States, to everyone whom they deemed ineligible for admission. By its broad terms the new statute sanctions the exclusion of "doubtful" persons at the source instead of allowing them to puzzle government agents on reaching America.

Control over Shipping. The mere elimination of unhealthy passengers from ships leaving foreign ports for the United States does not, of course,

solve the problem of keeping disease from our shores. Bubonic plague, for instance, is carried by fleas on rats, a roundabout process to be sure, but nevertheless one that has been responsible for many disastrous epidemics. If a steamer is infested with these pests, the dread plague may break out on board among the passengers and crew before the ship comes to anchor in American waters. Obviously the proper sanitation of the vessels themselves, at the time of departure from all parts of the world, is necessary for efficient protection.

Consequently Congress has provided that every ship sailing for the United States from a foreign country, with few exceptions, must obtain a bill of health from the federal consular officer at the point of departure or be liable to penalties on reaching America. The bill of health is a document describing as satisfactory the sanitary conditions of the port in question and of the vessel to which it is issued, as well as the state of health among the passengers and crew. For practical purposes it is a guarantee that American standards have been met previous to sailing.

International Health Coöperation. To cope more efficiently with difficulties resulting from the rapid spread of disease among the countries of the earth by rail, steamer, and airplane, several general agencies have been formed and world-wide standards have been evolved by periodical conferences. Apart from the special committee on this subject created under the auspices of the League of Nations, the most noted of these institutions are the International Health Office and the Division of Health and Sanitation for Inter-American Affairs. With both of these organizations federal health authorities are affiliated and maintain contact for the exchange of information respecting the outbreak of epidemics. By various connections quarantine officers are kept currently informed by wire and wireless about communicable diseases all over the world and are put on their guard against vessels coming from zones of danger.

Inspection and Quarantine. Work in and with foreign countries is merely the first line of defense maintained for the protection of American citizens. On our shores, at many points of entry, quarantine stations serve as the second line of inspection and exclusion. At these domestic posts of scrutiny vessels, immigrants, crews, passengers, and cargo are given a final examination before being admitted to the country. Persons coming within the ban of the law are temporarily held for observation and treatment, and those who do not meet the medical requirements for admission are deported. Vessels infested with rats are fumigated, while baggage is subjected to similar precautions.

Development of Domestic Health Activities. If the framers of the Constitution intended to confer upon the Federal Government a wide jurisdiction over public health in connection with its control of foreign commerce and intercourse, they did not foresee the need or possibility of extensive national activities in the medical sphere at home. In their day science was in a rudimentary stage; moreover, long-distance trade and travel formed no considerable part of American economy, owing to the primitive condition of transportation and manufacture. In the beginning therefore Congress deemed it sufficient to instruct federal officers, by an act of 1799, to obey the health laws of the several states.

But new aspects were given to the problem by technology and science, the introduction of the locomotive and the steamer, and discoveries pertaining to the sources of disease. Keeping step with the development of commerce and medicine, Congress has progressively conferred upon federal authorities important functions pertaining to public health in its interstate relations. By numerous laws it has sought to prevent the spread of epidemics among the states by passengers, by the instrumentalities of transportation, and by commodities.

Interstate Travel. While as a matter of current practice the traveler from one state to another is not subjected to physical examination, except in times of serious epidemics, this does not mean that he is entirely overlooked. On the contrary, if he is suffering from a communicable disease, he is subject to elaborate restrictions imposed by federal law. Furthermore all common carriers engaged in interstate commerce are compelled, by acts of Congress, to observe certain precautions against the spread of disease. To make sure that the rules are properly observed, representatives of the Public Health Service periodically inspect the facilities of common carriers.

Changes in Commodity Production and Sale. Far more extensive are the health activities of the Federal Government with respect to the manufacture and sale of commodities entering interstate traffic. Here again the change of jurisdiction from local to national authorities has been the inevitable result of technical developments. For the few fresh vegetables and medicinal herbs produced in nearby gardens, the machine age has substituted an elaborate array of foods and drugs grown in remote regions or prepared in distant factories. While the industrial revolution, by increasing the average length of haul, has brought an ever mounting percentage of these articles under the commerce power of Congress, it has another significant effect. It has increased the de-

mand for regulation on the part of the average consumer who, though ordinarily able to judge the value and purity of new potatoes or corn on the cob at the corner grocery, has no way of telling the worth and composition of prepared substances such as jellies, canned goods, or evaporated milk. Left to his own devices he may be easily imposed upon.

The Control of Food, Drugs, Cosmetics, and Medical Devices. In 1906, after the country had become alarmed over the extent to which adulterated and injurious articles were being circulated in the general market, the National Government undertook to regulate the food and drug trade. Little by little the federal program has been extended until today a comprehensive statute (1938) forbids the manufacture and sale in interstate and foreign commerce of adulterated or misbranded foods, drugs, and cosmetics, and of certain virtually untried medical devices. To the Food and Drug Administration in the Federal Security Agency has been given the task of amplifying this basic statute by setting standards of purity and performance for these articles, standards which must be met by those who would keep within the law.

Obviously it is not an easy task to establish many of these standards, owing to legitimate differences of opinion regarding the true nature of many articles, especially compounds. What, for instance, constitutes "pure" sausage or mayonnaise? If definitions were broad enough to satisfy everybody, they would be well-nigh useless in practice; if narrow, they would be irksome to legitimate business. Hence conflicts between manufacturers and federal authorities are continuous.

Nor is the task of applying scientific standards to actual commodities taken from commercial channels an easy one. The increasing complexity and variety of foods, drugs, cosmetics, and medical devices, multiplying the difficulties of detecting fraud, tax the expert to the limit. For instance, he must resort to ingenious laboratory manipulations to determine whether coumarin, the active principle of the Tonka bean, and caramel, a coloring matter, have been employed to adulterate vanilla extract. Evidently then the Government is doing more than relieving the consumer of responsibilities; it is daily performing for him highly skilled operations which he is not in a position to undertake for himself. At bottom the purpose of scientific checks on articles affecting health is threefold—to prevent injuries to the human body, to block the offering of inferior ingredients under false guises, and to stop the vending of worthless commodities.

Poisons and Adulterants. The first of these functions can scarcely be

overemphasized. Serious disease and death may result from the use of infected, putrefied, or poisonous foods. Adulterated, no less than poisonous, foods come within the proscriptions of the law. Intended as a rule to cheapen the manufacture of products by the addition or use of less expensive materials, adulteration is not an accident but a deliberate expedient employed in the interest of profits. Although it may not affect the wholesomeness of a commodity, it defrauds the consumer by making him pay more for the article than it is worth. It also penalizes honest business by subjecting it to unfair competition.

A few examples of practice, from hundreds that might be cited, illustrate the possibilities of the "art": chicory and clay molded in the form of coffee berries, colored and flavored to represent coffee but containing no trace of the latter; vinegar tinctured with sulphuric acid; milk made synthetically and not containing one drop of the genuine substance; artificially colored sawdust ground and added to cayenne pepper. If the watchfulness of the federal authorities and their promptness in seizing adulterated goods tend to reduce the number of such old frauds, the ingenuity of scientific schemers constantly provides new types of cheating to tax their defensive organization and skill.

"Quack Medicines." Allied to the work of the Food and Drug Administration in the suppression of adulteration are its activities directed towards the elimination of "quack medicines." Worthless "cures," of course, are not necessarily harmful, for they may contain nothing but water, sugar, and tea leaves. Yet at all events they waste the money of consumers and often give them a false sense of security, leading them to delay in seeking the advice of physicians until serious damage is done.

Whenever the federal authorities discover a fraudulent preparation circulating in interstate commerce, they remove it from the market. Among the products which have been withdrawn from the channels of trade by this process are the following items: a cure for pernicidus anaemia consisting largely of ground granite; a cure for cancer in the form of a bread and milk poultice; and an Epsom-salts compound "guaranteed" to cure diabetes.

Serum Control. One group of bona fide medicines, distinctly marked off from other types by the peculiarities of its uses and manufacture, calls for special supervision. This class includes serums, viruses, antitoxins, and related products employed in inoculations against certain diseases. Unsanitary conditions of preparation or improper testing of strength may result in serious injury to the users.

Awakened to the perils lurking in this branch of pharmacy, Congress has enacted a law making all such "biologic products" subject to federal control insofar as they enter interstate commerce. In the execution of this statute the National Institute of Health collects samples of these articles in factories and other places and examines them for purity as well as strength. As a further protection to the public, every manufacturer of vaccines is required to procure a license before engaging in interstate business. As a check, federal authorities make periodical inspections of the sanitary conditions under which production takes place. So much for the prevention of disease.

Hospital Services. The second great branch of federal health activity—the provision of medical care for certain classes of sick and injured civilians—is entrusted to government hospitals scattered over the United States. The first group of private persons to enjoy this service were members of the crews of merchant vessels flying the American flag. For this there are good reasons. Often far from home and possessing scanty funds, seamen have a special claim to public assistance. Often they cannot receive adequate attention on shipboard where medical facilities are limited and space is at a premium. If they go ashore they may readily become a liability to the community in which they land. For more than a century therefore federal authorities—now the Public Health Service—have provided free hospital treatment for the sailors of the American merchant marine. Besides sailors, longshoremen and harbor workers are entitled to the advantages offered at the hospitals maintained by the Public Health Service.

Without any direct sanction like that supplied by the commerce clause of the Constitution, Congress furnishes hospital care for lepers. For these unfortunates two homes are maintained under the Public Health Service—one in Hawaii and the other at Carville, Louisiana, the latter accepting lepers who voluntarily present themselves, those apprehended under the quarantine laws, and others committed by state authorities.

In addition to the above classes of private citizens entitled to the hospital and medical privileges provided by the Federal Government, thousands of public servants enjoy similar benefits. As a matter of right, of course, officers, nurses, and men belonging to the army and navy, and war veterans are entitled under certain conditions to care in appropriate institutions. A kindred service is rendered to the civilian employees of the Government injured in the performance of their duties.

General Functions of the Health Service. The Public Health Service in the Federal Security Agency carries on varied activities connected with preventing the introduction of disease from abroad and the spread of diseases in the United States. It coöperates with other federal agencies and with state and local officials in developing and maintaining sanitary and health provisions, especially in war time with reference to camps maintained for military forces and to war production industries. It has responsibility for the treatment and hospitalization of persons legally entitled to such services at numerous federal hospitals and health institutions. The treatment and rehabilitation of drug addicts are also under its care. It surveys occupational hazards in government war plants and assists states and communities in efforts to control and exterminate venereal disease and disseminates information on all aspects of public health. In its research work, the Service is aided by its National Institute of Health, an investigating agency of great value created in 1930 by a reorganization of the former Hygienic Laboratory.

Aid in Time of Disaster. Most of the functions described in the preceding pages, except those connected with epidemics, have to do with a normal course of affairs, but it is well to remember that fires, floods, hurricanes, and earthquakes are also common enough to call for vigilant preparedness against disaster. When a terrible calamity suddenly strikes a community, local health and safety authorities often find themselves face to face with responsibilities far beyond their powers and their equipment. In these circumstances Congress may come to their aid with a special appropriation. In furtherance of such work, the army and navy likewise render signal service, for they are so organized that they can supply a police force, hospital outfits, and food to sufferers on the shortest possible notice. Zealous in the discharge of its duties, the Public Health Service likewise springs into action and coöperates with official and private agencies, such as the Red Cross, in devising measures of control, relief, and rehabilitation.

Public Safety

New Technical Dangers. For convenience, the term "public safety" is employed here to cover federal functions designed to protect life and property against dangerous things rather than dangerous men. As in many other branches, these activities are in the main the outcome of the mechanical inventions and scientific discoveries which have revolu-

tionized the modern world. When people travelled in ox carts or stage coaches at a few miles an hour, they needed little or no guarantee against faulty or obsolete equipment. But in this age of high-speed travel on complicated machines—with automatic couplings, air-brakes, and electric signals—the "layman" cannot form a correct judgment concerning the risk involved in choosing any particular vehicle. Although he may sue for damages if he is injured in a railway accident, that is little consolation for his pain and losses. Nor is the ordinary employee, outside of his special responsibility, in any better position to arrive at a correct opinion concerning the soundness of the general apparatus with which he works.

Taking into account the requirements of the technical era, Congress has, under its power to regulate interstate and foreign commerce, set up standards of safety for certain common carriers and prescribed the adoption of special devices or practices to protect both the public and its servants. The general provisions of law are supplemented by orders of the Interstate Commerce Commission and other agencies.

Railway Safety. As the major operators in the field of transportation, of course, railroads are subject to extensive supervision in the interest of safety. Locomotive boilers and appurtenances, power brakes, automatic couplers, and automatic train-stop devices on interstate lines must comply with government prescriptions which are enforced through inspection by federal agents. If it does not meet official requirements, any car, locomotive, or other piece of equipment may be ordered out of service pending suitable repairs.

In connection with its safety work the Interstate Commerce Commission is required by law to investigate all serious railway accidents that come to its attention. This function serves a double purpose. "Coroners' inquests" over damaged apparatus develop information of value in drawing up and revising regulations. And the mere certainty that they will be held also acts as a stimulus to the adoption of precautions and the observance of law.

Transport of Dangerous Commodities. Standard equipment and competent operators however do not remove all dangers from transportation. Explosives, gases, and inflammable materials hauled by common carriers offer perils to life and property. Within the limits of its jurisdiction Congress has therefore made the shipment of dangerous commodities subject to regulation by the Interstate Commerce Commission. According to the directions of this body, high explosives, including dynamite,

may not be conveyed on the same vehicle as passengers; and all articles of this general class must be suitably marked, packed, and handled in conformity with specific rules.

Safety by Water. Common carriers by water, especially on the ocean, are subject to a detailed scrutiny similar to that maintained over the railroads. The need for this circumspection is evident. In fact and fiction the perils of the deep have been brought home to "landlubbers" too often to need description here. Taking cognizance of their unfailing presence, the Federal Government has provided that all American ships engaged in interstate or foreign commerce and those of other nations using our ports must meet certain safety requirements. Some of these regulations affect the number of passengers and crew that may be carried; others dictate the physical equipment of the vessels; and a third group deals with the licensing of officers and crew.

With respect to the physical equipment of vessels the laws and orders of the Federal Government go into great detail. Boilers on steamships, fire-fighting equipment, hulls, steering gear, and other mechanical devices must comply with official standards and are subject to periodical inspections. In fact, the number of matters to be checked is so large that a complete description of the specifications for ocean and coastwise vessels alone fills a volume of two hundred and fifty pages.

By no means subordinate to proper equipment is the necessity that every ship be manned by a competent crew. Here too Congress has intervened. No marine officers can be placed in posts of authority on American vessels subject to federal control until they pass federal examinations showing that they have had the requisite training and experience to qualify them for the responsibility they are to assume. Yet prolix as is the legislation in this field it falls far short of the highest standards, frightful losses at sea occur with distressing regularity, and efforts are repeatedly made in Congress to bring the law and its execution abreast the latest scientific knowledge.

Coast Guard Services. Despite all precautions, accidents occur from defects, storms, fires, icebergs, and derelicts. To alleviate suffering and reduce material losses from such sources Coast Guard vessels stand ready at all times to assist ships in distress on the high seas. As an aid to those wrecked or in trouble on our coasts the Government maintains a chain of life-saving stations which serve as headquarters for a patrol of watchmen. When a vessel in distress is discovered, Coast Guard men and equipment are sent to the scene. Employing special boats, rockets, life-

lines, and other devices these workers often perform feats of signal bravery in holding losses to a minimum. Nor do their efforts cease when all on board are landed. Sufferers from accidents then receive temporary medical treatment, shelter, and nourishment until they can be carried to the nearest settlements.

Safety in Aviation. From land and sea federal control over transportation has spread to the skies. With the growth of interstate aviation the Federal Government was moved to erect safeguards for the general public in this transportation field. As a result, the Civil Aeronautics Administration now stands between the non-technical passenger and the aircraft business, enforcing certain fundamental regulations touching equipment, operation, and management. In accordance with these rules airplane engines are subjected to rigid tests before their design is approved. Planes themselves must be properly built, formally licensed, and periodically inspected. Only mechanics who have demonstrated their expertness can be put in charge of maintenance; only pilots who have proved their ability through physical, written, and flight examinations can be entrusted with operation. Supplemented by investigations of accidents, such official activities have materially reduced the hazards of aviation.

Dangerous Industries. Departing from the well-defined channels of interstate and foreign commerce, Congress has employed its power to tax in the interest of public safety. A clear example of such action is afforded by the levy on matches made with white phosphorus. In the present state of scientific technique this chemical, once widely used in their manufacture, is a menacing poison which may inflict on workers, exposed to it in factories, a distressing and often deadly malady known as "phossy jaw." For more than half a century the evils of the match industry had been well understood, but since they were regarded as under state jurisdiction, Congress apparently had no power to deal with them by adopting measures openly restrictive in character. At length however in 1912 it struck at them indirectly, as we have just said, by imposing on white phosphorus matches a tax high enough to be prohibitive in effect, and was upheld in a decision of the Supreme Court (p. 262).

Safety Codes. Through a second indirect route—under its power to appropriate money—Congress has gone into other matters of safety once supposed to be reserved to the states. Sustained by grants from the Treasury, the Bureau of Standards, in coöperation with public and

private bodies, has worked out a number of "safety codes" covering such subjects as woodworking machinery, logging, and sawmills. On their face these proposals merely set up rules of practice for construction and operation, with a view to eliminating physical hazards wherever possible. While they have not been transformed into federal law and enforced by the Government, they have nevertheless been observed by numerous manufacturers and voluntarily adopted by several state legislatures.

Safety in Mines. With respect to one particular enterprise over which its explicit jurisdiction does not extend, the Government has gone far beyond the mere suggestion of standards. Stirred by repeated tragedies in mining, Congress established the Bureau of Mines and authorized it to devise rules and instruments for the elimination of risks in this industry. With assistance from many quarters, the Bureau operates along two lines: prevention and rescue.

In the former relation it carries on researches in the explosives used in blasting and in the electrical apparatus employed underground in mining, lighting, and hauling—both sources of frequent disasters. On the basis of its studies, it has prepared a long list of "permissible" materials and equipment calculated to reduce perils to a minimum. Convinced of their practicality, manufacturers produce them for the market and many mine owners install them in their plants.

Notwithstanding such precautions, awful disasters still occur underground, demanding prompt, skillful, and energetic measures of relief. With an eye to efficiency in rescue work, the Bureau of Mines, aided by the industry itself, has developed special apparatus to cope with gases, fires, cave-ins, and floods. This equipment is installed in railway cars and automobile trucks and held in constant readiness at convenient points in mining regions. As soon as a call for help in a catastrophe reaches the nearest headquarters, the car or truck, with its corps of expert operators, is rushed to the scene of trouble, to help in saving life and property. But even in the most fortunate circumstances a certain interval of precious time must elapse before the Bureau's agents can reach the spot. Therefore it is important that officials and workers at mines should be trained to grapple at once with calamity of every sort. This first-aid talent the Bureau fosters by conducting courses in mine-rescue technique in various parts of the country.

Flood Control. Another outstanding problem in the field of public safety has attracted the attention of the whole country—the prevention

of floods and the amelioration of suffering from such disasters. The most conspicuous attempt to forestall such catastrophes has been made on the Mississippi. In their eagerness for homesteads, settlers along its banks, singly or with public assistance, have gradually confined the river to a narrow channel by means of levees. As a rule these dykes serve very well, but when a super-flood occurs, the mighty stream pours over the restraining walls. For years individual farmers, city governments, and states attempted to wrestle with such periodical crises without any marked success. After the great disaster of 1927, Congress, aroused to the necessity for federal action, authorized an expenditure of three hundred twenty-five million dollars to carry out a comprehensive scheme for controlling the waters of the Mississippi. Under the direction of the engineer corps of the War Department, projects for this collective enterprise, to cost almost as much as the Panama Canal, were immediately launched.

Subsequent disasters in other parts of the country, occurring with startling regularity, led Congress to take up the whole subject in a comprehensive manner. By the Flood Control Act of 1938 it authorized the construction of flood-control works on rivers and harbors extending from the Merrimac river basin to the lower Mississippi valley and westward to the Willamette river basin, and made a huge appropriation for a program to extend over five years. It also empowered the War Department and the Department of Agriculture to make general and specific surveys of flood-menaced regions and prepare reports on their findings.

Aids to Victims of Disasters. In time of floods, fires, and other great domestic disasters, Congress usually appropriates funds to aid the victims and the various agencies of the Government concerned with safety and health, including the armed forces, assist states, communities, and the Red Cross in the work of rehabilitation.

Public Morals

Morals and Mails. From early times the Federal Government has been forced to deal with issues quite commonly regarded as "moral." For example, it was long ago necessary to decide whether the Post Office should carry obscene mail matter—and on no subject under the sun is there more difference of opinion than is to be found in this field. Again, in the exercise of its undoubted powers over commerce, Congress was early compelled to deal with problems primarily ethical in character,

through legislation pertaining to the importation of indecent books, to lotteries, to commercialized vice, to the sale of narcotics, and to numerous topics of this class.

Under its power to control the mails the Federal Government has dealt with a number of schemes which are supposed to run counter to public welfare. The use of the Post Office for the promotion of frauds and lotteries is forbidden. A large amount of matter which does not affect the pocketbook is also banned. Many things tending to incite to crime are excluded from the mails. But psychologists are far from agreement on the extent to which detective stories or newspaper accounts of homicides and burglaries act as a stimulant to law-breaking. And in reality federal authorities display no little confusion in devising and enforcing laws of this type. The mails are likewise closed to matter containing libelous, scurrilous, defamatory, or threatening statements on the outside of envelopes, wrappers, or post cards where they may be seen by any person other than the addressees. Also banned are all obscene pictures and publications—presenting many thorny issues for postal officials to consider.

Immoral Imports. Restrictions of such a character are not limited to domestic sale and transportation. Congress has sought to keep "dangerous and wicked" thoughts and objects out of the country. By law it prohibits the importation of printed matter and drawings advocating treason or insurrection against the United States, resistance to law, or threats of bodily harm to any person in the country, and everything else which is "obscene or immoral." The Secretary of the Treasury acts as the supreme censor of imported literature; he may in his discretion admit questionable "classics or books of recognized and established literary or scientific merit" but only when they are "imported for noncommercial purposes." If protests are filed, customs officials however cannot destroy "objectionable" books and materials until a federal district court has passed upon their merits.

Control over Alcohol. On the border line between morals and health come alcohol and narcotic drugs. From January, 1920, when the Eighteenth Amendment went into operation until its repeal in 1933, the Federal Government sought to enforce nation-wide prohibition with results that were decidedly unconvincing to the mass of the American people. On the adoption of the Twenty-first Amendment repealing the Eighteenth, control over the manufacture and sale of intoxicating liquor was returned to the states, with power to prohibit or regulate as they

might see fit. But one explicit responsibility in this connection was given to the Federal Government by the provision forbidding the importation of intoxicating liquor into any state in violation of its laws controlling the liquor traffic. In an age of airplanes and automobiles this is a responsibility exceedingly difficult to discharge effectively.

Since the Federal Government lays heavy taxes on alcoholic liquors, it assumed special burdens in connection with the collection of these taxes and suppressing illicit distilling and brewing. Its responsibilities in this respect are increased by the fact that states and communities also insist upon deriving huge revenues from the liquor business. Federal, state, and local taxes are in fact so heavy that they put a premium on illegal manufacture and on bootlegging; and federal law enforcement officers have about as much trouble now as they did in trying to make total prohibition work. The higher the taxes the greater the evasion but it is a strange year that does not see a new state or federal law increasing in some form the taxes on alcoholic liquors. The Alcohol Tax Unit in the Bureau of Internal Revenue in the Treasury Department, to say nothing of the Department of Justice, has its hands full in looking after the liquor business which "has been returned to the states."

Control over Narcotics. While similar difficulties arise in connection with the control of narcotics, there is far less difference of opinion on this subject. Indeed it is generally agreed that governments should put a curb on the free manufacture and sale of such drugs. Without any express constitutional warrant, merely under its power to regulate commerce and to tax, Congress has subjected all traffic in narcotics to strict federal supervision, under the Bureau of Narcotics in the Treasury Department. By special legislation it has prohibited their importation in excess of the amount actually needed for lawful purposes as determined by the Government. Violators are punished and contraband goods are seized. Kindred restraints cover shipments to other countries.

As a check on the smuggling of narcotics, provision has been made for the international distribution of information relative to the business. Many countries, including the United States, now coöperate in the interchange of news and evidence dealing with illegal traffic. For the purpose of expediting these mutual services, ordinary diplomatic methods are discarded and exchanges take place directly between the enforcing agencies of the several governments.

Within the United States the power to levy internal revenue taxes

has enabled the Federal Government to exert a high degree of control over narcotics business. Manufacturers, wholesalers, and retailers of narcotics are required to register with the collectors of internal revenue in their respective localities and pay a yearly tax for the privilege of engaging in the business. Every purchaser of any drug on the prohibited list must either show a doctor's prescription for it or receive it while under medical care.

Going far beyond the mere imposition of restraints, Congress has authorized the establishment of federal farms for the care of drug addicts. To be "eligible" for treatment in one of these institutions a person must have been convicted of violating the national narcotics laws and be a victim of the drug habit.

Relief and Social Security

Original Local Responsibility. Although the Constitution originally gave Congress power to lay and collect taxes and provide for the general welfare, the function of relieving the poor and unfortunate was long left in the hands of states and communities. Congress did from time to time appropriate money for aiding the victims of fires, earthquakes, floods, and famines in the United States and even in foreign countries; but such actions were regarded as generous and occasional gestures. When the great depression opened in 1929, President Hoover insisted that the responsibility for the relief of the unemployed should be placed squarely on local agencies, public and private. His successor, Franklin D. Roosevelt, also contended at first that state and local authorities should carry a large share of the burden.

Federal Aid. Both Presidents however announced that no one should be permitted to starve in the United States, and by 1933 many sources of state and private charity had been seriously curtailed. At the same time the number of unemployed had mounted to more than 12,000,000. The states could not, or would not, lay the taxes sufficient to cope with rising distress. So the Federal Government stepped into the breach with indirect and direct measures of relief.

Indirect Measures. Among the indirect measures were provisions for lending money to farmers and home owners, with a view to keeping them in possession of their property and out of the homeless class. Under this head likewise may be included loans and gifts to states and

communities enabling them to create employment on public works, and also expenditures for federal public works directed to the same end, thus relaxing the local tensions.

Direct Grants in Aid. It was soon decided that indirect measures were not enough. In 1933 the Federal Emergency Relief Administration was established in Washington and Congress appropriated hundreds of millions to aid the states in meeting relief problems. In the beginning the states and communities were required to provide three dollars of relief funds for every one tendered by the Federal Government, but in time this was abandoned. The Relief Administration then adopted the policy of getting as much as possible out of state and local treasuries, while trying to prevent actual starvation by the use of federal funds. As states and communities defaulted in providing relief, the burden of the Federal Government increased. By the close of the following year, practically all the cost of relief in more than one-third of the states came from federal sources, and the proportion covered by state and local funds was diminishing in other states.

The dilemma was very great. If the Federal Government had not intervened in many sections distress would have become starvation, owing to the failure or inability of state and local authorities to cope with it. On the other hand, the very fact that federal funds were available gave many of them an excuse for evading their responsibilities. The peril of general demoralization was obvious. Recognizing evils inherent in such practices, Congress sought to work out a regular system of social security in coöperation with the states.

Backgrounds of Security Legislation. For nearly a hundred years state legislatures had poured out statutes pertaining to public health, safety in industries, and the welfare of wage workers; and, after 1900, laws pertaining to workmen's compensation, widows' pensions, old-age pensions, and the rehabilitation of persons injured in industries. After the opening of the twentieth century Congress had begun legislating in respect of social matters within the federal sphere, sometimes in coöperation with the states. But such laws had consisted mainly of isolated measures directed to particular evils which had attracted popular attention.

To coördinate efforts of this kind and make certain minimum standards prevail in all parts of the country, President Roosevelt in 1935 suggested a reconsideration of the prime objectives in social legislation and summarized them as follows: "1. The security of a livelihood through

the better use of the natural resources of the land we live in. 2. The security against the major hazards and vicissitudes of life. 3. The security of decent homes." It was with these objectives in view that many statutes and executive orders were promulgated in and after 1933. Several of them have been reviewed elsewhere in this volume, especially in the sections dealing with agriculture and labor (pp. 426, 440). Here we shall consider particular measures related to old age, unemployment, and the hazards of fortune.

Protection for Old Age. In an attempt to universalize the principle of old-age pensions already adopted in many states, Congress passed the Social Security Act of 1935, later amended. This legislation authorizes grants of money for pension purposes to the states which comply with federal terms. It matches, dollar for dollar, state grants to all needy persons over sixty-five years of age, up to twenty dollars per month per person, thus making possible a standard federal-state pension of forty dollars a month throughout the country. By 1938 every state had made provisions for pensions, at varying rates, under such conditions.

This pension system is supplemented by a separate old-age insurance or pension plan for large classes of persons, which is financed by tax contributions from the workers and their employers. Out of the fund accumulated in the federal treasury, pensions, at varying rates, are paid to the beneficiaries. By 1944 about 63,000,000 persons were entered on the insurance rolls kept by the Bureau of Old-Age and Survivors Insurance in the Federal Security Agency. To get a complete picture of guarantees for old age we must associate with these pension projects special pensions for soldiers, railway workers, and federal and state employees. Yet large classes of persons, among them industrial workers, domestics, and farm workers in small establishments, are excluded from the new insurance provisions.

Unemployment Insurance. It is recognized that neither emergency measures (above, p. 351) nor any scheme of insurance can adequately meet the problem of mass unemployment, but Congress has provided for a restricted form of unemployment insurance. Federal legislation under this head however only covers limited grants for limited periods and to certain classes of workers, and is not uniform in its operation throughout the country. It leaves the states free to adopt plans of their own or no plans at all, but it penalizes them if they do not establish an unemployment-compensation scheme of some kind. This virtual coercion of the states Congress has achieved by laying a tax on the payrolls

of each employer of eight persons or more and then crediting against this tax ninety per cent of the amount which the employer contributes to the funds of any unemployment system established by his state and approved by the federal authorities. All the states, the District of Columbia, and Hawaii and Alaski as well, have set up unemployment-compensation schemes. Although the schemes all follow certain principles laid down by federal authorities, they vary widely in the benefits paid to persons unemployed and all leave out of account millions of workers in special classes.

Hazards of Fortune. A variety of federal measures, often administered in coöperation with the states or supplementing state legislation, provides assistance to persons suffering from accidents or disabilities of some kind. In this field come pensions for soldiers, services to veterans of wars (p. 337), compensation for injured federal employees and transportation workers (pp. 442 ff.), grants for vocational rehabilitation (p. 503), and special aids to victims of floods, droughts, and storms (p. 349). Under the Social Security Act grants are made to states in aid of needy children, maternal care, child health work, homeless and crippled children, the blind, and public health services. When all such provisions are combined with similar provisions in states and communities, it becomes evident that many hazards of fortune are more or less covered by existing legislation, although many persons are still excluded from its scope.

Sickness Insurance. The major hazards of sickness are not yet brought within the range of public control. The importance of the subject is not to be doubted. In its report to President Roosevelt in January, 1935, the Committee on Social Security emphasized it: "Illness is one of the major causes of economic insecurity which threatens people of small means in good times and bad. In normal times from one-third to one-half of all dependency can be traced to the economic effects of illness. The money loss caused by sickness in families of less than $2500 of income per year has been estimated at a total of $2,400,000,000 per annum, of which $900,000,000 represents wage loss and $1,500,000,000 the expenses of medical care. . . . The figures cited explain why many millions of American families live in dread of sickness. Families with small incomes are compelled to sacrifice other essentials of decent living when serious illness strikes some member, go without needed medical care, or depend upon the gratuitous or near gratuitous services of doctors and hospitals. A mere statement of this situation is sufficient to show

that it is both unfair to the medical profession and very costly to the public."

While it did not urge the immediate enactment of a national sickness insurance law, the Committee on Social Security recommended further study and set forth the goals of such a project: "(*a*) The provision of adequate health and medical services to the insured population and their families; (*b*) the development of a system whereby people are enabled to budget the costs of wage-loss and of medical costs; (*c*) the assurance of reasonably adequate remuneration to medical practitioners and institutions; (*d*) the development under professional auspices of new incentives for improvement in the quality of medical services. . . . The insurance benefits must be considered in two broad classes: (*a*) cash payments in partial replacement of wage loss due to sickness and for maternity cases; and (*b*) health and medical services."

By general admission the difficulties of setting up, administering, and financing national health insurance are immense but, as England has demonstrated, not insurmountable. How far should the Federal Government go in laying obligations on the states and in providing funds? How much freedom should the states enjoy in making various plans and experiments? In what ways should health insurance be associated with public health activities, public hospitals, and existing facilities for furnishing free or inexpensive medical services? In what relation should private practice stand to practice supported by insurance funds? These are troublesome questions no doubt, but there is a growing opinion among doctors and the people at large in favor of health insurance in some form.

A Greater Social Security Program. In March, 1943, in the midst of the Global War, President Roosevelt laid before Congress a Report of the National Resources Planning Board calling for a wide extension of the social security principles adopted by the Act of 1935 (p. 471). The Board recommended a more complete and better organized system of old-age and unemployment insurance; health and medical services at low cost, with disability insurance for workers kept from work by sickness or as the result of accidents; special aids for the families of persons out of work; an expansion of educational opportunities for youth; a long-term program of public works geared to the course of private business and serving as a kind of "fly-wheel" for maintaining industry and employment at a high level. A bill for realizing a large part of the Board's program was drawn up and introduced in the Senate by Robert F. Wagner,

long a leader in the promotion of labor and social legislation; but Congress was then in no mood to press for the speedy enactment of any such measure. On the contrary it soon abolished the National Resources Planning Board and gave many indications that it regarded the Wagner bill as "too socialistic." What would happen in another post-war depression was thus left obscure.

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Part II

State and Local Government

CHAPTER XXI

POSITION OF STATES AND TERRITORIES IN THE FEDERAL SYSTEM

It was long the fashion of orators to speak of the Federal Government and the states as "sovereign within their respective spheres" and to regard territories as mere regions temporarily under federal tutelage, preparatory for statehood. Writers on the subject, for the sake of convenience, usually treat the governments of the Union and the states separately, thus accentuating the distinction created by the orators. But in reality, as pointed out above (p. 7), there is no sharp dividing line that can be drawn between the Federal Government on the one side and the state and local governments on the other, and the United States now has some territories for which statehood is not contemplated.

In letter and spirit the Constitution of the United States gives effect to a general political organization involving states from the base to the top of the structure. While conferring large powers on the national authorities, including that of admitting new states to the Union, it imposes restraints on the states; and the definition and enforcement of these restraints are functions of the National Government, especially the Supreme Court. Furthermore, with the increasing interdependence of all industries and branches of agriculture, the spread of motor transportation, highways, scientific knowledge, public health activities, education, and efforts to conserve resources and attain a higher degree of social security, Congress is multiplying its provisions for coöperating with state agencies, encouraging the creation of state organs of government, subsidizing them, subjecting them to national standards, and scrutinizing their administrative performances. With this development the ties between the Union and the state and communities are increasing in number and intricacy. Although many citizens protest against this tendency, it is likely that the number of the ties will increase rather than diminish in the future.

The Admission of New States to the Union

Constitutional Provision Is General in Terms. The federal Constitution provides that new states may be admitted by Congress and that no new state shall be formed out of another state or by the junction of two or more parts of different states without the consent of the legislatures concerned and Congress as well. Details of the process are left to time and circumstance. It is not surprising therefore to find that a variety of methods have been employed in the admission of states. Texas, for example, was brought into the Union as an independent republic by a resolution of Congress. California never went through a territorial stage; the inhabitants of that region, shortly after the cession from Mexico, drew up a constitution, knocked at the door of the Union, and wrung from Congress a formal approval.

Ordinary Practice. Ordinarily the operation of admitting a state is simple. The inhabitants of an eligible territory present a petition to Congress praying for admission. If the petition is granted, Congress passes an enabling act authorizing the voters of the territory to elect a convention for the purpose of framing a constitution and thus to prepare the way for taking their position among the other commonwealths. When the document is drawn and approved, Congress then adopts a resolution declaring the said territory to be accepted as a state; the fact is generally announced to the country by a formal executive proclamation. In certain cases, Utah and Arizona, for instance, Congress has entertained objections to the constitution drafted by the territorial convention and has delayed admission until suggested amendments were adopted.

Can Congress Impose Restraints on New States? The only constitutional question of any importance which arises in connection with the admission of new states is whether Congress has the power to impose any limitations in addition to those laid down in the federal Constitution. In theory all states in the Union are equal in rights and privileges. The famous Northwest Ordinance declared that the new states created in that region should be admitted "on an equal footing with the original states in all respects whatsoever." But on the admission of Ohio in 1802, Congress forced that state to agree not to tax for a period of five years any public lands sold within its borders by the United States.

When called upon to discuss the point of restraints on new states, the Supreme Court declared, in a case involving restrictions imposed

on Illinois, that "whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787, or the legislation of Congress, it ceased to have any operative force except as voluntarily adopted by her after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted only on the same footing with them."

Nevertheless, the Court upheld a limitation on Minnesota by which that state, on its admission, was bound not to impose any tax on lands belonging to the United States, or any higher tax on non-resident proprietors than on residents. The Courts said in this instance: "The case before us is one involving simply an agreement as to property between a state and a nation. That a state and a nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this Court, and that they have been frequently made in the admission of new states, as well as subsequently thereto, is a matter of history." Such is the controlling rule now.

Theoretical Boundaries between Federal Power and State Power

Powers Clearly Denied to States. In their nature and their operations states are limited by the powers which the Constitution confers on the three branches of the Federal Government. In one case, "exclusive" authority is given expressly to Congress; namely, in respect of legislation concerning the District of Columbia and other places purchased with the consent of state legislatures for the erection of forts, arsenals, dockyards, and other needful buildings. In other cases, the exclusive jurisdiction of Congress is clearly implied, because the states are definitely estopped from acting in connection with the subjects covered. For example, the power to coin money and regulate the value thereof is assigned to Congress and at the same time states are forbidden to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. In still other cases, the right of the states to act is obviously denied by the very language employed in conferring a specific prerogative on Congress. For instance, Congress is authorized "to establish a uniform rule of naturalization" throughout the United States.

Border-Line Cases. If many questions of power are well settled, there is

still a "border line" of uncertainty at which practice and judicial rulings must constantly be determining whether the states are entirely excluded from acting in specific ways on subjects placed under the jurisdiction of the Federal Government. In this connection, the commentator, Story, has laid down a rule of interpretation. "Wherever," he says, "the power given to the general government requires that, to be efficacious and adequate to its end, it should be exclusive, there arises a just implication for deeming it exclusive. Whether exercised or not in such a case makes no difference." The significance of this language lies in its very vagueness. With reference to innumerable practical matters therefore nothing precise can be said about the powers which may be ascribed exclusively to Congress and hence withdrawn from the states. The needs of each age must be considered in the light of what appears to be efficacious and adequate.

Concurrent Powers of States. In that wide range of operations in which the states possess a "concurrent power," they are materially limited in the exercise of the rights they enjoy. Both Congress and the states, for instance, have the power to tax; they may even tax the same objects, let us say, incomes. Yet, by judicial interpretation, states may not burden with a discriminatory tax "the instrumentalities of the Federal Government" although this principle is no longer held to exempt from taxation the incomes of officers derived from their salaries. Nor may a state levy a tax that lays a burden on interstate commerce. Again Congress has made laws on bankruptcy; but, subject to their limitations or in the absence of congressional action, states are free to legislate in this connection.

Supremacy of Federal Law. To some extent federal statutes in such concurrent spheres supersede state statutes; how far and in what degree, as Story remarks, is a question of "delicate nature." With good reason does he conclude that "it would be impracticable to lay down any universal rule as to what powers are, by implication, exclusive in the general government or concurrent in the states; and in relation to the latter, what restrictions either on the power itself, or on the actual exercise of the power, arise by implication. In some cases, as we have seen, there may exist a concurrent power and yet restrictions upon it must exist in regard to objects. In other cases, the actual operations of the power only are suspended or controlled when there arises a conflict with the actual operations of the Union. Every question of this sort must be de-

cided by itself upon its own circumstances and reasons." Evidently the states are afloat on the sea of experience.

Original Federal Limitations on States

Nevertheless certain positive limitations on the states are laid down in the Constitution, and they must be considered in connection with any survey of the American political system. These rules, as expounded from time to time, bind the states and if necessary will be enforced by the appropriate department of the Federal Government, especially the judiciary. That Government, including the Supreme Court, determines for practical purposes the nature of the powers enjoyed by the states in the Union. If "sovereign" in their sphere, as the orators say, their dominion is positively restricted and is subject to contraction or expansion under interpretation.

Limits on State Taxing Power. The first group of limitations on the states pertains to their taxing power. States cannot lay ordinary imposts and duties upon exports and imports. They may, it is true, levy such taxes to defray expenses incurred in the execution of inspection laws, but always subject to the control of Congress.

Duties on imports, said the Supreme Court long ago, include levies not only on the act of importation itself, but also on the commodity imported. "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." Thus foreign commerce is evidently protected against all impediments in the form of taxes devised by state governments.

Analogous to this provision is the rule which forbids any state to lay a tonnage duty without the consent of Congress. States may tax the ships of their citizens as property valued as such; but it is clear and undeniable, the Supreme Court has held, "that taxes levied by a state upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the states from levying any duty of tonnage without the consent of Congress; and it makes no

difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state, as the prohibition is general."

No Discriminatory Taxes on Federal Instrumentalities. No state can lay a discriminatory tax burdening the property, lawful agencies, and instrumentalities of the Federal Government or franchises granted by it. This principle, as we have seen (p. 260), is not expressly incorporated in the Constitution. It was derived by Chief Justice Marshall from the nature of the federal system itself. The power to create implies the power to preserve; the power to tax is the power to destroy, and if wielded without restraint by a different hand is incompatible with the power to create and preserve; therefore, if the states could lay a penalizing tax on federal instrumentalities, they could destroy a union which was meant to be indestructible. According to this doctrine, states cannot tax branches of a United States bank as such, federal bonds, or federal property, or by taxation "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." Even bonds issued under its auspices, not for its direct use but to obtain money to be lent to farmers and home owners, are declared by Congress to be federal instrumentalities exempt from state taxation.

However the strict doctrine laid down by Marshall has been modified (p. 261) to mean merely that the states cannot interfere with a federal instrumentality in such a manner as to impair its efficiency in performing the function for which it was designed. A state, for example, cannot tax income from federal bonds, at least as yet (p. 261), but it may tax buildings and other property of a national bank chartered by the Federal Government. "It is manifest," the Supreme Court says, "that exemption of federal agencies from state taxation is dependent not upon the nature of the agents or upon the mode of their constitution or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."

Interstate Commerce. In another important department of economy the states are still more severely restricted. They cannot regulate or in

any way seriously interfere with interstate commerce. To be sure they may pass laws relative to local matters which to some extent bear on commerce of that character. For example, the Supreme Court sustained a law of Kentucky providing for the inspection of illuminating oils and imposing a penalty upon persons selling oil branded as unsafe by state officers; this statute was evidently in the interest of public safety, although it certainly interfered with the right of citizens of other states to sell oil freely in that commonwealth. States may also prohibit the running of freight trains on Sundays, forbid the employment of color-blind engineers on interstate as well as local trains, regulate speed within city limits, and compel the guarding of bridges and the protection of crossings. But legislation of this type must be clearly intended to afford local police protection. If it passes beyond that object it is likely to be set aside by judicial process as a trespass on the authority of Congress.

State actions which constitute invasions of federal power over interstate commerce may likewise be illustrated by concrete cases. A law of Minnesota requiring the inspection of all meat twenty-four hours before slaughtering—in substance a pure-food measure—was declared invalid by the Supreme Court because it necessarily prevented the importation of meat from other states where, of course, no such scrutiny could be enforced by Minnesota officials. To cite a more explicit example, Illinois passed an act regulating railway rates within the state; when it attempted to apply the rule to a shipment starting in Illinois and destined to another state, the Supreme Court of the United States on proper application interfered, and declared that control over such a shipment from beginning to end was vested exclusively in Congress. Again, a state cannot impose a tax upon all freight carried by a railway, but it can levy on its franchise, using its total income, including receipts from interstate and foreign commerce, in determining the taxable valuation. No state can penalize the bringing into it of indigent persons from another state since the Supreme Court in the Anti-Okie case decided unanimously that "the burden upon interstate commerce is intended and immediate," thereby invalidating statutes in more than twenty states.

Monetary Control. When a state comes to that high prerogative historically associated with all governments, namely, control over the monetary system, it confronts insurmountable barriers. Here it is, for all practical purposes, powerless. It may charter and regulate state banks, but it cannot coin money, emit bills of credit, or make anything but gold and silver coin legal tender in the payment of debts. Although

theoretically it may authorize a state banking association to issue notes for circulation, the exercise of this right is really prohibited by an act of Congress, in effect since 1866, laying a ten per cent tax on such currency. On account of the weight of the tax, state banks simply cannot issue notes designed to circulate as money.

Criminal Legislation. Even in the matter of criminal legislation—a subject peculiarly reserved to them—the states are limited by provisions of the federal Constitution. No state can pass any bill of attainder; that is, a measure which inflicts punishment upon some person by legislative act without ordinary judicial trial. Fully aware that this expedient had been frequently employed for partisan designs by the British Parliament, the framers of the Constitution firmly resolved to prevent all such abuses of legislative authority in the United States. Nor can any state pass an *ex post facto* law: that is, one which prescribes a penalty for an act which was legal when committed; or imposes a penalty in addition to that in force when the act was committed; or changes the rules of evidence to the serious disadvantage of an accused person, allowing conviction on testimony less rigorous than was required at the time of his alleged offense. Framed to protect citizens from punishment by acts having retroactive operation, the *ex post facto* limitation applies only to criminal legislation.

Obligation of Contract Protected. More extensive than these restrictions on what may be called the "normal" legislative powers of the state are the provisions of the Constitution curbing its right to interfere with the use and enjoyment of private property. In explicit language the original Constitution stipulates that no state shall pass any law impairing the obligation of contracts. The obligation of a contract, as judicially interpreted, is the body of law existing at the time an agreement is made, defining and regulating it and making provision for its due enforcement. For example, one Crowninshield, on March 22, 1811, gave a note for a sum of money to one Sturges; shortly afterward the legislature of New York, in which the note was made, passed a bankruptcy act; somewhat later Crowninshield became a bankrupt, paid Sturges a portion of what he owed, and then claimed the right to be discharged from the remainder of his obligation under the terms of the new law. On appeal the Supreme Court declared invalid the New York bankruptcy measure, in so far as it applied to debts contracted *before* its passage, on the ground that such retroactive legislation was a clear impairment of the obligation of contracts.

Definition of Contract. As employed in the Constitution, the word "contract" has a far wider meaning than in ordinary law. It covers not only agreements between private parties with respect to property but also grants, charters, and franchises issued by a state to individuals and corporations. In one of its most celebrated cases, decided in 1819, the Supreme Court established the broader interpretation by holding that a charter granted to Dartmouth College by the King of England was a contract which New Hampshire, as his successor in interest, was bound to honor after securing its independence. Having announced this ruling the Court then declared that a law of the state in question designed to control the College and its funds was void as an impairment of the obligation of the contract. Under a literal application of such a doctrine, a state legislature having once granted a privilege to a person or corporation would be bound to maintain it unimpaired forever if no specific provisions were made in the grant as to time limitations or other conditions.

Exceptions. The Supreme Court however has refused to extend the term "contract" to several forms of agreement between a state and its citizens. An appointment to a public office even for a fixed period at a definite salary is not a contract and a legislature may abolish the position without impairing any obligation. From the category of contracts are also excluded such measures as a legislative grant of power to a municipal corporation and a bounty law offering to pay from the public treasury a specific rate on the production of certain commodities. If judicial interpretations were less generous the states would be seriously hampered whenever they attempted to repeal any law under which property rights and claims have been established.

Limitation on Obligation. In practical operation moreover the contract clause has been limited in another direction. By one early school of thought the term "obligation" was construed to place certain rights of property forever beyond legislative reach, but this view did not prevail. As we have seen, obligation was finally defined as the body of law existing and controlling a contract at the time it is formally made. Hence the Supreme Court, in applying the clause, declares a law invalid only when it is retroactive; that is, when it impairs contracts made before its passage. Therefore, if a state provides in its constitution or laws that all future charters and franchises granted under its authority may be amended or repealed, it thereby makes the very reservation a part of the obligation of such contracts and thus leaves the legislature free to alter

or abolish them without running counter to this historic provision of the Constitution.

State Control over Future Contracts Reserved. Taking the hint from early judicial decisions, the states now safeguard, by precautionary measures, their right to control in the future the privileges they grant; hence, it is no longer possible for private corporations to secure, either honestly or by corrupt means, priceless concessions and then defend them against withdrawal or modification by taking shelter under the sacredness of contract. In their general tenor the provisions freeing state legislatures from the strangling effect of this clause are illustrated by the following extract from the constitution of Wisconsin: "All general laws or special acts, enacted under the provisions of this section [dealing with corporations], may be altered or repealed by the legislature at any time after their passage."

Yet there is in truth more shadow than substance to such declarations, for the Fourteenth Amendment, adopted in 1868, has radically altered their legal effect by forbidding states to deprive any person of life, liberty, or property without due process of law. The state may still rescind charters granted to corporations, if it has previously reserved the right, but it cannot alter, interfere with, or revoke them in such a manner as to deprive stockholders of their property without due process. In other words, a legislature may extinguish a corporation but cannot destroy all the tangible rights which the latter has developed under its franchise.

Exceptions in Time of Emergency. Another turn was given to the contract clause of the Constitution in 1934 when the Supreme Court of the United States upheld a Minnesota law giving property owners the right to apply in court for a two-year extension of the time in which to redeem their property about to be taken under foreclosure of mortgage —an emergency measure enacted during a depression in business. The Minnesota Supreme Court had conceded that the statute in question did impair the obligation of mortgage contracts but held that such impairment was within the police power of the state (p. 493) as called into exercise during the economic emergency which the legislature found to exist. This view was substantially confirmed by the federal Supreme Court. In stating the opinion of the Court, Chief Justice Hughes declared that the policy of protecting contracts against impairment "presupposes the maintenance of a government by virtue of which contractual relationships are worth while—a government which retains adequate authority to secure the peace and good order of society." He added that,

as constitutional restrictions could not be interpreted to prevent temporary interferences in times of fire and earthquake, so public needs arising from economic and other emergencies required similar consideration in the application of such limitations. He quoted with approval Marshall's statement that the Constitution was intended to endure for ages to come and to be adapted to the various crisis of human affairs.

Liberty of Person and Property in the States under the Fourteenth Amendment

Wide Scope of the Fourteenth Amendment. The most significant phase of federal control over the activities of states is authorized by the Fourteenth Amendment. For practical purposes, this clause of the Constitution places in the hands of the federal judiciary a veto power over local legislation on nearly all important matters. According to the first section of that Amendment, no state can make or enforce any law which abridges the privileges or immunities of citizens of the United States; no state can deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. In order to grasp the import of the provisions of this brief legal declaration, it is necessary to examine them in the light of judicial decisions, for in themselves they furnish only a slight clue to the restraints which they provide.

Former Narrow View of Civil Liberties under the Fourteenth Amendment. For nearly twenty years after the adoption of the Fourteenth Amendment, the Supreme Court of the United States took a restricted view of its effects upon civil liberties. At first the Court was inclined to the opinion that its primary purpose was to confer certain civil rights upon Negroes recently freed from slavery. It did not deny other purposes but it emphasized the legal rights of Negroes; such as the right of migration, to own property, engage in business, enjoy the privileges of freemen in the courts of law, and in other ways stand on the same footing as citizens and persons in general. While always laying stress upon this conception of the Amendment, the Court repeatedly declared that the states, in other respects, still retained most of their former power to control and regulate life, liberty, property, the press, liberty of speech, and freedom of religious worship. It long rejected the opposite view, which had been advanced by some sponsors of the Amendment; namely, the view that the Amendment "nationalized" civil liberties and

was intended, in effect, to place on the states all the restraints which the first nine amendments of the Federal Constitution placed on the Federal Government. In other words, the Court at first rejected the idea that the Fourteenth Amendment, in sum and substance, amounted to a bill of rights imposed on the states by the national Constitution.

For example when railroad companies claimed before the Court that state laws regulating railway rates violated the Amendment, the Court at first replied that the states had the power to make such regulations and that relief from injustice, if there had been any, must be sought at the hands of the state legislatures, as before the adoption of the Amendment. Not until about 1890 did the Court reverse itself on this point and assume the obligation of passing upon the reasonableness of state railway regulations under the Fourteenth Amendment (p. 490). Not until the third decade of the twentieth century did the Court begin to maintain that freedom of press, speech, and religious worship—civil liberties in general—came within the scope of the Amendment.

Present Limits on States in Respect of Civil Liberties. In numerous decisions the Supreme Court has, since 1922, declared that states are forbidden under the Fourteenth Amendment to do many things which trench upon civil liberties. The following examples are illustrative. States cannot compel all children to attend the public schools, punish an individual for merely displaying a red flag, or lay discriminating taxes on selected newspapers because they oppose the political party at the state capital. States cannot punish a man for attending a meeting held under the auspices of the Communist party. They cannot compel the children of a religious sect to salute the American flag if the sect had conscientious scruples against this ceremony in the schools; nor can they unduly interfere with the propaganda of a religious sect, such, for example, as Jehovah's Witnesses.

Nor can states go too far in suppressing free speech. For instance, in 1937 the Supreme Court, speaking through Justice Roberts, indicated that states cannot arrest and imprison any person merely because he has communist literature in his possession or indulges in loose, inflammatory talk without having in mind an immediate incitement to disorder. The case in question involved an old statute of Georgia under which Angelo Herndon, a communist organizer, was arrested and convicted of incitement to insurrection. "The statute, as construed and applied," said Justice Roberts, "amounts merely to a dragnet which may enmesh anyone who agitates for a change of government, if a jury can be persuaded that

he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." Referring to a communistic manifesto in possession of Herndon at the time of his arrest, Justice Roberts remarked coldly: "This vague declaration falls short of an attempt to bring about insurrection either immediately or within a reasonable time, but amounts merely to a statement of ultimate ideals."

States still retain large powers over life, liberty, and property; but the Supreme Court has served notice on them that there are many principles of civil liberty which they cannot violate with impunity. A substantial body of precedents has now been established on this point. In many fundamental ways civil liberty has at last been nationalized in the United States and put under the protection of the Supreme Court.

Term "Due Process." Of life, liberty, and property no person may be deprived without due process of law; but what is due process of law? The answers of the Supreme Court are somewhat nebulous. Due process of law, replied the Court in one case, is "a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." And in another case, it declared that there are certain immutable principles of free government which control the law of every state. It is only when the justices are pinned down in specific cases and forced to decide whether a given state law does or does not violate these vague principles that we can get anything like concrete answers to our question. Such cases are either procedural or substantive in character, that is, they either pertain to the methods to be followed by the government in trying criminals and performing other duties, or they relate to the substance of the law—the way in which it controls the ordinary conduct of private individuals and corporations, especially in respect of property.

Due Process in Criminal Cases. Taking up procedural matters first, we may ask: "What is due process of law in criminal cases?" An example will illustrate the answer. A law of California provided that a person could be prosecuted for felony after examination and commitment *without* indictment by a grand jury. Under this act one Hurtado was charged with the crime of murder on mere information and, after jury

trial in the ordinary manner, was found guilty and condemned to death. Was this procedure constitutional? The Supreme Court replied that due process of law under the Fourteenth Amendment was different from that under the Fifth Amendment; that the California statute was valid; and that "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice [lying at the base of all our civil and political institutions] must be held to be due process of law."

Civil Cases. Due process of law in civil matters has also been defined in a similar spirit by the Supreme Court. In one pertinent case it held that the Fourteenth Amendment did not guarantee trial by jury in suits at common law in state courts but merely required conformity to a set course of judicial proceedings. In other words, any method which provides for reasonable security, full notice, and a satisfactory protection of the substantial rights involved in such suits may be regarded as complying with the terms of that Amendment.

Taxation. With respect to taxation the Supreme Court has been inclined to allow the states the same latitude. Whenever a tax is laid according to the valuation of property, due process merely requires general notice to owners and public hearings affording them a chance to contest their liability; personal notice is not necessary. Not even the right to be heard is indispensable to due process in the imposition of poll and license taxes, specific taxes on things, persons, or corporations, and many other kinds of taxes.

In dealing with such procedural and administrative questions, the courts are merely handling technical phases of law, in the main, although of course their decisions frequently concern life and liberty in vital relations. Here they have long lines of precedents to guide them, and their usual practice is to uphold state legislation which does not depart too arbitrarily from historic traditions. In this connection they do not often have to consider large issues of public policy.

The Regulation of Property under the Fourteenth Amendment. When we pass to the subject of federal control over state legislation taking property or regulating the use of property directly, we find that the due process clause involves the whole range of economics. Did the framers of the Fourteenth Amendment intend to permit state and local legislatures to regulate the rates and services of public utility corporations—

water, gas, and electric plants? The hours of women in factories? The wages of children? The conduct of strikes in labor disputes? If so, subject to what limitations? In answering these questions, the federal courts do not deal with obvious technicalities of law but rather with broad questions of public interest.

Utilities Legislation. In considering the validity of state and local laws regulating public utilities, the Supreme Court applies certain broad principles developed under the Fourteenth Amendment. First, state governments may control within limits the rates and services of such concerns, but in so doing they must make provision for a judicial review of the cases arising out of the action. In the end, the determination of every important issue in this sphere is vested in the judiciary headed by the high tribunal at Washington.[1] Official bodies engaged in utility supervision (Chapter XXIX) must always operate with due reference to the precedents and dicta of the federal courts.

The Doctrine of a "Fair Return." In the second place, whenever it tests the legality of a state measure regulating utilities, the Supreme Court applies a rule of "reasonableness." Broadly speaking, this means that in the absence of a special contract the rate fixed in each instance must be high enough to permit the company in question to earn a "fair" return on its "capital." If such earnings are not permitted, then the concern is deprived of its property without due process of law, in violation of the Fourteenth Amendment. While the theory may seem clear at first glance, it will be found on examination to raise many complex problems. In calculating the "capital" on which a "fair" return must be allowed, what elements are to be considered? The actual cost of the property? Cost plus good will? The cost of reproduction today, which may be almost double or half the original outlay? The value of the plant as determined on the basis of prudent investment? Its selling value, which may be due to high earning power under exorbitant rates?

Rules for Fixing Amount of an Investment. To the questions thus presented, the Supreme Court has made no clear-cut answers. On the contrary it has vibrated to and fro among the various elements encountered in evaluating utility property. Indeed it has been inclined to include all rather than to emphasize some of them. In one case, for example, it contended that, in order to fix a fair value, "the original cost of con-

[1] By an important act passed in 1934 Congress deprived federal district courts of jurisdiction over practically all rulings of state boards and commissions affecting the services and rates of utilities.

struction, the amount expended in permanent improvements, the amount and market value of its stocks and bonds, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration and are to be given such weight as may be just and right in each case." As if this sweep were not broad enough, the Court added, "We do not say that there may not be other matters to be regarded in estimating the value of the property." On another occasion, it declared that a company was entitled to the benefit of any increase in the value of its property, but immediately countered by remarking, "We do not say that there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public." Not content with covering past and present factors in its calculations, the Court has insisted that "An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances is essential." More recently the Court has been developing the doctrine that the capital of a company should represent the results of "prudent investment" policies. In such language as this are to be found the "principles" which the Supreme Court applies in deciding whether, in any particular state or local action on rates, the capital of the utility company concerned has been fairly evaluated.

What Is a "Fair" Return? When, by some process, a conclusion is reached respecting the true capital of a company, there remains another vital question. What is a fair return on it? Here too the Supreme Court has not adopted any definite rule. In the Baltimore case, decided in 1930, it declared confiscatory a rate that allowed a company to earn only about six per cent on its capital, in which was included a large sum representing easements granted to it by the city. Judging from the general run of decisions six or seven per cent would be somewhere near the Court's idea of a "fair" return, although neither of these figures has been established as the minimum. Moreover in this connection it should be noted that the percentage allowed is applied to the entire capital of the company, when as a matter of fact one-half or three-fourths of its funds may be represented by bonds on which it may pay only four or five per cent or even less. By the above process of judicial calculation the company's actual earnings on its mere stock may be lifted, under the fair return theory, to fifteen per cent or more.

Even if definite rules bearing on valuation and rate return were established, all the problems arising in this field under the due process clause would not be solved. Suppose a company's failure to earn a fair dividend is due not to the low rate allowed by the state but to inefficient management. What then? Suppose it charges up to operating expenses money spent in propaganda, perhaps for higher rates, as has sometimes been the case. What if it pays enormous salaries to superfluous officials or extravagant fees to holding companies for advice? It is not necessary to go further to show that under the Fourteenth Amendment the Supreme Court exercises a vast and elusive power over all the states and communities in the American Union.

Due Process in Labor Legislation. In the field of labor legislation, as well as utility regulation, the states often come into conflict with the due process clause of the Fourteenth Amendment. For example, the Supreme Court in 1936 declared invalid under the Amendment a New York minimum wage law for women, but the following year, after President Roosevelt proposed to reconstruct the judiciary (p. 227), the Court reversed itself and upheld an Oregon minimum wage law.

In dealing with other phases of the labor question, the Supreme Court has often held state laws unconstitutional under the Fourteenth Amendment. It declared invalid a Kansas statute making it a misdemeanor for an employer to threaten to discharge an employee on account of membership in a trade union. As fourteen other states had similar laws, which were thus automatically set aside at one stroke, the range of the judicial decree was stunning to labor leaders. A decision rendered in 1921 invalidated an Arizona law forbidding the issue of injunctions in labor disputes in certain cases but in recent years the Court has been more liberal in construing state labor laws.

State Police Power Reserved. Notwithstanding the prohibitions of the Fourteenth Amendment, the states retain, under judicial interpretation, their "police power," and may in fact do many things that interfere with life, liberty, and property. But the Court refuses to define the term police power once for all, reserving to itself the right to determine at the proper moment whether a particular act comes within that sphere or not. Doubtless a broad interpretation of this very elastic phrase would give a state sanction for passing any legislation designed to promote general welfare as opposed to special privilege. Indeed the Court once said that the police power includes full authority "to prescribe regulations to promote the health, peace, morals, education, and good order of the

people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and its prosperity."

However that may be, a state, under its police power, certainly may do many definite things. It may, for example, restrict dangerous and objectionable trades to certain localities; it may provide for dividing cities into zones; it may regulate, to a limited extent, railways and other common carriers; and it may fix the hours of women and children in industries. It may declare a moratorium on mortgages and extend the time allowed for home owners to redeem property about to be seized under foreclosure. According to the decision of the Supreme Court in a New York milk law case in 1934, a state legislature may establish a milk control board and empower it to fix the price of milk sold to the public.

General Effect of Federal Judicial Control. If it be said that, after all, relatively few state laws are set aside by the Supreme Court under the various constitutional clauses cited above, the answer is that it is not their number but their implication which counts. Moreover cases of this character are now increasing. That is not all. Whenever an act of one state is declared void, legislation of the same type in all the other states falls to the ground with it and future experiments of a kindred nature are barred. When doctrines are laid down in connection with the valuation of public utilities or the regulation of their rates, legislatures throughout the Union must take note of these instructions from high authority and exercise more precaution.

Constitutional Relations among States

Privileges and Immunities Made Common to All Citizens. The Constitution requires the maintenance of certain relations among the states. By a specific provision it guarantees to the citizens of each state the privileges and immunities of the citizens in the several states, and the federal judiciary enforces the pledge by proper processes. In substance this means that there are certain great legal rights necessary to free migration throughout the American empire, to the successful conduct of business and industry, and to the enjoyment of property, which no state may take away from a citizen of another commonwealth coming within its borders. It means also that the civil rights which a state confers on its own citizens may be claimed by citizens of other states taking up residence in its territory.

Under the vague language of this clause a number of interesting ques-

tions have arisen.[2] Within its meaning, are corporations citizens? The courts have answered in the negative. Subject to the limitations of the interstate commerce clause, a state may impose on outside corporations seeking to do business within its borders restraints to which domestic corporations are not subjected. What privileges and immunities are included in the guarantee? No exhaustive list or all-embracing definition is to be found anywhere. Many years ago, when Maryland tried to compel non-residents to take out licenses before offering for sale, in certain districts, goods not manufactured in the state, the Supreme Court held the law invalid. Evidently a certain freedom of trade throughout the Union is among the privileges and immunities enjoyed by the citizens of each state although it may be and is hampered by many state laws (p. 513). Equality of taxation is likewise assured. New York, for instance, cannot lay a heavier rate of tax on property owned within its borders by a Connecticut citizen than it levies upon similar property belonging to its own citizens. The right of the citizens of each state to acquire property in other states is also well established.

State Records Given Effect throughout the Union. A kindred arrangement for facilitating intercourse among the several states, especially in the conduct of legal business, is furnished by the clause of the Constitution which declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Congress has provided by law the form in which legal transactions shall be authenticated. When they are so verified, such faith and credit shall be given them in every court within the United States as they have by law and usage in the courts of the state from which they are taken.

In practice the system operates as follows. A brings suit on a debt against B in a court in Ohio, of which state they are both residents; after trial, the court decides that B owes A one thousand dollars and gives judgment accordingly. B thereupon moves into New York, taking his property along, before it can be attached for the debt. When A in quest of his money goes after B into New York, it is not necessary for him to bring another suit in that state in order to get the proper process to recover the amount due him. All he has to do is to show in the New York court of proper jurisdiction the authenticated judgment of the Ohio court. B may contend that the records are not correctly transcribed, or that the court which rendered the original opinion did not have jurisdiction, but he cannot secure a reopening of the case on its merits. He is

[2] Bates and Field, *State Government*, pp. 55 ff.

bound in New York by any decision properly rendered against him in Ohio.

Although explicit in some relations the constitutional provision in question was long open to a diversity of views in others, especially matrimonial cases. A and B, let us say, are married in North Carolina; A goes to Nevada and secures a divorce. Must the state of North Carolina accept the decision of a Nevada court as binding within its jurisdiction? The Supreme Court of the United States has said, "Yes," reversing an interpretation of a generation's standing. North Carolina cannot disregard the "full faith and credit" clause on the ground that the Nevada decree conflicts with her policy.[3]

Rendition of Criminals. Another phase of interstate relations, the extradition or rendition of criminals, long an international practice based on treaty arrangements between independent countries, is covered by the federal Constitution. An express provision stipulates that any person charged with crime, fleeing from justice and found in another state, shall be delivered up for trial on demand of the executive authority of the state in which the alleged offense was committed. This language Congress has amplified by an act declaring that on proper application "it shall be the duty of the executive authority of the state to which a fugitive has fled" to cause him to be seized and handed over to the agent of the state making the requisition.

But the words "it shall be the duty" have been interpreted by the Supreme Court as merely announcing a moral, not a mandatory, obligation. "The act," explains the Court, "does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power." Hence the governor of a state may use his discretion in every case brought to him for consideration and decline to accede to a requisition if he sees fit to do so.

Process of Rendition. The detailed process to be followed in the rendition of criminals is prescribed in federal legislation. In addition most states have statutes providing that an accused person can be arrested when information of the charge against him is duly received, and held until the official demand is made. Let us suppose that A commits murder in Ohio and escapes into Indiana. As soon as his place of refuge is discovered, the authorities of the community in which the crime oc-

[3] Williams v. North Carolina, 317 U. S. 287.

curred will call for his arrest, and he will be taken into custody by the police or the sheriff of the locality where he is found. A regular charge will then be lodged against him in Ohio, if this has not been already done, either in the form of an indictment by grand jury or an affidavit made before a magistrate. Thereupon the governor of Ohio will issue to the governor of Indiana a formal request for the surrender of A, appending to it a certified copy of the aforesaid indictment or affidavit. If the governor of Indiana finds that the papers are regular and that A is in fact a fugitive from Ohio and was there at the time the alleged murder took place, he will, in the ordinary course, issue an order for the surrender of the accused to the agent sent from Ohio to assume charge of him. On the other hand, if for any reason whatever the governor refuses to accede to the demand, the issue is closed, for no appeal can be taken to any other authority against his decision.

This elaborate process for capturing and returning offenders against the law has been modified however by a number of states voluntarily, by the enactment of uniform laws relative to the subject. One of these laws, already adopted by thirty-four states, permits the officers of any state in pursuit of a criminal to cross their borders and arrest the fugitive from justice on their soil. Another law, accepted by thirty states, waives the formal requirements for rendition proceedings in the state of arrest and permits the easy transfer of an offender to the state in which the crime was committed. In fact it would seem that the airplane and automobile have made obsolete the application of rendition rules to the states of the Union—rules originally devised to operate between sovereign nations. Meanwhile the Council of State Governments continues its campaign to obtain uniform state laws for crime control with respect to arrest, interstate and intrastate fresh pursuit, extradition and rendition of witnesses.[4]

Compacts between States. Relations established among the states under the constitutional clauses just considered may be supplemented by special understandings created by negotiation and agreement. Article I declares that compacts among the states must have the consent of Congress, but practice is not so strict. In minor matters states often enter into arrangements without asking Congress for its formal approval, but if significant political and property rights are involved the constitutional requirement is observed. Notable examples of arrangements coming under this head are the Port Authority organized by agreement between

[4] *Book of the States: 1943–1944*, p. 279.

New York and New Jersey and the Boulder Dam project (p. 366). Evidently there are great possibilities in this half-explored realm of interstate relations. Without changing a line in the Constitution sectional and regional plans required by special economic and technological conditions—for instance, pertaining to metropolitan New York reaching into three states—could be carried into execution.

Federal Coöperation with the States

Important Activities Cross State Boundaries. Owing to the growth of corporations controlling industries in many states and selling goods throughout the country, it is almost impossible to separate the business transacted in any one state from the general mass of national or interstate commerce. Furthermore railways, telephones, the telegraph, and the radio cut across all geographical borders and, as in the case of corporate manufacturing, make it hard to discover sharp distinctions between intrastate and interstate traffic. In public health a similar situation arises, for modern science shows that human maladies, particularly contagious diseases, are not confined to localities, but spread far and wide without respect to political "sovereignties." Nor is it possible to say that in social relations the affairs and policies of one state do not concern those of its neighbors. Low labor standards in one section affect adversely life in other sections; illiteracy, unemployment, and poverty in one region tend to lower the level of civilization in other parts of the Union; and such conditions give rise to demands for national legislation.

If therefore commentators on the Constitution and judges were unable to fix definite lines of law between state and federal powers before the advent of the railway and radio, it is not surprising that they are even more bewildered amid the social complexities of our own time. In some cases where fairly clear divisions have been established by the Constitution, it has been found expedient to bridge the gaps by federal and state coöperation.

State May Adopt Federal Laws. An extreme form of coöperation is to be found in the few instances in which states in effect assign to the Federal Government functions that clearly belong to them under the Constitution, and the Federal Government in turn attempts to give force to state laws throughout the Union. The shift of function from state to nation is nowhere better illustrated than in the case of aeronautics. Under its power to regulate commerce the United States Government

licenses aircraft and pilots engaged in flights of an interstate character. Confronted with the problem of supervising local aviation, a matter entirely subject to her own jurisdiction, the state of New York had to establish a separate system of control for intrastate flying or extend the federal licensing system to include that branch of traffic. After a brief debate the state adopted the latter course in a law of 1928 which requires all planes and pilots flying within her borders to possess federal licenses even if their operations are purely intrastate. Practically all states are now wholly under the federal licensing system.

Federal Government May Enforce State Laws. A shift of authority also occurs occasionally in the other direction—in the validation of state law throughout the Union by federal action. Coöperation in the conservation of wild life affords an example of this reverse process. The states, under the Constitution, possess the power to prescribe the conditions under which game may be killed, and the Federal Government has no authority in this connection, except over migratory animals. Congress however has agreed to accept state game statutes as binding in all shipments under its jurisdiction. It is now a criminal offense against the United States for any person knowingly to deliver to a common carrier or for a common carrier to accept for transportation to another state wild animals killed in violation of local laws. Consignees in other states are also forbidden knowingly to receive such game, under penalties. In taking this action the Federal Government has really made state game legislation, no matter what its nature, obligatory with respect to the interstate commerce of the entire nation.

Federal Action through the Power of Appropriating Money. In addition to lending sanction to transactions in which functions are carried out jointly by the two governments or are shifted from one to the other, the Constitution allows Congress to appropriate money for operations over which it has no express powers whatever (p. 454). Under this authority, the Federal Government deals with many matters which fall within the competence of the states. Its activities thus undertaken may be divided into two broad classes. The first embraces research and standardization; the second, the use of financial measures and aids for the purpose of encouraging, if not actually compelling, states to undertake certain functions or reforms.

Federal Research of General Interest. In our technical age when all governments, from the rural community upwards, must constantly deal with highly complicated scientific questions, research and the develop-

ment of standards are absolutely necessary to efficient procedure. The problems involved, though they may be handled locally, are not local in their intrinsic nature. Hence from year to year the Federal Government has assumed new responsibilities in this relation. Education, for example, except in the case of the Indians and the territories, is not a federal function; nevertheless the National Government maintains an Office of Education which makes special studies, collects data, issues publications, and gives advice and counsel to state and local authorities. Somewhat in the same way, the Department of Labor compiles statistics, analyzes laws, and disseminates information relative to labor questions falling entirely within state jurisdiction. Even more striking is the work of the Bureau of Standards which carries on investigations in various fields of science, evolves regulations, and makes them available to local as well as federal officials. Some of its standards, for instance those dealing with heat and light units and model ordinances for zoning cities, have been adopted by many states as binding within their respective jurisdictions. As soon as new scientific questions arise and begin to receive local consideration, the interest of the National Government may be enlisted and its powerful assistance invoked.

Federal Financial Aid to States. The second type of responsibility assumed by the Federal Government under its power to tax and appropriate money for general purposes, namely, that of rendering financial and administrative assistance to states, runs still deeper into national economy. It involves the distribution of wealth as well as research and the establishment of standards. The costs of governmental services are mounting, and the states, especially those with slight economic strength, find it increasingly difficult to carry their burdens. Moreover the sources of public revenue are not local, but national, in their connections. For example, Smith owns a farm in Indiana; it is taxable for local purposes; but it is mortgaged to Jones in Connecticut, who receives in interest a considerable share of the proceeds of the farm. Is it just to put the whole burden of local improvements on Indiana property irrespective of circumstances? A large part of modern wealth is intangible, namely, stocks, bonds, and mortgages related to property scattered throughout the Union, and it has become increasingly difficult for states and localities to tax such wealth for their own needs (Chapter XXVIII). The national income levy reaches it more effectively.

Grants in Aid of Education. The practice of granting subsidies to states from the federal treasury is not new. By numerous laws beginning with

the Land Ordinance for the Northwest Territory in 1785 and running down to our own time, Congress has made grants, formerly from the public lands, to the states for schools, roads, and canals. The most outstanding of the earlier measures was, perhaps, the Morrill Act of 1862, which set aside for the benefit of each state, in proportion to its representation in Congress, an enormous block of the national domain and provided that the proceeds were to be devoted to the maintenance of one or more colleges engaged principally, but not exclusively, in teaching branches of learning related to agriculture and the mechanical arts. This Act, although attacked by a Senator from Virginia as "an unconstitutional robbery of the Treasury for the purpose of bribing the states," attempted to impose no federal control over them in the use of the money. Congress simply made the gift and trusted them to employ it wisely. Later, amendments to the Act however went into some detail as to the management of the land-grant colleges, and authorized the withholding of the allotment of any state which did not comply with the terms of the concession.

With a view to improving the work already started in this field, Congress began in 1887 to make an annual lump sum appropriation to each state to assist in the development of an agricultural experiment station in connection with the agricultural college. In 1906 it materially increased the appropriation and laid down additional rules for the use of the money. Nine years later it took another step in the direction of closer control by reorganizing, in the Department of Agriculture, an administrative division charged with the duty of supervising the agricultural colleges and experiment stations. At the present time the whole field of relationships created by these subsidies is covered in minute regulations reached by agreement between state and federal authorities. In fact the coöperation is close, continuous, and helpful to both parties. Federal supremacy is unquestionable, because funds can be withheld if rules are not complied with, but resort to this drastic action is seldom if ever necessary.

Enlarging its historic interest in the subject, Congress commenced, with the Smith-Lever Act of 1914, to make appropriations for extension work in agriculture to be undertaken by the Department of Agriculture and the state agricultural colleges. At the outset a small lump sum was assigned to each of the states and the remainder of the annual allotment was distributed among them on the basis of their respective proportions of rural inhabitants; in other words, farming population, not geographi-

cal units as such, was used as the standard to measure needs. Even more striking was the additional provision that national funds should not be given to any state until it accepted the terms of the Act and appropriated or otherwise secured a sum equal to that granted to it by federal law. Under this Act the agricultural extension work of the entire country is conducted according to broad and uniform principles adopted by the Secretary of Agriculture and the state college officials.

Not content with its efforts on behalf of agricultural education Congress undertook, by passing the Smith-Hughes Vocational Education Act of 1917, to promote technical training. It appropriated money from the federal treasury to assist the states in teaching trades, industrial subjects, and home economics. At the same time it kept an eye on general supervision by arranging for the execution of the Act under the direction of a Federal Board for Vocational Education, now the Office of Education.

Forestry. If education, primarily a state function, can receive assistance from the federal treasury and be brought to some extent under national administrative control, why not forestry, a branch of economy also within the jurisdiction of particular states, except where the Federal Government holds domains of its own? In spite of vigorous protests on constitutional grounds, Congress decided that action was imperative in this field and in 1911 it passed an act which made appropriations for the purpose of enabling the Forest Service in the Department of Agriculture to coöperate with any state or group of states, when requested, in protecting the forested watersheds of navigable streams against fire. Though falling nominally under the power of Congress to regulate interstate commerce and hence navigable waters, this measure in effect established a system of coöperative forest protection by a combination of federal and state administrative authorities (p. 361).

Grants for Highways. With this extraordinary precedent accepted, it was comparatively easy for Congress to find warrant, in its authority over post roads, if nowhere else, for enacting the highway law of 1916 (p. 397). In that year it inaugurated the practice of granting immense sums of money to the states for road-building programs and established close federal scrutiny over both construction and maintenance. Under the terms of the Act, modified by later amendments, uniform scientific specifications have been forced upon state highway engineers, common working agreements have been formulated by federal and state officers, conferences of state highway officers have been held under national

auspices, and to cap the climax states that forbade their governments to appropriate money for such public improvements were in effect asked to change their constitutions! Under the control and stimulus of the Federal Government the highway legislation of the states has been multiplied many times in volume and raised to high standards in quality.

Grants for State Militia. If by advancing into the fields of education, forestry, and highway construction Congress "invades the sovereignty" of the states, it certainly goes still deeper into that reservation by legislation which virtually incorporates their militia forces in the national army. Doubtless Thomas Jefferson and Patrick Henry would be astounded and alarmed by the very idea. Nevertheless, by the National Defense Act of 1916, extending principles laid down thirteen years earlier, Congress has, to all intents and purposes, made the militia of each state a cog in the military machine of the Union. In this case, as in others, federal aid is extended; and federal standards for equipment, drilling, administration, and service are strictly applied. The very name "militia" has been dropped and the term "National Guard" substituted for it. Thus the ancient symbol of independence, armed force, passes from the states to the nation. Once it was contended that militiamen were obligated to fight only within the borders of the country and in defense of its territory; in 1917 they were swept into the Expeditionary Army and sent across the seas. Under a law passed in 1934 the National Guard may be called into federal service by the President whenever Congress declares a "national emergency."

Federal Aid for Vocational Rehabilitation. The Industrial Rehabilitation Act of 1920, later renewed in 1930, provides federal aid in restoring to civil employment persons injured in industry or any legitimate occupation. As A. F. Macdonald points out, "the number of workers disabled every year in the course of industry exceeds the total number of American soldiers incapacitated during the entire course of the [First] World War." In recognition of this startling fact Congress, by the Act just mentioned, offers the incentive of monetary aid to the states to induce them to aid persons injured in the course of their work.

Federal Administrative Aids to States. Without any explicit statutory sanction whatever, numerous federal agencies coöperate with state authorities in enterprises of bewildering variety. In a single year the Public Health Service aided Maryland in planning a county anti-mosquito campaign; detailed a federal sanitary engineer to a midwestern city for the purpose of examining the local water supply; conferred with a state food

research laboratory staff in regard to certain chemical tests; assisted two Southern states in the conduct of a thyroid survey; and made, together with the state of Washington, a study of the public health work and needs of the city of Seattle. Without any difficulty this list of coöperative activities could be extended to include nearly every Department of the Federal Government and almost all types of local enterprise.

Summary Illustration. In exploring the organization of a single state, Arkansas, in 1930, A. E. Buck, an authority on administration, encountered federal assistance in the form of financial grants or official coöperation, or both, in the following branches of its work: road construction, equipment and management of the militia, county health work, civilian vocational rehabilitation, agricultural and home economics extension, vocational education, maintenance of the land-grant college, collection of crop statistics, plant-disease and pest-quarantine control, eradication of tuberculosis in cattle, hog cholera control, extermination of cattle tick, forest fire prevention, promotion of forestry, conduct of free employment service, special studies of ground waters, topographical surveying, and stream gauging. In some divisions expenditures from the federal treasury ranged from two to five times the outlays from state and local sources.

Growth of Federal Subsidies in the 1930's. Concerning the growth of the subsidy principle during the 1930's A. F. Macdonald wrote: "Federal payments to the states have risen more than 300 per cent and there can be little doubt that the trend will continue for a number of years. Twenty-one separate grants are now made to the state governments from the Federal treasury. Even yet, however, there is no general policy of subsidizing all major state activities, or all activities affecting the national interest. Grants are made for some services rather than others largely because of variations in the strength and persuasiveness of the several lobbies in the national capital." [5] The haphazard development of Federal subsidies is creating the necessity of an over-all policy for guiding the distribution of such funds. It is becoming desirable to correct the imbalance between state functions receiving such grants and those dependent solely upon state funds.[6]

Recent Developments in Federal-State Relations. After the onset of

[5] "Federal Aid to the States: 1940 Model," *American Political Science Review*, June, 1940.

[6] J. P. Harris, "Should Grants-In-Aid Have a Policy?" *State Government*, July, 1940.

the economic depression in 1929, the relations of the Federal Government and the states, already numerous, intimate, and growing, were materially extended, as efforts were made on a national scale to cope with the problems of industry, agriculture, unemployment, and insecurity. A comprehensive survey of the newer relations would require a recapitulation of nearly all the recent federal legislation described in other parts of this volume, especially Chapters XV to XX inclusive; but to indicate the nature of the alterations that have been made in the interconnections of the once "independent sovereignties" a summary review is necessary.

1. *Financial Relations.* At the opening of the twentieth century the Federal Government and the states derived their main revenues from independent sources. The former relied largely on customs duties and other indirect taxes, while the latter relied principally on taxing real and personal property within their respective borders. Now both governments are heavily taxing the same "objects": incomes, inheritances, manufacture and sale of liquor, and the sales of commodities such as gasoline, beer, and tobacco. The Federal Government makes loans and gifts to states for public works, for housing, and for unemployment relief. In order to insure adequate financial resources for the Federal Government in its prosecution of the Global War and to permit the states to maintain their functions, a coöperative fiscal plan, prepared by the Tax Committee of the Council of State Governments, was adopted almost without exception by the state legislatures in session in 1942.[7]

2. *Federal Penetration of State Economy.* By a long line of legislation the Federal Government has assumed responsibilities in the relations of capital and labor, which were formerly left almost entirely to the states. To grasp the significance of this change it is necessary merely to review again the Labor Relations Act, the Government Contracts Act, the National Wages and Hours Act, and the activities of the Works Progress Administration (lately abolished).

3. *Coöperation in Social Security and Housing.* The care of persons suffering misfortune of all kinds was once considered a purely local function; then states took over a part of the obligation; finally the Federal Government entered the scene. It now offers grants in aid of old-age pensions, public health, the welfare of women and children, and the care of the blind. It makes provision for unemployment insurance and old-age

[7] *Book of the States: 1943–1944*, pp. 3, 4.

insurance and encourages states to clear away slums, engage in rehousing the people, and do many other things coming under the head of general welfare.

4. *Coöperation in Legislation.* In attempts to carry out its plans, the Federal Government has called upon the states to enact similar or identical laws that dovetail into federal legislation. When the Supreme Court declared that the regulation of agriculture belonged to the states (p. 426), Congress passed the Soil Conservation Act designed to insure uniform regulatory operation by joint actions with the states, and the states with alacrity enacted laws complying with the terms of the federal statute. The National Housing Act would have been ineffective without state legislation and a large number of states quickly passed laws enabling communities to take advantage of the loans and gifts proffered by the Act. It has become a common practice for Departments in Washington to draw up standard bills for states and to secure their enactment by state legislatures. It is a roundabout process for attaining uniformity of procedure throughout the country but it works, especially when many state governments are in the hands of the party in power at Washington.

5. *Federal Coercion of States.* When the Federal Government offers money to a state on condition that it will furnish a certain amount itself or do certain things prescribed by federal law, the state is free to accept or refuse. But in some cases the inducement becomes almost coercive. The unemployment insurance provision of the Social Security Act lays a heavy tax on employers' payrolls and then offers to remit nearly all the tax if employers are making payments in support of a state unemployment insurance plan. That practically amounts to coercion in fact if not in theory.

6. *Federal-State Administrative Coöperation.* Once federal officers were federal officers and state officers were state officers. Now the distinction has become blurred in many respects. Federal officers lay down rules for state and local officers to follow in such fields as forestry, housing, agriculture, and flood control. In various connections the two sets of officials work side by side in coöperative undertakings. In some cases state officers may be shifted to the services of the Federal Government for particular purposes. For example, the Wages and Hours Act of 1938 authorizes the Administrator to "utilize the services of state and local agencies and their employees and . . . reimburse such state and local agencies and their employees for services rendered."

7. *Federal and Municipal Relations.* In numerous cases the Federal

Government goes past the state government and, with or without explicit state authorization, forms connections with communities or renders services to them. In his *Federal Services to Municipal Governments*, Paul V. Betters has supplied a whole volume of illustrations, in such matters as health, safety, crime, and civil engineering. Under state legislation, the federal Housing Authority deals directly with communities empowered to coöperate with it. As Charles E. Merriam has said: "In many instances . . . the state will neither grant autonomy to cities nor will it assume the burden of administrative supervision over them." In such circumstances, the Federal Government often steps in where states fail to assume certain obligations.

Recent Discussions of Federal-State Relations

The Critical Note. The rapid growth of federal-state interconnections, especially the extension of federal aid and activities, has awakened a widespread debate over the subject itself and over the future of the states in the American Union. On the one side, the discussion has been marked by considerable heat among opponents of recent federal policies. In its platform of 1936 the Republican party, under whose auspices state sovereignty had been finally destroyed by armed might and federal aids to states had been lavishly granted, declared: "The New Deal administration constantly seeks to usurp the rights reserved to the states and to the people"; while on their part the Democrats in the same year, forgetting their old passion for states' rights, warmly defended the expansion of federal power under President Roosevelt. Professor T. V. Smith, while a member of Congress, insisted that so-called "States Rights" are meaningless unless considered in terms of states' competence and that as Madison put it, "the people ought not to be precluded from giving the most of their confidence where they may discover it most due." [8] Other able students and practitioners in the field of government and administration, little concerned with partisan slogans and distempers, have surveyed the tendencies in federal and state relations and have come to the conclusion that the states make for waste and ineptitude and should either be abolished, reduced to the level of administrative subdivisions of the Union, or otherwise reformed. Among these vigorous critics of state government are Charles E. Merriam, Edward S. Corwin,

[8] " 'States Rights' and the Rights of the States," *State Government*, February, 1940.

William Y. Elliott, James T. Young, Roy V. Peel, and William B. Munro, whose studies and experiences give weight to their judgments.

Summary of Criticisms. The burden of the arguments against the states is summarized by W. Brooke Graves as follows: "In general, it may be said that the criticisms leveled against the states through the years have centered around the fact that their boundaries were not determined in accordance with any guiding principles, the claim that they constitute an obstacle to effective local government, and that they have often failed to deal adequately with many of the pressing responsibilities with which they have been confronted. They have failed to adjust themselves, structurally and functionally, to the increased responsibilities imposed upon them, and upon all government, by the developments of modern civilization. They have often failed to coöperate effectively with each other in the development of common policies, and because of restrictive clauses in their constitutions have frequently been unable to coöperate with the Federal Government." [9] Or as Charles E. Merriam tersely stated his case: "Most states do not now correspond to economic or social unities, and their validity as units of organization and representation may be and has been seriously challenged."

Regional Commonwealths as a Way Out. Calling attention to the manner in which the Federal Government has districted the country for military, banking, agricultural, conservation, and other purposes, some critics of the states have proposed a new subdivision of the Union on regional rather than state lines. For example, William Y. Elliott proposes to divide the country into a few great regional commonwealths, retaining the states "for some administrative units as the English counties have been," and giving each commonwealth representation in Congress. This arrangement, he argues, would bring strong regional governments into existence and make less necessary the creation of a powerful federal bureaucracy.[10]

Counter Proposals. Deeming such projects impracticable or undesirable, other critics of state government hold that the process of working out more effective federal and state relations can be facilitated by the education of state authorities as to the utility of coöperation among the states themselves and better adjustments to federal activities within their borders. As W. Brooke Graves points out in his work on the sub-

[9] *Political Science Review*, February, 1936, pp. 24 ff.
[10] *The Need for Constitutional Reform.*

ject, there are many ways of effecting this purpose.[11] State administrative and legislative authorities may be brought to see the significance of the problem; a national council of state agents could be formally organized; agencies promoting such coöperation could be centralized; the subject could be brought to the attention of state judges inclined to go their several directions; and a popular campaign could be launched in the interest of uniform state action. If this could be brought to pass, then state authorities would be encouraged to take and keep the initiative in numerous matters instead of waiting for action on the part of the Federal Government. In such a way the evils of a centralized bureaucracy could be mitigated and local intelligence, interest, and control kept in full vigor. As a matter of fact such coöperation among the states is now in process of development (below, p. 512).

Probable Tendencies. What a new national crisis might produce, no one can say but at the moment state attachments are so fervent and state political machines are so strong that any radical consolidation of states into regional commonwealths seems beyond the range of practical politics. Yet federal activities impinging upon the states and their inhabitants continue unabated and the merging of local economies into the national economy goes on as before, despite all state resistance. It appears to be a settled policy that the regions of concentrated wealth, derived from industry, agriculture, mining, and transportation in all parts of the Union, must contribute materially to the education, welfare, and security of regions less endowed with riches and resources. The once general requirement that states must match federal grants dollar for dollar is being abandoned in various particulars and, as Arthur Macmahon points out, it is "inconsistent with the logic of equalization. It bears invidiously on the states most in need." [12]

Centralism and Local Autonomy. While the independence of the states does often make for delay and confusion, federal and state coöperation offers a possible solution of the old problem of central authority and local liberty, of uniformity in standards and autonomy in local administration. If the actual direction of all the activities cited above were concentrated in Washington and even county farm-extension agents were appointed by the President, an immense machine would be

[11] *Uniform State Action* (1934); see also his article on "The Future of the American States," *Political Science Review*, February, 1936.

[12] *Survey Graphic*, November, 1938, p. 545.

created, a still larger bureaucracy, in other words. Now, such a bureaucracy is itself a formidable interest. It tends to dogmatism and routine, and puts a check on local spirit, initiative, and ingenuity. On the other hand, if all communities were left to themselves, some of them would inevitably sink to low levels in education, health, and culture. How to combine local energy with high national standards, to stimulate the weak without oppressing the strong, is really the problem which the states and the Federal Government are attacking in the extension of their coöperative functions. By a skillful adjustment of relations between supervising federal authorities and state executive officials, scientific standards and individual initiative may be united.

The Broad Picture of American Government

A Caution against Overemphasizing Single Phases. From what has been said above it is apparent that any separate treatment of federal, state, and local institutions as water-tight compartments is bound to give only a partial picture of each element in the processes of American government. All are rooted in American civilization, traditions, and interests, despite the strength of regionalism. None of the institutions —central, state, or local—stands alone and operates alone, as in a vacuum, without reference to the others. All are interrelated and interdependent. The form, functions, and spirit of each affect the others, are indeed necessary to their operations. More than this, coöperation among federal agencies, states, cities, and counties for the interchange of ideas and for the drafting and execution of common plans works for the introduction of improvements and best methods everywhere throughout the Union. At the risk of some repetition therefore it is necessary to emphasize a summary view of these interrelations in seeking to understand the structure and operations of American government as a whole and the responsibilities of citizenship in all its phases.

Penetration of State and Local Government by Federal Activities. As a result of a long development extending over many decades, federal activities now impinge upon, aid, and stimulate state and local activities in nearly every sphere, ranging from public health to the conservation of resources. Federal grants of money help the states and communities to carry on work which they had earlier assumed on their own initiative; for example, the provision of old-age pensions. Federal laws and grants offer inducements to the states to expand old functions and undertake

new enterprises; for instance, in the field of public health and unemployment insurance. Federal agents work with state and local agents in numerous relations—the administration of wages and hours regulations, soil conservation, marginal land retirement, and land use planning, for example. High standards for the performance of state and local functions are prepared by federal agencies in coöperation with state and local officials for the purpose of raising the general level of public achievements; federal standards for highway construction furnish an excellent illustration of this point. In some cases federal activities supplement without supplanting state activities, as in the apprehension of kidnapers, bandits, and other criminals. When close federal and state coöperation is required and supplementary state legislation is necessary, federal agencies often provide model laws which state legislatures adopt with or without amendments, if they wish to participate in the particular form of national action. This was done in connection with the Soil Conservation Act of 1936 which has been supplemented and implemented by state laws.

Federal-State-Local Inter-Governmental Coördination in the Global War. During the Second World War, here called the Global War, the Federal Government relied as never before upon citizen action at the local level. Millions volunteered for civilian defense and rationing. Public school teachers administered the registration for rationing of scarce commodities. In response to Federal recommendations the states promptly established regulations for enforcement of the 35-miles-per-hour speed limit to conserve rubber. In order to facilitate motor transportation of war material the confusion of state regulations was instantly resolved through the adoption by all the states of uniform size and weight requirements for trucks.[13]

The Upward Reach of State Governments. While the Federal Government has been taking part in state and local legislation and administration, state governments have been enacting laws and creating agencies for the purpose of taking advantage of federal offers, standards, requests, and examples. Congress offers aid in low-cost housing; in response states enact appropriate legislation and establish housing authorities. Congress lays down standards for vocational education, highway construction, or agricultural experiment stations and tenders aid on such conditions; states that wish to accept set up the proper agencies and inform the

[13] A. W. Bromage, "Federal-State-Local Relations," *American Political Science Review*, February, 1943, pp. 35 ff.

Federal Government that they are ready to coöperate on the terms laid down. Congress attempts to deal with labor relations by a national law (p. 499), thus setting an example to the states; and many of them follow the example on their own motion, by passing "Little Labor Relations Acts." No impassable barrier separates the states from the National Government even in the discharge of functions which historically and practically fall mainly within their own sphere.

Interstate Actions on Common Problems. Nor do any great barriers stand between the states themselves. On the contrary, with the consent of Congress, they may make compacts with one another to accomplish general and particular ends; and they have made compacts, embracing two or more states, covering such matters as the construction of bridges, the control of floods, the production of oil, the regulation of wages, the restraint of crime, the abatement of water pollution, and the conservation of marine fisheries. Without asking the consent of Congress, they may and do draw up uniform laws extending concessions to one another or providing for uniform treatment to their respective citizens in specific matters. By legislation thirty-one of the states have agreed to waive the historic requirements for the interstate rendition of fleeing criminals (p. 497). By common action, a number of states establish reciprocal regulations for bus and truck transportation. From year to year the practice of enacting uniform laws on important matters entirely subject to state control is extended.

Interstate Administrative Agencies. In various forms states have entered into agreements which create joint agencies to carry their common designs into effect. Such agencies now in existence manage bridges and tunnels, take care of adjoining park areas, and supervise flood control works. These are in effect regional authorities which are neither federal nor state in the strict sense, and their success in many undertakings points to the possibility of a more extended use of such regional governments for dealing with matters that transcend state boundaries and yet are not national in scope and interest.

Interstate Affiliations and Coöperation. Crowning these varied activities and in many respects promoting them are the coöperative endeavors of states and communities implemented by numerous permanent associations. So extensive has been this development in recent years that only a bare outline can be given here. Among the interstate and intercommunity organizations now operating are the following units: (1) The Council of State Governments officially representing

nearly forty states, with headquarters in Chicago and branches in New York City, Washington, and San Francisco. This Council, headed in 1943 by the Governor of Maryland, publishes a journal, *State Government*, serves as a kind of clearing house of interstate activities, and promotes research in state problems. (2) The Interstate Assembly, the sixth session of which was held in Baltimore in 1943 and attended by 435 official delegates. (3) The Governors' Conference, held periodically. (4) The American Legislators' Association, officially representing state legislatures and in charge of conferences and research respecting questions of common interest. (5) Special interstate associations, now numbering forty or more, such as the Civil Service Assembly, National Association of Attorneys General, National Association of Secretaries of State, and organizations of public health officials, public service commissioners, and state auditors—all concerned with the exchange of ideas and the improvement of standards. (6) The American Municipal Association representing some 7,000 municipalities and receiving the coöperation of officials in about forty states. (7) The American County Association, "devoted to better county government."

Cross Currents. In portraying this growing affiliation of states and communities, it is to be noted however that there are also conflicts among states which seriously interfere with freedom of commerce and intercourse. States bid against one another for industries by offering tax exemptions and other favors, including in substance assurance of docile labor; they discriminate against the products of other states by imposing taxes on them or by applying sanitary regulations against them; and they erect other barriers against the movement of goods. And such actions bring retaliations and ill will in their train.[14] The business depression and the hard struggle for existence were partly responsible for such tendencies. During the Global War the Council of State Governments was so influential in checking these tendencies that only a few new trade barriers were even considered by state legislatures. This does not signify however that the trend may not be resumed later.

Is This Regimentation? It is often said that the extension of federal activities in matters affecting states and communities is destroying their initiative, crushing the spirit of self-government, and regimenting free-born citizens. In their alarm, real or feigned, some critics declare that America is being subdued to a bureaucracy in Washington and on the

[14] F. E. Melder, *State and Local Barriers to Interstate Commerce*, University of Maine Studies.

way to becoming a totalitarian State. Do the facts in the case support this judgment? If words are to be used with due respect to their meaning, the answer is an emphatic negative. In some relations, to be sure, the Federal Government is coercive; it was intended to be; and has always been since its establishment in 1789. But in most of the newer activities that penetrate state and local areas, it offers assistance, not a threat of arbitrary dominance, leaving to the states and communities the privilege of coöperating or not as they see fit. And as a rule the spirit of give and take, teach and learn, controls the relations of state and federal officials in working out their joint undertakings. After all, federal officers are not imposed on the country by force and they are not aliens. They are American citizens usually well acquainted with American ways in state and community life.

Looking at these newer activities from the side of the states, we find that nearly all the functions for the discharge of which federal aid is offered were originally undertaken by states in some form on their own motion; and federal activity has merely tended to make such functions more general and more effective. Most of the so-called newer activities are not so very new, as anybody can see who will examine the successive editions of this volume which have appeared since 1910, tracing the changes of the years. The newness consists rather in their spread from state to state, in variations, and in federal coöperation in the process of extension and development.

Another pertinent fact can scarcely be overemphasized. Paralleling the penetration of state and local governments by federal agencies has been an extraordinary growth of interest in state and local government, a drive for reorganization and improvement in machinery and methods, an expansion of state civil service, and an amazing extension of interstate and intercommunity coöperation. The competence of state and local officers has been raised by an interchange of ideas and demonstrations of more efficient practices. And the citizens of states have more to do, not less, more power to achieve results, not less, and more encouragement to participate in public affairs, not less. The centralizing tendencies, accompanied by state and local activity on a larger scale, express neither the letter nor the spirit of totalitarianism. On the contrary the whole process represents American democracy, with its diverse interests and its central and local agencies, working at higher speed and stimulating, not suppressing, the creative energies of citizenship.

The Legal Powers of the National Government over Territories

Acquisition under Treaty Power. The Constitution makes no express provision for the acquisition of territory, and at the time of the Louisiana Purchase the question was raised whether the Federal Government really had the power to buy that domain. President Jefferson thought that an amendment was necessary to authorize any such addition to the original Union. Since that was impracticable, he gave up the idea, but he confessed to a friend: "The executive, in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The legislature, in casting behind them metaphysical subtleties and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves."

On the other hand, Jefferson's supporters who took a broader view of the matter insisted that there was full constitutional warrant for the action; that the Federal Government enjoyed the undoubted right to acquire territory under its treaty-making power. In time this view prevailed. Several years later the Supreme Court sanctioned it by declaring that "the Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory either by conquest or by treaty."

Constitutional Provision for Territorial Government. All possessions, however acquired, are governed by Congress under a clause of the Constitution giving it authority to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The nature of the jurisdiction thus conferred has been the subject of a conflict which has furnished a long and stirring chapter in the constitutional history of the United States.

Early Limits on Power over Territories. What clauses of the Constitution actually control the national authorities in the administration of territories? It requires no subtle analysis to discover that certain provisions restrain the operations of the Federal Government within the states. But do all the limitations in behalf of private rights contained in the Constitution, especially in the first nine amendments, control the Federal Government in the territories? In his famous opinion in the

Dred Scott case, Chief Justice Taney answered in the affirmative, and declared that Congress could not abolish slavery in any territory because in so doing it would deprive slave-owners of their property without due process of law. Many years later the Supreme Court confirmed this doctrine by holding that the Seventh Amendment, prescribing a unanimous verdict in common law trials, was binding on both Congress and the territorial assemblies. According to these opinions, the inhabitants of territories enjoy the rights proclaimed in the amendments which restrict the governing power of Congress. So things stood at the close of the nineteenth century.

New Doctines Provided by Courts. Then suddenly a new aspect was given to the old theme when the Philippines and other former Spanish colonies were acquired, for it was obviously impracticable to apply to them all the elaborate principles of Anglo-Saxon jurisprudence laid down in the federal Constitution. Confronted by this situation, the Supreme Court cut its way out by swift strokes. Beginning with the "Insular Cases," it held, in substance, that not all parts of the Constitution apply to all the territories and that the Supreme Court is to determine, as specific cases arise, just what portions of that document are applicable to any given area. It once ruled, for instance, that the Sixth Amendment protects Alaskans but not Puerto Ricans, since Alaska had been "incorporated into" the United States whereas Puerto Rico had not. In addition to being free from some of the usual limitations set by the Bill of Rights on federal activities, Congress, when legislating for the territories, also enjoys what are customarily regarded as state and municipal powers. In other words, the National Government, having acquired the territories in its own name, thereby becomes the sole authority which can impose its will on them, and hence can undertake local activities in them which it could not assume elsewhere in the Union. For practical purposes the overseas territories are almost entirely subject to Congress and may be governed under virtually any system which it cares to prescribe.

The Government of Districts, Territories, and Possessions

The actual administration of the districts, territories, and possessions not organized into states varies according to circumstances. Some regions are governed in part by local legislatures and enjoy a large measure

of autonomy; some are placed under the control of federal officers; and others are subject to marine law.

District of Columbia. Among the regions directly subject to congressional authority the District of Columbia, the seat of the Federal Government, occupies a unique position. The District was originally accepted by Congress in 1790 as cessions from Maryland and Virginia but Virginia's grant was later restored to her. Reckoning subsequent modifications, it now consists of about seventy square miles. After several experiments in the administration of the municipality by a mayor and council had been tried and found wanting, Congress destroyed in 1878 the last vestiges of popular representation. At the present time the supreme legislative power of the District is assumed by Congress itself, which has set aside certain days to be devoted to the business of the community. The executive authority is vested in a board of three commissioners—two civilians appointed by the President and Senate and one military officer detailed by the President. Besides carrying on important administrative activities, this body makes ordinances relating to public health, safety, and welfare.

Territories with Popular Government. Popular government, with varying qualifications for voting, has been granted to four territories and possessions of the United States—Alaska, Hawaii, the Philippines, and Puerto Rico. The first of these, Alaska, secured from Russia by purchase in 1867, remained under direct administration from Washington until 1912, when a large measure of home rule was conceded. The second, Hawaii, was annexed by a joint resolution of Congress in 1898 and accorded representative institutions two years later. In the Philippines, acquired by conquest from Spain in 1898, government has passed through various stages. At the outset a military system was organized; this was followed shortly by a civil régime consisting of a governor and a commission; in 1907 a representative body was installed; by the Jones law of 1916 the senate, as well as the lower chamber, was made elective; and finally in 1934 Congress enacted a law providing for the ultimate independence of the Philippines (p. 315). A somewhat similar course was pursued in the case of Puerto Rico, likewise wrested from Spain in 1898. After a brief period of military rule, Congress authorized in 1902 the establishment of a legislature with one popular chamber; fifteen years later it provided that the upper house also should be chosen by duly qualified voters.

Alaska, Hawaii, and Puerto Rico have governors and the Philippines a High Commissioner appointed by the President with the concurrence of the Senate of the United States. In Alaska, Hawaii, and Puerto Rico, the law-making functions are exercised by a legislature composed of two chambers—a senate and a house of representatives, both elected by local voters. The new constitution for the Philippines provides for a unicameral legislature and a governor elected by popular vote. These territories and possessions send delegates or resident commissioners to represent them in Congress at Washington. Although these agents may speak on affairs that concern them, they do not enjoy the right to vote in that body.

The Virgin Islands. The Virgin Islands, purchased from Denmark in 1917, enjoy a measure of local autonomy. As in the case of the territories just described, the governor of the Virgin Islands is chosen by the President and Senate of the United States, and local legislative functions are discharged by popularly elected representatives. On the other hand, the authorities at Washington have wider power over the appointment of local officials in the Virgin Islands than in the territories treated above. Moreover legislative functions in the Virgin Islands have merely been delegated to two regional councils which meet periodically in joint session to make laws for the entire area, a system having no exact counterpart in the previously cited territories. The Virgin Islands do not have the right to send a spokesman to the United States Congress.

Territories with Executive Government. At the bottom of the scale in local autonomy are a few American possessions governed directly by federal officers without the intervention of a legislative assembly. The most important of these are the Panama Canal Zone, leased by a treaty from the Republic of Panama in 1904, Guam, secured by arrangements with Spain in 1898, and Tutuila with neighboring islets, finally acquired in a settlement with England and Germany in 1899.

Administrative power over the Panama Canal Zone is vested in a governor appointed by the President with the consent of the Senate; all other officials attached to the Zone are now chosen by him or under his authority and hold office at his pleasure. Most of the laws and ordinances for the strip are made by executive decree, subject to the right of Congress to change them by specific enactment. The chief business of the Zone authorities is the all-important function of maintaining and operating the Panama Canal and its adjuncts.

Also purely executive in nature are the governments of Guam and

American Samoa, for they are normally carried on by naval officers under presidential supervision. In both places the local commander of the armed forces of the United States acts as the supreme authority, with power to frame laws and ordinances and compel obedience to them. In this fashion the civil and military governments are combined, which is not surprising in view of the fact that the islands are of significance chiefly as naval bases.

Besides the regions just enumerated there are several minor islands in the Pacific Ocean which are claimed by the United States. Most of them seemed of slight importance until war with Japan suddenly brought them into the headlines; but a few contain a valuable fertilizer or are considered useful as bases for trans-Pacific air lines. Federal colonies have been placed on some of them to preserve American sovereignty.

Question of American Citizenship. Difficult problems of citizenship as well as government have arisen in connection with American possessions. In some cases United States citizenship has been generally bestowed. Thus the inhabitants of Alaska, except certain uncivilized tribes, became American citizens unless they preferred their Russian connection. A similar policy was applied to Puerto Rico and the Virgin Islands. In the former, all Spanish citizens, including the natives, and in the latter all Danish citizens, were allowed to retain their old allegiance; then by subsequent acts those who had not so elected were granted American citizenship. Hawaii, of course, stood on a different footing and all Hawaiian citizens were automatically made citizens of the United States.

In contrast to this policy, the people of the Philippine Islands were never granted American citizenship. Spanish subjects were permitted either to retain their old allegiance or to become citizens of the Philippines; while the Philippine legislature was authorized to provide for the naturalization of other persons. Thus the Filipinos were placed between two worlds. They were not made citizens of the United States, nor yet citizens of an independent country. Only when and if the Independence Act of 1934 is carried into effect will they acquire citizenship in an independent country of their own. Apparently Filipinos resident in the United States cannot become naturalized Americans under the law as it now stands. In a still more curious plight are the inhabitants of American Samoa. They are not American citizens. What are they? Law and diplomacy make no answer.

Immigration from Possessions. Closely associated with the problem of

citizenship is that of immigration from the possessions. Residents of Alaska, Hawaii, and other regions who are American citizens may freely enter the United States. Philippine citizens formerly enjoyed the same privilege but under the Act of 1934 the immigration quota was fixed at fifty per year.

Insular Tariff Arrangements. Closely allied with the question of colonial government and citizenship is the bearing of the protective tariff on the possessions of the United States. Hawaii and Alaska came within the tariff borders of the United States; but by a curious line of reasoning the Supreme Court held that Puerto Rico and the Philippines were not necessarily parts of the United States within the meaning of the revenue acts of Congress. Hence duties could be laid on commodities passing in both directions. For a time something approaching free trade with the Philippines was established, but this brought protests in the United States, especially from American farmers, against the importation of Philippine agricultural products. So restrictions were imposed on certain Philippine products in 1934; when and if independence is finally granted, the Philippines will take the status of a foreign country in respect of the American tariff. Free trade was extended to Puerto Rico in 1901 but the tariff problem still remains an issue of discussion and protest in the Island and in the United States, for several competitive items appear in their commercial exchanges.

Administration of Possessions. Until 1934 the United States did not have a centralized department or agency for the administration of its territories and outlying possessions. Affairs pertaining to the Philippines, Hawaii, Alaska, Puerto Rico, the Virgin Islands, Guam, and Samoa, were handled by various departments of the Federal Government—the Department of the Interior, the Bureau of Insular Affairs of the War Department, and the Navy Department. But in November of that year a central agency—the Division of Territories and Island Possessions under the general supervision of the Department of the Interior—was created to supervise the government of certain territories and insular possessions of the United States. The new division now has control over Alaska, Hawaii, Puerto Rico, and the Virgin Islands, chiefly. It is not assigned direct dealings with the Philippines which, since the passage of the law providing for independence, constitute a special problem; nor with Guam and Samoa which are still under the supervision of the Navy Department. Under its general responsibility for administering

possessions, the new division supervises their relationships with the Federal Government, their civil and economic development, and many special problems relating to them.

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CHAPTER XXII

THE STATE AND ITS CONSTITUTION

Extensive Powers of "the People." Though limited by the federal Constitution and in many respects reduced to the position of a province in the Union, the state still enjoys immense powers and bears a vital relation to the life and property of its inhabitants. Indeed Amendment X of the Constitution expressly declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Before elaborating this point, a word should be said about "the people." A state is not a government established by a constitution. In the eye of the supreme law of the land it is a body of people occupying a definite geographical area; more narrowly, a body of duly enfranchised voters empowered to set up and operate any kind of government, so long as it is republican in form and is in accord with the framework of federal law. If the people of any state have been unimaginative, have clung to a stereotyped scheme, limited in conception and devoid of grand policy, that is no fault of the federal Constitution but must be ascribed to their incapacity for creative thinking.

State as a Unit in Federal Affairs. The state is still fundamental to the very operation of the federal system itself. It is a unit for equal representation in the Senate of the United States, for the apportionment of members of the federal House of Representatives, and for the distribution of presidential electors. Under its varied laws delegates to national political conventions are chosen, nominations to the federal House and Senate are made, and all federal elections are conducted. The Federal Government in its major branches is composed largely of persons from the states who have had experience in some division of state or local service. So far as national policy springs from the character of the men and women active in that Government, the states carry a heavy responsibility for it. Even the national Constitution itself is at the mercy of the states. No change can be made in it without the consent of three-

fourths of them, and two-thirds of them may initiate a call for a national constitutional convention to recast the whole instrument.

Wide Scope of State Authority. Speaking generally of the powers which it enjoys in its own right despite its close relations with the Federal Government (Chapter XXI), the jurisdiction of the state extends over a wide domain, subject of course to federal limitations. It can cover by legislation the field of civil and criminal law, can determine what objects and intangibles shall be property and whether public or private, and what actions shall be deemed crimes punishable by fine, imprisonment, or death. It can regulate the rates and services of utilities within its borders. It can encourage and promote industry and agriculture. It can incorporate manufacturing companies, charter banks, and license trades. A wide field of social control is under its authority—factory legislation, workmen's compensation, the rights of labor unions, and old-age pensions. Health, education, parks, forestry, rivers, lakes, irrigation come under the sweep of its powers. Law enforcement high and low, from the governor as commander of its armed forces through the police organizations of great cities to county sheriffs and village constables, hangs upon its decisions and efficiency. To paraphrase Bryce's well-known passage written long ago, the state registers the birth of the individual, appoints his guardian, pays for his schooling, licenses him to enter a trade or profession, marries him, divorces him, hears civil actions brought against him by litigants, guarantees him a wide range of liberty of press and opinion, protects him in freedom of religious worship, and opens up many avenues of opportunity.

States as Experimental Laboratories. Nor is this mere political theory. States are actively operating in every direction alone and in coöperation with federal authorities, exploring and applying the powers they enjoy. In truth they are veritable laboratories of political and economic experimentation. Each state is so organized in village, township, county, or district formations, and in its higher unity, that neighborhoods may try out ideas, spread them into surrounding regions, and make them prevail, perhaps, at the state capital. It is from the communities and states that ideas make their way upward into the National Government. Many states had in effect adopted popular election of United States Senators long before enough momentum was gathered to force an amendment to the federal Constitution. The same was true of woman suffrage. Child labor legislation, workmen's compensation, railway regulation, and many other expedients for social control were first devised and tried

in the states before they were seriously advocated at Washington. Thus one state may attempt experiments which others consider dangerous and by its success or failure illuminate wide spaces of political enterprise. Offices that seem trivial, duties that appear commonplace, ideas that look futile may in the course of time assume a strange value and elevation.

Growth of Constitutions in Bulk. Subject to the limitations of the federal Constitution and such restraints, if any, as may be imposed at the time of admission to the Union, the voters of each state may, by proper process, formulate a constitution for their own government. Theoretically a constitution is supposed to be a "fundamental" law, to incorporate only the grand principles of government, leaving details to the legislature for elaboration; but in practice this rule is no longer observed. The constitution of New York drafted in 1777, including the Declaration of Independence, covers less than sixteen printed pages; while the constitution prepared in 1894 spread over more than forty pages. The Virginia constitution of 1776, leaving out of account some passages from the Declaration of Independence, fills less than six pages; the Virginia constitution today is many times larger. Most voluminous of all is the fundamental law of Louisiana, a document which, in 1938, filled more than 250 printed pages the size of this one.

Reasons for Growth. What has produced this change in the state constitutions? On one count it is to be ascribed to popular distrust of the state legislature. In some cases constitutions have grown by the addition of limitations on the powers of the law makers to do evil, to enact special and objectionable legislation. In other cases legislatures have refused to comply with popular demands, and voters have employed the amending power to force the realization of their will, adding provisions to the constitution which might well have taken statutory form. To a certain extent the new bulk is due to judicial rulings. The supreme court of California, for example, declares a primary law unconstitutional; the voters respond by writing into their state constitution a section authorizing a definite type of such legislation; and when they wish to change it they must amend "the fundamental law."

Results of Growth. Two striking results flow from this increase in the size of state constitutions. The distinction between "fundamental" and statutory law has been lost, beyond recovery it seems; and it has become necessary for the voters to be continually amending their state constitutions. Broad principles may stand unaltered for generations; de-

tails must be continually modified. Hence it is not uncommon for the voters of a state to be called upon to approve from ten to thirty amendments at a single election. Sometimes as high as two-thirds of the states are found voting on one or more amendments in a single year. Correlatively, of course, thoroughgoing revisions by constitutional conventions become more necessary and more frequent. The manufacture of fundamental law has thus become one of the major industries of state politics, resulting in many varieties of doctrine and prescription. In 1943 Tennessee was the only state in the Union that had not amended its constitution since 1912—in fact since 1870 when it was adopted.

Constitutions Not Complete Guide to Practices. The differences in the constitutions however are not a complete index to the real differences in practices of government, for the newer and more bulky fundamental laws frequently provide for institutions which have been set up in older states by legislative enactment. For example, the constitution of Louisiana adopted in 1921 devotes several pages to highway affairs, even going so far as to designate the state highways on a map which forms an integral part of the constitution. On the other hand, the Illinois constitution contains only a few words on roads; yet Illinois now has an extensive highway system.

The Elements of a State Constitution

A state constitution generally falls into six parts: (1) a bill of rights; (2) sections providing the framework of government, central and local, and the fundamental limitations on each branch; (3) sections dealing with state finances; (4) clauses pertaining to economic interests, such as railways, insurance, banking, and labor; (5) provisions for education and social welfare generally; and lastly (6) an amendment clause.

1. **Rights of Persons and Property.** Taking several of the state constitutions together, we find that a composite view of the bill of rights reveals two somewhat sharply defined segments. One contains those ancient limitations on behalf of private rights so famous in the constitutional history of England and the United States: indictment by grand jury; trial by jury; the free exercise of religious worship without discrimination or preference; the privilege of the writ of habeas corpus save in case of rebellion, invasion, or public danger; prohibition of excessive bail and fines and cruel and unusual punishments; compensation for private property when taken for public use; the right of every citizen to

speak freely, write and publish his sentiments on all matters, subject to responsibility for libelous publications; and the right of the people peaceably to assemble and to petition the government or any department thereof.

Rights Enforced at Law. These broad principles are not, as sometimes imagined, mere platitudes or pious wishes; they are rules of law interpreted and applied by the courts, especially in passing upon the constitutionality of the acts of state legislatures. Every important legislative measure touching seriously the rights of private property or the franchises and charters of corporations is almost certain to be brought before the courts and tested against one or more of the above generalities as well as the provisions of the federal Constitution. The bulk of such legislation declared invalid is enormous.

Limitations on Freedom of Opinion Generally Upheld. Laws touching liberty of person, press, and speech are less frequently carried into the courts. Measures of this character are not so numerous and the courts seem more loath to declare them unconstitutional. This was amply demonstrated when the Bolshevist fear swept over the country at the close of the World War in 1918. Many states, nearly all in the North, hurriedly adopted sedition acts laying heavy penalties upon all persons who publicly advocated violent revolution or any doctrine calculated to affect the state and national governments injuriously or bring them into contempt. Under these statutes arrests were made wholesale and penalties of fine and imprisonment were lavishly imposed. It was not uncommon for the courts to send persons to prison for ten years or more for the expression of opinions classed as dangerous. Five years after the end of the World War more than one hundred persons were still held in prison under these laws. In 1931 twenty-one states had criminal syndicalism statutes prohibiting the advocacy and use of violence to achieve social change. By 1943 the number of states with such laws had declined to fifteen.

Again and again the "sedition" statutes were attacked in state courts on the ground that they violated constitutional provisions but, except in a few cases, without avail. The general attitude of the courts may be summed up in the language of a judge speaking on liberty of opinion: "The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the state. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of any other action includes an

injurious use of one's occupation, business, or property." Perhaps the most striking of the many decisions touching liberty of opinion was that of the Connecticut Supreme Court of Errors which held that aliens were not entitled to the privileges and liberties set forth in the bill of rights. This rather startling ruling was based upon an old case in which it had been declared that the said privileges and liberties were not guaranteed to slaves. The assumption must be therefore that aliens in this particular have the status of slaves.[1] Since state courts are inclined to sustain any kind of law regulating freedom of opinion, it has become a practice for persons affected to appeal to the Supreme Court of the United States where relief is often granted (pp. 488–489).

Newer Doctrines of Legal Rights. By the side of the historic doctrines touching rights of property, person, and opinion—rights of English origin—we find in many state constitutions a number of newer principles; such, for example, as are laid down in the constitution of Oklahoma. In that document, prosecution for felony and misdemeanor by information as well as by indictment by grand jury is expressly sanctioned, but no one may be prosecuted for felony by information without having had a preliminary hearing before an examining magistrate or having waived such hearing. In county courts and courts not of record the petty jury consists of only six men; and in civil cases and in criminal cases involving crimes less than felony, three-quarters of the whole number of jurors may render a verdict. In other cases unanimity is required. In all criminal prosecutions for libel the truth of the matter alleged to be libelous may be given in evidence to the jury; if it appears to the jury that the statement alleged to be libelous is true, or was made with a good motive or for justifiable ends, the defendant shall be acquitted—a provision in behalf of liberty of speech and press which is also to be found in the constitutions of some of the more conservative states.

Right of State to Engage in Business. While safeguarding private property by providing that it shall be taken for public use only when just compensation is given, the Oklahoma constitution declares that "the right of the state to engage in any occupation or business for public purposes shall not be denied nor prohibited, except that the state shall not engage in agriculture for any other than educational and scientific purposes and for the support of its penal, charitable, and educational in-

[1] See Chafee, *Freedom of Speech*, especially the tables in the Appendix. For the Connecticut case see R. E. Cushman, in the *Political Science Review*, Vol. XVI, p. 468.

stitutions." It furthermore provides that municipal corporations may engage in any business or enterprise which may be carried on privately under a franchise from a municipality. Perpetuities and monopolies are declared to be contrary to the genius of free government and forever prohibited.

Special Limits on Corporations. In the name of individual liberty, Oklahoma excludes corporations from several privileges and immunities secured to natural persons. The framers of her fundamental law have provided for unrestricted searches into the actual operations of corporations, by explicitly stating that their records, books, and files shall be at all times subject to the full visitorial and inquisitorial powers of the state, notwithstanding the rights secured to persons and to citizens.

Limits on Military and Judicial Powers. The constitution of Oklahoma guarantees to its citizens immunity from the worst features of martial law by declaring that "the privilege of the writ of habeas corpus shall never be suspended by the authorities of this state"; but this provision did not prevent the governor from establishing complete military rule in the capital in 1923—an action which culminated in his impeachment and removal. The theoretical subordination of military to civil authority is accompanied by a positive limitation on the power of the judiciary to grant injunctions. The legislature, the constitution runs, shall pass laws defining contempt and regulating proceedings and punishments in case of contempt; but every person accused of violating or disobeying an injunction out of the presence and hearing of the court is to be entitled to trial by jury to determine his guilt or innocence, and in no case shall penalty or punishment be imposed for contempt until the accused has had an opportunity to be heard.

Miscellaneous Provisions Touching Private Rights. In addition to these principles of civil liberty, there are to be found in several bills of rights curious provisions which belong rather to the sphere of political theory than to constitutional law, but are interesting nevertheless. The constitution of Kentucky declares that "absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. All men, when they form a social compact, are equal; . . . All power is inherent in the people; and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may

deem proper." The Massachusetts constitution solemnly announces: "It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe." The inhabitants of Vermont are warned "That frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the blessings of liberty, and keep government free; the people ought, therefore, to pay particular attention to these points, in the choice of officers and representatives, and have a right, in a legal way, to exact a due and constant regard to them, from their legislators and magistrates, in making and executing such laws as are necessary for the good government of the State." While guaranteeing freedom of religious worship, the constitution of Pennsylvania declares "that no person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth."

Provisions on Civil Liberty in the New York Constitution of 1938. As the constitution of Oklahoma adopted in 1907 reflected the spirit of that age, so the revision of the New York constitution in 1938 revealed the still newer interest in civil liberty. It declares that no person shall ever be denied the equal protection of the laws of the state or any subdivision thereof or be subjected to any discrimination in his civil rights because of race, color, creed, or religion, by any other person, firm, corporation, or institution or by the state or any agency or subdivision of the state. This was a direct answer to the challenge of fascism and intolerance.

2. **Structure of Government.** The second part of the state constitution embraces the sections dealing with the separation of powers, the frame of government, and the limitations on the authorities of the state. This part usually outlines the form of the central government in considerable detail, and contains more or less explicit provisions in relation to rural and municipal government. It defines the suffrage, sketches the organization of the legislature, and prescribes the limitations under which it must operate. It provides for the election of the governor and the great officers of state, leaving the construction of the minor administrative offices and boards to the legislature. It creates the judicial system, state and local; but generally entrusts the regulation of matters with regard to jurisdiction, procedure, and appeals to the legislature.

3. **Financial Limitations.** The third division of our composite state constitution places fundamental limitations upon the financial power of the state legislature (Chapter XXVIII). Such provisions are often detailed and complicated, but their general purpose is to fix a debt limit beyond which the legislature cannot go, and to compel that body to make adequate provision for the payment of the interest and principal of debts created.

4. **Special Position of Corporations.** The fourth part of the state constitution frequently lays down with considerable minuteness the general principles which shall be applied in the regulation of corporations. The newer constitutions are especially full and explicit on this point. They not only provide that corporations shall be chartered under general rather than special laws, but they go into great detail with regard to public service corporations. Typical northern constitutions—for example, those of Pennsylvania, Ohio, and Indiana—dispose of the matter in relatively few words; but the constitution of Virginia drafted in 1902 contains twelve large and closely printed pages on the subject of corporations alone; while Oklahoma gives fourteen pages of the same size to that branch of law. These newer constitutions limit very narrowly the activities of corporations. They provide for a state commission with large powers over the rates, charges, and general conduct of public utilities.

5. **General Welfare.** The fifth part of our composite constitution contains a large variety of miscellaneous provisions designed to promote general welfare. It usually includes sections relative to the public schools and the state educational system. The Nebraska constitution, for example, requires the legislature to provide free instruction in the common schools of the state for all persons between the ages of five and twenty-one; it sets aside certain revenues for educational purposes; and creates a board of regents for the University of Nebraska, a state institution. Under the head of general provisions we also find clauses authorizing legislation relative to workmen's compensation, providing for the care and maintenance of the poor, exempting homesteads from forced sales for debt except under prescribed conditions, fixing the maximum rates of interest, safeguarding public health, creating charitable and eleemosynary institutions, controlling the management of public property, and giving a broad sanction to social legislation.

To settle all doubts respecting the power of the legislature to enact social legislation and promote the health and welfare of the people de-

tailed clauses containing express authorizations were inserted in the constitution of New York in 1938. The sections on conservation were enlarged and strengthened. In response to the growing demand for public housing, expressed in the National Housing Act of 1934 and recent social security legislation (p. 470), long sections were written into the constitution explicitly empowering the legislature to provide low-rent housing for persons of low income, to clear, replan, reconstruct, and rehabilitate substandard and insanitary areas, and to deal with sickness, old age, and unemployment insurance. In order that New York City might unify and municipalize its system of rapid transit, a special amendment authorized the metropolis to issue a large block of bonds outside its debt limit for that purpose. If the older state constitutions may be called political documents, the New York constitution as revised in 1938 may be characterized as a social and economic document.

6. Amendment Provisions. The last part of the state constitution makes provision for future alterations by prescribing the way in which amendments may be proposed and adopted (Chapter XXIII).

The Suffrage

Since the structure and functions of each state government depend so largely upon the determinations of the people subject to it, the right to vote is of course a primary consideration and is naturally covered in some detail by the fundamental law. Subject to the restraints imposed by the federal Constitution (p. 36), the state may prescribe its own conditions and limitations with respect to the suffrage. Broadly speaking however all men and women who possess certain qualifications may vote in state and local elections. For convenience the qualifications may be grouped under six heads: age, residence, citizenship, property, education, and miscellaneous.

Age, Residence, and Citizenship. The ancient English rule of fixing the age limit of voters at twenty-one years is used by all of the states except Georgia whose electorate in 1943 set the limit at eighteen through an amendment to the state constitution adopted by a vote of two to one.

A period of residence in the state is always required. It varies from a few months to two years, but the most common term is one year. It is also a general practice to require a period of residence in the county and election district in which the voter wishes to cast his ballot. In operation this apparently simple provision disfranchises thousands of voters

every year, especially in the cities where there are relatively few home owners and the amount of migration among renters is large. Particularly does it affect working people who must of necessity move about a great deal on account of changes in their employments. On the other hand it eliminates many frauds and prevents the importation of "floaters" into close districts where a few votes might turn the tide.

In every state the voter must now be a bona fide citizen of the United States. Until 1926 Arkansas admitted to the suffrage all aliens who had declared their intention of becoming citizens, but this relic of old days, when many Western states sought to encourage immigration by conferring the suffrage upon newcomers, has at last been abandoned.[2]

Property and Literacy Tests. Although the ownership of property is no longer an absolute requirement for the general suffrage, it is occasionally employed as an alternative to other qualifications. The payment of a small tax, such as a poll tax however is frequently prescribed.

About one-half the states impose some kind of educational test, either as a general or as an alternative qualification. Among them are Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, Washington, West Virginia and Wyoming. In details these provisions vary widely, but a typical rule requires the voter to be able to read a passage from the federal or state constitution and to be capable of writing his own name. Where the application of the test is left to election officers, as generally in the South, it may be employed, of course, to exclude applicants on other grounds. New York however seeks to avoid such discriminations by arranging for the issuance of certificates of literacy under the supervision of school authorities—certificates declaring that the holders can read and write English.

Miscellaneous provisions respecting the suffrage exclude persons of unsound mind, criminals, and paupers maintained at public expense. These naturally vary as to details from one part of the country to another.

Special Devices in South. All the above qualifications and some in addition have been employed by Southern states with a view to reducing or eliminating the Negro vote, without violating the letter of the federal Constitution. The following are included among their ingenious devices. Sometimes the voter must own certain amount of property or

[2] L. E. Aylsworth, *Political Science Review*, February, 1931, p. 114.

have paid all taxes legally required of him, including a poll tax—an arrangement disqualifying many Negroes, for they are often at the bottom of the economic scale. In other cases, the prospective voter must be able to understand any section of the state constitution and to give a "reasonable" interpretation thereof to his white examiners. By selecting easy passages for whites and harder ones for Negroes, it is possible for election officials to eliminate those whom they do not wish to see voting.

At one time, both the property and the literacy tests were applied in connection with what was called the "grandfather clause." Louisiana, for instance, once divided all adult males into two groups. The first of these included all men who could have voted on or before January 1, 1867, together with their sons and grandsons, a description which admirably suited the white race. The second class comprised those who could not have voted on or before that date, together with their sons and grandsons, which was merely a way of speaking of Negroes without mentioning them by name. The former, or white group, did not have to meet any literacy or property requirements, whereas the latter, or Negro group, did. Still a different scheme was tried in the neighboring state of Texas. There Negroes were allowed to vote, to be sure, but only in the elections which ordinarily are of minor importance. That is, Negroes could vote in the general elections but not in the Democratic primaries and in the normally Democratic state of Texas the only real contest is in the Democratic primaries.

Effect on Negro Voting. Through the employment of devices of the above variety, there has been an almost total exclusion of Negroes from the polls in such states of the Far South as South Carolina and Mississippi, and a lesser degree of disfranchisement has frequently been achieved elsewhere.

Rights of Negroes under the Federal Constitution. For a long time, the Supreme Court of the United States refused to interfere with state laws respecting suffrage, elections, and primaries which in effect disfranchised Negroes. Once the Court avoided the issue by treating it as "political" and by referring Negroes to the governments of the states and the political departments of the Federal Government for relief, if any wrong had been done. At first it also upheld the Texas "white primary" as an act of a political party and not as an act of the state of Texas. More recently the Court has taken another view. Many years ago it declared the "grandfather clause" unconstitutional as violating the Fifteenth Amendment. In 1939 it held unconstitutional an Okla-

homa statute which, by a complicated provision for registration of voters, in effect disfranchised many Negroes. In 1941, in the "Classic" case, it reviewed the action of Louisiana election officers in wilfully altering and falsely counting ballots cast in a primary election and decided that a primary election is a necessary part of the regular election process. On April 3, 1944, the Supreme Court declared that the resolution of the Democratic state party convention in Texas limiting primaries to white voters is in substance an act of the state itself and void as contrary to the Fifteenth Amendment. Thus it settled a long debated question: political party primaries are to be regarded as belonging to the election process and as involving the rights of suffrage within the terms of the federal Constitution. It should be noted also that any state, regardless of whether it is in the North or South, which imposes special restrictions on the suffrage, is supposed to undergo a reduction in its representation in Congress, as prescribed by the Fourteenth Amendment, but that the rule is not likely to be enforced.

Separation of Powers

Doctrine Generally Expressed. Among the other principles common to state constitutions, as we have seen, is the historic doctrine that the powers of government should be divided into legislative, executive, and judicial. Most constitutions expressly announce it and the others proclaim it by implication. To make sure that there can be no mistake, Massachusetts gives it a triple precision: "In the government of this Commonwealth, the Legislative Department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end, that it may be a government of laws and not of men." If other states are less explicit in their declarations, still there can be no doubt that they provide for the separation of powers and their courts will take cognizance of the fact.

Origins of the Practice. This creed was by no means universal in the beginning of our constitutional development, although Massachusetts included it in her first fundamental law. On the contrary, in several states the legislatures were almost supreme; in some they elected the governor, created courts at will, and controlled the whole process of government. In general the separation of powers was a later development, to

some extent an imitation of the federal Constitution, but perhaps more fundamentally the outcome of a reaction against the abuses and corruption of the state legislature—an effort to introduce checks on it in the form of an independent executive and judiciary. At all events, for one reason or another, it has become a universal rule.

Vagueness of Meaning. But what does it mean? After exploring the subject with great acumen, giving attention to theory and practice, W. F. Dodd comes to the conclusion that it does not mean anything very definite.[3] It cannot be said that all powers of government are clearly divisible into legislative, executive, and judicial according to their intrinsic nature. While some do fall within one category or another, many cut athwart dividing lines. In the best of classifications there is overlapping. Assuming that clean cuts are possible, the very states which announce them violate them in practice, must violate them if the wheels of government are not to be stopped. Governors and executive boards, officers, and commissions enjoy and exercise powers that are in fact legislative in character: they make rules and regulations pertaining to health, utilities, and education, for example. Even in the enforcement of an explicit statute there is room for legislative action on the part of the executive: he interprets it and may indeed defeat it entirely by the methods he chooses or by masterly inactivity. Some legislatures exercise administrative powers by making appointments to certain public offices. Administrative boards and commissions often hear cases, take testimony, and make decisions in a manner quite judicial. Again, courts occasionally exercise the power of selecting officers who perform executive functions. "The courts of Illinois," for example, "say that it is proper to vest in the judicial department the appointment of election officers, mine examiners, and park commissioners, but that it is improper, under the principle of the separation of powers, to vest in the courts a power to review administrative action removing policemen and firemen." In one state a given exercise of power is treated as judicial by the courts, in another as executive. So numerous and perplexing are the diversities of interpretation, that the logician must give up the quest for precision as hopeless.

Practical Uses. Yet the theory is incorporated in our state constitutions and is constantly invoked for or against specific lines of action. If indefinite, it is still not without its uses. Few there are who would like to have the legislature define crimes, prescribe penalties, act as judge and

[3] *State Government* (1928 ed.), pp. 58 ff.

jury, and carry its own findings into execution, or to allow judges to make any kind of laws they please, or give the governor a free hand in devising legislation to suit his fancy. Perhaps the practice of allowing the legislature to order arrests, try offenders, and condemn them, once followed by the English Parliament, is remote from American politics, but the tradition against it is sound and should be preserved. The tumult and oratory appropriate to the forum are out of place in the court room where men's lives hang upon a calm inquiry into tangled facts and upon the exercise of almost infinite patience. Nor are the cold logic and respect for precedent so necessary in deciding cases at law adapted to the discernment of new popular needs and the enactment of delicately adjusted legislation. Not without reason therefore is the separation of powers, vague though the doctrine may be, incorporated in our state constitutions. If in the hands of narrow-minded courts it may become a procrustean bed, it has the sanction of bitter experience behind it.

Judicial Supremacy in the States

The Theory. The constitution of a state is its supreme law, and courts, in proper proceedings, are bound to hold void any act of any state authority, legislative or executive, which violates the letter or spirit of that document. Although the principle met with some resistance in the beginning of our history, it has now been universally accepted. "In exercising this high authority," it has been said, "the judges claim no judicial supremacy; they are only the administrators of public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution and because the will of the people which is therein declared is paramount to that of their representatives expressed in any law." Yet owing to the vagueness of many constitutional provisions, the courts really exercise a wide discretion in disclosing "the will of the people."

Controlling Principles. With respect to the canons to be applied in passing upon the constitutionality of acts of the legislature, the courts of New York have laid down certain principles which are now commonly accepted throughout the United States.[4] The constitution should

[4] State judges are also bound to declare void a state act which violates the Constitution of the United States. In Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island, and South Dakota the constitutions or statutes authorize the governor or the legislature, or both, to require the supreme court judges to give opinions upon the form and constitutionality of

be so construed as to promote in the best way the objects for which it was made, avoiding the two extremes of a wide and a strict construction; statutes are presumed to be constitutional; an act must be constitutional in substance as well as in form; the constitutionality of statutes is not to be passed upon unless necessary to the decision of the case in question; no statute should be declared unconstitutional unless it is in direct, clear, and necessary conflict with the constitution; a law, unconstitutional in part, may be enforced as to its constitutional provisions. A statute evading the terms or frustrating the general and clearly expressed or necessarily implied purposes of the constitution is as certainly void as if expressly forbidden; in the case of an act susceptible of valid or invalid construction courts should lean to the construction of validity; if an act is corruptly administered, this is no reason for holding it unconstitutional; long and undisputed practice in the construction of a constitutional provision by the legislature has almost the force of judicial exposition in its interpretation.

Recent Tendencies in State Judicial Reasoning. For many years after the opening of the twentieth century, state courts showed an inclination to declare unconstitutional laws dealing with questions of social welfare and to uphold laws restricting civil liberties (p. 527). Popular protests against decisions of state courts voiding legislation passed "in the interest of social justice," as Theodore Roosevelt called it, led to demands for restrictions on the powers of the higher state courts over the law-making authority of state legislatures. Three proposals to effect this end were brought up for discussion. The first was a plan for applying the recall to judges as well as other state officers and allowing the people to recall judges whose decisions ran counter to popular views. This plan was adopted in a few states (p. 553). The second proposal took the form of a project for allowing the voters to recall, not the judges, but their decisions, by applying the initiative and referendum (p. 544) to decisions which did not meet sufficient public approval. The third scheme provided that no state court should declare a state law unconstitutional except by a unanimous vote or at least an extraordinary majority; two states—Ohio and Nebraska—have put into force an amendment requiring the concurrence of at least all except one of the supreme court judges in a decision setting aside a state law.

Although the movement to restrict the powers of state courts over

existing legislation or proposed legislation. See Ellingwood, *Department Coöperation in State Government* (1918).

state legislation did not result in many changes in judicial systems, state judges soon revealed a greater hesitancy in declaring invalid state laws bearing on questions of social welfare. Agitations against them undoubtedly had some influence on their minds. The growth of a more liberal spirit in the country likewise affected them. In common with other enlightened citizens, state judges were, no doubt, influenced in their legal thinking by the liberal opinions of distinguished members of the Supreme Court of the United States, such as Oliver Wendell Holmes, Louis D. Brandeis, Benjamin Cardozo, and Harlan F. Stone. At all events state judicial decisions on social legislation have become more liberal in recent years.

State courts have also been forced to revise their opinions on the constitutionality of state laws affecting freedom of speech, press and religious worship. Once they freely upheld state laws of this character as valid under their respective state constitutions. In the third decade of the century, however, the Supreme Court at Washington began to declare many such laws void as contrary to the federal Constitution (pp. 487–488). Now state judges, whether they like it or not, are compelled to bow to federal rulings in many matters of civil liberty.

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CHAPTER XXIII

POPULAR CONTROL IN STATE AND LOCAL GOVERNMENTS

Democratic Institutions. The state constitution rests on a popular basis. Subject to the limitations of the federal Constitution, the voters may by due process under their state constitution amend the document at will. State and local governments move under popular impulses and their functions reflect the ideas and interests of the people. All executives, legislators, and judges spring from the general body of the citizens, are chosen directly or indirectly by the voters, and are subject to pressures and scrutiny by the public. Since these are accepted principles, machinery has been created in each state by which the will of the voters may be brought to a focus in electing official authorities and exercising control over the forms and activities of government, state and community, to the end that popular judgment shall prevail in due course and popular conceptions of the public services may be realized. Some states have gone further than others in allowing voters to participate in various phases of government, but all seek to make effective in some form and measure the aspirations, demands, and choices of the voters, in practice, the majority or a plurality as the case may be. From generation to generation, new devices have been introduced to assure the responsiveness of government to the popular will and the question of better methods for concentrating and giving effect to public opinion is still under discussion, especially as the functions of government multiply. Connected with this issue is the problem of ways and means for drawing high talents to the service of government and facilitating the continuance of competence and experience in official positions.

The Amending System

Initiation and Adoption. Inasmuch as the supreme law of the state is its constitution, subject to federal limitations, it follows from the

principle of popular control that methods of amending or recasting this document should be formally provided.[1] And this implies a system by which constitutional changes may be initiated and a procedure by which they may be adopted and put into effect. Considered in relation to these two elements of the amendment process the provisions of the several states may be classified as follows.

Amendment by Legislative Proposal. The first method, to be found everywhere except in New Hampshire and Delaware, is proposal by the legislature and ratification by popular vote. In some states a simple majority of the members of both houses of the legislature is sufficient to initiate an amendment; in others, two-thirds; in a few, three-fifths. About one-fourth of the constitutions provide that an amendment proposed by a legislature must be approved again by the succeeding legislature before it is submitted to the people. In Delaware two successive legislatures may amend the constitution, without popular approval.

How shall a proposal duly initiated be given the force of law? It is now the common practice to stipulate that a mere majority of those voting on an amendment at the polls can put it into effect; but ten commonwealths declare that it must receive a majority of all the votes cast at some state election in order to become a law.

The method of amendment by legislative action plus popular approval is relatively easy to operate and almost destroys the distinction between constitutional and statutory law. Especially is this true if nothing is required beyond the action of a single legislature and the approval of a majority of those persons who take the trouble to vote on propositions. In fact the distinction is a mere fiction in Oregon where the legislature may submit statutes as well as amendments to the voters—both exactly in the same manner. If however the number of votes necessary to carry an amendment must be equal to a majority of all the votes cast in some state election, then it becomes in practice very difficult to make any change in the constitution.

Amendment by Constitutional Convention. Up to 1943 a total of 191 state Constitutional Conventions had been held. About two-thirds of the states provide for amending their constitutions by conventions composed of delegates elected for the special purpose by popular vote. Although some constitutional lawyers hold that the legislatures of the remaining states may call conventions at will under their general legisla-

[1] O'Rourke and Campbell, *Constitution-making in a Democracy* (1943).

tive powers, there are some doubts on the point. A few states provide that the question whether a constitutional convention shall be held must be referred to popular vote at stated intervals. More than one-half of them however merely authorize the legislature to submit the question to the voters whenever it thinks a convention is desirable. In such cases the proposition to call a convention must usually receive an extraordinary majority in the legislature before it can be laid before the electorate; and sometimes a majority of all those voting at some state election is necessary to put the proposition into effect.

Very few of the states which make provision for constitutional conventions prescribe the methods by which the delegates shall be apportioned and elected. In this respect the constitution of Michigan is unusually explicit. It stipulates that the legislature may submit the question of calling a convention to the voters at any time and must submit it every sixteen years. It declares that three delegates shall be chosen by the voters from each senatorial district and that they shall compose the convention; it fixes the quorum at a majority of the delegates; and concludes by declaring that the constitution or amendments adopted by the convention must be laid before the voters for their approval, within a specified time.

The above rule for submitting convention amendments to popular judgment is by no means universal. On the contrary, a majority of the state constitutions contain no such provision. In practice however state conventions nearly always lay their proposed changes before the voters for ratification. Only a few exceptions have occurred in the past fifty years and most of them have been in the South where suffrage controversies explain the variations.

A substitute for the constitutional convention appears to be emerging in the form of a commission appointed by the governor. It provides an opportunity for a state to utilize some of its outstanding citizens for this purpose. The work is done better, more expeditiously, and at much less expense. The legislature of Michigan, for example, created such a commission, which prepared the draft of a revised constitution for submission to the electorate in 1943. Whether this innovation will meet with general popular acceptance in other parts of the country remains to be seen. In the state of New Jersey, which has no provision whatever for a constitutional convention, a struggle has been going on for years over a revision of its out-moded constitution; in 1941 the legislature ap-

pointed a commission of revision, without achieving results; in 1943 the governor-elect appointed unofficial committees to prepare amendments; and early in 1944 the deadlock was broken by agreement upon certain amendments.[2]

Amendment on Popular Initiative. The third mode of amendment, by the initiative and referendum, is to be found in several states (p. 545). For example, the constitution of Oregon expressly reserves to the people the power to propose amendments to the constitution and to approve or reject the same at the polls without the intervention of the legislature in any form. It provides that eight per cent of the legal voters may initiate an amendment by petition, and if the proposal, on its submission to popular ratification, receives a majority of all the votes cast thereon, it becomes a part of the fundamental law of the state.

There is an element of special significance in the amending of constitutions by the initiative and referendum. Members of state conventions and legislatures are elected by districts; and usually the rural regions have more representatives in proportion to their population than do the cities. Thus farmers may block the proposals of townspeople. When however amendments may be initiated by petition and carried into force by a majority of those voting, distinctions between town and country disappear; geographical districts are ignored; the idea of numerical democracy is carried to its logical conclusion.

Direct Popular Government

Rise and Growth of Initiative and Referendum. Not satisfied with making their own constitutions by conventions or through legislative initiative about one third of the states insist on the right to make laws directly. Realistically considered, this practice is an extension of the custom of submitting propositions to the voters for decision, which developed steadily in various parts of the Union during the nineteenth century, particularly in connection with constitution-making (p. 542). It was no very radical break in our political evolution when in 1898 the voters of South Dakota approved the first constitutional amendment making the initiative and referendum state-wide in application. The idea however had been associated with Populism, and leaders in the old parties were at first suspicious. Still during the opening years of the twentieth century it spread rapidly, especially in the West; by 1912 sixteen states

[2] *National Municipal Review*, January, 1944, pp. 17 ff.

had adopted it in some form—South Dakota, Oregon, Idaho, Missouri, Montana, Utah, Maine, Oklahoma, Nevada, Arkansas, Colorado, California, Washington, Nebraska, Ohio, and Arizona.[3] Then its advance was checked; only three states have adopted it since the year of the great Progressive upheaval: Michigan (1913, extending the system of 1908), North Dakota (1914), and Massachusetts (1918).

Definition of Terms. In principle the initiative is a system which permits any person or group of persons to draft a bill or proposal of law and, on securing the signature of a certain number or percentage of voters, to force the submission of the same, with or without legislative intervention, to the voters for their approval or rejection. If the requisite majority is cast in favor of the proposal, it becomes a law. The referendum is a plan which makes it possible for a certain number of voters to demand that any bill passed by the legislature (except emergency measures) shall be submitted to the voters for approval or rejection. If the requisite majority is cast against it, the bill does not become a law. Note should be taken however of the fact that the term "referendum" has still wider connotations; there is, for example, "the optional referendum"—a device which permits the legislature to submit measures to the electorate at will; and, as we have seen, the practice of "referring" constitutional matters to the people is widely followed. But as here used "referendum" means compulsory action on the demand of petitioners.

Variations in Practice. Such are the broad principles, but in reality these principles take a bewildering variety of forms.

1. The uses to which the initiative and referendum are put may be general in character or closely restricted. They may be employed in making both statutes and constitutional amendments or restricted merely to statutory enactments, leaving judicial control under the state constitution still supreme over measures adopted by the people. Indeed the initiative and referendum may be separated, as was formerly the case in Michigan where constitutional amendments only could be initiated by petition and the legislature alone could employ the referendum. Such a separation takes place in all those states which require a referendum on constitutional amendments but have no system of initiative at all. Finally the initiative and referendum may be limited to cities or other local units.

[3] New Mexico adopted the referendum in 1911 and Maryland in 1915. Mississippi tried to establish direct government in 1914, but was prevented by a decision of the Supreme Court of the state. R. H. Wells, *American Year Book* (1926), p. 175.

2. The initiation of measures may be made easy or difficult. The percentage of voters necessary to propose a law varies. Usually it is eight or ten. A larger number may be required to initiate a constitutional amendment than an ordinary law. For example, in Oklahoma eight per cent of the voters may propose an ordinary law, while fifteen per cent is necessary to originate a constitutional amendment. It may be made easier to force the submission of a bill passed by the legislature than to propose a new bill; that is, a small number of signatures may be required in the former case.

3. Provision may be made for the intervention of the legislature in the process of initiating laws and constitutional amendments. In Ohio, for instance, three per cent of the voters may propose a bill to the legislature; if the legislature passes the measure, that ends the matter; if the legislature defeats it, then an additional three per cent of the voters is necessary to lay the proposal before the people. In Massachusetts, a one-fourth vote of all the members of both houses of two successive legislatures is required to lay before the voters a constitutional amendment after it is proposed by petitioners. In a few states, the legislature is authorized to draw up and submit a competing measure so that the voters may choose between the initiated bill and the legislative bill.

4. The adoption of a measure referred to the people may be made easy or difficult. The law may require only a simple majority of all those voting for and against the bill—the easiest method of all. It may require a simple majority, provided that it is equivalent to a certain percentage of all the votes cast at a particular election. A differentiation may be made between the vote necessary for the approval of an initiated measure and the vote necessary in case of a bill referred to the voters by the legislature itself. For example, in Oklahoma, a project laid before the people by the initiative goes into force only when approved by a majority of all those voting in the general or special election in which it appears, while a legislative proposal becomes a law when it receives a majority of those voting thereon.[4] When a majority of all the voters in a specific election is required, it is often difficult to carry a referendum, because many electors may be indifferent and fail to register any opinion on propositions referred to them in that election.

The Oregon System. Since a complete and thoroughgoing system of initiative and referendum was adopted first in Oregon and has been extensively tried there, something may be said of the details of that plan.

[4] Oklahoma Constitution, Art V.

It was established by a constitutional amendment approved by the voters in June, 1902. This amendment provides that any statutory or constitutional measure may be initiated by a petition bearing the signatures of eight per cent of the voters and containing the proposed measure in full. The petition must be filed with the secretary of state not less than four months before election day; when the formal requirements are met, he must submit the proposal to popular vote, and if it is approved by a majority of all the electors voting thereon, it becomes a part of the law of Oregon. With special exceptions, any act passed by the legislature must likewise be referred to the electorate if five per cent of the voters file a duly executed petition within ninety days after the adjournment of the legislature, demanding such a referendum.

The most noteworthy feature of the Oregon system is however the statute providing for the publication and distribution of arguments for and against the propositions submitted to the decision of the voters. Under this law the supporters and opponents of any particular measure may prepare arguments at length and have them printed by the state (at the expense of the private parties concerned) in the pamphlet containing transcripts of the measures to be referred to the voters. A copy is then sent to every elector. Friends of this system contend that it has an immense educational value; it arouses the interest of the people; it insures some consideration of each proposition on its merits; it turns the searchlight of publicity on the important political issues of the state; and it gives to citizens who do not have a long purse an opportunity to address their fellow citizens at a small cost. Professor James D. Barnett, after giving the subject careful study, expressed grave doubts whether one person in a hundred really reads the entire pamphlet issued in connection with an election or examines any considerable part of it even in a cursory manner.[5] Nevertheless it forms the basis of newspaper discussions and affords information and misinformation to those who take leadership in making opinion.

Claims and Counter Claims. While the popular movement in favor of the initiative and referendum was spreading and indeed long after the adoption of the system was checked, violent discussions of the subject raged among politicians. On the one side there were the usual hopes and promises of better government; on the other side were the usual alarms over the safety of the Republic. On behalf of the project it was said that corruption in legislatures and "boss rule" would be checked,

[5] *Operation of the Initiative, Referendum, and Recall in Oregon*, pp. 94–95.

that the people would secure measures of reform long blocked by legislatures, that bills sponsored by "special interests" would be defeated, that government by minority cliques would be prevented, and that citizens would be moved to take more interest in public affairs. Counter allegations were equally positive: the initiative and referendum will "overthrow our system of representative government," facilitate the adoption of "radical" measures attacking property rights, introduce legislation by laymen incapable of properly drawing up laws, transfer responsibility for law-making from responsible legislatures to irresponsible crowds at the polls, enable agitators to keep the people in turmoil by initiating measures, and permit small minorities voting in favor of bills to govern.

A Critical Survey. To what extent have the praise and condemnation bestowed on law-making by the initiative and referendum been justified by experience in the more than a third of a century that has elapsed since it was put into practice? Seeking information on this subject for the use of the New York State Constitutional Convention of 1938, Harold F. Gosnell and Margaret J. Schmidt surveyed the history of direct legislation in the United States for the entire period from 1924 to 1936 and summarized their findings.[6] Their report, supplemented by later materials, now supplies a basis for the formation of judgments.

Extent of Direct Legislation. In the first place, it had been prophesied that the adoption of the initiative or referendum would deluge the country with measures, seriously overtaxing the strength and patience of the average voter. The aforementioned survey reveals that there is a shred of truth in the contention; in South Carolina 52 propositions were submitted at a single election in 1924, while in California 173 measures were voted on during the thirteen-year period under review, the highest total of any state in the Union. In these instances, conscientious citizens would seem to have valid grounds for complaining that they have to study too many propositions to do their duty at the polls. On the other hand, the prophecy of excessive use is certainly not borne out by experience in the nation as a whole. According to the New York report, a total of 1,493 constitutional and statutory measures were voted on in 47 states from 1924 to 1936, or an annual average of less than two and a half per state. Indeed in each of nine states the average fell below one

[6] New York State Constitutional Convention Committee, *Problems Relating to Legislative Organization and Powers* (1938), pp. 314–335. For the checkered career of the initiative and referendum in Arkansas, see D. Y. Thomas, *Political Science Review*, February, 1933, pp. 66 ff. For the referendum in Maryland, see C. I. Winslow, *ibid.*, pp. 75 ff.

measure per year. From 1938 to 1941 inclusive 616 measures were submitted to the voters—an average of 154 a year or an annual average of about 3 per state.

Few Radical Measures Adopted. What may be said about a second claim, namely that the initiative and referendum would lead to the adoption of radical laws? Proposals to abolish the state senate, set up a cabinet system of government, and apply the single tax have been defeated. A grand scheme for the public ownership of a state power system went down in a crash in California in 1922 and again a few years later. Some of the laws obtained by this method in North Dakota are deemed radical because they apply the principle of state ownership rather widely, but the politics of North Dakota must be ascribed to agrarian conditions rather than to the existence of the initiative and referendum.[7] No drastic change, as prophesied, has yet been made in our form of government by the direct method, unless we include the adoption of the single-chamber in Nebraska in 1934 under this head. No revolutionary economic devices may be laid at the door of that institution, unless the measures relative to the public ownership of utilities adopted in Oregon, Washington, and Nebraska in 1930 or the old-age pension law adopted by Colorado in 1936 may be so characterized. It is not resorted to merely by persons of progressive or radical tendencies; the so-called conservative or "business interests" frequently make use of it for their own purposes.

Variations in Popular Interest. A third moot point in the debate over the initiative and referendum has been whether enough people would vote on proposed measures to make their participation in the legislative process worth while. The answer given by experience is that it depends to a high degree on the attractiveness of specific propositions. According to the New York Survey mentioned above the subjects which have produced the heaviest balloting in California, where the initiative and referendum are most widely used, include Sunday closing, Bible reading in the schools, the gasoline tax, the repeal of prohibition, boxing legislation, cruelty to animals, daylight saving time, and unemployment relief. Those which drew the least attention included a proposal for a judicial council, amendments to local charters, and certain questions relating to private corporations.

When the country as a whole is considered, it is found that Americans

[7] The North Dakota program was adopted by the legislature and state officials, and the referendum and recall were used against it by the conservatives.

are most deeply disturbed over matters affecting public morals, education, highways, and the limitation of taxes, and are least aroused over minor constitutional points—issues affecting some small subdivision but voted on throughout an entire state—and the public debt. Not only is the volume of voting affected by the character of subject matter; it is also influenced by the amount of work to be done at the polls. The New York study reveals a tendency for the enthusiasm of voters to wane when they are confronted with ten or more measures on a single ballot, as evidenced by the fact that propositions near the top of the page to be marked by the voter receive more votes than those at the bottom. In California, there may be a variation of from 25 to 35 per cent in the votes cast on different projects at the same election. For most satisfactory results in terms of voting volume, then, only certain matters should be offered, and not too many even of them.

How Critical Are the Voters? The size of a vote, of course, is of little significance unless it represents an intelligent weighing of arguments. Now how critical is the average poll? Perhaps one favorable sign is that there are relatively few landslides either for or against measures, taking the country as a whole. The New York survey reveals that in general the "yes" votes predominate over the "no" votes. But the proportion varies. Of the 197 measures submitted in 1940, 105 were defeated; whereas in 1941 only 3 measures out of 87 were rejected. This seems to show the exercise of some discrimination.

Old Abuses Appear. Have the initiative and referendum eliminated the old abuses associated with law-making by legislatures? Here the answer is definitely in the negative. For many years the typical state legislature has been the object of attack by advocates of direct government on the ground that it is amenable to the lobby of "the interests," but no doubt the said interests are just as active and influential in referendum elections as at the state capital. Under the system of direct government, Professor Barnett points out, "every man is his own legislature"; he can initiate any bill that suits his fancy and spend immense sums of money promoting it. In the fight over a public power act submitted to popular vote in California in 1922 the public utility companies were openly active and a committee of the legislature which investigated their operations reported that they spent half a million dollars "influencing public opinion."

The legislature is assailed by its critics on account of the prevalence of "log-rolling"; representatives of different sections and interests co-

operate in pushing one another's bills; but Professor Barnett finds cities engaged in log-rolling under direct government. It has been noted by observers that legislatures sometimes pass conflicting laws; in Oregon the voters on a referendum once approved two conflicting bills and the next legislature was compelled to repeal both of them. The passage of badly drawn bills by legislatures has long been a matter of comment, but the initiative and referendum also offer their dreadful examples.

An indictment has been brought against legislatures to the effect that it is impossible to fix responsibility for the drafting and enactment of laws where a hundred or two hundred members or even more, divided into two houses and different parties, all have a hand in the business, besides the lobbies, citizens' committees, and party bosses who throw their weight into the scales. But what is to be said of direct government on this score? Professor Barnett calls our attention to the fact that, under direct government, legislators may submit bills; that legislators, governors, party bosses, and anybody else may take part in getting up petitions and securing their adoption; that it is often impossible to discover who is supporting any particular measure or why it is laid before the voters. He cites the amusing instance of the owners of a private road who drafted a petition under the name of "a committee of farmers," asking the state to buy the road and throw it open to the public! Finally legislatures are often charged with defeating progressive, enlightened, and necessary measures; it would be equally easy to make a long list of enlightened measures "snowed under" by popular vote.

Summary. In fine, as is usually the case, neither the promises of the advocates nor the alarms of critics have been realized. The representative form of government has not been overthrown. It does not appear that the legislation of the states having the initiative and referendum is more or less radical than that of the other states or that its quality is mainly due to the existence of a particular form of enactment. If the balance tips either way, it cannot be proved that the system of direct government is the "cause." The sources of legislation lie deep in the social and economic life of the people, in their ideas and interests, rather than in mere devices of government.

The Recall

Theory of the Plan. Owing to discontent with the legislators and officials whom they had voted into power, the people in nearly one-

fourth of the states have insisted on establishing their right to oust elected persons at will or at least to pass judgment upon their continuance in authority at any time during their terms of service. Effect is given to this right by an institution known as the recall. The principle upon which it is based is simple, namely that elected officials are merely agents of the popular will and that the voters should have at all times an opportunity to pass upon the conduct of their representatives. The device itself is a plan whereby a certain number of the voters, whenever they are dissatisfied with the services of a public officer (usually elective officers only), may, by petition, force a new election and thus submit his right to continue in power to the judgment of the electors.

Rise and Growth. For practical purposes, the recall began its career in the city of Los Angeles, California, where it appeared in the city charter of 1903. At first it attracted little attention; then suddenly it sprang into prominence. A state-wide form of the plan was incorporated in the Oregon constitution in 1908, and it was seized upon by the makers of commission charters for cities as a useful check on the large powers conferred upon the commissioners. California adopted it for state-wide purposes in 1911; Arizona, Idaho, Washington, Colorado, and Nevada in 1912; Michigan in 1913; Louisiana, North Dakota, and Kansas in 1914; Wisconsin in 1926.

Variations in Plan. Although apparently a simple institution, the recall is susceptible of a large number of variations which affect very considerably its character as a practical instrument:

1. The percentage required to force an election to recall an officer may be high or low. It is usually about twenty-five per cent, as in Oregon.

2. Signatures to petitions may be gathered by solicitors, or citizens may be compelled to appear before a local official to affix their signatures.

3. The recall may be used only once against an officer under some of the provisions, and under others it may be employed many times against the same officer, if the sponsors for the second and following petitions pay the expenses of the preceding elections.

4. The vote required to remove an officer may vary. It may be equal to a majority of all the votes cast at the election at which he was chosen in the first instance, or it may be simply a majority of those voting at the recall election. Moreover the recall election may be divided into two parts: the question of removal may be submitted first to popular

vote and this process followed by an election to fill the vacancy; or the vote on the recall may simply take the form of an election at which the officer against whom the petition is filed may run again if he likes.

5. The recall may be restricted to certain officers and not applied to the judiciary at all, or it may apply to all officers.

Experience with the Recall. The recall has not been used as extensively as the initiative and referendum. It was once estimated that there had been on the average six recall elections a year within a period of about twenty years, and that about half of them had resulted in the vindication of the officers against whom they were directed; but this reckoning was not based on an exhaustive survey, and the figures are evidently too small. It has been applied to mayors, councilmen, county judges, commissioners, county attorneys, school boards, and other local officers. It was used for the first time on a state-wide scale in 1921 when the governor, attorney-general, and commissioner of agriculture were recalled in North Dakota.

Although the data bearing on the use of the recall in the country as a whole are meager, there is fortunately available a searching and illuminating study of its operation in California where it was adopted by Los Angeles in 1903 and for state-wide purposes in 1911.[8] This work must be examined carefully by anyone who wishes to speak with authority on the subject but the upshot of the inquiry may be roughly summarized in the following fashion. Up to 1930 there were only 155 cases in which recall petitions resulted in elections or resignations and only seventy-two ejections from office—certainly a small number in view of the fact that there are about one thousand political subdivisions entitled to employ the recall and that each of them is free to resort to the device practically at any time. It had not been brought into action against any state officials elected at large. Apart from three senators serving in the state legislature, the recall was, in this period, directed against municipal, county, and irrigation district officials alone. While the courts as well as other authorities come within the scope of the law, "only three judicial officials above the rank of justices of the peace"—three municipal judges of San Francisco—were removed by popular verdict. During the past decade there has been an increase in the use of the instrument and a growing appreciation of its possibilities. In 1938, for instance, the

[8] F. L. Bird and F. M. Ryan, *The Recall of Public Officers: Study of the Operation of the Recall in California* (1930). For a valuable study of Oregon, made many years ago, J. D. Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon*, published in 1915.

mayor of Los Angeles was recalled and a reform administration installed in office.

Conclusions from California Practice. With respect to the merits of the recall as an adjunct to popular government, mathematical judgments are, of course, impossible, but with cautious reserve the authors of the work here under consideration draw certain rational conclusions from the experience they survey. Judges in California do not operate as a rule under any fear of reprisal at the polls; they seem to be sure that their decisions will not be traversed by appeals to popular passions. For the expulsion of the three municipal judges in San Francisco there was "ample justification." In some instances the officials recalled were evidently corrupt or guilty of malfeasance or of doubtful integrity; in others, they had apparently flouted the desires of their constituents or had been arbitrary or negligent in the discharge of their obligations. For example, a county supervisor was dethroned for inattention to his duties, unbusinesslike methods in conducting his office, and general unfitness for such an important public trust. There are, in addition, some borderline cases in which the popular verdict of recall may be justly open to criticism—not a surprising report when the fallibility of human nature comes into consideration.

Narrowing the issues, our authors conclude that "the recall has found its most satisfactory application . . . in making possible the retirement of political officials who have arbitrarily run counter to the opinion and wishes of their constituents." It has permitted an increase in official terms and a consequent reduction in the frequency of elections, without risking the creation of a bureaucracy. "It has established the principle of responsibility and responsiveness with a value limited only by the capacity of the public to understand it and benefit thereby. Finally it serves a useful purpose in helping to maintain public interest and confidence." In details the system might well be modified to correct abuses which have arisen in practice, but speaking broadly it may be reasonably defended on the same grounds as democracy itself and tends to strengthen rather than weaken popular government. No one expected the recall to give intelligence to any constituency or to escape the perils of popular prejudices and tumult, and experience with it confirms the correctness of such anticipations. Still, whatever follies and irritations may have accompanied its use, the people of California apparently are convinced that it is an agency of security against official betrayal of public trust

and an excellent weapon of defense against autocratic bearing and malfeasance in office.

Popular Control through the Ballot in Elections

The Democratic Theory of Popular Control. Amending or recasting constitutions, making statutes by the initiative and referendum, and applying the recall to public authorities are occasional and extraordinary operations. In the ordinary course of things popular control over government is manifested in nominating and electing executive, legislative, and judicial agents with the aid of the ballot. Under the democratic theory generally prevailing since the time of Andrew Jackson, it has been assumed that the popular election of representatives and officers guarantees popular control over their policies and actions and, more or less implicitly, competence and loyalty to the public good on the part of agents so chosen. The theory is extremely simple. For each elective position in government, a number of candidates will present themselves to the people. Each of these candidates announces that he will do certain things if elected, and each has certain standards of honesty and efficiency. At the primary and election the voters select the one who most accurately reflects the prevailing public sentiment and seems most likely to realize the dominant public desire. If he does not carry out the policy which he is expected to realize, or fails to come up to the standards set by his constituents, he is turned out at the expiration of his term (which ought theoretically to be short in order to give the people a chance to express their judgment with great frequency), and someone who more nearly represents the electorate is chosen in his stead. Thus, in the long run, representative democracy triumphs and popular control is maintained. To question the essential soundness of this view is deemed petty treason by most politicians. The doubter is met with the firm assertion that the people may be trusted to elect any officer, local, state, or national—an assertion which overlooks the fundamental fact that electing *all* officers together is an entirely different matter from electing *any* one of them separately.

Multiplication of Elective Offices. On the assumption that popular election meant popular selection, choice, and control, the number and variety of elective offices was steadily increased, especially after the advent of Jacksonian democracy. Although, as we shall see, a reaction has

set in, it is not uncommon to find on the same ballot the names of two or three hundred candidates for twenty or thirty federal, state, county, district, and municipal positions. Voters are not only invited to choose congressmen, governors, legislators, mayors, and councilmen; they may be asked to decide who is best qualified to be bailiff, clerk of a court, statistician, engineer, health officer, or chief manager of accounts. They are often called upon to pass on minor matters, such as: May the municipal judge appoint a clerk at a salary of not more than $100 a month? Shall the mayor appoint a woman to serve on the city police force?

Frequency of Elections. This is not all. Elections are made frequent. All over the country there are primaries and sometimes "run-off" primaries to decide between the candidates standing highest on the first poll, regular elections, special elections, separate school and municipal elections, and elections on franchises and other referenda laid before the voters. The political calendar of California for the year 1944 lists sixty-five dates between February 2 and December 16 on which operations relative to primaries, elections, and other civic obligations must be performed.[9]

Complexity of Elections Favors Experts or Professionals. The state and local election law usually equals in bulk and complexity a moderately comprehensive treatise on the Constitution of the United States, to say nothing of the unwritten customs of the parties and election officials. The primaries, whether under the convention or the direct nomination system, are, if possible, more complicated than the election machinery itself. Nominating petitions and certificates must be filed on or before the exact day mentioned in the law; committees and conventions must be summoned; representatives on bi-partisan election boards must be selected; and so on through the long process.

Here, then, are important and numerous functions to be performed by citizens in order to set the official election machinery in motion. Someone must know where, when, and how the complex machine works; the average citizen is busy and uninformed as to law and practice; hence the duties have fallen into the hands of regulars and professionals, known as "politicians," large and small. They are aptly described by Richard S. Childs as persons "who know more about the voter's business than the voter does himself." Thus, in seeking to establish popular control through the ballot, the American people called into existence an

[9] *Congressional Record*, January 12, 1944, Appendix, pp. A143 f.

elaborate party organization to serve as an office-filling and spoils-sharing machine.

Protests against Machine Government. Long before the close of the nineteenth century it became apparent that popular control through the ballot was not working according to theory. Many scandals, inquiries, and investigations showed that in various parts of the country state and local governments were really dominated by managers and bosses behind the scenes, who picked candidates for the voters to approve and controlled them after their election. The situation was eloquently described in 1915 by Elihu Root, a statesman accustomed to speak with caution, out of wide knowledge:

> 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 or half way. When I ask what did the people find wrong in our state government, my mind goes back to those periodic fits of public rage in which the people rouse up and tear down the political leader, first of one party, then of the other party. . . . I am talking about the system. 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; one, of the constitutional and statutory officers of the state and the other of the party leaders; they call them party bosses. They call the system—I don't coin the phrase—the system they call "invisible government." For I don't know how many years Mr. Conkling was the supreme ruler in this state. The governor did not count, the legislature did not count, comptrollers and secretaries of state and what not did not count. It was what Mr. Conkling said, and in a great outburst of public rage he was pulled down. Then Mr. Platt ruled the state; for nigh upon twenty years he ruled it. It was not the governor; it was not the legislature; it was Mr. Platt. And the capital was not here [Albany]; it was at 49 Broadway; Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Conkling or Cornell or Arthur or Platt or by the names of men now living. The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the constitution or by law. . . . The party leader is elected by no one, bound by no oath of office, removable by no one.

How could the power of invisible government be broken and government by responsible and responsive agents be substituted?

The Question of Competence in Government. As elective officers increased in number and the functions of government so important for public welfare multiplied, other vital issues arose. Is popular election

a guarantee that the legislators, executives, and judges popularly chosen will be competent to discharge efficiently the heavy obligations imposed upon them by the necessities of our complex industrial society? Are our institutions of state and local government so organized as to attract talents and keep talents in the public service and to assure efficiency and economy in action? A search for answers to these questions began years ago and is still going on; and many concrete steps have been taken to improve the competence and efficiency of government.

The Short Ballot Movement. The solution of the problem of invisible or irresponsible government which Elihu Root offered was a reduction in the number of elective officials, so that the floodlight of public interest and scrutiny could be turned squarely upon a few outstanding leaders held to account for the performance of their duties. For this proposal Richard S. Childs had already coined a caption: "The Short Ballot." The principles of this reform may be summed up as follows:

1. Only policy determining officers should be elected by popular vote.
2. Popular election should be restricted to officers important enough to deserve and attract public attention and interest.
3. The number of officers chosen at any election should be small enough to permit the voter to scrutinize carefully the policies and character of each candidate.

Simplification, it is urged, will permit the electorate to bring steady and persistent pressure upon the great organs of government in the broad daylight of interested public discussion. Only in this way can issues be joined and public opinion be made to prevail over the will of professional politicians. To put the argument in the language of President Wilson:

> Elaborate your government; place every officer upon his own dear little statute; make it necessary for him to be voted for; and you will not have a democratic government. Just so certainly as you segregate all these little offices and put every man upon his own statutory pedestal and have a miscellaneous organ of government, too miscellaneous for a busy people either to put together or to watch, public aversion will have no effect on it; and public opinion, finding itself ineffectual, will get discouraged, as it does in this country, by finding its assaults like assaults against battlements of air, where they find no one to resist them, where they capture no positions, where they accomplish nothing. . . . What is the moral? . . . The remedy is contained in one word: *simplification*. Simplify your processes, and you will begin to control; complicate them, and you will get farther and farther away from their control. Simplification! simplification! simplification! is the task that awaits us; to reduce the number of persons to be voted for to the

absolute workable minimum—knowing whom you have selected; knowing whom you have trusted; and having so few persons to watch that you can watch them.

Simplification in State and Local Government. Efforts to attain the simplicity that makes for responsibility in government were early concentrated on the reorganization of state administration. This meant making the governor the chief executive of the state in fact, placing the principal departments directly under his control, and vesting in him the duty of preparing and supervising the state's budget of finances (Chapter XXVII). In the cities simplification has taken the form of increasing the mayor's power or substituting a city manager for the mayor (Chapter XXXI). The attempt to achieve simplicity in the counties has appeared in the county manager form of government, which concentrates nearly all administrative responsibilities in the hands of a single executive officer (Chapter XXXIII).

The Search for Competence in Government. Associated with the simplification of state, city, and county government has been a search for institutions and methods which will assure competence as well as responsiveness on the part of public authorities. Evidences of this search are scattered through all the chapters that follow, for the various changes in recent times which they record have been mainly directed to the attainment of efficiency along with responsibility. Signs of the general movement appear in the consolidation of state boards and offices under a few department chiefs headed by the governor. They are to be found in the introduction of budget reform, in the substitution of the merit system for the spoils system in recruiting public officials, and in the extension of state control over local finances and administration. In a resolve to diminish the power of mere politicians and secure better legislators, Nebraska abolished the double-chamber legislature and created a small unicameral body of forty-three members—after effecting a partial consolidation of the state administrative system. Still the demand for a more extensive overhauling of state and local machinery is heard among specialists in the subject and in popular discussions of the issue. On the outcome of this quest for ways and means of combining popular control with competence at all levels of government, local, state, and federal, may well turn the fortunes of the American experiment in democracy. At all events the effective handling of the problems calls for the wisest statesmanship, the highest talents, and the finest energies the nation can command.

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CHAPTER XXIV

STATE REGULATION OF PARTY MACHINERY AND ELECTIONS

Party as Motive Force in State and Local Government. All that has been said about the political party as a controlling power in the National Government (p. 61) is generally applicable to state and local government, particularly in the North where there are two active parties contending for mastery. It is through the party that citizens ordinarily bring their influence to bear on the daily operations of state and local functionaries. Through the party are usually nominated the candidates for elective positions; thus public policies are shaped, in a large measure, at party primaries. The formulation of issues and the conduct of campaigns is principally in the hands of party officials and managers. In other words, the motive forces which drive state and local governments are gathered and channelled through party organizations, with federal officers and patronage giving strength to them. A study of state and local party machinery, methods, and regulations thus becomes a preliminary to an inquiry into state and local governments as going concerns.

Extent of State Control over Federal Elections. One more point must be emphasized in this connection. Despite the tendency to exalt the Federal Government and to speak of the declining importance of states, it is well to recall a few often neglected facts in the case. First of all, subject to a few limitations, states regulate the suffrage, decide who shall be allowed to vote, control all elections even for Congress and President, and prescribe the methods to be employed in nominating candidates and constructing party machinery. Even the choice of delegates to national party conventions and members of national party committees (p. 143) is largely determined by state legislation. National party machinery is built upon state and local machinery; the states are units of representation in the national convention and the national committee; Senators and Representatives are chosen in the states and are

leaders in their communities; federal offices and patronage are distributed with partial reference to state and local politics. The outcome of many a federal election has turned on purely local considerations which had nothing to do with national policy, sometimes on factional fights of village politicians. Hence the overshadowing interest in national politics should not be allowed to obscure the fundamental fact that the foundations of American party government are laid in the states and communities of the country and are under the jurisdiction of state governments.

Federal Regulation of Elections. However there is no doubt that Congress has power to regulate in various respects the elections in states which pertain to the choice of Senators and Representatives. The Constitution confers on Congress the power to make regulations and alter state regulations respecting the times and manner of conducting such elections. The Constitution likewise authorizes Congress to determine the time of choosing presidential electors and the day on which the electors shall cast their votes. Furthermore, Congress has power to enforce by legislation the provisions of the amendments which forbid the denial or abridgment of the right of citizens to vote on account of race, color, previous condition of servitude or sex. Congress has however no express power under the Constitution to interfere otherwise with the qualifications which states impose on the right to vote within their borders. Nor does it have any express power to regulate in any way the "manner" of holding presidential elections. The action of Congress in abolishing poll taxes in connection with the measure of 1942 (above, p. 38) allowing members of the armed forces to vote in the federal elections of that year may therefore be challenged on constitutional grounds.

When Congress took up the discussion of bills designed to facilitate voting by members of the armed services and certain other persons in the elections of 1944 a long and angry debate ensued. By a combination of Southern Democrats and Northern Republicans a bill in some respects more limited than that of 1942 was passed. Under this bill poll-tax qualifications on the suffrage were left intact and the principal responsibility for preparing and counting ballots used by members of the armed services was placed upon the states. All efforts to provide a simple federal ballot for voting in federal elections were defeated. Although thoroughly dissatisfied with the bill, President Roosevelt allowed it to become a law without his signature.

Armed Services Vote Act (1944). The power of the states over even federal elections is emphasized in every section of the Act of 1944. Under the law voters can use the short federal ballot in federal elections in only two cases: if they come from states which have no system of absentee voting (p. 577) or if they fail to receive their respective state ballots by a given date. In neither case however may the voter use the federal ballot unless the governor of his state has certified that use of this ballot is authorized by the laws of his state. In all other cases members of the armed services and others entitled to vote under the Act must use the regular state ballots to be supplied by the respective states and distributed under the supervision of federal authorities. As under the federal voting law of 1942 (p. 38), persons entitled to vote under the Act of 1944 must fill out applications for ballots to the authorities of their respective states. In short, in the very midst of a great war, Congress, instead of providing a simple federal ballot for all members of the armed forces, resorted to a complicated method of voting which laid stress on the power of the states over election processes.

State Party Organization [1]

State Chairman. The formal structure of each political party within a state consists of the state and local chairmen, committees, and conventions. At the head of the party organization is the chairman of the state committee who may or may not be the dominant leader in the party. Sometimes he is a mere figurehead who obeys the orders of bosses and private persons who dictate party policies and use him as a screen.[2] The real director of party affairs may be a United States Senator who has patronage to dispense or the governor who commands a large popular following on account of his personality or policies, or an astute manipulator standing in the background. The state chairman is chosen by the state committee, the state convention, at a party primary, or by a group of party candidates nominated at a primary—according to the laws and political customs of the several states.

State Committee. The state committee is a representative party organization. It consists of members from various subdivisions in the state—counties, legislative districts, or congressional districts, as the case may be. The members may be elected in their respective districts at party primaries, selected by the delegates from such districts at a state

[1] For legal control over state machinery, see below, p. 581.

[2] See H. F. Gosnell, *Boss Platt and His New York Machine* (1924).

convention, or chosen by local conventions—as law or practice may determine. The power of a state committee cannot be easily defined, because party rules usually contain few if any provisions on the subject, and the work of the committee really depends upon the personal strength of its members and their capacity for leadership in the party. In a formal way, the committee holds periodical meetings, calls state conventions and other state party assemblies, and takes charge of the preliminaries. In some states the committee chooses delegates to the national convention.

It is also the duty of the state committee to supervise the process of obtaining a full party registration and vote; to adjust quarrels and dissensions within the ranks; to see that local organizations are in good working order; to raise funds; and sometimes to nominate candidates for state offices in minor cases. Finally, it is the duty of the committee to direct campaigns throughout the state, coöperating, on the one hand, with the national committee when there is a national election, and, on the other hand, with the local party committees, strengthening the weak places and devoting special attention to the districts in which it is believed the vote will be close.

The work of the state central committee is usually done by the officers—the chairman, secretary, and treasurer—and such members as choose to devote their time and attention to party matters. In most state committees there is an executive committee, composed of a small number of members who manage to gather into their hands, by constant attention to business, substantially all the powers.

Party Conventions. For nearly a hundred years it was customary for each party to hold a state convention prior to every state election, nominate candidates for office, and draft a platform of party principles. In the course of time however it was discovered that the state convention was often controlled by party bosses. To reduce their influence, state after state passed laws either abolishing the convention or otherwise depriving it of the power to prepare a full and final party ticket. So far had this change gone by 1944 that every state except Connecticut, New York and Rhode Island used the primary election to nominate state officers. Nevertheless the convention or, where it has been eliminated, a party caucus which replaces it frequently arrives at an informal understanding which actually determines who is to run for office with any hope of success. While it is not as supreme as it once was, the state machine is evidently far from dead.

The state convention, where it is permitted by law, is composed of delegates from counties or other local districts, who are chosen by party voters or local conventions. So far as the management of party affairs is concerned, the convention has extensive powers, subject to the laws of the state. It is bound by nothing save its own will, the theory being that the delegates coming "direct from the voters" are the sovereign power within the party for the time being. Often there is no written constitution for the party; each convention is regarded as an original and independent body, which may make its own rules of procedure; for practical purposes it is governed only by the principles of parliamentary law and by precedents.

Unofficial Party Leaders. The formal party organization just outlined is only a part of the state "machine." Indeed, as indicated, the dominant figure in the party may not be a party official at all. He may be a United States Senator, a governor, or a silent, retiring figure behind the scenes. The machine itself consists of state, city, county, and village officials belonging to the party, party chairmen and committeemen throughout the state, aspirants for office who expect to rise by services to the party, numerous attorneys for railway, utility, and other corporations that are involved more or less in politics, labor leaders and labor agents who can swing trade union votes, and the retainers affiliated with the precinct or election district captains whose function is described below. In short, the most permanent, most loyal, most dependable elements of the party machine are those who derive emoluments or favors directly or indirectly from its operations or expect to do so. Since we have in America no leisure class of independent means devoted to party management, as was once the case in England and still is to some extent, it is necessary that those who apply themselves to this form of public service should derive at least a certain degree of economic support from their activities. Of course the public suffers frequently from the evil deeds of machine politicians, but on the whole perhaps the public business is managed as well as could be expected in the circumstances.

Local Party Organization and Methods

County Machine. Leaving out of account the congressional district organization which, save in rare instances, is of no considerable importance in state politics, the basic unit in the state party machinery is the county organization, except in New England where the town is the

home of local politics. It consists of a chairman, committee, and convention (unless the direct primary takes its place). The county convention, where permitted, is composed of delegates from lower units—towns, townships, or assembly districts as the case may be. The county committee, as a rule, is also made up of representatives from certain local subdivisions and the chairman is chosen at a convention, or by the committee, or at a primary. The county organization runs into the great cities; the Cook county organization in Chicago, the New York and Kings county machines in New York, and the Suffolk county organization in Boston are already more than famous in the history of local politics.

Rise of Tammany Hall. The most famous of them all, perhaps, is the Democratic machine in New York county—the central portion of the metropolis—popularly known as Tammany Hall. This organization was established some time before the adoption of the federal Constitution, for the purpose of connecting in "indissoluble bonds of friendship brethren of common bonds of attachment to the political rights of human nature and the liberties of the country." It seems that William Mooney, an Irishman of humble extraction, eager to "diffuse the light of liberty," was chiefly instrumental in the organization of this society.[3] As its purposes were benevolent as well as patriotic, it took the name of an Indian chief of William Penn's time, Tammany, celebrated for his wisdom, peace, diplomacy, and exemplary life.

Thus it made connections with tradition. Tammany had been canonized as a saint by the Revolutionary army in place of St. George, the slayer of the dragon and the patron protector of the British army. And in honor of this noble red man, a number of Tammany societies had been established at various points throughout the East. The New York organization derived its name from older fraternities, and, as if to give more weight to its American character, it took the name of Columbus also, calling itself "the Tammany Society or the Columbian Order."

Growing Influence of Tammany. The Tammany Society seems to have entered politics in support of Jefferson during the hot campaign of 1800, and from that time forward it began to exercise more and more control over elections in the city. The extension of the suffrage by the

[3] The traditional date, 1789, for the establishment of Tammany Hall seems to be wrong, and even Mooney's part in it is uncertain. See Dr. E. P. Kilroe, *St. Tammany and the Origin of the Tammany Society* (New York, 1913).

state constitutional convention of 1821 strengthened its hold upon the working-class electors of the city; and its influence was further advanced on the adoption of white manhood suffrage in 1826. When, a few years later, great famines in Ireland drove thousands of Irish peasants to America, they were received with open arms by the Tammany Society, and through that organization many rose to positions of wealth and influence.

As the population of the city and the membership of the Society increased, a Democratic-Republican political organization was slowly evolved which was nominally distinct from the Columbian Order. This political organization, in the beginning, took the form of a "general meeting" composed of members of the Tammany Society and its political supporters. About 1822, the general meeting was supplanted by a general committee composed of delegates elected at ward primaries; and in due time complete control over the Society and the Democratic-Republican organization, formed in connection with it, passed into the hands of a sub-committee of the general committee. As a rule the leading members of the general committee and the sub-committee were at the same time officers or leading members of the Tammany Society.

After the victory of the Jeffersonian party in the election of 1800, appointments to the federal offices in New York City began to fall to the leaders in the Tammany fraternity. In 1839 the organization elected its first mayor of New York, and thus the spoils of local offices were added to the rich gains made in federal elections. The Society was further strengthened by the multiplication of municipal offices, and the astounding rise in local expenditures. Here were unlimited opportunities for an astute leader bent upon the manipulation of politics for his own personal gain.

Boss Tweed. This leader appeared in 1863 in the person of William Marcy Tweed,[4] who, in that year, became chairman of the general committee of the political machine and Grand Sachem of the Tammany Society. Tweed was born in 1823; he was educated at a public school, and entered politics in his ward as a fireman in a volunteer company about 1850. He was soon elected to the county board of supervisors, which had large powers, distinct from those of the city authorities, in levying local taxes and spending money for county buildings and improvements. As president of the board he extended his authority over various branches of the city administration. From this point of vantage

[4] There were however leaders of some renown before Tweed's day.

he began an organization within the Tammany Society for the purpose of controlling metropolitan politics. In 1869 the Tweed group had possession of the mayor's office, the common council, the district attorney's office, the county and city treasury, the street department, the comptroller's office, the municipal judgeships, the speakership of the assembly at Albany, the state legislature, and even the executive department of the state.

The pernicious operations of this group when in control of the metropolis and the commonwealth cannot even be catalogued here Between 1860 and 1871 the debt of the city was increased nearly five fold; a county courthouse which was to cost $250,000 really cost more than $8,000,000, the tax-payers being charged $470 apiece for chairs and $400,000 apiece for safes; and under the specious title of "general purposes" enormous sums of money were paid out fraudulently by the comptroller. In short, no bounds seem to have been set to the ambitions of Tweed and his fellow-workers; but they overreached themselves, and in 1871 their operations were exposed by the New York *Times*. A committee of indignant citizens, including prominent Democrats as well as Republicans, was formed to break up the ring, and prosecute the criminals. Tweed was arrested on the charge of having stolen $6,000,000; he was convicted, fined, and sentenced to twelve years in prison in 1873; released on an order of the court of appeals, he was rearrested and confined in Ludlow Street jail, from which he escaped in 1875, only to be arrested in Spain and brought back to prison, where he died shortly afterward. The other leading members of the ring were likewise made to feel the penalties of the law.

Later Revelations. From time to time after the downfall of Tweed, the Tammany organization was captured by politicians bent on exploiting it to enrich themselves and their henchmen. Each time there was a reaction in the Democratic party and outside, and an upheaval ousted the malefactors. Near the end of the nineteenth century "Boss" Croker rose to power, made fortunes for himself and his followers, and then was overthrown, after more than one exposure of his corrupt actions. About twenty years later came another saturnalia of spending and wasting under John F. Curry and his mayor of the city, James J. Walker. In due course affairs under this leadership were "exposed" by a legislative investigation directed by Judge Samuel Seabury. As a result Mayor Walker fled the country, Tammany was badly beaten in the next election by the Republican-Fusion candidate, F. H. La Guardia, and Mr. Curry was

deprived of his dictatorial powers by a revolt in the ranks of his own organization. With the growth of the outlying sections of the city, the relative weight of New York county declined, and with it the power of Tammany in municipal and state politics. The appearance of the American Labor party and the triumphant reëlection of Mayor La Guardia in 1937 and again in 1941 further reduced the strength of the historic organization. By 1944 it was apparently moribund but still a force in politics and making efforts to recover power.

Similar Machines in Other Cities. Although it is customary, especially for Republicans, to point to Tammany as the "horrible example" among municipal party machines, as a matter of cold fact its record has not differed essentially from that of both Republican and Democratic machines in Philadelphia, Chicago, St. Louis, New Orleans, Kansas City, Missouri, and other leading cities. The opportunities for corruption have been larger in New York City, but there is no reason for believing that New York politicians have done more than measure up to their opportunities. William Vare, in Philadelphia, and Roger Sullivan, in Chicago, were not far behind Richard Croker and William M. Tweed in New York. Vare, who began active life as an ash and garbage collector, managed to leave an estate of over $1,500,000 when death closed his career as boss of Philadelphia in 1934.

Chicago Machines. Although the scene of municipal politics comparable with New York City's or Philadelphia's best or worst, Chicago has never had a single, long-lived machine like Tammany Hall in almost undisputed dominance from decade to decade; nor has it ever had such storms of reform as have occasionally shaken New York City. No boss equal to Tweed or Croker has ever ruled it with an iron hand for years at a time. Inasmuch as its polyglot aggregation of Irish, Czechs, Poles, Negroes, Jews, and Italians is hard to unite in a solid mass, the fortunes of Chicago's party managers, whether Republican or Democratic, have always been precarious. But these managers have never been lacking in ingenuity.

In that city, members of the local machine have provided "adjustments" in taxes with the help of elective assessors, and traffic tickets have been "fixed," in the hope that such favors would be gratefully remembered on election day.[5] To please voters who had no property to be favored at assessment time, grocers and butchers were once forced to contribute food to a free lunch enterprise run by the gangster, Al

[5] H. F. Gosnell, *Machine Politics: Chicago Model* (1937); *Fortune*, August, 1936.

Capone, and were allowed to make up the reduction in their stock by short-weighting their regular customers—while the city sealer of weights and measures politely looked the other way. Politicians induced friendly judges to appoint them receivers of bankrupt hotels, thereby making sure that the occupants and employees did "the right thing" at the polls. Saloons that had no licenses, gambling joints or houses of prostitution that could get none anyway, and other illegal undertakings contributed further quotas of loyal voters from their staffs, and money as well, in return for continued "protection." In a recent election, money was freely used in encouraging homeless drifters to register under bogus addresses and vote as they were told. For fifty cents apiece so many individuals of this description were induced to register under the names of dead persons and vote that election day could be given the appropriate title of "Resurrection Day." When Frank Kelly was elected mayor on "Resurrection Day" in 1935, it was estimated that over a quarter of his 800,000 odd votes were fraudulent; yet he was so proud of his success that he had his election total made into a license tag for his automobile. A loyal supporter of President Franklin D. Roosevelt and dispenser of an enormous federal patronage, Kelly was able to defy all challengers.

Ward Politics

The Final Political Subdivision. The basic unit of the county organization is the town (in rural New England), precinct, ward, or, as in New York City, election district—the lowest subdivision of the state—the unit in which a polling place is located. Here it is that the party workers come into immediate contact with the voters; here it is also that public opinion may be organized to bring pressure to bear upon the party machinery.

The Precinct Leader. If a party hopes for success at the polls, it should have in each precinct, ward, or election district, as the case may be, at least one loyal and tried official known as the captain, chairman, or president—a tireless party worker, personally acquainted with a large number of the residents and trained in the art and science of winning votes. If this party worker in the lowest political subdivision represents the interests and aspirations of the party voters in his district, the party organization is representative. If, on the other hand, the ward leader is appointed, sustained, and financed by somebody "higher up," the whole party organization may be lifted out of popular control and

vested in the superior officers who are in charge of the base of supplies. Vote-getting "pays" in the economic sense of the word, for the man who can deliver votes can exact a price from those who are willing to pay for the delivery.

The Leader Marshals a Block of Voters. In large sections of the country the precinct, ward, or the election district, in which the leader or captain operates, contains from 200 to 600 voters of all sorts and conditions; perhaps the number of active voters is not more than three or four hundred at most. Let us fix the figure at four hundred. Then two hundred and one constitute a majority. If the captain can get out a party vote of that number or more, he can carry his district. So he has to manage only about two hundred party members. If he has one hundred of them "sewed up," he can ordinarily "swing the district" at will. How can he get control of a hundred voters? He starts with his own family and relatives—perhaps eight or ten voters. Then he usually has the right to choose ballot and election clerks allotted to his party—petty jobs which pay sometimes as high as fifty or sixty dollars a year and are eagerly snapped up by party members. He recommends persons for appointive positions, suggests candidates for minor local offices, gets jobs for the unemployed with contractors in charge of municipal work, and renders numerous other services of an economic sort. Perhaps he is himself a petty office-holder and can work "a few boys" into his own branch of the city government. He distributes "judiciously" the share of the campaign fund which is assigned to his district and has a hand in distributing public relief funds among the unemployed; usually there are ten or twenty shiftless persons who are happy to "run errands" and do other odd jobs more or less arduous during the campaign rush. The captain or leader therefore has many ways of bringing together a fairly solid mass of voters on a practical basis. Counting the members of the families of the retainers, the number may run up as high as one hundred.

Local Leadership Geared into the Machine. By managing this group the precinct leader makes himself "solid" with the bosses of the party machine higher up; they cannot ignore him as long as he holds his forces together and delivers the vote as instructed in primaries and elections. Inasmuch as the primary vote often amounts to no more than fifty per cent of the party strength, it is clear that nothing but the most powerful effort on the part of independent citizens can force the nomination of a candidate who is not approved by the machine. It is evident also that a huge sum of money rightly placed among district leaders will marshal

a considerable vote for any person who will supply the funds. Since there are over 120,000 election districts, it is evident that the precinct leaders in the United States, each with a band of faithful retainers, constitute a truly formidable political machine.

Winning New Recruits. Besides managing the machine in his own party, the leader or captain must always be seeking to win new recruits. If he is efficient, he has a list of all the voters in his district, knows their occupations, and discovers how to help those who are in trouble. When newcomers take up their residence in his neighborhood he finds out about them from the leader of the precinct from which they have moved. As youngsters approach the voting age, he takes an interest in them and invites them to enroll in the party. He is acquainted with merchants in his district and does what he can to "throw business" their way. He is always accessible and anyone in difficulty can easily approach him. He is the channel through which the humble citizen can reach officials high in authority; if necessary he may take a constituent down to the city hall to see the mayor. He is always treated with respect by superiors because he is their sheet anchor in time of a political storm. If he can call the mayor by his first name, the whole neighborhood finds vicarious pride in his self-esteem. In fair weather and foul, in victory and defeat, in primaries and elections, in season and out he must keep his battle array in order. His livelihood, his chances of promotion, his honor, such as it may be, are all at stake; if he cannot "deliver the vote," he is ruined politically and perhaps, financially.

Legal Control over Elections

From Freedom to Regulation. In the early days of American history, elections were simple affairs; in some parts of the country they were held in the open air and voting was registered by a show of hands or in case of doubt by a calling of the roll. The organization of parties and the conduct of their affairs were determined by party members. Nearly everything was left to custom and practice. As a general rule even the printing of ballots for regular elections was entrusted to party directors. But later, owing to abuses, legislatures began to enact statute after statute, laying down rules for the preparation of ballots, procedure at elections, and the counting of votes. Now the whole election process from the enrollment of voters, through nominations and elections, to the making of official reports on results is subject to elaborate provisions of law. So

extensive is such legislation that it is impossible to set down here in any detail even the provisions of the election law of a single state—that of New York is a volume of about 250 pages of ordinary print—but the following principles are now to be found in the legislation of any fairly advanced commonwealth:

Principles of Election Regulations. 1. Certain officers—the secretary of state, county clerks, and in some instances special election boards—are placed in charge of the entire election process.

2. Provisions are made for bi-partisan boards of poll clerks, ballot clerks, and election inspectors in each polling place within the state.

3. Duly authorized watchers from each party may be present at each polling place to secure a fair count or make sure that the figures recorded by voting machines are correctly reported.

4. Standard and official tally sheets, or records, on which to make the returns of each polling place, are furnished, and all returns must be certified by the proper officers in charge.

5. Special arrangements are made to police polling places.

6. In order to secure to every citizen, properly qualified, the right to vote, official registers of voters are prepared and each citizen is entitled to enter his name so that on election day his right may be realized. A most drastic scheme for preventing false registration was created in New York in 1908 by an act requiring the personal identification of voters in cities of 1,000,000 or more inhabitants. According to this law, as later amended, the voter, on registering, in addition to answering the ordinary questions, must give the number of the room in which he lives or the name of the householder or the tenant with whom he lives; he is furthermore required to write his name in a register, and when on election day he appears to vote he must again sign his name opposite the first signature. By a comparison of the signatures, the election officials are able to detect frauds and thus exclude from voting a large number of "floaters" and "repeaters." There is no doubt that the effect of the law has been most salutary.

7. Finally, there is a long line of important legislation bearing on the ballot—designed to prevent intimidation by securing secrecy to the voter and to foster independence rather than the "herd instinct."

Old Methods of Balloting. The earliest form of voting seems to have been viva voce voting in the open air or in open meetings. This practice, imported into colonial America from England, was continued in some states until well down into the nineteenth century. When the ballot

was substituted for this method, one idea was to secure secrecy, but the purpose was generally defeated, for it was customary for party organizations or candidates to furnish their own ballots. Usually each party chose its own color of paper so that even when the ballot was folded anyone could see what party ticket was being voted. Since the voter could be watched from the moment a ballot was handed to him somewhere outside the polling place until he deposited the same in the ballot-box, it was easy to find out whether he had, according to the modern phrase, "delivered the goods." The result of this was to facilitate and encourage bribery. Persons economically dependent, being deprived of the protection of secrecy, were readily coerced into voting as others bade them, or punished if they disobeyed. The expense of printing the ballots, moreover, while not a heavy burden on the party organizations, was large enough to act as a deterrent on independent candidates. Such tricks as the distribution of ballots bearing the emblem of one party and the candidates of another, or of ballots containing the wrong candidates for certain offices, although usually forbidden under the penal law, were common.

Elements of Australian Ballot System. The growth of such abuses finally aroused a strong movement for reform and in time led nearly all the states to adopt the so-called "Australian ballot system." The principal features of this system may be outlined as follows:

1. All ballots used in elections of public officers (except, perhaps, certain minor local elections) are printed under the direction of public officials, at public expense, and are distributed by officials to the various polling places prior to the election.

2. Each ballot contains on a single sheet the names of all the candidates nominated by all the parties and by special petitions, and is duly protected against counterfeit by a number and an official endorsement on the back.

3. Ballots can be obtained by the voters only within the polling places, on election day, from the regular election officials. They are to be marked in absolute secrecy in voting booths provided for the purpose, folded so as to conceal the marking on the face and yet leave exposed the official endorsement on the back, and returned to the election officers to be deposited in the ballot box, before the voter leaves the polling place.

4. Special safeguards are usually provided to make sure that the official ballots shall not be lost or stolen; that none but official ballots

shall be cast or counted; that the number of ballots counted shall correspond exactly to the number of persons voting; that the ballot actually cast by each voter shall be the identical one given to him by the election officers (these two objects are attained by a system of detachable, numbered stubs); that no official ballot shall be left unaccounted for when the election is over; that no electioneering shall be done in or around the polling place; that only the election officers, the duly appointed watchers of each party, and a specified number of voters shall be allowed within the polling place at any given time; that no voter shall divulge, while in or near the polling place, how he has voted; and that no election officer or other person shall attempt to discover, or having discovered shall disclose, how any person has voted.

When voting machines are substituted for ballots, the safeguards of the Australian ballot are made even more effective. There is no possibility of using fraudulent ballots. The names of duly nominated candidates are placed officially on the machines. The voter can only register his will by pulling the appropriate levers beside the symbol of his party or the names of his candidates. There is no chance to commit frauds in counting, since the votes for each party or candidate are automatically registered and totaled by the machine itself. All that election officers have to do is to read the numbers and set them down on the reporting sheets.

The Old Party-Column Ballot. Numerous devices have been invented to encourage the voter to act independently in expressing his choices. When the Australian ballot was first introduced it was the general rule to print the names of the candidates of each party in a separate column with the name of the party at the top in large letters and also the party emblem for the benefit of illiterate voters. Immediately under the emblem was placed a circle and by merely making a mark within that circle the voter could cast his ballot for all the candidates of the party at one stroke. Obviously this called for no discrimination or intelligence. Moreover it placed great obstacles in the way of the voter who wished to choose freely among the candidates of the various parties. If he did not mark in the circle—that is, vote a "straight ticket"—he had to make a mark beside the name of every candidate for whom he wished to vote and thus incurred the risk of becoming confused as he looked from column to column.

The Party-Column Eliminated. With a view to stimulating independence, a large number of states have abolished the party column ballot

and substituted for it the Massachusetts ballot, adopted in that commonwealth in 1888. On this ballot or voting-machine face the names of the candidates of all parties for each office, except of course presidential electors, are grouped in alphabetical order under the title of the office. There is only one way of marking this kind of ticket; the voter must put a cross or pull the voting-machine lever opposite the name of each candidate for whom he wishes to vote. But he is frequently aided in his tendency to stick to his party by the practice of printing the name or emblem of the party on the ballot near the name of each of the candidates. Thus "regularity" is distinctly favored.

Non-Partisan Ballots for Local Elections. Even this party prop is taken away in the municipal elections of a large number of states by laws forbidding the nomination of candidates for certain offices by political parties and excluding the names and emblems of all parties from the ballot or voting machine. In this way an attempt is made to establish a non-partisan primary and a non-partisan election.

After the non-partisan idea spread among cities, it was carried over into the election of state officials, particularly judges. By 1944 the process of electing judges under the non-partisan system had been adopted in one form or other in sixteen states.[6] A common type of law authorizes designation by petition; the names of the persons so designated by petition are placed without party signs or names upon a separate ballot at the official primaries; the two candidates for each judgeship receiving the highest vote appear without party signs upon the official ballot at the regular election. Minnesota in 1912 adopted the non-partisan primary not only for certain county offices but for the selection of members of the state legislature as well. This action is credited with being the first case of the abolition of party labels in the election of state legislators. Nebraska recently followed Minnesota's example by prescribing that members of its unicameral state legislature must be elected on a non-partisan basis.

There are evident limits to the application of the non-partisan principle. Party organizations are too well grounded in American political life to be uprooted by the mere abolition of symbols. In municipal and judicial elections, where partisanship is ordinarily not so strongly manifest, the exclusion of party designations and signs frequently works for independent voting and hampers somewhat the operations of the party

[6] Kansas, Iowa, Missouri, and Pennsylvania, after trying the system, abandoned it.

"boss," but in large cities it is difficult to divorce elections from partisan methods.

Provisions for Absent Voters. Modern industrial and commercial life makes it necessary for voters to be away from home frequently, in distant cities or states, and thus, in effect, deprives them of the franchise, as long as physical presence at the polling place on election day is necessary to the exercise of the suffrage. To meet this condition of affairs, nearly all states, beginning with Vermont in 1896, have enacted laws which permit electors to vote at primaries or elections or both without appearing at the polls. The practice of absent voting had, however, already been established for the Union troops at the front during the Civil War. In the Global War provisions enabling members of the armed forces to vote spread rapidly until by 1943 half of the states had statutes covering the matter. By 1944 every state but two had provided for some kind of absent-voting for civilians or soldiers or both.

Absent-voting laws, as may be imagined, differ widely in form and content, but certain principles run through them all. They cover the following elements: (1) distance from home necessary to entitle the voter to the privilege; (2) causes of absence, such as sickness, nature of business, some unavoidable cause, or in a few cases no cause at all; (3) the application for the ballot and the declaration necessary to obtain it; (4) the marking of the ballot and the affidavit required to authenticate it; (5) the transmission of the ballot to the election official in the home precinct of the voter; (6) and the rules governing the acceptance, rejection, and counting of such ballots. In the more carefully drawn laws, such as those of Indiana, Illinois, and Minnesota, all these points are covered with such precision that collusion and fraud are almost impossible; the right of the absent voter is fully safeguarded, while the possibility of misuse of the privilege of absent-voting is reduced to the minimum.[7]

Summary: Voting Made Easy. By way of summary, it would appear that American legislation covers almost everything necessary to enable the voter to exercise his rights effectively:

1. The polling place is brought near to his residence.
2. Notices of the time and place of the election are posted and published.

[7] For a review of the situation in 1938, see Paul G. Steinbicker, "Absentee Voting in the United States," *Political Science Review*, October, 1938, pp. 898 ff.

3. Official specimen ballots or instructions as to the use of the voting machine are furnished before he enters the polls.

4. Spaces are left on the ballot so that the voter may write in the names of candidates that do not appear on the official ballot.

5. The ballot is marked or the voting machine is operated in secret.

6. Provisions are made for bi-partisan election boards and for watchers and challengers of all parties.

7. Official tally sheets and poll books are kept and the ballots are numbered so that the possibility of "counting out" candidates is reduced to a minimum.

8. In case of a contested election a judicial review of the ballots may be had before a regular court of law.

9. The voter may exercise his right even though away from his residence at the time of the election.

The Legal Control of Party Organization and Procedure at Primaries

The political party began as a purely private association of citizens. At first it devised its own form of organization, decided how many and what committees it would have, provided for the choice of its officers, arranged for the nomination of candidates, and raised money for campaigns without any interference from the government. All that however belongs to history. Today every state in the Union regulates these party operations in more or less detail.

1. Definition of Term "Party." At the outset, when the state legislature undertakes to control political parties, it must define just what it means by the term "party," for obviously groups having slight numerical strength or formed for semipolitical purposes need not be brought within the purview of the law. In meeting this problem of definition, two rules have been devised. It is sometimes the practice to extend the application of the law only to those political associations which cast at least a certain number of votes for some candidate, such as for governor, at the preceding state election. The more frequent practice, embodied in the most recent statutes, is to provide that any political organization which receives a certain percentage of the entire vote cast shall be subject to the law. The percentage varies: sometimes it is two per cent of the entire vote; sometimes it is twenty-five per cent.

In several states the Communist party is excluded by law from partici-

pation in elections. In 1942 the Supreme Court of California in a unanimous decision declared unconstitutional a statute barring the Communist party from primary elections on account of its name, foreign affiliation, policy of violence and small size.

2. Party to Be Governed by Its Members. After deciding what political organizations shall come within the purview of the law, it is next imperative that some regular mode be provided for determining who are entitled to membership and voting rights within the party. Otherwise it would be impossible for a primary law to attain its fundamental purpose of securing the expression of the party will on the composition of committees and conventions, the nomination of candidates, and the drafting of the platform. This principle found expression in the preamble to an Oregon law: "Every political party and every volunteer political organization has the same right to be protected from the interference of persons who are not identified with it as its known and publicly avowed members that the government of the state has to protect itself from the interference of persons who are not known and registered as its electors."

Various Rules for Determining Membership. This seems axiomatic: each party should be managed only by its members; but how can we determine whether a particular person belongs to one party or another? It is difficult to devise any scheme for testing allegiance which does not strike at independence in voting. If to participate in the primaries of a party, the voter must declare his adherence to it and appear openly on its rolls, what becomes of the secrecy of the ballot—that boon won by years of hard labor? If the voter has labored in his own party to secure the nomination of good candidates and has been defeated there, is he to be denied the privilege of voting for better candidates put up by the opposing party? In the attempts to solve the problems of party allegiance thus raised, a great diversity of practice has sprung up. Among them four general methods are outstanding: official enrollment, personal declaration of allegiance at the party primary, determination of the test of allegiance by party officials, and the open primary—no test at all.

1. The first of these methods is concretely illustrated by the law for New York City. The voter, on registering for the coming election, must enroll in some party if he wishes to participate in any primary, and declare that he intends generally to support its candidates at the next election. From the blanks so filled out, the list of members for each party is prepared and the right of any particular individual to vote in

its primaries can be officially determined. As already indicated, the chief objection to this system is that it makes public the party affiliation of every voter who enrolls and may subject him to the pressures incident to such publicity.

2. The second test of party allegiance, that is, personal declaration at the primary, is very generally applied, but it tends to approximate the New York plan because an official register based on such declarations is frequently compiled. According to this scheme, the voter at the primary asks for and receives the ballot of the party in whose nominations he wishes to take part; unless challenged, he marks and deposits the ballot in the box of the party he has chosen; if challenged he must take an oath to the effect that he is a member of that party, supported it generally at the last election, and intends to vote for at least a majority of its candidates at the coming election. Usually his name is then entered on the party roll.

3. The third method—leaving the imposition of the test to party officials operating under organization rules—is prevalent in the South, where, for racial reasons, the dominant party has desired a generous freedom in this respect.

4. Wisconsin has attempted to avoid the problem of the allegiance test by a provision for an "open primary" in which all voters may participate irrespective of allegiance. Each voter at the primary is given ballots of all the parties; the ballots are officially prepared, are alike in form and color, and are sheets, perforated, and bound in a pad. On each ballot the names of the several party candidates are arranged under the titles of the offices to which they seek the nomination; the voter separates from the group of ballots the ballot of the party which he wishes to vote, marks it, folds it, and then deposits it in the regular box. All the other papers he puts in a separate box for blanks which are destroyed immediately after the canvass. Thus absolute secrecy is preserved for the primary as well as elections. After making a survey of recent legislation, Louise Overacker reached the conclusion that there is a striking shift in the direction of open primaries[8] and the *Book of the States* in 1943 lists fifteen states as having tests of party membership lax enough to have their primaries classified as "open."

3. Control over Party Voting at Primaries. Having defined the type of organization which shall be deemed a party and laid down rules de-

[8] "Direct Primary Legislation, 1936–1939," *American Political Science Review*, June, 1940, pp. 499 ff.

termining party membership, legislatures next provide for safeguarding the balloting at primaries; in this connection they have regulated the dates of primaries, polling places, size and shape of ballots, the conduct of the balloting, the count, and the payment of the expenses. The principles now accepted in this field of primary legislation are old and well known, so that they need little more than mention here. There is a uniform tendency to fix the holding of all primary elections of all parties on the same day and at the same place for all territorial divisions coming under the provisions of the law; but this rule is not universally adopted; some states, for instance, forbid two parties to hold their pollings on the same day, leaving the matter otherwise to the determination of the committees, subject to certain limits as to time. There is also a tendency to require an official primary ballot for all parties, printed at public expense; this is designed to eliminate evils connected with the private printing of ballots, such as the use of different colors by separate factions to control the purchased vote. It is also a generally accepted principle that the primaries shall be conducted by regular officials according to minute provisions as to opening and closing the polls and counting the ballots; and finally that the expenses shall be borne by the same governmental authority that bears the regular election expenses.

4. Control over Party Organization. The definition of the party, the provision of an allegiance test, and the regulation of balloting at the primary are but the preliminaries to the control of party organization and operations. The dominating element in the state party organization is, as we have seen, the central committee (including the chairman), which has charge of marshalling the party hosts in campaigns and has more or less to say, according to circumstances, about the conduct of party members in legislatures and official places. In many states this important body early took advantage of the rich opportunities offered to build up a centralized machine, and accordingly our legislatures have sought to bring it under control and fix its responsibility.

State Machinery. A few states, even some which have extensive primary legislation, still leave the parties free to decide what kind of state organization they will have and how it shall be elected. A large majority of states however have provisions of law dealing with the subject.

But whether law or party custom is the controlling force, certain principles are applied in the construction of the state committee. As a rule, the members of the committee represent some unit of local gov-

ernment or election region, such as the county, congressional district, or town. In assigning to the local unit membership in the state committee, practice varies. In some cases, all districts are given the same number of members, no matter how many votes the party may poll in them. In other cases, each district is given a fixed representation and then additional representation according to the number of party voters it contains. After the establishment of woman suffrage it became a general practice to assign women a certain number of places on the state committee.

Naturally the methods of electing state committees differ from state to state. Where the party convention is still retained, members of the committee are sometimes elected by local conventions in the units represented and sometimes by the delegates of the several units attending the state convention. With the adoption of the direct primary for nominating purposes, it was frequently provided that state committeemen should be elected by direct party vote in their respective units of representation. According to Charles E. Merriam, "there has been a general tendency in this direction in recent years."

Local Machinery. Descending from the central party organization to the basic unit in the state machinery—the county organization—we also discover a tendency on the part of the legislatures to regulate the most minute details. The form and composition of the county committee are provided by statute or left to party rules subject to certain specific terms of law. Usually the county committee is made up of members specially elected in the townships or other districts of the county or of *ex officio* chairmen or members of the committees in the lower subdivisions of the county. The county committee has a chairman, who is generally selected by the committee or by the county convention —a party assembly composed of delegates chosen by party voters in the lower units. The convention has greatly diminished in importance, if indeed it has not been abolished, wherever the direct primary is applied to the nomination of county officers.

The Direct Primary

Rise of Popular Voting on Candidates. State legislatures have not been content with attempts to "democratize" party organization by requiring the popular election of party officers and delegates to conventions. They have savagely attacked the convention system itself. As

indicated above, the practice of holding local conventions composed of party delegates from small units for the purpose of making nominations appeared very early in our history. In the Jacksonian era it was everywhere substituted for the legislative caucus as the more democratic method of selecting party candidates. It was not without critics however from the beginning; as early as 1868 local leaders in Crawford county, Pennsylvania, abandoned the convention in favor of selecting candidates by a direct vote of party members. As the scheme worked very well it was tried for local purposes in many other states, especially in the Middle West.

Growth of the Movement. By the opening of the twentieth century, a profound distrust of the convention had appeared in all parts of the country, because it was often a tool of special interests seeking control of the government for private ends. At best it was composed mainly of professional politicians bent on monopolizing offices and emoluments and excluding disinterested citizens from any effective rôle in party councils. In the course of time new political leaders, who had appeared with the growth of popular distrust, became discontented with the convention system and demanded its destruction. As a substitute they proposed the direct primary or election within the party as the official system for the nomination of candidates. By 1913 a large majority of states had adopted the new institution for either state or local purposes or both, leaving only a few still clinging to the convention for making nominations to offices. In 1943 Connecticut, New York, and Rhode Island were the only states that did not use the direct primary in some form for state-wide elections.

Elements of the Direct Primary. Generalizing from a survey of the statutes, we may say that the direct primary involves the following elements:

1. A primary election within each party held at a stated time prior to each election for the purpose of enabling party voters to choose, from among the several aspirants, the persons whom they wish to stand as the candidates of the party for the various offices in the coming election.

2. A method by which party members seeking nomination to offices may have their names placed upon the official primary ballot used at the primary election—a process usually called "designation." The most popular method is the petition plan which permits anyone to obtain a place on the ballot by securing a certain number of signatures to a

petition in his favor. Sometimes the number of signatures is a fixed quantity and sometimes (more generally) it is a certain percentage of the party voters within the city, county, district, or state, as the case may be. Objections have been made to this system largely on account of the expense attached and the burden which it places upon the poor man unable to employ persons to collect signatures; but no satisfactory substitute has been found.

3. A scheme for determining the order in which names shall appear on the primary ballot. At first glance an alphabetical order seems reasonable enough, but it has been found by experience that those who get at the top of the list simply because their names begin with A or B have an actual advantage over those who, through no fault of their own, happen to be named Xantippe or Yontz. The discovery of this fact has led, in some states, to the practice of "rotating" the names, that is, allowing each aspirant to appear at the top of a portion of the ballots to be determined by the number of aspirants and the number of ballots. Another method is to place the names of aspirants on the ballot in order of the time of the filing of their respective applications or petitions, but this is objectionable because it introduces an unseemly scramble for places outside the office where such petitions are filed. Still another plan is to determine the position by lot.

4. The rule has now been generally established that the ballots for direct primaries shall be printed at public expense and made as "official" as the ballots used at regular elections.

5. It is necessary to determine what vote shall be required to constitute a choice at the primary. Most of the direct primary laws in the United States provide that the person who receives the highest number of votes shall be declared the party candidate for the office which he seeks. Under this rule a man representing a minority may become the standard-bearer of the whole party, thus violating the first principle of the democratic order which primary legislation is designed to attain.

Often attempts are made to obviate the evil. (*a*) In some instances, a rule is introduced to the effect that an aspirant at the primary must receive an absolute majority of all the votes cast in order to win. In the South, where nomination is usually equivalent to election, it is a general practice to require an absolute majority and if no aspirant receives such a majority, a second ballot—"run off primary"—is taken on the two candidates standing highest on the list. (*b*) A second method for over-

coming the objection to plurality nominations is to provide that, unless the candidate standing highest on the poll at a direct primary receives at least a certain fixed percentage of the total vote, a convention shall be held for the purpose of making the nomination in question.

6. If the convention is entirely abolished provision is made for an assembly of some kind to formulate the principles and issues of the party as a platform preparatory to the election (p. 586).

7. In order to carry out the theory of equality among candidates for nomination at the primary, Oregon has devised a publicity pamphlet (issued and sent to party members by public authorities), in which each aspirant may lay before his fellow-citizens his claims to the nomination, by paying a sum, proportioned to the importance of the office which he seeks, for the use of a certain amount of space. This is supposed to offset, in part, the publicity which the press affords to candidates able to pay for advertising.

8. The extent to which the principle of the direct primary is applied to offices varies from state to state. In the great majority of states the application is universal and state-wide, that is, it covers all elective officers from the governor down to local officers, with only minor exceptions. Other direct primary laws are restricted to the nomination of local officers, the convention being employed for state purposes. Some primary laws specially exempt judges from their provisions and substitute nomination by petition without party interference (p. 576).

Supplementary Election Legislation

Nominations by Conventions. Nominations for offices outside the scope of the direct primary are, naturally, left to party conventions, but these are in nearly every case regulated with more or less strictness as to selection of delegates, conduct of meetings, and modes of procedure. The authorized committees of the parties must give due notice of the primaries to be held for the election of delegates, indicating at the same time the officers to be nominated by the conventions so called. In general, the primaries held for the purpose of choosing delegates must be conducted like other primaries at a regular polling place kept open for a certain number of hours.

Drafting Party Platforms. In connection with the nomination of candidates, especially for state offices, it is a custom of political parties to for-

mulate a declaration of principles, known as the platform. In some states, even where the direct primary is used for making nominations, the business of drafting the platform is entrusted to a party convention. Other states which have abolished the convention must provide a substitute. Wisconsin vests this function in a kind of party council composed of certain candidates for office and certain party members already in office. A few states have followed this example with modifications.

Use of Money in Elections. The extensive use of money in elections by candidates and committees and notorious gifts of huge sums by corporations and individuals to campaign funds, especially during the closing years of the nineteenth century, led to a great popular outcry against "government by a plutocracy." As a result, the control of money in elections became a fundamental concern of those interested in regulating the operations of political parties, and state legislatures enacted voluminous statutes dealing with the subject. The general principles embodied in this legislation may be briefly summarized as follows: [9]

1. The amount of money which candidates for office may spend is limited to specific sums varying according to the character of the offices. Candidates must file with certain public authorities sworn statements of their expenditures.

2. Political committees must keep a record of their receipts and expenditures even to minute details and must file complete statements with appropriate officials designated by law.

3. Corporations are absolutely forbidden to make any contributions in aid of any political committee or candidate.

4. The objects for which candidates and political committees may spend money are defined by law. They include such items as rent of halls and expenses connected with public meetings, preparation and publication of various kinds of political "literature," compensation for agents who prepare and supervise articles and advertisements for the press, payment of newspapers for publishing materials, rent of offices and club rooms, compensation of clerks, agents, and attorneys managing the "reasonable business of elections," preparation of lists of voters, personal expenses of candidates, traveling expenses, compensation of workers at the polls, and the hire of automobiles.

[9] See L. Overacker, *Money in Elections* (1932). Also H. R. Bruce, *American Parties and Politics* (3rd ed., 1936), pp. 438–449. For federal legislation, see above, p. 76.

Non-Partisan Politics

Importance of Independent Vote. While the place of party government in American politics must be emphasized, the influence of non-partisan organizations should by no means be lost to sight. The non-partisan or independent vote is often a decisive factor, particularly when the contest between the two great parties is very close, and it is probable that there is an ever-increasing proportion of people who are independent of party organization (p. 69). At all events, in many a national election an appeal has been made to the non-partisan voter and it is even more customary in municipal and other local contests.

Non-Partisan Associations. In nearly every great city there is a non-partisan citizens' organization of one kind or another. New York City, for example, has the Citizens' Union, a group of persons united without regard to party for the purpose of securing the honest and efficient government of the city of New York by the nomination and election of candidates or by endorsing the nominees of the regular parties whose character and policy the Union can approve. The Union was at first a sort of political party with officers, committees, and conventions modeled somewhat on the plan of the older parties; but it now confines its work largely to political education and to scrutinizing and reporting on candidates for office. It maintains a representative at Albany to keep a watch on legislation affecting New York City. It issues bulletins from time to time on the questions of local government, and brings under review important acts of the city administration.

On the larger stage of state and national politics, the outstanding non-partisan organization is the National League of Women Voters formed by certain leaders in the woman suffrage movement shortly after the adoption of the Nineteenth Amendment. It consists of local and state associations federated in a great national society. Women of all parties are affiliated with it. They do not endorse or support political parties as such, but they do favor many specific legislative proposals and public policies, and sometimes give their support to candidates who agree to promote the measures they have approved. Indeed in some respects the League has lost its "non-partisan" character. The League maintains headquarters in Washington, holds an annual convention, keeps speakers in the field enlisting the interest of women in public affairs, conducts schools of citizenship, gives special attention to laws pertaining to

women, and urges the election or appointment of qualified women to positions in local, state, and national governments.

Fifty Years' Warfare on Party Abuses—a Balance Sheet

More than half a century has now elapsed since the mighty boss of Tammany Hall, William Marcy Tweed, was sent to prison; more than fifty years have passed since the enactment of the famous Massachusetts ballot law; more than three decades have run their course since Wisconsin's adoption of the first state-wide direct primary system. Where do we stand now? Are our public officers of a better quality, more efficient, more intelligent, more honest? Has corruption diminished? Are party bosses shorn of their power or reduced in strength? Is government more responsive to the wishes of the people? Is there less slavish devotion to party machines? Is the independence of the voter increased? Is public opinion more alert, more influential in party councils and official circles? If our governments, national, state, and local, are more responsive and efficient today than formerly, how much of the improvement is due to the unending stream of election and primary laws that has flowed from the state legislatures?

The correct answers to these questions would require the establishment of criteria which are scarcely formulated at the present time—a science of government which we do not possess. Still a tentative balance sheet may be struck on the basis of some obvious facts and many opinions hazarded by students and practitioners of government. There is no doubt that the whole election process has been lifted to a higher plane during the past fifty years. Elections are no longer held in saloons. Brawls, drunkenness, and disorder are no longer prominent features of election day; it is not often that the voter has his head broken at the polls. There seems to be more independence both within and outside established party organizations. There is still a large annual crop of political scandals; yet on the whole there is reason for believing that public officers have higher standards and more professional skill than half a century ago. But to a considerable extent this advance has been due to civil service reform, the spread of technical education, the establishment of associations for the improvement of administrative methods, and the growth of societies and institutions for the study, discussion, and criticism of government.

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CHAPTER XXV

THE STATE LEGISLATURE

Legislative Powers over Civil and Criminal Law. All work undertaken by the state government either originates in the legislature or, if ordered by the constitution, comes under its scrutiny in the provision of funds. In its membership are represented the dynamic forces of the state which give impulse to legislation and administration—the various classes, interests, and groupings of society. Despite the restraints imposed upon it by the federal Constitution and laws and by the constitution under which it immediately operates, it has an immense jurisdiction and wide-reaching responsibilities. Unlike the Congress of the United States, which possesses only powers conferred upon it, the state legislature enjoys every right and authority not specifically denied to it. It has control over the whole range of civil law; that is, it lays down the rules governing contracts, real and personal property, inheritance, corporations, mortgages, marriage and divorce, and other civil matters. It defines crime; that is, it names those actions of the citizens which are to be punished by fine or imprisonment or death. It touches the property of the citizen not only by regulating its use, but also by imposing upon it a burden of taxation. It has control over that vast domain known as the police power; in other words, it makes regulations concerning public health, morals, and welfare, devises rules for the conduct of business and professions, and in other ways restrains or enlarges the liberty of the citizen to do as he pleases.

Constitutional and Administrative Functions. Besides its authority over ordinary law making, the legislature has command over other matters of high significance. With respect to alterations in the state constitution, it is in a way a constituent body, for it may propose amendments for popular ratification and as a general rule it may summon a constitutional convention for the purpose of drafting a new fundamental law. It sets up a large part of the machinery of administration to discharge the numerous functions assumed by the state, and through its

appropriating power may lay emphasis on some, curtail others, and determine the spirit of all. Over administration as a going concern it exercises prerogatives of no mean proportions; frequently the state senate must consent to the governor's appointments to important offices; by resorting to the process of impeachment the two chambers may, as a rule, oust state officials at will; through investigations the legislature may discover malfeasance in government establishments; in the allotment of funds it may dictate or modify policy for the several departments.

Powers over Economic and Social Affairs. In providing the money for the support of government, it lays taxes, thus affecting the distribution of wealth among the people under its jurisdiction. Public education comes almost wholly within its dominion. The extent and character of the institutions for the care of the defective, delinquent, and dependent lie at its mercy (p. 711). The legislature determines what enterprises, if any, the state shall establish and manage on its own account. Measures for the encouragement of industry and agriculture hang upon its decisions. The development and use of natural resources are contingent upon its counsels. The summary is not yet at an end. The legislature may cooperate with the Federal Government in the execution of national policies on a grand scale (p. 498), and it is the laboratory in which are made political and economic experiments that may sooner or later set models for the entire country. When all these things are brought within purview, the claim of the legislature upon the interest of citizens concerned about the course of American civilization in the large becomes evident.

Name of the Legislature. The technical name of the legislature varies from state to state. It is usually called "the general assembly" or "the legislative assembly," but in Massachusetts and New Hampshire it bears the ancient title, "the general court." Everywhere the upper house of the legislature is known as "the senate"; and most of the states apply the term "house of representatives" to the lower chamber, although in some states, including New York, it bears the name "assembly" and in others is designated "the house of delegates."

The Structure of the State Legislature

Uniformity of Type. The general framework of the legislature is prescribed by the state constitution and cannot be altered by the legisla-

ture itself. And despite the fact that the states may rightly be called laboratories of experimentation, there is a striking uniformity among them in respect of their legislative organizations. There are, to be sure, signs of change. There is, for example, some discussion of reducing the size of the legislature and eliminating one of the chambers. But, except in Nebraska (p. 619), such discussion is now merely in an academic stage.

Two Houses. The legislature is everywhere, save Nebraska, divided into two houses. In the source of their authority and the nature of their powers they are substantially alike. Both are elected by the same voters and in ordinary legislation they are equal. The differences between them are, except in one or two respects, unimportant. The ancient rule that money bills must originate in the lower house is frequently inscribed in the constitution, but in practice it amounts to almost nothing. The senate is always smaller in number and the term of the senator generally longer than that of his colleague in the lower chamber. Very often the senate, like its greater counterpart at Washington, is made a continuous body by provision for partial, instead of total, renewal at each election. Since the senators are elected in larger districts, they are, as a rule, more prominent and more influential in party councils and public affairs. Their influence is frequently augmented by a constitutional provision that they shall have the right to approve or reject nominees to high state offices presented by the governor and to concur or dissent when removals are proposed. This gives them a power over patronage, with all its by-products, which their brethren in the lower house do not enjoy.

Original Reasons for Two Houses. Theoretically speaking, there is no reason why a state legislature should have two houses. The House of Lords in England, the upper house in Switzerland, and the Senate of the United States are partly to be accounted for on the ground that some arrangement had to be made for the representation of specific interests which could not in the nature of circumstances be separately represented in the lower chamber. The House of Lords, in its historic origin at least, spoke for the landed aristocracy and the clergy; the Swiss Federal Council and the American Senate represent large and important subdivisions which enjoy the flavor if not the substance of sovereignty and cling stoutly to their ancient rights. When, as in the early days of our constitutional history, the state senators often represented openly and lawfully certain propertied interests, there was a practical

justification for the two houses; but that reason disappeared long ago, unless forsooth we are to take the discriminations in the apportionment of members (p. 595) as continuing the clash between town and country, industry and agriculture. Once there was some ground for claiming that the more checks and balances in the state government the better for property rights, but since the adoption of the Fourteenth Amendment placing state legislation under the supervision of the federal judiciary the danger of confiscatory measures has been reduced.

Theory of Checks and Balances Examined. As things now stand, the chief defense of the double chamber system rests on the assumption that it helps to prevent hasty and ill-considered legislation and assures more deliberation and reflection. This hypothesis, much lauded in orations, has seldom been put to the acid test of fact. There have been few detailed and searching inquiries into the working of the system in practice and fewer philosophical studies of the realities behind it. One scrutiny of the data in a single case, a session of the New York legislature, made many years ago by D. L. Colvin, disclosed very little evidence of any checks imposed on legislation by the double review of bills. Mr. Colvin reported that only nineteen per cent of the bills which passed one house were killed in the other and that only fifteen per cent of all bills were amended after they passed from the house of origin into the hands of the other chamber. The measures blocked entirely or amended, moreover, were not fundamental acts which threatened "to shake the foundations of the commonwealth"; they were relatively insignificant proposals. Besides, a large number of them would never have been initiated had the chamber which devised them known full well that in the end it would have to assume responsibility for the outcome.[1] A later study of the bicameral principle in operation, this time in Illinois, covering four legislative sessions, produced similar statistical results: about twenty per cent of the bills passed by one house were defeated in the other.[2] A third searching inquiry into the subject, as illustrated by the shift from a unicameral legislature to the bicameral system in Vermont in 1836, by D. B. Carroll, indicates no noteworthy improvement brought about by the change, at least in the first ten years of operation under the double-chamber system.[3] A fourth study of bicameralism—a single assembly in Ohio—by Mona Fletcher showed that "the senate passed

[1] D. L. Colvin, *The Bicameral Principle in the New York Legislature* (1913).

[2] W. F. Dodd, *State Government* (1928), p. 146.

[3] D. B. Carroll, *The Unicameral Legislature of Vermont* (Vermont Historical Society).

82 per cent of the bills referred from the house, while the house passed only 54 per cent of the bills which it received from the senate." In this case it would seem that the lower chamber acted as a check on the upper.[4]

Other Questions Unsettled. An examination of the number of bills defeated or amended by the double review does not however get very far into the heart of the problem. Nor do declarations of legislators based on their "experience" provide a conclusive answer; on the foundations of experience the mass of the people once believed with firm assurance that the world was flat. If ten or fifty per cent of the bills coming out of one house are defeated in the other, what of it? Should they have been defeated? On what criteria can such a judgment be based? Would most of them have been passed in the original form if the house of adoption had known that it must assume full responsibility for them as drafted? Suppose that ten or fifty per cent of the bills passed by one chamber are amended in the other; what of it? Were the amendments wise? Who can answer? By what standards are they to be measured? Since all important proposals subjected to "deliberation" in the two chambers are determined in private council by party or factional leaders, under the pressure of various interests, it is difficult to discover in individual cases the effect of double review upon the form and substance of bills.

Size of Each House. In determining the size of each house, constitution-makers have arrived at no consensus of opinion. New York at one end of the scale with more than thirteen million inhabitants has fifty-one senators and one hundred and fifty assemblymen. Nevada at the other end with about 110,000 people has seventeen members in the upper house and forty in the lower. New Hampshire with under half a million inhabitants has more than four hundred members in its legislature. Arizona, weary of paying sixty-four members of the lower house for their services, cut the number in 1932, hoping to save $60,000 a year by this action.[5]

What, after all, is the psychology of size? Is there any relation between the number of members in a legislature and the quality of the representatives? Not necessarily, but it often seems to happen that the larger the number, the narrower the horizon of the individual members. Men of capacious minds sometimes come from little districts, but the

[4] *Political Science Review*, February, 1938, pp. 80 ff.
[5] H. R. Enslow, *Political Science Review*, April, 1933, p. 228.

chances of securing persons of small caliber are increased by diminishing the size of the constituencies.

Who Is Represented? Who should be represented in the apportionment of members throughout the state—population, citizens, adults, or voters? The question is not yet answered to the satisfaction of all sections of the country. The drift of opinion is in favor of apportioning representatives among the several divisions of the state on the basis of the total population, citizens and aliens, as ascertained by the federal census. The rule however is not universal. Other bases of apportionment are white population, adult males, legal voters, qualified voters, and all inhabitants excluding aliens.

Theory of Equal Districts. According to the strict theory of numerical democracy, representatives should be apportioned among districts containing substantially an equal number of inhabitants. About one-third of our state constitutions adopt this principle and order a periodical redistribution to correct inequalities caused by changes in population. Prescribing and applying are however two different things, for in actual practice there are often great inequalities in the size of the constituencies. Does not the constitution of California say that the legislative districts shall be as "nearly equal in population as may be"? Yet there are glaring discrepancies in the weight of representation accorded to the different sections of that state. Nothing causes the politicians more pain than the alteration of districts which they have well in hand. So the great principle of equality is sometimes slain in the house of its friends.

Exceptions in Law. In fact, about one-third of the states expressly depart from the principle by making exceptions in favor of local units, the town in New England and the county generally. Pieces of towns and counties cannot be torn away and united with pieces of other towns and counties to make equal districts, in these instances, for if this were done, the temptations to gerrymander would be multiplied and village statesmen would be deprived of offices. In every state convention, some person is sure to rise and champion in tremulous tones the right of each town or county to have at least one member in the state legislature. In the New York convention of 1894, Joseph H. Choate, an orator of commanding power, employed all his arts in defending the right of the county, no matter how small, to have at least one spokesman in the assembly of the state; in a telling speech, rich in allusions to the history of local government, he almost moved his auditors to tears. He saved the day, for the convention was controlled by Republicans; by giving

the rural counties, except Hamilton, at least one member each, it assured them a larger representation in the assembly than they could otherwise get. Sometimes the case is reversed and Democrats by the nature of circumstances must plead for the county. Thus there has been established a very general rule that the county—in New England the town—must have at least one member in the lower house, no matter how small the number of its inhabitants. Wherever the principle is applied there are to be found inequalities in the size of constituencies—sometimes slight, often gross. The sparsely settled counties are over-represented; the populous counties are under-represented.

Discrimination against Cities. The outcome is in keeping with the general tendency to discriminate against the cities in favor of the country in making apportionments. This is accomplished in New York by the county-unit rule mentioned above and by constitutional provisions that run against New York City. Similar devices, equally effective but less obvious, are employed in other states to accomplish the same end.

Compromises in Apportionment. In the warfare of political democracy against political geography, a compromise is sometimes reached in a provision that numerical equality shall prevail in the apportionment of one house and geographical equality in the other. This is a favorite idea in New England. Connecticut, for example, provides that the senators shall be distributed throughout the state on the basis of population, saving always the unity of counties and towns, and that the members of the lower chamber shall be assigned to the towns, giving one or two members to each. This system, of course, results in the grossest inequalities. The city of Hartford with more than two hundred thousand inhabitants has no greater weight in the lower house than some small town with two or three thousand inhabitants. According to a speech made in the Connecticut house of representatives by R. I. Kemmel in January, 1931, eighty-five Democratic members of that chamber had been elected in the preceding November by 153,042 voters while 182 Republican members had been chosen by 93,484 voters. The former spoke for communities containing approximately a million people and the latter collectively represented six hundred and fifty thousand people. About the same time it was reported that a decayed town in Vermont had only one family and yet was entitled to its representation in the legislature. In other parts of the country glaring examples may be found. In Georgia, for instance, one county with 318,000 inhabitants in

1931 had only three members in the house of representatives while another county with 2,700 inhabitants had one member.[6]

Rules against Gerrymandering. On account of the natural propensity of statesmen to "gerrymander," it has become a custom to establish in the state constitution some rules controlling the distribution of representatives. For instance, it is frequently stipulated that legislative districts must be composed of areas compact in form and contiguous, that counties shall not be divided except into whole districts, that districts shall be so laid out as to be nearly equal in population, and that citizens may appeal to the courts against gerrymandering on the part of the legislature. Maryland and Ohio take the matter out of the hands of the legislature. The former provides that the governor shall make the periodical apportionment according to the principles laid down in the constitution; the latter vests the power in the governor, auditor, and secretary of state or any two of them.

An Exception from the Rule of Single-Member Districts. In the distribution of representation, the rule of one member to each district is generally applied. However, the state of Illinois has made an attempt to avoid the inevitable inequalities of this system by introducing minority representation. This was done in 1870 by a constitutional provision that the house of representatives shall consist of three times the number of the members of the senate; that three representatives shall be elected in each senatorial district at the regular biennial election; and that in the election of representatives each qualified voter may cast as many votes as there are representatives to be elected, giving all his votes to one candidate or distributing them, or equal parts thereof, among the several candidates as he sees fit. The three candidates standing highest on the list after the votes are counted are declared to be elected.

Many years ago Dr. B. F. Moore made a careful study of the working of minority representation in Illinois during the period from 1870 to 1919 and presented certain conclusions relative to it.[7] He shows that in practice the system almost always secures for the minority party a representative from every district. It also prevents those gross inequalities in constituencies which are to be found in most other states; it reduces the evils of the gerrymander. It also guarantees a strong minority

[6] C. B. Gosnell, "Rotten Boroughs in Georgia," *National Municipal Review*, July, 1931.

[7] B. F. Moore, *History of Cumulative Voting and Minority Representation in Illinois, 1870–1919.*

in the legislature to act as a check on the corrupt practices which are likely to ensue whenever one party enjoys an overwhelming supremacy for a long period. On other points Dr. Moore speaks with caution. He is not sure that cumulative voting improves the quality of the representatives or guarantees more independence on their part. Its effect upon the power of the political machine is an unknown quantity. Certainly the experiment has not led other states to follow the example of Illinois.

Terms of Legislators. How often should the voice of the people be heard in the election of representatives? There was once a firmly fixed tradition that annual elections were necessary to the safety of the public, but grave doubts have arisen on the subject. In fact the tradition has been uprooted, for no state in the Union now renews both houses every year. More than half the states have established a four-year term for senators; New Jersey clings to the odd number three; the remainder have adopted two years as the period. In all but a few states the term of the members of the lower house is fixed at two years; Alabama, Louisiana, Mississippi, and Maryland have raised it to four; New Jersey alone clings to the old custom of annual elections.

A typical argument against longer terms was presented to the New York constitutional convention of 1894, a member declaring that it was to the best interest of the state to have the assemblymen returned to the people every year in order that the latter might pass upon their acts. "You take away the dread," he said, "that the average member of the assembly has that his constituents at home are watching his acts and will pass upon them at the coming election and you will take away one of the greatest incentives to right action."

Experience seems to run against this contention. When a member is elected for one year, he hardly has time to learn the rules of the body before his period of service expires; and if he contemplates reëlection, he must devote a considerable portion of his energies to "nursing" his district. As everybody knows, effective work in a legislature can only be done by a person of experience, notwithstanding the best intentions. A district is not adequately represented unless its spokesman is able to accomplish results.

Qualifications of Members. To insure a certain minimum of character and ability in their legislative bodies, various states forbid the seating of convicted criminals, embezzlers of state funds, aliens, those who have been in the state they are supposed to help govern for less than a year, those who cannot understand English well enough to know what is

being done in the legislative halls, or those who are below specified ages, ranging from twenty-one to thirty years.

Legislative Sessions. As in the case of elections, it was for a long time a cherished tradition that frequent meetings of the legislature were essential to the democratic process. On this point also doubts have arisen. A small group of four states, New Jersey, New York, Rhode Island, and South Carolina, now require annual sessions and the remainder of the states provide for convening the legislature biennially. California and Georgia have split each session into two parts (p. 613).

The length as well as the frequency of legislative sessions is subject to constitutional limitations in a majority of states. Some of them have fixed a definite period, varying from forty to 150 days and have forbidden the legislature to sit longer; others seek to check legislative sessions by reducing the per diem wage of the members after the expiration of a certain number of days. It is argued that where the time at the disposal of legislators is short they will devote their attention mainly to important matters, to the exclusion of local and special bills and the pet schemes of small politicians. Experience hardly supports the argument. It does not appear that the quality of the laws passed is improved by the attempt to reduce the span of legislative deliberations. The laws of states with the shortest sessions do not seem to be automatically the best; and the number of special sessions in such states seems to indicate that brevity for regular sessions does not always save money for taxpayers in the end. During the last decade special sessions have come so frequently as to result in a practical abandonment of the biennial rule. The crest came in 1936 when an aggregate of 46 special sessions occurred. Sessional time limits were set aside and inter-sessional committee activity increased markedly.[8]

Payment of Members. In all states members of the legislature are paid. Several constitutions prescribe the amount; others leave the matter of compensation to the legislature, forbidding incidentally any increase during the term of service. Some commonwealths provide an annual salary; other states make a per diem allowance, combining this with a limitation on the length of the session or at least on the number of days for which payment can be drawn.

Kinds of Persons Elected. So far we have been dealing with the formal provisions of the law. What can be said of the human element—the

[8] O. Douglass Weeks, "Recent Developments in the State Legislative Process," *State Government*, July, 1943.

kind of persons elected to state legislatures? In general all professions, trades, and crafts have representatives—lawyers, doctors, teachers, ministers, merchants, manufacturers, bankers, farmers, insurance agents, local politicians, artisans, and last but not least housewives. Some of them are versatile; on one occasion a legislator professed to be at the same time "a furniture dealer, undertaker, miller, and dealer in grain and feed." Another reported that he was a composer of music "with a national reputation, being the author of many works on music and over 100 piano compositions, many of which had proven very popular." The stable boy of a college president in New England was once elevated to the legislature and bore the title of "the Honorable" with dignity. Lawyers however seem to be favorites, except in the agricultural states, while workingmen are seldom chosen.

The personnel of the legislature is constantly changing. It happens frequently that three-fourths of the members are new to the business. Few there are who make a career in the legislature, for it offers in itself no career. The ablest member cannot by any chance become a great party leader or national figure through mere legislative service.

The Legislature as a Gateway to Political Careers. Although relatively few among the thousands of legislators ever rise to high positions in the state or nation, still in a number of cases Presidents, Senators, members of the House of Representatives, Supreme Court judges, Cabinet officers, and Governors and other state officials have opened their political careers in local legislatures. A careful survey published by John Brown Mason in 1938 shows that more than two-thirds of our Presidents, one-half of all the Supreme Court judges, and about one-third of the Senators and Representatives in five recent Congresses had experience as colonial or state legislators. Of the fifty governors of Massachusetts between 1780 and 1938 thirty-seven or about three-fourths had served as legislators at one time or another. Indeed as a result of his painstaking inquiry, Dr. Mason is warranted in saying: "The state legislature presents a singular training and tryout ground for the politician—as T. V. Smith calls him 'at once the hope and the despair of the American people.' " [9]

Legislators Fairly Representative in Character. All in all our legislatures seem to represent with a fair degree of precision the politically active elements of the population. Their members spring from the people and

[9] *Annals of the American Academy of Political and Social Science*, January, 1938, "The State Legislature as Training for Further Public Service."

are in close touch with all interests, prejudices, and customs. Every miscellaneous group in society except as a rule industrial workers has its spokesmen in one or both houses. The restless motion of American life, a phenomenon which has struck every foreign observer from de Tocqueville to visitors of our time, is reflected in legislatures, in the changing personnel, the ebb and flow of opinions, the violent actions and reactions. The voters always want senators and assemblymen to be "just folks" like themselves, but strange to say they are always busy devising constitutional limitations to prevent their agents from injuring the public or betraying their trust.

Constitutional Limitations on the State Legislature

Extensive as are the powers of the state legislature, they are not unlimited. Some powers are entirely withheld from it by the federal Constitution and the state constitution under which it operates. Others may be exercised only in certain ways; for example, private property may be taken but only by due process of law (p. 489). The legislature cannot alter the frame of government—legislative, executive, and judicial—or the distribution of powers between state and local governments as prescribed by the state constitution. Before studying the functioning of the legislature therefore it is important to inquire into the constitutional restraints under which it works.

Federal Limitations. At the outset, of course, there are those limitations laid down in the federal Constitution (p. 479), which are common to all states—limitations forbidding the legislature to emit bills of credit, coin money, pass ex post facto laws or laws impairing the obligation of contract, or to make or enforce laws abridging the privileges and immunities of United States citizens, or to deprive persons of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. These restraints are not fictions. As we have seen, the Fourteenth Amendment to the federal Constitution is frequently called into play to check our state legislatures. Only by exercising great care in framing important measures affecting property rights can they escape the wide sweep of this provision.

Five Classes of Limitations in State Constitutions. The general limitations imposed on legislatures by the state constitutions themselves fall into five groups. In the first place, there is the bill of rights guarantee-

ing jury trial, religious freedom, and liberty of press and speech, securing to the citizen the ancient right to the writ of habeas corpus, and forbidding the legislature to take private property for public use without compensation. In the second place, there are provisions controlling the legislature in dealing with corporations, forbidding it to grant separate charters of incorporation or special privileges of any kind. A third group of limitations curb the financial power of the legislature, restrict its capacity for incurring debts, compel it to make provisions for paying the interest and ultimately the principal of all money borrowed, and secure publicity for financial measures during their passage. In the fourth place, the constitution provides the framework of the state government, defines the terms and powers of various officials, and prescribes the qualifications for voters, thus placing these matters beyond the reach of the legislature. In the fifth place, the state constitution generally lays down some fundamental principles with regard to local government, public institutions, and education.

Limits on Special Legislation. The power of the legislature to pass special and local laws is often hedged about with restrictions. Broadly speaking, statutes fall into two classes: (*a*) general or public laws and (*b*) special laws. The former apply equally to all persons or classes of persons throughout the state. For example, an act regulating the time of opening the polls at elections throughout the state is a general law; likewise a statute compelling all manufacturers to maintain certain sanitary standards in their shops. A special law is limited in its reach to some particular person or corporation or locality—township, county, or city; for example, a law requiring a county to build a certain bridge or lay out a certain highway is a special law; so is an act exempting some manufacturer or profession or corporation from state taxes. It can be seen at a glance how easily corrupt and pernicious legislation could be enacted in favor of local and particular interests by a legislature enjoying unlimited power.

Evils of Special Legislation. The right to pass such laws, whenever it is freely given to a state legislature, produces two unfortunate results. It leads private persons, localities, and corporations to press into politics in the quest for favors, thus stimulating lobbying, bribery, and log-rolling. It crowds the legislative program with petty bills which obscure the more important public measures and occupy the time of members with trivial matters. These things, in turn, have an evil effect on the quality of candidates who seek to enter the legislature. Persons of high standards

and more than average intelligence are not willing to waste their lives trying to get an iron bridge over Duck Creek in Posey township or working for a highway through the town of Bad Angel. Business of this kind appeals to citizens of small caliber; sometimes to men deficient in integrity.

Types of Restraints. The evils of the system have been recognized and our constitution-makers have devised a variety of limitations to restrain the legislative hand. One method is to provide that no special laws shall be passed relative to matters which can be covered by general legislation. This hurdle is easily vaulted by enterprising legislators. Another method is to insert in the constitution a long list of topics on which the legislature cannot enact any laws whatever; sometimes the list will include twenty or thirty subjects, such as regulating the rate of interest, changing county seats, remitting fines, and granting divorces. A third way of restraining the legislature is to prohibit all special legislation. This barrier is easily thrown down, for legislatures can classify cities and interests into groups and pass "general" laws binding on each group—a practice which has been sustained by the courts. Another check on local legislation, found in a few states, requires the publication of such bills in the newspapers of the communities affected, thus giving the citizens notice and a chance to protest. Finally, pressure for special legislation can be reduced by giving cities and counties a large measure of self-government, namely, "home rule," which permits them to legislate for themselves on many matters without resorting to the state legislature (Chapter XXXI). The effect of these various limitations has been marked, but it can scarcely be said that the problem of special legislation has been solved—indeed it cannot be solved definitively because there is in reality no sharp dividing line between general and special interest. It may be that only through extensive and continuous reliance on research assistance and guidance can legislators be relieved of the burden of special legislation and thus enabled to assume the larger responsibilities that now fall upon them.[10]

Legislative Organization and Procedure

Officers and Committees. In organization and procedure our state legislatures follow, in the main, the example set by Congress. In taking

[10] V. O. Key, Jr., "The Problem of Local Legislation," *State Government*, June, 1940.

up this phase of state government, therefore, we encounter the party system, the speaker, and the committees, just as at Washington. The lieutenant governor, where such an officer is provided for, usually presides in the state senate and occupies a position analogous to that of the Vice-President at Washington; the lower house of the legislature, like the House of Representatives, elects its own speaker. The chief difference between Congress and the state legislature with regard to procedure lies in the fact that the latter is more closely hampered by constitutional limitations designed to secure regularity, publicity, and deliberation in the enactment of laws.

Legislation in Form of Definite Bills. Among such limitations are provisions requiring that laws must be passed in the form of bills and that each bill must cover only one subject clearly expressed in the title. In this manner the legislature is supposed to be estopped from making laws in the form of resolutions and from burying a vicious measure in the heart of a long bill dealing with some apparently harmless matter. There are commonly some stipulations to the effect that when an existing law is to be amended, the section changed shall be reprinted in the new bill with the emendations clearly indicated in some form. It is also a favorite practice to require three different readings of every bill, but the rule is more honored in the breach than in the observance—if "reading" means anything more than mumbling the title. Most of these limitations are little more than pious wishes, for only a few "have teeth" and will be enforced by the courts if they are violated by the legislature. Ordinarily, as Professor Reinsch remarks, "the observance of the rules of procedure is very largely dependent upon the will and purpose of the majority in the legislative body. The leaders do not often find it difficult to arrive at an understanding with the minority under which legislation can be carried on largely by common consent."

Publicity for Bills. The second fairly definite group of rules respecting procedure are those designed to secure publicity in the consideration of measures. The constitution of Michigan, for instance, provides that at regular sessions all bills must be printed and copies thereof must have been in the possession of both houses for at least five days before the measures can be passed and become laws. Moreover no bill is to be so altered in its passage through either house as to change its original purpose and thereby mislead its reviewers. As a further precaution, the vote on the final passage of bills must be taken by yeas and nays, and the results are to be entered on the journal. The stipulation that no bill shall

be introduced during the closing days of a session is sometimes applied in the interest of publicity, but it is commonly nullified by the qualification that it may be waived either by unanimous consent or on approval by a large portion of the members of the house.

The Caucus. Turning from constitutional law to party practice we meet at the outset the caucus in each chamber of the state legislature. In the caucus of the majority party or faction the speaker of the lower house is chosen, subject to the admonitions of the party leaders on the outside; and by much "higgling of the market" the chairmen of the important committees to be named by the speaker are agreed upon. Here too controversies over the leading legislative measures to be sponsored by the party are threshed out and settled. Here it is that the party organization within the legislature does its work. Here it is that members who fain would be independent are brought to realize that practically the only hope for securing a consideration of their own bills is a judicious submission to the will of the party managers. And usually the caucus is dominated by a small and experienced group of legislative workers. Indeed it may be dominated by forces outside its own ranks. In an amusing passage in his *Autobiography*, Theodore Roosevelt tells us that when he was governor of New York, the boss of the state, Senator Platt, asked him whether he wished to name any members of the assembly for committee positions; Roosevelt expressed surprise because the speaker had not yet been selected. Thereupon Senator Platt, "with a tolerant smile," replied that it made no difference, for the speaker when chosen would agree in advance to the appointments "we wish."

The Speaker. The speaker in the lower house is nominally chosen by that body, but in practice by, in, or for the caucus, depending upon the degree of party pressure there. Like the speaker at Washington he enjoys enormous power if he has tact and capacity—and more important still, the support of his party brethren. He often appoints committees in theory and to some extent in fact. Like the speaker in the House of Representatives he has at his side a rules committee, or a group of his party colleagues who, acting in coöperation with him, determine ordinarily the course of daily procedure. He may kill bills by distributing them as introduced to unfriendly committees, and he may refuse to permit them to be called up for consideration if they are not reported favorably from the committees.

Committees. As at Washington, committees play an important rôle in the legislative process. Among those to be found in the legislature,

as a rule, are the following: finance, or ways and means, judiciary, affairs of cities, railroads, commerce and navigation, codes, insurance, taxation and retrenchment, banks, forest, fish and game laws, internal affairs of towns and counties, military affairs, miscellaneous corporations, public education, public health, penal institutions, revision, affairs of villages, agriculture, printed and engrossed bills, trade and manufactures, labor, privileges and elections, public printing, roads and bridges.

Committee Methods. All legislative committees, of course, are not equal in importance. Perhaps first in the list ought to be placed the committees which deal with financial measures, commonly known as the committee on finance in the senate and the committee on ways and means in the house. If there are great cities in the state, the committee on cities is, naturally, high in rank. The committee on the judiciary also enjoys great power because it often has referred to it, under the cover of questions of constitutionality, important measures, such as primary legislation and election laws. In addition, it frequently has to review proposed amendments to the existing statutes.

In actual operation the committee system in the state legislature does not differ much from that in Congress. The committee may report favorably or adversely on a bill, report it with amendments, or kill it by silence. Committees in charge of important matters are often given the privilege of reporting to the house for action out of the regular order of business. If a committee refuses to report a bill, its sponsor may get it up for consideration by securing unanimous consent or a special vote in support of his request; but each powerful committee is directed by party leaders and a motion to take a bill out of its hands is usually a revolt against party understandings which is not likely to meet with success. In other words, the speaker of the house and the committee chairmen possess nearly all the sovereignty that is assigned to the legislative chamber by party managers and the governor or boss as party leader. It is in the committee that bills are drawn, amended, or "smothered" with due reference to party policies and plans.

Special Committee System in Massachusetts. In this respect the practice of Massachusetts offers some remarkable contrasts to the prevailing modes. There the committee enjoys no special privilege except that of scrutinizing bills referred to it. It must report on all bills to the legislative chamber which it serves. Bills reported are considered in regular order—an order that must run its course unless changed by a four-fifths vote. The leading committees of the two houses act jointly and hold

public hearings on practically all significant bills placed in their hands. Accordingly there is little opportunity for "dark room" procedure—for smothering bills without public knowledge. The system has one great disadvantage, however; it prolongs the transaction of business because it offers no swift process for selecting a few measures and compelling legislative action on them.

Nevertheless, for its fairness and usefulness in producing discrimination in law-making, it is justly held up as a model. "In Massachusetts," says Professor Reinsch, "committee hearings are a very important part of legislative action. Notice of all hearings is given in the public press, and the committee meetings are well attended, not only by people who have an axe to grind, but by citizens of the state who interest themselves in legislative reforms. All testimony brought before the committees is carefully weighed; in fact, the legislature and its committees assume rather a judicial attitude. Petitions are brought before them, testimony is given, arguments are made, and they can generally decide the matter impartially upon the basis of all these considerations." [11] Naturally the recommendations of the committees carry great weight in the legislature.

Order of Procedure. To give some concrete idea of the general character of procedure we may take up the practice of a well-ordered legislature. A bill is introduced in the lower house by any one of four methods: by a private member who may deposit it with the speaker or the clerk, by the report of a committee, on the order of the house, or by a messenger from the senate. At each regular meeting the speaker announces the introduction of the bills for their first reading and thereupon refers them to appropriate committees with the consent of the house. If a bill is favorably reported and the report is approved by the house, the bill is then placed on the order of second reading. If the report is adverse and is approved by the house, the bill is in effect rejected.

When a bill is placed on the order of second reading, it is then subjected to debate, being considered section by section—unless, by unanimous consent, it is advanced to the third reading. If a bill passes the second reading and is ordered to the third reading, it is referred to the committee on revision; then it goes to the committee on engrossed bills, where it is put in finished form; thereafter it is laid on the desks of the members sometime before final action. When a bill is ready for the third reading, it is placed on the appropriate calendar and taken up at the proper time. Unless there is a demand, the bill is not read through.

[11] *American Legislatures*, p. 174.

If some member wants to reopen debate on it, he moves to strike out the enacting clause; otherwise a formal vote is taken. The proceedings in the senate are very much like those in the lower house.

To prevent unnecessary delays various expedients are embodied in the rules of legislatures. For example, the amount of time which a speaker may consume is usually fixed and he cannot exceed the limit without the consent of an extraordinary majority. In other words the practice of unrestricted discussion allowed in the Senate at Washington does not prevail in the states. On the contrary, the motion for closure is freely employed both before and after the expiration of the time allotted by the rules to debate on any particular question. If this were not done, legislative sessions limited to forty and sixty days would be barren in results.

Variations from Order of Procedure. The law and the rules however are, as Mr. Dooley remarked in another connection, "triumphal arches" to experienced manipulators in American legislatures. In states such as New York where party conflicts are ardent and the business is voluminous and complex, the party organization in the legislature takes charge. The sum and substance of procedure in such circumstances may be gathered from the following account written many years ago but still true to life: "Before I came up here I had an idea that a legislator, after a profound study of the subject, would introduce a bill with a few words that would at once attract the attention of the press and through them the public. Presently, by some machinery which I never clearly understood, the bill would be taken up in its turn and after grave and serious argument would either be passed or defeated. But what really happens is this. You sneak up back of the desk and drop into a slot your bill, which half the time you don't know anything about yourself, because either your boss, or your senator, or some organization in your district, gave it to you. By bothering the clerk next day you can find out what committee it has been referred to. If you are a member of the committee, there is a good chance to get it reported, because the other members of the committee want your vote to get their own bills out. If not, you are a hundred to one shot, unless your senator comes over and sees Wadsworth [the speaker of the assembly] or Merritt [the floor leader of the majority] about it. The next thing you do is to ask for a hearing on the bill. You find out who is the chairman and hunt him up. When he sees you are only a first-year man, he insists in mistaking you for a doorkeeper or messenger, just to let you know your place. After you get that straightened out and tell him what you want, he pulls a

long face and talks about the flood of bills they have to consider. That's all you can do. If the committee, or rather if two or three men on the committee, are willing to give your bill a chance, you may get it out after begging like a college president. Once on the calendar, instead of the chairman of the committee, you have one man, Merritt, the Republican floor leader, to convince before you can get a vote on the bill at all. They say it's even worse over in the senate, but it's bad enough here. All a new assemblyman is good for is to vote as he is told. If he doesn't do that, never a bill of his will see daylight. The committee holds the power of life and death over a bill, and Wadsworth and Merritt hold the committee in an iron grip."

Rush and Confusion in Procedure. Broadly speaking, legislative procedure in the American states is characterized by confusion and drift, no matter how strong the party organization may be. There is no one person or group of persons openly responsible in law and fact for formulating a program of measures to be laid before the legislature when it meets. Theoretically all members are equal; if they are not, the fact is due to accidents and the advantages arising from experience and political connections. Every member can introduce as many bills as he pleases. Ordinarily the members dawdle during the opening weeks of the session, spending only two or three days at the capital and going home "over Sundays." Not until the end approaches do they begin hard labor; necessity is the mother of activity. For example, the Illinois legislature which met in January, 1923, sent ten bills to the governor during the first sixteen weeks of the session and 296 bills during the last nine days.[12] No one is responsible for a legislative program; no one is responsible for expediting business; no one is responsible for searching all the bills, for bringing unity into the grist of laws, for eliminating disorder, conflict, and favoritism. If there is a strong party machine, it may take things in hand, but it usually follows what is known as "dark room procedure." If there is no strong party machine, then the chaos is still more confounded. In other words, our legislatures are not organized to bring public opinion to a focus, to secure a definition of questions, to concentrate debate on issues, to formulate laws on clear principles of public policy; they are miscellaneous assemblies of citizens, chosen independently, subjected to local influences, often with little experience in

[12] For a study of the legislative session in Illinois in 1923, see a valuable article by Leonard D. White, "Our Legislative Mills," *National Municipal Review*, Vol. XII, pp. 712 ff. The correct scientific method for studying this subject is illustrated here.

public affairs, busily engaged in making a living, eager "to get things done and get home," and, though generally zealous for the public good, often without the knowledge or power necessary to effect their purposes.

Amount of Legislation. From the legislative mills so constituted a huge grist of laws pours out in an apparently endless stream. An assiduous mathematician has ascertained that in the two decades between 1906 and 1926 over 850,000 bills were introduced in the combined legislatures of the forty-eight states and that approximately 220,000 of these projects became law.[13] An output of fifteen or twenty thousand acts at their biennial sessions is by no means uncommon. From such statistics startling conclusions are drawn. It is almost impossible for any bar association to hold a meeting without considering frightful reports on the flood of laws and the menace of legislation. But usually when the orators who love to fashion fine periods on this subject are brought down to earth and requested to name the laws which should be eliminated, they are covered with confusion. Immediately they begin to differ among themselves, and it is not probable that any ten of them could agree upon a long list of laws to be withdrawn from the books—at least, a list that would commend itself to that portion of the public competent to express a judgment on the matter.

Exaggeration of Amount. Inflated notions coming under this head should be pricked. In fact they have been attacked by a man of experience and penetration, Charles E. Hughes: "After you get through with private bills, local bills, amendments of charters of all sorts, relief of towns, villages, and cities, provisions for public improvements, and appropriations, you will probably find that the bulk of legislation of a general nature touching your lives and property is much smaller than you thought, although much larger than it ought to be." And who is to decide what general bills ought to be cut out?

If anyone wishes a private entertainment, let him present a list to a miscellaneous assembly of American citizens. The truth is that every general law of importance is certain to reflect the demand of some powerful interest in society, and proposals to repeal it will stir up a noisy protest in quarters that are not to be ignored by statesmen. Besides the pressures of powerful groups which increase the legislative output, there are the necessities created by modern invention and science. For example, the automobile alone is responsible for thousands of legislative acts relative to traffic, accidents, and public safety.

[13] W. F. Dodd, *State Government* (1928), p. 203.

Criticism of State Legislatures and Constructive Reforms

Evidences of Dissatisfaction. No branch of American government, except possibly the city council, has been subjected to such merciless criticism as the state legislature. The charges brought against it are not based upon the statements of irresponsible persons. They are set forth in many official investigations into public scandals and expounded in the debates of state constitutional conventions. They are substantiated in the clauses of the constitutions, for nearly every new paragraph and section is a reflection of public anxiety. Almost every line betrays an unwillingness on the part of the framers to trust the matter covered to the honor and intelligence of the legislators limited by it. In fact convention after convention has exhausted its ingenuity in devising new limitations on the power of the legislature for evil.

Types of Criticism. When these charges are sifted and classified, they fall into certain broad groups. The first has to do with the character of persons elected to the legislature, with the mediocrity of talent displayed, the extent of corruption and petty trading that prevails, and the lack of experience in public affairs. The second pertains to the quantity of laws passed. Usually coupled with the subject of quantity is criticism of the quality of legislation: the loose language employed in statutes and the frequent absence of clear purpose and legal precision in draftsmanship. The fourth group of criticisms bears upon the delays, haste, and confusion which mark the average legislative session. The charge is also frequently made that legislatures are prone to rush through laws, throw them upon the table of the governor or other executive officials for enforcement, and then pay little if any attention to results unless some scandal arises. Finally, and still more grave, is the accusation that many members, sometimes a majority, are in the pay of, or under the direct or indirect influence of, private parties, and sacrifice the public interest to special interests. Out of these and similar criticisms have grown many efforts at constructive reforms designed to eliminate such abuses.

Lack of Experience and Character. In the bill of indictment brought against the personnel of the legislature, a chief article is that the members are often wanting in independence and experience, in character and intelligence. Touching the first point, Bryce expressed the opinion fifty years ago that the nomination of candidates by political conventions was mainly responsible for the choice of mediocre men, subservi-

ent to the political machine. Now the direct primary has generally taken the place of the convention. What changes has it effected? There is some reason for believing that it works for more independence on the part of legislators, especially in the states which permit any aspirant to seek the nomination of any or all parties. Still no revolution has been wrought in the composition of our legislative bodies. Experience is something more easily measured; it grows out of long service. The direct primary apparently does not lead to the more frequent reëlection of members. Indeed it is questionable whether any mere device can accomplish this. Election machinery is only one element in the case and easily overemphasized in any event.

Intelligence and character are elusive factors, but in an industrial civilization like that of America they are most likely to be devoted to some business, professional, or industrial career. Men of talent who have built up great manufacturing concerns or organized powerful trade unions are seldom found in state legislatures. They cannot or will not spare the time necessary to become effective leaders in politics; they prefer to exert their influence through proxies and criticism. Still more significant, perhaps, is the fact that, as our state governments are now organized, legislative service in itself offers no career; years of loyal and intelligent work in a legislature seldom give a senator or assemblyman state-wide distinction. It is evident, then, that the problem of securing intelligence and character in legislatures runs deeper than matters of nominating machinery; it strikes into the nature of our civilization and the organic structure of our state governments.

Nevertheless, the state legislators, although far from infallible, are generally above the average among their constituents in the level of their intelligence. It seems safe to say that they are as a rule more alert to the varied currents of political thinking than the miscellaneous electorates which they represent. They appear to be reasonably well aware of the predominating facts of American development and sensitive to the growth of informed and humane opinion. Mathematical conclusions are impossible, of course, but the guess may be hazarded that no substantial movement of public interest or suggested advancement in governmental policy escapes their attention. It is not without significance that where the recall exists, as in California, few members of the state legislature are ever challenged for failure to measure up to the expectations of their constituencies. The problem of the state legislature therefore is not one of ideal excellence, but of possible improvement.

Haste and Confusion. Criticisms relative to legislative procedure and the output of laws in quantity and quality raise questions less difficult than those of intelligence and character. A great deal has already been done to correct the grosser faults in the daily operations of the legislature; as already noted, our state constitutions contain many provisions designed to attain this end. Still subterranean methods, haste, and irresponsibility are found everywhere. Not long ago the senate of Pennsylvania rushed through one hundred appropriation bills in thirty-six minutes, while the house ground them out at the rate of two a minute. On only four of the four hundred odd appropriation measures passed at the session in question was a vote formally taken, and less than three per cent of the members took the trouble to record a protest. A study of the New York legislature reveals the same high-speed methods in the closing days of the sessions. In fact they are common throughout the country.

Limits on Introduction of New Bills. Numerous remedies have been offered to cure the disease. Several states provide that no new bills can be introduced in the legislature after the lapse of a certain number of days; others prohibit the introduction of bills near the end of the session. It seems necessary however to leave room for exceptions and this is done by permitting the introduction of bills during the "closed season," with the consent of all or a large majority of the members. In times of stress party leaders employ this device. Aware of this fact, a few states absolutely forbid the legislature to consider any new bills at all during the closing days of the session.

The Split Session. Representing a marked departure from these expedients is the plan adopted in California in 1911, known as the "split session." The ordinary session of the legislature is divided into two parts. During the first thirty days the budget and bills are supposed to be introduced. Then follows a recess of thirty days, intended to give the members and citizens an opportunity to examine with care proposals to be enacted into law. At the expiration of the recess, the legislature reassembles to act upon the business before it. During the second part of the session no new bills can be introduced in either house except with the consent of three-fourths of the members, and no member may introduce more than two such bills. Somewhat later West Virginia decided to try the experiment. In 1932 Georgia followed the example by adopting a constitutional amendment providing that the legislature shall meet biennially on the second Monday in January, sit for ten days, and

then reconvene in regular session on the second Monday after July 4th. At the opening ten-day session the legislature is to organize, elect officers, decide contested elections, permit the introduction and first reading of bills, and attend to impeachments, if any are started. Except for impeachments the regular session is to last only sixty days for the consideration and passing of bills.[14] In 1940 New Mexico adopted a constitutional amendment requiring the legislature to convene for 30 days, recess for 30 days, and reconvene for 30 days.

The bifurcated plan is not as impressive in practice as it is on paper. In California it has often been circumvented by the "skeleton bill," consisting of a number, a title, and an enacting clause but little or no text. Introduced in quantities running as high as several hundred in the period preceding the recess, such bills are "amended" after the recess so as to complete the text, thus delaying the real task of writing measures to the usual last minute. True, many bills prepared in this manner have been vetoed, and an attorney-general has ventured the opinion that skeleton bills are invalid, but such sporadic action has not prevented the practice from surviving in slightly altered form. In the presence of such legislative ingenuity, it is scarcely possible to say that the bifurcated session is a complete success.[15]

Legislative Reference Work. Along with the above attempts to improve the quality of the legislative output by modifying the procedure for the passage of bills have gone efforts to attain the same result by very different means—by supplying bill drafters with fuller and more accurate information as a working base. As early as 1890 New York established a legislative bureau which keeps a careful record of the legislation of all the states and, in addition, maintains a well-equipped library. In 1901 the Wisconsin legislature appropriated a small sum of money for the organization of a legislative reference library. That body now has at its service a competent expert and a huge supply of papers and documents bearing on measures likely to come before the legislature for consideration; any member is at liberty to make the widest possible use of the library and technical assistance at his disposal. Since the launching of the Wisconsin experiment the idea has spread widely. At present forty-two states have legislative reference bureaus of one kind or another, usually in connection with their central libraries.[16] Their efficiency

[14] H. R. Enslow, in the *Political Science Review*, April, 1933, p. 229.
[15] For details, see T. S. Barclay in the *California Law Review*, 1931, pp. 43 ff.
[16] *The Book of the States*, 1943–1944, pp. 154, 155.

has been increased by the recently established American Legislators' Association which holds annual meetings, publishes a journal, and has created a central clearing house in Chicago.

Expert Committee Inquiries. Supplementing the work of the reference agencies is that of legislative committees appointed for special investigations and empowered to employ expert services. To deal with complex matters such as education, housing, banking, taxation, local government, natural resources, water power, and social welfare, our legislatures are relying more and more on scientific inquiries. On the average, it seems, there are eighty or more *ad interim* legislative committees at work on problems in law-making with the aid of specialists. At the same time technical studies are prosecuted by private bodies such as the American Law Institute, the Brookings Institution in Washington, and the National Institute of Public Administration in New York. Everywhere the practice of employing experts to develop information for legislative action is growing in favor and offers promise of improvement in law-making.

Expert Draftsmanship. After the pertinent information has been accumulated comes the actual drafting of bills. This calls for technical skill of the highest order. In the English parliament there is an expert bill drafter, a well-paid and trained lawyer, who helps to give the laws the form necessary to accomplish their purpose and assists in fitting them into older statutes; but in the United States many of our statutes are drawn up in a haphazard fashion by irresponsible persons in and outside the legislature. Some of the most important public acts, designed to achieve large reforms of one kind or another, are drafted by persons outside the legislature, interested in the proposed legislation. Another portion of our laws, especially those affecting private interests, are drafted by high-salaried persons in the employ of corporations or labor unions. Other bills are frequently drafted in a careless fashion by private members who are entirely without any legal knowledge, and sadly deficient in their understanding of the English language as well.

Heroic attempts are being made however to remedy technical defects. About half of the states now have special staffs charged with the duty of assisting in drafting bills, examining proposed measures, and advising legislators with respect to the form, substance, and legal implications of bills and amendments to existing laws. Most of these agencies are associated with the reference libraries mentioned above and make use of their facilities. But their powers are limited and legislators are still free to call on the bill drafters or not as they please.

Pooling National Experience. The tendency to pool experience, exchange information, and promote research, which is so noteworthy among the administrative officials of our states and cities, now marks the development of state legislatures. In this way the enormous waste and duplication of effort which characterize current legislative investigations is being materially reduced. Leadership in the new course has been assumed by the American Legislators' Association (p. 615), and substantial assistance is rendered by the Library of Congress and the Interstate Reference Library. In fact the Congressional Library has an extensive collection of state laws and now prepares an index and digest of state legislation. Much can be said in favor of making that great national institution, with its enormous array of domestic and foreign laws and official documents, the center for research in every phase of state government. If every local reference library and every state investigating committee would turn first to the Legislative Reference Service of the Library of Congress before embarking upon separate enterprises, great savings could be effected in time and money—for the printed records of experience in government throughout the world are assembled there, within easy reach, and a staff of competent and courteous librarians stands ready to lend assistance.

Legislative Councils. The charge that the legislature shows a tendency to enact bills hastily without thorough consideration, hands them to executive officers for enforcement, and then generally neglects the scrutiny of results, has been met in eight of the states by the establishment of legislative councils. In Kansas the council consists of ten senators and fifteen representatives nominated by the respective presiding officers and confirmed by majority vote of the respective houses in a manner to secure proportional representation of the parties.[17]

The operations of the Kansas legislative council since its creation in 1933 give hints that the institution may well serve as a positive contribution to the improvement of legislation.[18] The Kansas council represents both houses politically and geographically. It uses committees to investigate subjects of proposed legislation, hears citizens interested in such projects, employs the experts of its research department in conducting inquiries, holds informal conferences around a table, and submits drafts of bills to the legislature without attempting to dictate to that body.

[17] H. M. Door, in the *Political Science Review*, April, 1934, p. 270; and C. S. Strain, *ibid.*, October, 1933, p. 800.

[18] Frederic H. Guild, Bulletin No. 42, Research Department, Kansas Legislative Council (1936).

The council is a continuing organization which holds quarterly sessions, whereas the legislature normally meets for only sixty days in two years.

For the moment the relation of the council to the governor remains unsettled, although the possibility of smooth working arrangements is recognized. As a legislative organ the council is responsible for preparing a legislative program. And, according to our political practice, the governor is also under obligation to sponsor a legislative program. Here are opportunities for conflict over principles and honors. So far no irreconcilable opposition has appeared in Kansas. By careful management on both sides a concentration of intelligence may be effected and, conceivably, in an ideal plan the governor might become a working member of the council. If that step were taken something like a permanent executive-legislative organ would be instituted. This would permit the retention of the large legislature, with its minute representation of local and popular interests, and yet assure the critical study and preparation of the chief measures by a group small enough to sit around a table and discuss issues without oratory and heat. For extraordinary action the entire legislature could be called in session at any time. Indeed the council, as well as the governor, might be empowered to call special sessions. In this way continuity, expert research, and careful scrutiny could be combined with periodical action by a legislative body large enough to allow for representation of all the various interests and localities—an approach to the ideal of efficiency and democracy.

Some observers believe that the outstanding contributions of legislative councils have been the concentration of attention on important measures and the providing of a basis for intelligent discussion in the next session of the legislature. Council measures have a better than average chance of passage. Of 24 bills prepared by the Kansas Council for a special session in 1933 fifteen were adopted. Of 118 measures introduced by the Maryland Council in 1941, 99 or 83.9 per cent were enacted into law.[19]

Legislation against Special Interest Lobbies. Various technical schemes, such as reference libraries, unicameral systems, and legislative councils, excellent and useful as they are, do not however reach the roots of the evil legislation which may spring from pressures of private interests seeking special favors at the hands of the legislature. "There is hardly one of the many and widely diversified interests of the state," said Theodore Roosevelt, "that has not a mouthpiece at Albany, and

[19] *Book of the States: 1943–1944*, pp. 149, 150.

hardly a single class of these citizens—not even excepting, I regret to say, the criminal class, which lacks its representative among the legislators." [20] The same elements also have spokesmen outside of the legislature in the organized lobbyists, who bring every kind of influence to bear in the enactment of special laws. Powerful interests seeking favors maintain representatives at the state capital for the purpose of becoming acquainted with those members of the legislature who can be reached by devious means—by social considerations, money, or fear of being defeated for reëlection. On the other hand, corporations often employ lobbyists to defeat "strike" bills brought in with a view to extorting money from them.

For example, Harvey Walker's investigation of the source of measures passed by the lower house of the Ohio Legislature in 1939 revealed that 25 per cent were initiated by private members, 24 per cent by state officers, 7 per cent by local officers and 37 per cent by lobbyists. "It is a commonplace," observed Professor Walker, "that legislators usually no longer have time to consult individual constituents unless they represent an organized vote, that is, a conscious group. Pressures by these groups upon the legislature produce the resultant forces of legislation. The function of the legislator has changed from that of a producer to that of a judge. His task is that of weighing conflicting claims as to the merits of proposed laws and arriving at a conclusion as to their desirability." [21]

Well aware of these subterranean manipulations, thirty-five states have sought to suppress undesirable operations by anti-lobby legislation. New York, for example, has provided that every person employed for compensation as a counsel or agent by any person, firm, corporation, or association, to promote or oppose, directly or indirectly, the passage of any bill or resolution, by either house, or to influence executive approval of any such bill or resolution, must be registered every year (before entering upon any such service) in the office of the secretary of the state. Each legislative agent must give the name of the person or association by which he is retained and at the same time furnish a brief description of the measures for or against which he is working. The law also requires every person or corporation to file in the office of the secretary of state a complete account of all the money spent in influencing legislation

[20] *American Ideals*, pp. 63–66.
[21] "Who Writes the Laws," *State Government*, November, 1939.

during the immediately preceding session. Duly accredited agents of counties, cities, towns, villages, public boards, and public institutions are exempted from the provisions of the statute, but penalties are imposed upon all others failing to observe its terms.

Limited Usefulness of Lobby Laws. It is doubtful whether such laws exercise any considerable restraint upon undercover lobbying, and it is in fact difficult to draw the line between proper and improper activities in this sphere. The bills pending in legislatures affect vitally the rights and property of citizens and especially important groups of citizens, such as farmers, manufacturers, real estate owners in cities, trade unions, dairymen, insurance companies, railway corporations, and so on throughout our complex society. Most of these groups are well organized and have skillful counsel to advise and represent them. Their prominent members cannot be ignored by political managers. No one can deny that they are all entitled to be heard. Who can say just what shall be the nature and measure of their influence? Legislation in the abstract without reference to their needs and interests is impossible. Loose declamations about "driving them from the state capital" are both foolish and futile. Far more to the point is the discussion of ways and means for bringing the whole legislative process and the social forces that control it out into the broad daylight of popular knowledge and understanding.

Proposals for More Drastic Reform. The inadequacy of minor remedies offered for legislative ills has led to proposals for more radical changes in the structure of state governments—changes in the interest of simplicity, directness, power, and responsibility. Outstanding among these current projects is the substitution of a single-chambered legislature for the usual bicameral system. It has attracted such widespread attention, indeed, that bills calling for its adoption have been introduced in many legislatures.

Unicameral suggestions have been carried beyond the paper stage however only in Nebraska where a single-house legislature was installed in 1937. Nebraska's experience indicates that the unicameral plan does make for greater simplicity in legislative organization and for the election of more experienced members. Not only does the Nebraska legislature now operate as one house instead of two, but its membership is smaller than heretofore and apparently higher in quality, if collegiate training is a test; and it functions with a fourth of the former number of legislative committees. Simplification in turn spells economy, for the

legislative expenses in Nebraska were materially reduced after the installation of the one-house system.[22]

Whether the quality of the laws in Nebraska has been improved is a complicated and debated question. On the one hand it is said that the new unicameral legislature does excellent work and displays an unusual sense of responsibility. On the other it is claimed that lobbyists were able in 1937 to push through the single chamber certain measures which they had not been able to force through the old bicameral legislature, that the last minute rush of bills, with its attendant evils, was not entirely eliminated; and that three unicameral bills were vetoed for every one vetoed in the case of the former legislature.[23]

Meanwhile critics of the new system are appearing in academic circles. Professor Frank E. Horack, Jr., for example, regards the innovation as unnecessary and writes: "The usefulness of joint legislative committees and the party caucus had already been elaborated within the framework of the bicameral system. . . . This ability to accelerate or brake the speed of government should not be abandoned quickly for a vehicle built on horse-power and without brakes." [24]

The unicameral system is embodied in still larger and more advanced schemes for reform. For instance, Herbert Croly, in his *Promise of American Life*, proposes a complete reconstruction of state government along the following lines.

The center of the new system, projected by Mr. Croly, would be a governor, elected for a long term, but liable to recall by the voters under certain restrictions. The governor would be surrounded by a cabinet composed of the heads of departments appointed by himself; he would have the power of removing every high administrative officer in the state and would hold his departmental chiefs strictly responsible to himself for the work of their several divisions. Departmental chiefs, in turn, would be able to select their more important subordinates, but the technical work of administration would be in the hands of experts chosen under a carefully planned civil service system. The legislature, according to this scheme of government, would consist of a single chamber composed of delegates elected from districts for long terms by some system of proportional representation; at the same time the recall would be provided to hold them accountable to the voters. The ancient tradi-

[22] L. E. Aylsworth, *National Municipal Review*, October, 1938, pp. 490 ff.

[23] The New York State Constitutional Convention Committee, *Problems Relating to Legislative Organization* (1938), pp. 125–141.

[24] "Bicameral Legislatures Are Effective," *State Government*, April, 1941.

tion respecting the separation of executive and legislative power would be entirely abandoned; the governor would be given not only the veto, but also the right to propose legislation, and to dissolve the legislature and appeal to the people in case his particular measures were rejected or seriously amended.

A somewhat similar program has been suggested by the National Municipal League in its model state constitution. This document also proposes a single-chamber legislature elected by the people under a system of proportional representation. The legislature would in turn choose a council from its own members. The traditional separation of powers would be discarded, for the high executive officers appointed by the governor would enjoy with him the right to be heard in the legislature. This project differs from Mr. Croly's plan in that the governor would not only be powerless to dissolve the legislature and appeal to the people if thwarted in his legislative program, but might even be himself removed from office by the legislature.

Growth of State Administration Calls for Higher Legislative Standards. Recent emphasis on the reorganization of state administration, on budget and fiscal reform, and on social legislation has tended to obscure the importance of developing legislatures competent to handle complex legislation and to exercise effective control over the administrative agencies charged with carrying laws into effect. As Hyneman and Lay put the argument after a survey of "Tenure and Turnover of the Indiana General Assembly," the case is pressing: "The rise of dictatorships in Europe is, alone, sufficient reason why Americans should consider seriously the security of representative government in the United States. . . . The traditional function of the legislative branch, the formulation of public policy, has passed in large measure from the state legislature to other hands. The abdication by the lawmaking body of a part of its historic functions may well be a necessary concomitant of the increasing control of individual, corporate, and group activities. But the tendency, in the opinion of the writers, has been accelerated beyond all reason in the American states because of the unwillingness of the American people to provide themselves with a forum competent for careful inquiry and thoughtful deliberation about public questions. . . . Students of government are no doubt agreed that executive leadership is important to the best of legislative bodies. But this is not to assert that the legislature should serve merely to ratify the governor's proposals. Groups who are unable to win the governor to their point of view on is-

sues of public policy vital to their comfort and happiness should still have some opportunity to win acceptance for their wishes through the action of an independent legislature. Even where the governor and the majority of the legislature are fundamentally in agreement, there is need for both clear statement of divergent opinion and careful workmanship in the formulation of statutory language." [25]

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[25] *Political Science Review*, February–April, 1938, pp. 51–67, 311–331.

CHAPTER XXVI

THE OFFICE OF GOVERNOR

The Rôle of Governor

Constitutional Powers. The governor is the central figure in state politics and administration. He is no longer a mere "presiding officer" as Jefferson wished him to be—a nonentity or a servant of the legislature as all the early state constitutions, except those of New York and Massachusetts, sought to make him. He now enjoys constitutional powers of a high order. He is, at least in the public mind, responsible for complex and technical administrative work of vital significance to public welfare. Nearly every new constitutional convention seeks to enlarge his prestige and authority.

Party Leader. Politics, even more than the law, tends to exalt the position of the governor. Next to the President of the United States, it is the governor who engages the interest of the voters of the state. Thousands who do not know the names of the members who represent them in the legislature know who is the chief executive and have some idea of his personality and opinions. As a rule the number of votes cast for governor rises far above that cast for any other state or local officer. So great is the popular interest in the office that even the most powerful party managers, in making nominations, must be on their guard; they may choose a nonentity or even a man of doubtful reputation for auditor or treasurer, but seldom for governor. They may even be forced by public opinion to choose someone whom they dislike or distrust. In the old days in New York, when Senator Thomas Platt was "boss" of the state, he was compelled to take Theodore Roosevelt as the Republican candidate for governor in spite of himself. "Senator Platt picked me for the nomination," said Roosevelt. "He was entirely frank in the matter. He made no pretense that he liked me personally; but he deferred to the judgment of those who insisted that I was the only man who could be elected, and that therefore I had to be nominated."

Interpreter of Popular Opinion. After his nomination a candidate for governor is expected to interpret the vague desires and drifting opinions of the people, especially the voters of his party, and transmute them into a concrete program of legislation and administration for discussion in the campaign. It is true that this function of concentrating and defining opinion is supposed to be discharged by the party and the results are supposed to be expressed in the platform. But in actual practice the voters pay little attention to platforms and a great deal of attention to the personality, speeches, and declarations of candidates for governor. They know from experience that the victor, rather than his party platform, will set the tasks of the legislature. After he is elected and assumes office, a governor continues the function of formulating popular opinion on issues as they arise from time to time during his term. He presses his policies and measures upon the legislature, and may take the stump to arouse support among the people for his program. As the representative of great popular interests, he may overshadow the legislature and the judiciary and spring into prominence as a national figure.

A Potential President. Indeed in the strategic states, such as New York, Ohio, and Indiana, the office of governor may well be a stepping stone to the Presidency. It was as governor of New York that Cleveland arrested the attention of the country and secured the prestige which sent him to the White House. McKinley had been governor of Ohio as well as a Representative in Congress before he was elevated to the presidency. As governor of New Jersey Wilson drew the attention of the country to his program, his personality, and his spirited leadership; while occupying that office he toured the country from Massachusetts to Oregon, from Michigan to Texas, and stimulated the growing sentiment in his party which won the presidency for him. The spectacular victory of Franklin D. Roosevelt in New York, in the election of 1928, and his strategic position as governor of the state, made him immediately "available" for the presidency. In four years he left the Executive Mansion in Albany for the White House in Washington.

Elected by Popular Vote. It is no doubt the system of popular election which gives the governor such high prerogatives within the state and permits him to demonstrate that he can conduct a whirlwind campaign on the national stage if fates should so will it. In all the states except Mississippi, which has a curious indirect process resembling the electoral college plan used for Presidents, the governor is chosen by direct popular vote.

Method of Nomination. In a few states, New York, for example, candidates for the office of governor are nominated by party conventions composed of delegates apportioned among the counties or other subdivisions according to population, party vote, or some arbitrary rule. In nearly all the states however the convention has been abolished by law, and each party is compelled to select its candidates for governor and other state offices by direct vote, usually of the enrolled party members. This "direct primary" is, as we have seen, an election within the party. For example, any Republican who wants to be a candidate for the office of governor must get his name on the primary ballot of his party by securing the signatures of a certain number of voters to a petition; on primary day, each person entitled to vote in the primary (p. 578) may designate one among the several aspirants whose names are thus placed on the ballot as his choice for the Republican candidate for governor at the next ensuing general election. The victorious aspirant at this primary is declared to be the official Republican candidate, and his name is then placed on the regular election ticket with the names of the candidates of other parties. The nominees of the several parties are all presented to the voters of the state at a general election. It is now the commonly accepted practice to declare elected that candidate for governor who receives the highest number of votes—not necessarily a majority.

Type of Person Usually Chosen. What is usually the background of the governor? Some light is thrown upon previous public officeholding by the published biographies of the governors who were in power in 1936.[1] Among the members of this group were Alfred M. Landon, a business man prior to his election as governor of Kansas, and Wilbur L. Cross, who went from a professorship at Yale to the executive office at Hartford, Connecticut. A frequent explanation of such abrupt shifts from private to governmental life is that, when there happens to be a serious split in the ranks of the "regulars" or when popular discontent with "politicians" runs high, a person of distinction outside the conventional political circles may have the strongest appeal. But the majority of the governors serving in 1936 had received at least some training in practical politics before they were elected—nineteen as members of state legislatures, nine as occupants of other state offices, four as members of the national Congress, and three as city councilmen. Even then, the length of time ordinarily devoted to public service in preparation for the governor's chair was rather short. Nevertheless there were some

[1] *State Government*, December, 1935, to November, 1936.

exceptions, such as the case of Frank F. Merriam who was a member of the legislature for over a decade before rising to the governorship in California, and of Junius M. Futrell who rose from over ten years of legislative experience to the office of governor of Arkansas.

Spectacular Elements Required. Since in the campaign for election an appeal must be made to an immense constituency, there must be something rather spectacular about the personality of a candidate for governor. There are, it is true, quiet days when the managers of the majority party find little difficulty in electing an obscure or reserved man; but in close contests no reliance can be placed on such an expedient. More often elections are exciting; an electorate that loves baseball games, boxing matches, and every form of sport demands more "ginger" than is afforded by a lawyer or banker of a retiring disposition. The occasion calls for a man who has "fought" something or somebody. A prosecuting attorney who has shown relentless energy in prosecuting criminals and putting "grafters" into jail is good gubernatorial timber. It is surprising how many governors were district attorneys in their younger days.[2]

Reformers Often in Demand. "War on the political bosses" curiously enough has compelled many bosses to nominate or at least accept the selection of an erstwhile opponent. Speaking of his effort to win the Republican nomination for governor in Wisconsin, R. M. La Follette, Sr., said: "It was clear to me that the single issue against boss rule would be more immediately effective than a program for legislation which would necessarily require much more time for educational work." Hughes, of New York, had hardly been heard of in political circles when as counsel for a life insurance investigating committee he "grilled" some of the financiers and political bosses of the state, held them up to public scorn, and called for drastic reforms. In a few months he was nominated for governor by the Republican party, some of whose leaders he had exposed as lobbyists and "grafters." Thomas Dewey, as prosecutor in New York City, had sent a Tammany politician to prison before he was elected governor of New York in 1942. There are times, too, when the advocate of some outstanding issue of political or economic reform must be chosen. At all events, as a politician of the old school once remarked, "you can't elect a dead one."

Legal Qualifications and Term. The constitutional provisions with

[2] For an analysis of "gubernatorial timber," see S. R. Solomon, "American Governors since 1915," *National Municipal Review*, March, 1931, pp. 152 ff.

respect to the qualifications and term of the governor are very few. Nearly all states provide that the governor must be thirty years of age. Citizenship and a term of residence in the state (five years, in Indiana) are now the usual qualifications. Some states stipulate that the governor cannot be reëlected to succeed himself; Indiana, for example, provides that he shall hold office for four years, but shall not be eligible for more than four in any period of eight years. Other states however place no limitation whatever on the number of terms which a governor may serve; but custom has decreed that it shall not be more than two, though the third-term or even fourth-term rule is by no means absolute. It is also usual to forbid the governor to hold any federal office during his period of service.

Twenty-four states fix the governor's term at four years, and twenty-three at two years; Massachusetts, in 1920, gave up the ancient practice of holding annual elections; New Jersey alone has a triennial election. The tendency is strongly in the direction of the longer term; even the constitution of Oklahoma, which reflects in many clauses the spirit of the Jeffersonian democracy, fixes it at four years; and New York went from the two-year to the four-year term in 1937. This is the result of the recognition of the patent fact that the governor must have time at least to master the details of the complicated system over which he presides if he is to be efficient in his administration.

Salary. The salary paid to the governor is sometimes fixed by the state constitution, but many commonwealths, following the example of the federal Constitution, leave the amount to the discretion of the legislature. In ten states the governor's salary is $7,500 which is also the median in the 48 states. In two states it is as low as $3,000 while the top salary is the $25,000 paid the governor of New York. The constitution of California places his compensation at not more than $10,000, and stipulates that the legislature shall not increase or diminish his salary during his term of office.

Formal Powers. The formal powers enjoyed by the governor must be sought in the express terms of the constitution. The legislature possesses every power and authority not denied to it; but the governor has no such high prerogative. The customary clause that "the executive power shall be vested in a governor" bestows upon him practically no authority which is not explicitly conferred somewhere by the written instrument itself. According to Frank J. Goodnow, "Little if any power is to be regarded as vested in the governor as a result of the grant to him of execu-

tive power. . . . The state courts have not derived, as has the Supreme Court of the United States, any very large powers from such a general power or duty as the duty to see that the laws be faithfully executed. In other words, the principle of narrow construction is more commonly adopted with regard to the powers of the governor than with regard to those of the President."

Removal. As a rule, the governor may be removed from office by impeachment (p. 656). The process in the states generally follows the principles laid down in the federal Constitution with differences only in detail. Usually the lower house brings the impeachment charges and the upper house hears. In the long history of our republic only a few governors have been ousted by this humiliating process: Sulzer of New York in 1913, Ferguson of Texas in 1917, Walton of Oklahoma in 1923, and Johnson of Oklahoma in 1929, for example. In the eleven states which have adopted the state-wide recall that radical device has been used only once in this connection—in the case of Governor Frazier of North Dakota during a partisan conflict in 1921.

The Governor and State Administration

Two Types of Executive Departments. There was a time, not very long ago, when it was possible to draw a general sketch of the office of governor as administrator, which was fairly applicable to all parts of the Union; but this simple bit of artistry is now out of the question. In a number of states constitutional amendments or statutes or both have consolidated, more or less, the offices and boards of state administration into a few departments, placed them immediately under the governor's supervision, enlarged his appointing, removing, and directing powers, made him responsible for the preparation of the budget, and given him, in some respects, a position akin to that of the President of the United States. In others this process of reconstruction is under way, with prospects for gains in the near future. Meanwhile nearly half the states cling to the historic rule, evolved during the nineteenth century, under which the executive power is distributed among many independent officers and establishments and the governor himself is merely one of the high authorities responsible for state administrative performances. It is therefore necessary to divide any treatment of the governor as administrator into at least two parts, corresponding to the variation in the laws applicable to his office. In reality such treatment should be

laid out into many sections beginning with the states in which the governor is in fact as well as theory the supreme administrative head and gradually shading off in the direction of the states which have made no fundamental changes in the heritage handed down by the nineteenth century.

The Consolidated Type. In the first class, the reconstructed states, belong Illinois, Idaho, Nebraska, Massachusetts, Washington, Ohio, California, Maryland, Pennsylvania, Tennessee, Vermont, Minnesota, South Dakota, New York, Virginia, Maine, Georgia, North Carolina (partial), Indiana, Colorado, Kentucky, and Rhode Island. There the governor has powers and responsibilities somewhat different from those prevailing in the remaining states. Yet, as already hinted, these reorganized states do not conform to a single type, for the actual authority enjoyed by the governor under their laws varies widely, so widely that it is difficult to construct a framework of generalization appropriate to them all. In such circumstances, it seems best to begin with a specific state, Rhode Island, where a high degree of centralization has been effected, indicating perhaps the general type toward which all states of this group are tending—in fact, all the states now engaged in reconsidering their executive departments (see Chapter XXVII).

Under a reorganization plan put into effect in 1935, the governor of Rhode Island is made in effect the chief elective officer responsible for administration. The attorney general, the state treasurer, and the secretary of state, chosen by the voters of the state, have only limited obligations in this sphere. The administrative work of the state is grouped in eleven departments. The secretary of state, the treasurer, and the attorney-general each head a department. The remaining eight are under the governor's immediate supervision; he is head of one department himself, in which are located the state police and the purchasing office. The directors of the other seven departments are appointed by the governor with the consent of the senate and they select their own subordinates. In other words, an attempt is made to arrange the chief functions of state administration in a small number of departments according to their kindred relationships, to make the governor responsible for the choice of their directing officers, except as noted, and thus to establish lines of authority and responsibility from the governor down through the ramifications of the system. Furthermore the governor of Rhode Island has been made responsible for preparing and laying before the legislature the annual budget—the program of expenditures for the work of

the state; and he has been supplied with technical assistance for the conduct of investigations and the formulation of fiscal and administrative policies.

Position of Governor in Consolidated Type. In states with centralized systems of administration the governor occupies a unique position. He is made responsible for the discharge of numerous functions assumed by the government of the state. If they are inefficiently or corruptly administered, the evil can be laid at his door. Of necessity he is compelled to think of the work of the state as a whole, to plan for it, to bring its fragments into harmonious relations, unless forsooth he betrays his trust. His power is great and his responsibility is commensurate. He may, of course, still play petty politics, use his appointments to reward mere party hacks, and resort to favoritism in every direction; but when he does there can be no dispute as to accountability. If that is the kind of government the people of the state prefer, no constitutional device known to mankind can prevent it. But if they wish humane and enlightened administration they do not have to find their way through a maze of independent and often conflicting establishments; as all roads lead to Rome, so under a system of centralization all trails, good and bad, lead to a single spot, the chamber of the governor.

Decentralized Type—Place of Governor. In the remaining states where no consolidation of executive functions has taken place, the law confers upon the governor no such high administrative powers. Theoretically, to be sure, he is the chief executive and head of the civil administration but "there is a wide domain of executive or administrative action over which he has no control or slight control." Where this condition prevails, a large amount of executive work is distributed under constitutional mandate among a number of state officials elected by popular vote, endowed with special powers, and entirely independent of the governor. In these cases the state administration is not organized in hierarchical form. It consists on the contrary of a large number of offices, bureaus, commissions, and boards, some elective and some appointive, each with its appropriate duties prescribed by law. The head of a department in a state government of this type is hardly a head at all in the sense in which the term is used at Washington.

Compare, for example, the Secretary of the Treasury of the United States with the treasurer in any of the states not yet transformed by an administrative reorganization. The former is appointed by the President, and in his department are grouped the revenue and disbursing offices—

the agencies dealing with taxation, revenue, and finance. The Secretary is subject to the President and can be removed by him. The state treasurer, on the other hand, is usually elected by popular vote, and is in no way responsible to the governor. The auditor or comptroller generally occupies the same independent position. Often the supervision of taxation and assessments is vested in special agencies operating in spheres defined by acts of the legislature. To supervise properly state financial administration, the governor has not merely to watch the treasurer, over whom he has little or no authority; he must watch various independent officers and commissioners, some of whom he has not chosen in the first place and few of whom he can remove at will.

Governor Only One among Several High Officials. In such circumstances the governor is not head of an administration. He is only one among several high officers elected by popular vote. The auditor, the secretary of state, the treasurer, and other state authorities are not under the governor, but in the eye of the law are his peers. He does not appoint them; he cannot remove them; he cannot prescribe their duties, for they are prescribed by law. There are, no doubt, many offices which he can fill by appointment, but as a rule the consent of the state senate is necessary to appointments and, perhaps, to removals. If the governor is of one political party and the senate of another, conflicts and division of responsibility inevitably ensue. In this case the senate may dictate to the governor in making appointments and compel him to retain subordinates who dissent from his policies or attempt to thwart his measures.

Governor's Appointing Power Limited. The executive power in the states with a decentralized administration is further dissipated by the practice of making the terms of many state officers longer than that of the governor and providing that the terms of members of commissions and boards shall overlap so that one governor can seldom if ever appoint even a majority of the incumbents. On coming to power he finds his hands tied by officials thoroughly entrenched in their posts. He may, it is true, invoke the help of the legislature, if it is dominated by his party, and abolish positions right and left with the aid of "ripper" laws, but this is a procedure not conducive to administrative efficiency. As a rule he must do the best he can by bargaining and huckstering.

Lack of Coöperation in Administration. In any event extreme decentralization precludes that harmonious coöperation among the various administrative officials which is possible in the President's Cabinet. Of course, it sometimes happens that all these officials are of one political

party and represent a coherent section of that party; but it also often happens that the governor is the "drawing card" on the party ticket, while obscure machine workers with no administrative capacity and sometimes with little integrity are associated with him as candidates for the minor state executive offices. There is at least one instance in our history of a governor who was afraid to trust the legal advice of the attorney general of his state on account of the strong factional feeling which existed between them, although both belonged to the same political party. This form of antagonism is often more marked when the governor represents one party and his immediate associates represent the opposition.

Increased Burdens of the Governor. Another primary result of administrative decentralization, curiously enough, is to increase the administrative responsibilities and burdens of the governor. As he is compelled by law to appoint the heads of many minor offices, bureaus, and divisions, he is personally responsible for their conduct in matters of little importance. They can go directly to him with problems and complaints, whereas in states with well centralized administration such questions go to the heads of the departments, who do not trouble the governor with them except in cases of urgency. So it comes about that the governor is often loaded down with trifling details of office which should never come to his attention, while at the same time he is deprived of many of the large powers befitting his position as chief executive.

Special Powers Sometimes Conferred. As if to atone for the severe restraints placed upon the governor's administrative authority, several states authorize him to make special inquiries into the working of the various executive departments. The constitution of Montana, for instance, provides that "the governor may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath whenever so required; he may also require information at any time, under oath, from all officers and managers of state institutions upon any subject relating to the condition, management, and expenses of their respective offices and institutions, and may, at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or state institution." The governor of New York, under the Moreland Act of 1908, may order an investigation of any department; and in several states, the chief officers are required to make periodical reports or render opinions to the governor.

Occasionally, but not often, the governor is given power to suspend certain state officers during a recess of the legislature. But activities of this character are at best of slight significance in advancing the governor's power of continuous control over administration.

Other Efforts to Increase Governor's Powers. When attempts are made to counteract the evils of dispersion by methods other than that of consolidation under the governor, it usually happens that his authority is diminished or at least subjected to further control by some device. Without making any sweeping consolidation of offices, agencies, and commissions, Wisconsin undertook in 1931 to introduce some harmony into financial administration by setting up a board of public affairs composed of the governor, secretary of state, representatives from the legislature, and citizens appointed by the governor with the approval of the senate. But it marked no revolution in administration and in 1937 the Wisconsin legislature created a commission to prepare a plan for state reorganization and empowered the governor to make certain changes by executive order.[3] Other states, notably Alabama, West Virginia, and Kansas, have organized commissions to scrutinize phases of state administration, trusting to pluralism rather than unity to work efficiency and economy in administration. Whatever may be said for such devices, they do not conform to Burke's theorem that responsibility prevents abuses. They rest upon the assumption that ends may be attained by devious ways rather than by perpendicular strokes.

Yet on the whole the fourth decade of the century was marked by a steady growth of the governor's powers of overhead management. Among the factors contributing to this trend were administrative reorganization and consolidation, the increase in the number of officials appointed by the governor, the adoption of the executive budget system, and increased controls over state expenditures vested in the hands of the governor. Thus the transition of the governor from a titular to an actual "chief executive" seems to be in progress.[4]

Law Enforcement

Limited Control over Enforcing Agencies. Besides assuming certain administrative duties, the governor must undertake responsibility for

[3] A. E. Buck, *The Reorganization of State Governments* (1938), pp. 255 ff.

[4] Leonard D. White and M. Harvey Sherman, "The Governors on the March," *State Government*, October, 1940.

law enforcement in general—an obligation which is by no means distinct from supervising the discharge of state functions but in popular imagination at least pertains rather to the maintenance of order and the suppression of crime. As a rule the state constitution vests "the executive power" in the governor and instructs him to take care that the laws are faithfully enforced. But in the ordinary course of things this is a fiction rather than a reality. Unlike the President of the United States, he does not appoint the attorney general (except in a few cases) or the law officers scattered throughout the territory under his jurisdiction. On the contrary the attorney general is ordinarily elected by popular vote, while the local prosecuting attorneys, sheriffs, constables, and police officers are locally elected or appointed. The governor may instruct the state's attorney to institute proceedings against particular offenders and yet he is without power to compel action even here.

Use of Armed Forces. If a riot or disorder becomes too serious for the regular processes of the courts or for local authorities, the governor in most states may call out the militia of the state, for he is commander-in-chief of its armed force. In the states having a central constabulary, or state police force, he has an agency directly at hand and may employ it in exigencies beyond regular local processes. Nearly everywhere he may suspend the writ of habeas corpus, thus staying the hands of the courts and placing the regions affected in care of military authorities, if this is deemed warranted by invasion, rebellion, or public necessity.

As many disorders today arise in connection with labor disputes, the position of the governor in this regard is very delicate. A reckless state constabulary may interfere with controversies lawfully conducted and by arbitrary action bring about violence. It may in fact help employers to "break" strikes by interfering with labor meetings and arresting strike leaders on flimsy pretexts. Such cases are not unknown. On the other hand, if disorders arise in connection with an industrial contest, there is always great pressure on the governor not to interfere; he may be threatened with a loss of "the labor vote" if he does employ state forces. So in this sphere, particularly in the great mining and manufacturing states, the governor often has serious duties to perform. There are matters of fact to be ascertained in times when the truth is difficult to discover. Hasty and arbitrary action may work injustice; timidity and hesitation may result in the loss of life and property.

Special Powers in Law Enforcement. In some states, the governor's power of law enforcement permits him to control, to some extent at

least, local agencies. In a few instances, for example, he appoints and removes police commissioners. In New York, where he enjoys no wide authority over local officers, he may remove local prosecuting attorneys and municipal police commissioners after hearings on charges preferred against them. The exercise of these powers over local officers may have great political significance. It was a story of his action during a police strike in Boston that made Governor Calvin Coolidge a national figure and contributed powerfully to his nomination and election to the office of Vice-President of the United States.

Pardoning Power. In one relation to law enforcement, the governor stands above all other authorities, for he generally enjoys the quasi-judicial power of issuing reprieves, commutations, and pardons. But it is not always unlimited. In some states he shares it with a board of pardons or a high court.

Pennsylvania, for instance, while conferring upon the governor the power to remit fines and forfeitures, and to grant reprieves, commutations of sentence, and pardons, except in cases of impeachment, also provides that "no pardon shall be granted nor sentence commuted, except upon the recommendation in writing of the lieutenant governor, secretary of the commonwealth, attorney general, and secretary of internal affairs, or any three of them, after full hearing, upon due public notice and in open sessions; and such recommendation, with the reasons therefor at length, shall be recorded and filed in the office of the secretary of the commonwealth." New York, on the other hand, has accepted the great argument of Hamilton, that a single person is the best depository of such an important power because, being alone responsible, he dreads charges of weakness or connivance and is not likely to be so obdurate as a group of men. That state gives the governor alone the power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and in cases of impeachment, with such restrictions and limitations on its exercise as he may think proper.

Relations of the Governor to the Legislature

Decline of Legislatures. Although public sentiment in many parts of the Union has prevented the centralization of administrative powers in the hands of the governor, it has generally conceded to him leadership in important legislative matters. In a certain measure this is due to the state-wide character of many issues up for legislative action—issues of

general interest. To some extent it also is due to weaknesses in the legislature itself. Often the legislature is inefficient or dominated by special and hidden interests. Frequently it is a center of log-rolling and trading in which great grists of laws and appropriations for local benefits are turned out at the sacrifice of larger and more general interests. The existence of two houses, often at cross-purposes, and the absence of unified legislative leadership also work against the establishment of responsibility within the legislature itself. In part, leadership of the governor is established by constitutional provisions relative to the message, the budget, the special session, and the veto; in part, by political custom.

The Message. It is a regular practice to confer upon the governor the duty of communicating with the legislature on the state of the commonwealth and of recommending such legislative measures as he may see fit. This right, like that enjoyed by the President, may become a powerful instrument in presenting issues to the people and in forcing the legislature to act. "It is not," said Charles E. Hughes, speaking of the governor of New York, "his constitutional function to attempt, by use of patronage or by bargaining with respect to bills, to secure the passage of measures he approves. It is his prerogative to recommend and to state the reasons for his recommendation, and in common with all representative officers, it is his privilege to justify his position to the people to whom he is accountable." The governor, in his message, often sets the tasks for the legislature; in case that body refuses to accept his proposals, he may, if he is confident of popular support, take advantage of the important power of calling a special session of the legislature to consider the particular measures he has at heart.

Financial Powers. It was long a common practice for the governor to include in his regular message to the legislature a statement of the finances of the commonwealth; and the law in a majority of states now requires him to present to the legislature a complete program of revenues and expenditures—a budget, in short (Chapter XXVIII). The governor may discharge this duty in a perfunctory fashion or he may assume genuine leadership in the formulation of fiscal policies. Taken in connection with the right (which most governors have) to veto single items in appropriation bills, the budget may become an important instrument in the hands of a strong executive who has a decided policy of his own.

Special Sessions. The power of calling extraordinary sessions of the legislature is now regularly conferred on the governor by the state con-

stitution, and often he is bound to submit to the legislature the proposals to be considered at such sessions. The governor may "on extraordinary occasions," the constitution of Ohio provides, "convene the General Assembly by proclamation and shall state in the proclamation the purpose for which such special session is called." The Nebraska constitution expressly stipulates that no subject shall be acted upon by a special session except such as the governor may recommend, and thus the legislature cannot evade the issue which he has provided. It may, of course, reject the measure or measures which he proposes or it may adjourn without taking any action. At all events it is forced to debate and vote under the direct observation of a public immediately interested in the outcome.

The Veto. Also of great significance for executive leadership is the governor's right to veto bills. This is a two-edged sword. It may be used negatively to defeat bills, or it may be employed positively as a threat to compel the passage of measures advocated by the governor. It is easy for him to inform members of the legislature that their favorite bills will be vetoed if they do not accept his recommendations on other measures. Indeed more than one governor has openly announced his intention to veto certain bills which it favors if the legislature fails to adopt his leading proposals.

With one exception, North Carolina, all states give the governor the power to veto measures enacted by the legislature and also permit the legislature to override a veto by repassing the bill. About two-thirds of the states, at the present time, require a majority of two-thirds in both houses to overcome an executive veto; others fix the number at three-fifths; and a few at a mere majority vote. In the hope of checking the extravagance of the legislature, most of the states authorize the governor to veto single items in appropriation bills.

It is customary, in case of an exercise of the veto power, for the governor to return the bill to the house in which it originated with a statement of his objections. Like the President, the governor may veto measures which he thinks contrary to public policy as well as measures which he deems unconstitutional. "The plain intent of the constitution," said Governor Charles E. Hughes, "is that the governor shall express his judgment upon legislative measures before him and that his judgment shall control unless the measure is so strongly supported that it counts in its favor two-thirds of the members of the legislative houses after the objections have been formally stated."

Extent of Veto Practice. In actual practice the number of bills vetoed by governors varies greatly; in the aggregate it is enormous. In some states it amounts to as high as one-sixth or one-fifth of the bills passed at each session, especially where the governor enjoys the power to veto items in appropriation bills. The number of vetoes is also likely to be large if the governor and the legislature are of different parties; for the legislature may try to embarrass the governor by submitting bills which he is known to oppose, or he may veto measures on purely partisan grounds. When the governor assumes leadership and arranges his program with the party directors in the legislature, perhaps on a give and take basis, there are few vetoes. The veto in such circumstances is not an evidence of merit, but of bad management.

Veto after Adjournment. Before taking leave of the veto, we should examine an important matter that is usually passed over lightly, namely, the exercise of the veto after the legislature has adjourned. Most legislatures are in the habit of passing a huge grist of laws during their closing hours. Hence it is often provided in the constitution that bills shall become laws unless vetoed by the governor within a certain period, perhaps thirty days, after the adjournment of the legislature. This means that after the legislators have gone home and cannot call him to account for his conduct the governor may slash measures at will. In case he enjoys the right to veto items in the appropriation bills, he may punish districts and administrative officers for incurring his displeasure or failing to support his programs. He may cripple public services for political reasons and no one can hold him to account. The next legislature may be composed of new members representing another party. The general public, not usually exercised over such matters, has forgotten. Quite rightly this procedure has been termed "dark-room finance," even though it sometimes produces salutary results.

Managing the Legislature. Far more important than the letter of the constitutional provisions with respect to the message, the budget, special sessions, and the veto are the spirit and practice of state politics. The governor is the outstanding figure of his party, even though a "boss" may wield great power over him behind the scenes. The condition was neatly described by Woodrow Wilson when he was governor of New Jersey: "inasmuch as it is next to impossible to determine who is running the legislature from the inside, there is an instinctive desire that there should be some force directing and leading it from the outside; some force which shall be obvious and therefore responsible, open to the view of

everybody and subject only to the restraints of public opinion. Public opinion must by hook or crook get into the business. If it cannot get into it through the committee rooms, it may possibly get into it through executive leadership." Acting on this theory, Governor Wilson laid a complete program before the legislature and made a national reputation in a spectacular battle that accompanied his driving it through. "More than half of my work as governor," wrote Theodore Roosevelt of his experiences in New York, "was in the direction of getting needed and important legislation. I accomplished this only by arousing the people, and riveting their attention on what was to be done. . . . My success depended upon getting the people in the different districts to look at matters in my way and getting them to take such an active interest in affairs as to enable them to exercise control over their representatives."

Evidence on Executive Leadership. This direct testimony of two eminent governors has been confirmed by statements from a number of governors not as well known to the nation at large. When Finley and Sanderson, many years ago, prepared their work on the American executive, they addressed an inquiry to the state governors asking their views on the point of executive influence over legislation. It appears that, with few exceptions, the legislatures generally follow the suggestions of the governors with regard to particular matters of legislation, but not merely because the proposals come from the chief executive. The legislatures really respond to an imperative public opinion which is reflected in the policies of the governor, who, by virtue of his high position, is able to gauge the popular temper. One governor stated that whenever the executive of a commonwealth desires a certain law, he should lay his plan before the legislature in the form of a carefully drafted bill, and then interest influential men in the measure, acquainting them with the arguments for and against it. Another governor replied: "The legislature of the present year enacted into law practically all the measures suggested by the governor in his message to that body." [5]

Sometime later the subject of executive influence over legislation in Indiana during a period of twenty years was examined with great care and in a scientific spirit by Burton Y. Berry. His conclusions are significant. The platforms of the political parties did not exert any appreciable influence on the great majority of the bills proposed and measures enacted into law; in fact the platforms mentioned only about one-fourth of the principal measures considered by the legislature during the two

[5] Finley and Sanderson, *The American Executive*, pp. 181 ff.

decades under examination. Of the platform planks which actually suggested legislation, about one-half were carried into law without the support of the governor; of the planks approved by the governor nearly three-fourths were transformed in statutes. On the other hand, the major portion of the measures offered by the governors during the period were not mentioned in the platforms at all; they were bills sponsored by governors as party leaders. The projects drawn up by the chief executives independently outnumbered the platform proposals two to one, and half of them were enacted into law. At the special sessions of the Indiana legislature called during the two decades in question, every measure proposed by the governor was passed—probably because the consent of the party leaders was secured in advance.[6]

Conclusion. Thus from the testimony of distinguished governors, from the testimony of unknown governors, and from intensive studies of political practice emerges the conclusion that the governor, like the President of the United States, is often the head of the legislature as well as chief executive of the state. This, it should be noted, is not a confirmation of Bryce's dictum that the merit of the governor is "usually tested by the number and boldness of his vetoes." It is rather the more constructive concept that the merit of the governor is tested by the extent and character of his legislative program.

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[6] *The Political Science Review*, Vol. XVII (1923), pp. 51–69.

CHAPTER XXVII

STATE ADMINISTRATION

Scope. The administrative system of each state consists of offices, boards, commissions, and other agencies. They are charged with the duty of carrying out in detail the functions assumed by state government and of supervising local governments as may be required by law. Although these functions are numerous and complicated, they fall into certain broad classes: finance, safety, education, health, welfare, public works, agriculture, labor, industry, and conservation.

Tendencies in Administration. As a matter of course state administration grows and changes with growth and changes in society and government, and certain tendencies stand out clearly in the history of the past fifty years. With the rise of great industries in the nineteenth century and the opening decades of the twentieth century, the functions of state government increased rapidly. During this period new offices, boards, and agencies were established one after another, in great profusion, to discharge the additional obligations. The more advanced industrial states, at the opening of the twentieth century, had one hundred or more such scattered and independent offices, boards, and establishments, each operating under its own statute or statutes. While assuming new functions directly, state governments took over old functions from counties, towns, and cities and began to supervise under detailed provisions of law functions left to local governments. This was called the centralization of administration. About 1915 a third striking tendency appeared, namely, the consolidation and combination of numerous offices, boards, commissions, and other agencies of state administration into eight, ten, or more great departments. Thus the three outstanding tendencies have been: (1) multiplication of state agencies to discharge new functions; (2) more centralization in state control over local affairs; and (3) consolidation of state administrative agencies. About 1930, during the business depression, a fourth tendency appeared: the assumption by the state of administrative duties connected with efforts to cope

with unemployment, insecurity, and economic inefficiency, independently or in coöperation with federal agencies (Chapter XXI).

Two Types of Systems. It is impossible to give a single picture of state administration that is good for all the states. The only thing which they have in common is a small group of old offices connected with collecting revenues, controlling accounts, and keeping records, which have come down from the early days of the American Republic. With respect to the newer agencies, the states must be divided into two broad classes, with many gradations between the extremes. In the first come the states which discharge their administrative functions through numerous independent offices, boards, and commissions. About half of the states fall within this category. In the second class are the states which have to some extent combined their principal administrative agencies in a small number of departments under the more or less direct supervision of the governor (p. 628).

The Historic Officials of State Government

Certain offices established in the early days of the Republic have continued to exist despite the changes which have taken place around them. About the middle of the nineteenth century it became a general practice to make these offices elective and independent of the governor and the legislature. Among the officers in this historic class, usually elected by popular vote but occasionally by other methods, the following are to be found quite commonly throughout the Union.

Lieutenant Governor. About three-fourths of the states have a lieutenant governor who is the legal successor of the governor in case of the death, impeachment, or disability of the latter. The lieutenant governor is also generally president of the senate, with a vote in case of a tie. In those states where there is no lieutenant governor, it is the common practice to designate the president of the senate as the successor in case of a vacancy in the office of governor.[1]

Secretary. Many states have an independent secretary whose functions are very much the same everywhere. He is custodian of the state archives; he has charge of the publication and distribution of laws; he generally keeps the election records, issues notices for elections, and supervises the compilation of election returns for state offices. In some states the sec-

[1] For the rôle of the lieutenant governor, see W. R. Isom, *Political Science Review*, October, 1938, pp. 921 ff.

retary issues certificates of incorporation to companies formed under the general laws, including banking and insurance companies; he reports annually to the legislature on a large number of subjects as ordered by law or by legislative resolution; he administers the oath to members of the legislature and other state officers; he is *ex officio* member of certain boards and commissions; and he is the custodian of the great seal of the state.

Treasurer. Every state has a treasurer who is the collector and custodian of moneys accruing to the state from taxes, fees, and other sources of revenue. On proper authorizations based in due form upon legislative appropriations, he pays out the money of the state.

Auditor. In most states there is an auditor or comptroller. In general, we may say, this officer audits all accounts and authorizes the treasury to make payments of money as directed by law. Sometimes, as in Virginia and Massachusetts, a comptroller and an auditor are to be found, the former acting as the authorizing officer and the latter as a scrutinizer of payments after they are made. In case there is a central inspection of local accounts, the state's high financial officer may prescribe forms of reports to be made by local authorities and supervise the examination of their books and records (p. 662).

Attorney General. It is the duty of the attorney general to prosecute and defend all actions and proceedings in which the state has an interest, to advise the governor and other state officers on legal questions, to take charge of the legal business of the departments and bureaus of the state requiring the services of counsel in order to protect public interests. Frequently, the attorney general has certain specific duties in addition to the general supervision of the state's legal interests. When required by the governor, either he or one of his deputies must appear before any judicial court or the grand jury thereof for the purpose of conducting such criminal proceedings as the governor may specify; upon the request of the governor, secretary of state, treasurer, or other state officer, the attorney general must prosecute any person charged with the violation of the laws which these officers are especially required to execute; he must cause all persons indicted for corrupting, or attempting to corrupt, any member of the legislature, to be brought to trial.

As a rule the attorney general is elected by popular vote. There are however some exceptions. For example, in Maine he is chosen by the legislature; in New Jersey, Pennsylvania, and New Hampshire the governor nominates him and makes the appointment with the senate's con-

sent. Which of the methods is to be preferred? If the tendency to enlarge the powers of the governor is sound, if the governor is really to be made responsible for the enforcement of law, then he certainly should be empowered to select his attorney general. Under the system of popular election it often happens that the governor is of one party and the attorney general of another, so that the two executive officials are frequently at loggerheads. In such circumstances they may engage in unseemly bickerings, and responsibility for the suppression of crime and disorder may be lost in a fog.

States with Scattered and Independent Administrative Agencies

Number. As we have seen, the states, in undertaking new functions, followed the practice at first of creating special offices, boards, and commissions to discharge the additional duties. About half of the states have made no fundamental change in this historic practice. Generally speaking, these scattered agencies range in number from fifty to a hundred or more; even in agricultural regions where government is relatively simple they often present a bewildering array; for example, Arkansas had about sixty such establishments in 1920 and a survey made ten years later disclosed almost one hundred.

Varieties of Function. These scattered agencies may be grouped in a few broad classes. Some of them are concerned with what may be called the business management of the state: the collection of taxes, accounting, budget preparation and control, civil service administration, the purchase of supplies, and the operation of public buildings. Others are primarily devoted to carrying out functions assumed directly by the government: the management of educational institutions, prisons, asylums, hospitals, the operation of state fairs, the administration of parks, forests, reservations, and waterways, the construction and maintenance of highways, canals, and other public works. A third group deals with the promotion of agriculture and business enterprise. A fourth consists of boards engaged in the enforcement of regulations governing factories, mines, public utilities, banking, insurance, corporations, workmen's compensation, and labor conditions generally. Trailing along at the end may come a state historian, a voting machine commission, a statutory consolidation board, a superintendent of weights and measures, a forest, fish and game

commissioner, a state architect, a board for the equalization of local taxes, a farm loan board, a commission for the promotion of uniform legislation, a water supply commission, or an embalming board. Although at a casual glance this miscellaneous assembly of offices and establishments seems to defy classification with respect to form, it will be found on careful examination to be divided into five general types, for each of which a specific reason is assignable.[2]

Single-Headed Establishment. The first is the department with a single head appointed by the governor, usually with the consent of the senate. This device is likely to be adopted when the duties conferred on the officer are routine in character and do not allow him much discretion. In the states that have reconstructed their administrative systems, it is the prevailing scheme for the discharge of numerous functions, and in other states it represents an ideal toward which the sponsors of reform are tending.

Board with Single Agent. The second type of state agency has a single head appointed by a board or commission, itself chosen by the legislature, the governor, or popular vote. In this case the head performs administrative duties, while the board supervises in a general way and acts as a rule-making body. The underlying idea is to "remove the department from politics" by making the board unpaid and bi-partisan in composition. If no salary is attached to membership, then the politicians hunting for spoils will not interfere; such at least is the theory. At all events, educational and charitable institutions are often managed in this way.

Working Board. The third type is the board which assumes a great deal of the actual responsibility for administration, although it employs a skilled secretary for routine work. This, like the second device, is intended to draw into service public-spirited citizens and thereby reduce political interference to a minimum. It appears frequently in charities administration.

Head with Consulting Board. A variant form is to be found in the fourth type—the single-headed department with a chief appointed by the governor, subject usually to senatorial approval, and a collateral board chosen as a rule in the same manner. The departmental head carries on the administrative work while the board serves as a consulting, warning, and proposing agency. Here the fundamental idea is to place responsi-

[2] A. N. Holcombe, *State Government in the United States*, pp. 321 ff.

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[2] A. N. Holcombe, *State Government in the United States*, pp. 321 ff.

bility on the governor and his appointee and at the same time obtain the counsel and advice of private persons more or less expert in the work of the agency.

The Commission. Now we come to the fifth type—the board or commission composed of three or more members who are paid salaries and expected to perform specific duties separately or in conjunction with one another. In this class may be placed railway and public utility commissions charged with the regulation of railway and utility rates and services. Here too belong bipartisan civil service commissions which carry out employment policies and industrial commissions which make and administer rules relative to factories, industrial accidents, workmen's compensation, and kindred matters.

Such boards and commissions are in fact executive, legislative, and judicial in character.[8] They enforce laws. They make rules. They hold hearings and decide specific cases very much as the judges of courts do. For example, an industrial commission, in administering the law providing compensation for those injured in industry, will hear the employer and the employee in each contested case and award damages to the injured according to its interpretation of the law and facts. This type of organization is always advocated whenever the legislature is about to vest in the hands of some agency the power to fill in the provisions of statutes by devising rules applicable to details. Although it is severely criticized as making for irresponsible government, it is defended with equal force as making for flexibility and reasonableness in the application of general principles to concrete cases.

Independence of Agencies. However constituted as to form or type, most of these agencies in the majority of states stand upon an independent statutory basis, subject to little or no direct control by the governor. As a rule they regard themselves as sovereigns in their respective spheres, not as parts of a collective group charged with the coöperative planning and administration of public work. Each agency, jealous of its rights, eager to extend the sphere of its operations, sometimes seeking more spoils of office, applies to the legislature for more money and more employees.

Duplications and Conflicts. Waste, friction, duplication of effort, lack of coöperation, and irresponsibility inevitably flow from the system or lack of system. The governor cannot be held accountable for the busi-

[8] U. G. Dubach, "Quasi-Legislative Powers of State Boards of Health," *American Political Science Review*, Vol. X, pp. 80 ff.

ness transacted nominally under his leadership. The legislature which meets for sixty or ninety days every year or two could not be held responsible in fact even if it were made so in theory. Inevitably therefore the state administration in such circumstances tends to become a collection of special interests—official and private. In connection with each one of the great functions undertaken by the state—pertaining to health, education, charities, highways, industries, labor, etc.—there usually appears some kind of citizens' organization. It may be in theory disinterested, not formed for profit, or it may be directly interested in promoting operations which yield private gains. Often it has one or more paid secretaries who besiege state authorities in their offices. The people at large have only a vague idea of what is going on; the active agents of various societies at the state capital work day and night. Accordingly unity in government is dissipated; indeed administration tends to pass from the hands of duly constituted political authorities into the hands of separate and specialized groups, which fight one another or coöperate in common efforts to secure appropriations from the state treasury.

States with a Consolidated Administrative System

Protests and Call for Reform. As state agencies multiplied and tax burdens mounted at the turn of the century, protests were heard against the time-honored chaos of offices and boards. A demand arose for the consolidation of the scattered and independent establishments in a few great departments, each discharging a group of related functions. As a result nearly half the states (p. 628) have materially modified the old array of agencies and combined many of their duties under a few high officers headed by the governor.[4] In other states projects for concentrating offices and functions are under consideration. So we are now in the midst of a nation-wide movement designed to introduce order, economy, efficiency, and responsibility in state administration. This movement has followed the ordinary course: protest, plan, action, and evaluation.

Origins of the Movement. Leaving out of account minor events, the movement may be said to have begun as early as 1891, when the gov-

[4] A. E. Buck, *The Reorganization of State Governments* (1938), published for the National Municipal League. The great report of the Efficiency and Economy Commission of Illinois, under date of 1915, is a mine of information and wise comment on state administration. Of special importance also is the scientific study of the subject by J. M. Mathews, *Principles of American State Administration*, the first treatise of the kind to break away from the purely legalistic method of handling the question.

ernor of Massachusetts analyzed the state administrative system in a message to the legislature, pointed out with great cogency the defects in it, and recommended a consolidation in the interests of economy and efficiency. About the same time other governors spoke on the theme. But these criticisms failed to bear fruit. Then followed a period in which the subject was discussed mainly in treatises on government and administration, such as the writings of Frank J. Goodnow and Herbert Croly. In 1909 the idea took practical form when a committee of Oregon citizens, known as the People's Power League, proposed and advocated state constitutional amendments reorganizing departments and centralizing responsibility in the hands of the governor. Comprehensive plans along similar lines were made by expert commissions in Iowa in 1913 and in Minnesota in 1914. In 1915 the New York Bureau of Municipal Research prepared for the New York constitutional convention a complete survey of the state government and suggested a scheme of reorganization and consolidation. The constitution which was prepared went far in the direction of centralization, but it was rejected by the voters.

Action in Illinois. Two years later, Illinois adopted a general program of reorganization based upon a careful survey of the institutions and agencies of the state by a staff organized under the direction of Professor John A. Fairlie. The reform was effected by an act of the legislature and did not touch the elective officers of the state who stood on the same footing as the governor. The new law however abolished more than one hundred statutory offices, boards, departments, and agencies, and consolidated their functions under a few great departments which, as later modified, are as follows:

1. Finance, charged among other things with the responsibility of preparing the budget for the governor's scrutiny.
2. Agriculture, including all agricultural and related activities as well as food inspection.
3. Labor, including an industrial commission in charge of arbitration and conciliation matters.
4. Mines and Minerals.
5. Public Works and Buildings.
6. Public Welfare, having jurisdiction over all charitable, penal, and reformatory institutions.
7. Public Health, including control over laboratories.
8. Conservation.

9. Registration and Education.
10. Insurance.

Each department is headed by a single director appointed by the governor with the approval of the senate. In all cases in which departments are called upon to exercise quasi-legislative or quasi-judicial functions boards are provided. These include an industrial commission, a mining board, a tax commission, a normal school board, and a food standards commission. Each board is a part of the department to which it belongs and is under the system of financial control to which other officers are subjected. In several cases advisory boards were instituted to serve as counselers to department heads and the governor.

Action in Other States. After Illinois had broken the path, other states followed in rapid succession with administrative reforms more or less drastic: in 1919, Massachusetts, Idaho, and Nebraska; in 1921, Washington, Ohio, and California; in 1923, Maryland, Tennessee, Vermont, and Pennsylvania; in 1925, Minnesota and South Dakota; in 1927, New York and Virginia; in 1931, North Carolina; in 1932, Maine and Georgia; in 1933, Indiana and Colorado; in 1934, Kentucky; in 1935, Rhode Island; in 1937, various steps were taken in Connecticut and Wisconsin. In 1943 the legislature of Michigan created a Department of Business Administration to effect economies and to suggest means of consolidating functions and activities. Few of these states however have a system as symmetrical as that of Illinois, and some of them have made gestures rather than a thoroughgoing reconstruction. Several of them have made modifications since the first step was taken and the subject is a theme of lively discussion on the part of governors, legislatures, and interested citizens. Now that our states have assumed such extensive administrative functions, the quest for the best and most efficient way of discharging them will doubtless go on with increasing influence on law and policy.

Essential Features of Consolidation. Generalizing from the tendencies revealed in the consolidation movement, certain controlling principles come into the picture. All offices, boards, and agencies should be consolidated in a few departments. The number of departments to be established depends upon the amount, variety, and character of the work to be done. Each department should have a distinct function or group of related functions to perform. All closely related functions should be placed in the same department and the number of subdivisions within each department should be determined by the nature and

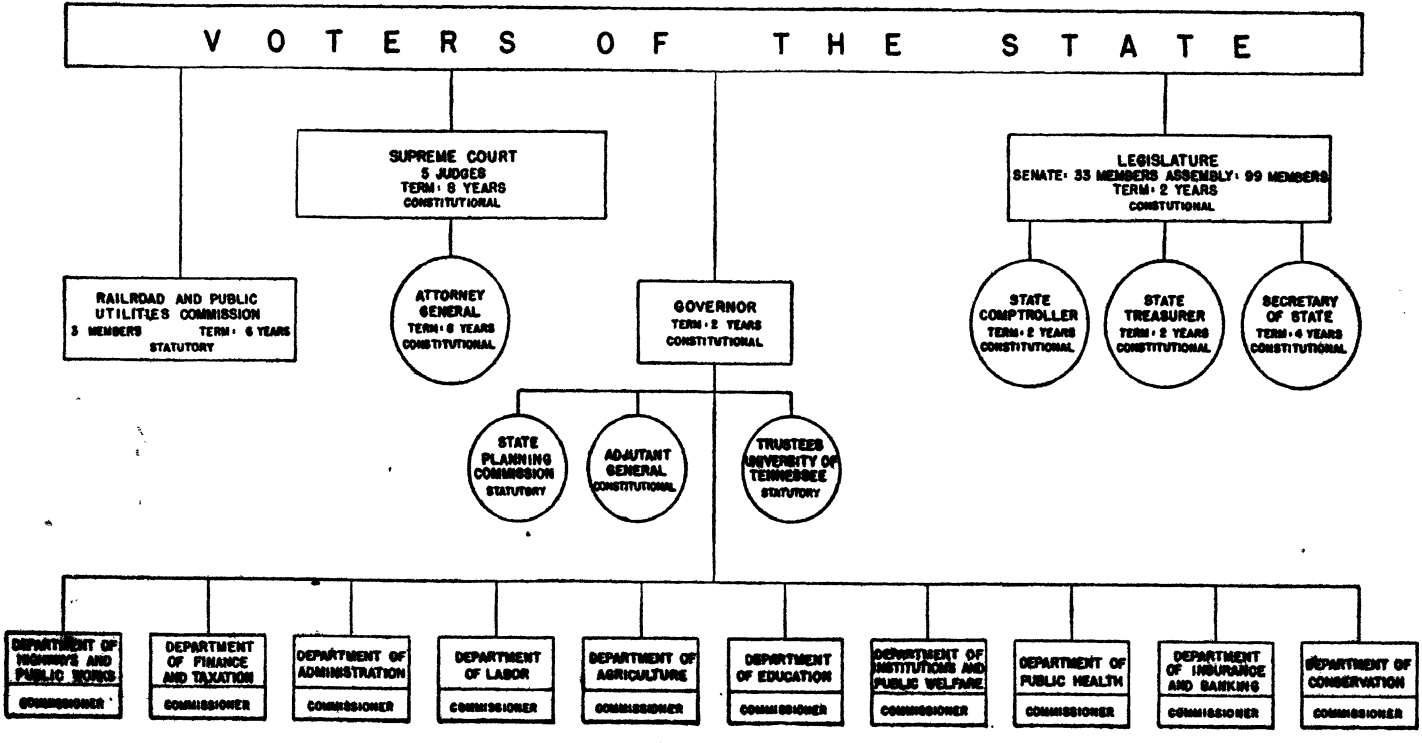
multiplicity of the duties assigned to it. Thus the responsibility for each major function and the power to discharge it will be vested in a specific officer and the lines of accountability from subordinates to superiors clearly drawn. The governor should have the power to appoint, or at least nominate, and remove department chiefs and direct their work within the limits of the law. He should also have a "staff" of investigators, independent of the operating force known as the "line," and require the staff to make investigations and report on methods and results of administrative work. He should also be provided with a business division to assist him in checking expenditures, purchasing supplies, making appointments and removals, and preparing the budget. For the confused tangle of offices, boards, commissions, and autonomous establishments described above (p. 644), such a set-up substitutes a clear-cut structure of administration which, in competent hands, makes for responsibility, action, speed, and precision. It throws the whole machinery of state government into bold relief so that the legislature and the people can readily see who is really managing public affairs.

Evaluation of the New System

Status of the Movement. Many years have now passed since the first state reorganized its administration and the general movement for reconstruction began. Where does the movement stand today? Have the improvements effected been equal to the expectations? In respect of the first question some fairly definite answers are forthcoming. The records show that in no state has reorganization been carried to a comprehensive conclusion. As William H. Edwards says, after making a careful survey, many important state functions have been left outside the administrative hierarchy headed by the governor; a great deal of the consolidation has been merely nominal—merely by attaching independent agencies to regular departments; the governor's appointing power has not been extended to cover numerous offices which would come under his authority in a logically perfected scheme; and the tendency to create new offices outside the hierarchy or to tear old agencies away from it still appears in state politics.[5] Yet there have been no signs of a wholesale reversal of the trend toward administrative reorganization. On the contrary, the actions of Rhode Island in 1935, and of Tennessee and Wisconsin in 1937 indicate that the movement has vitality and the

[5] *State Government*, October, 1938, pp. 183 ff.

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discussion of the subject in states which have not reconstructed their systems points to advances in the future.[6] Even so there is no prospect of seeing a uniform scheme of hierarchical administration in all the states at any time in the immediate future.

Gains in Economy and Efficiency. With reference to the second question—the advantages achieved by administrative reorganization—answers are more difficult to make, for standards of exact measurement are hard to establish and it is not often, if ever, possible to discover whether advantages to be noted are to be attributed to administrative changes, to the quality of the governors, or to other practices adopted about the same time. Perhaps the most satisfactory test is provided by comparing the costs of a state government just before and after consolidation. By applying this criterion, A. E. Buck finds material reductions in the state outlays of Nebraska, Tennessee, Pennsylvania, Maine, Kentucky, and Georgia within a short time after these states had overhauled their administrative systems.[7] For other states there is similar testimony. Indeed the weight of evidence seems to be on the side of gains in economy.[8] Leaving financial considerations we encounter greater difficulties in applying exact tests and reaching conclusions. There have been corruption, bribery, and spoils politics in the reformed states as well as in others and nobody has yet tried to strike a precise balance sheet. Nor have informed advocates of administrative reorganization ever claimed that it would automatically introduce efficiency and economy wherever adopted. As Governor F. E. Lowden said in 1921: "There is no form of government known to man which is self-executing." The chief claim made by sponsors of the new system was that it simplified and fixed responsibility in administration and enabled the people to know who was to be held accountable for money spent and work done.

Demands for Protection against "Politicians." Whatever may be said about the achievements of reorganized administrations, the reform is severely criticized by students who reject the very principles upon which it is based. According to one line of argument there are four sections of state administration which should be kept out of the hands of transitory partisan governors. One section includes technical activities that have

[6] A. E. Buck, *The Reorganization of State Governments*, pp. 209, 226, 252; *American Year Book*, 1937, pp. 160 ff.

[7] A. E. Buck, *op. cit.*, p. 35.

[8] Read Bain, "Theory and Practice of State Administration," *Political Science Review*, June, 1938, pp. 497, 501; A. J. Maxwell, "After Three Years," *State Government*, January, 1934, for North Carolina.

little relation to politics, such as the maintenance of highways, the conservation of natural resources, and the management of public works. A second section is in effect legislative in character; numerous boards are governed by general statutes and in fact make laws in detail by issuing orders and regulations. Other state agencies, such as public service commissions, perform functions that are judicial in nature. A fourth branch of state government, with features all its own, is the control of education; this function, it is claimed, should not be subjected to the fluctuating fortunes of party politics, but should be more or less insulated against them. In all these divisions of administration, the argument runs, there should be continuity and competence and these can best be secured, not by department heads appointed by the governor for a short term, but by boards whose members serve for long and overlapping terms.

On these or similar grounds, Kirk H. Porter argues cogently against the general program of administrative reorganization which distributes all functions among a few departments, all headed by the governor's appointees and subject to his direct control.[9] Taking the opposite tack, Mr. Porter would vest the administration over all "service functions," such as conservation, health, and welfare, in independent lay boards serving for long and overlapping terms and endowed with power to appoint the operating heads of the departments. The governor's power, Mr. Porter would limit mainly to the direction of the chief staff agencies, concerned with finances, personnel, supplies, and other matters ancillary to the conduct of the service functions. In this scheme the governor is viewed as a kind of overhead administrator rather than a political leader engaged in formulating and carrying out public policies respecting the affairs of the state in general. In such circumstances it would be largely useless for a candidate for the office of governor to make a campaign on issues associated with these policies for, if victorious, he could do little or nothing about them. Though popularly elected the governor would be more of a business manager than a policy-shaping leader in public affairs.

Demand for Political Representation in Administration. While some writers advocate the use of the board to control each main department on the ground that this would take administration out of politics, other writers favor boards as a means of bringing politics into administration, by allowing the representation of interests in such agencies of control.

[9] *State Government* (1938).

If a department is under the control of one man, it will of necessity be dominated by a Republican, a Democrat, or a partisan of some kind. If it is under a board, two or more parties may have their spokesmen and there may be a frank representation of interests in administration —a tendency which is steadily creeping into American government. "In Oregon," says Professor Barnett, "there is a statutory provision for the representation of various economic interests on ten state boards and one county board. Thus three labor boards, the state board of conciliation and arbitration, the industrial welfare commission, and the state industrial accident commission, are each composed of representatives of labor, capital, and the public." Inevitably this practice runs counter to a strict organization of all state administration along departmental lines and provides one of the cross currents in the development of American public law.

Call for a General Overhauling of State Government. There are broader grounds for rejecting the consolidated system alone, either partial or complete, as representing the ideal type of state government. As originally conceived by Frederick A. Cleveland, who may be justly called its first militant sponsor, hierarchical administration was associated with plans for a single-chamber legislature, the establishment of responsible government by placing the governor under continuous legislative scrutiny, and the treatment of department heads as cabinet officers. In practice little attention has been given by the makers of administrative plans to such checks on almost unrestricted control by the governor. A far more drastic reconstruction of state government has been proposed by Read Bain.[10] He would create a unicameral legislature, composed of relatively few members and meeting almost continuously, vest most executive duties in a state manager elected by the legislature, place administration in the hands of a few department heads subject to the manager, and make the governor a kind of honorary official. "State government," Mr. Bain concludes, "may soon be in the midst of as fundamental changes as those which began in cities over thirty years ago." At all events, surely, the reorganization of state administration does not stand alone. It bears a relation to the legislative system on the one side and to the position assigned to the governor, as leader or figurehead, on the other. Hence a comprehensive discussion of administration must go beyond the mere consideration of the official set-up—departments, boards, offices, and divisions, and their connection with one another and

[10] *Political Science Review*, June, 1938, pp. 495 ff.

the governor's powers and duties—and take into account the whole government of the state.

The Appointment and Removal of State Officials

Diversity in Appointing Methods. In the methods adopted by the various states for selecting, promoting, and removing officials there is no uniformity of practice. The states which have a consolidated administrative system show a tendency to vest in the governor the power to appoint, with the consent of the state senate, the heads of departments and members of boards. Here the governor also enjoys a large power in making removals. In these states the department heads frequently appoint and remove their immediate subordinates. Fewer than one-half of the states (p. 658) have sought to remove the spoils system from politics by establishing the merit system of civil service. A large majority continue in the old ways, making each victory at the polls the signal for discharging old officials and employees and appointing a different set of party workers in their stead.

Some state administrative officers are elected by popular vote; some are appointed by the governor alone; some are chosen by the governor with the consent of one or both houses of the legislature; some are chosen by the legislature. On the same board there may be members chosen by two or more methods supplemented by members who hold other positions and serve merely in an *ex officio* capacity. Some officers are appointed for long terms; others for one or two years. In the case of boards and commissions a special effort is made to assure continuity by providing long and overlapping terms; only a part of the members go out of office at one time. Hence it seldom if ever happens that a new governor on coming to power can make a clean sweep and assume full responsibility before the people for carrying on the work of the state; he must nearly always operate with the aid of many high officials who belong to some other political party or faction.

Removal Methods. The same diversity exists in the methods of removal. The governor has no general power of removal like that enjoyed by the President of the United States (p. 176). Not only do we discover a great variety of practices among the several commonwealths, but in each state we find dissimilar processes of removal applied to officers of equal rank as well as officers of different grades. In almost any commonwealth we may find three or more methods of removal.

Impeachment. The first method is that of impeachment. Many constitutions provide that any civil officer of the state may be impeached; others make all executive officers liable to that procedure; and still others specially enumerate the officers who may be subjected to it. The causes of impeachment vary, but crime, misdemeanor, treason, bribery, drunkenness, malfeasance, gross immorality, extortion, neglect of duty, incompetence, and misconduct are among those enumerated in various constitutions. South Carolina however assigns no causes whatever; it leaves the matter entirely to the discretion of the members of the state legislature.

The process of impeachment, in general, follows the pattern laid down for federal cases by the Constitution of the United States. That is, the lower chamber of the state legislature ordinarily initiates the proceedings, after which the senate sits as a court of trial, sometimes in conjunction with one or more justices of the state supreme court. Obviously such a division of duties is not feasible in Nebraska, since it has a unicameral law-making body. There the single house has the sole power of impeachment, and may exercise it by majority vote. Upon the passage of an impeachment resolution, the clerk of the legislature proceeds to serve notice of the action on the chief justice of the Nebraska supreme court. The latter is in turn obligated by the state constitution to call a session of his colleagues on the bench, to meet at the capital within ten days to conduct a formal trial. To prevent the court from passing judgment on itself, impeachment cases involving the justices are not referred to the supreme court.

The effect of a successful impeachment action is generally to oust the offender from his position and to disqualify him from holding state offices in the future. Nor is this all, for a person who has been impeached may subsequently be tried for his offense, if criminal in nature, in the ordinary law courts, and may thereby receive additional punishment. Evidently the threat of impeachment is not to be taken lightly.

Legislative Action. A second method of removal is by a resolution of the state legislature. This method is often provided for the removal of judges and judicial officers. For example, in the state of Washington, judges of the supreme court and of the various superior courts may be removed by concurrent resolution of both houses of the legislature, provided three-fourths of all the members elected to each house concur in such action. As a protection for the accused, it is specified that in every case the judge complained of shall be served with a copy of the charges

against him and shall be given an opportunity to be heard in his own behalf.

The third method of removal is by the governor with the consent of the senate. This is a frequent practice with respect to state officers and members of commissions who are appointed by the governor and the senate.

Removal by Governor. The fourth method of removal is by the governor alone; but this power is not very extensively granted by state constitutions. In several states—particularly Colorado, Maryland, Illinois, Nebraska, and Pennsylvania—he may remove those officers whom he appoints. In those states which have undergone an administrative reorganization, grouping the numerous bureaus, commissions, boards, and agencies in a few departments, the appointing and removing power of the governor has been materially enlarged (p. 649).

Judicial Action. The fifth method of removal is by the courts. In a few instances the judges of the higher courts may remove prosecuting attorneys, minor judicial officers, and county and other public officers. For example, the constitution of Oregon provides that "public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offences, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law."

The Recall. A sixth method of removal—recall on petition and action of the voters—is to be found in several states (p. 552).

The Rank and File of State Employees—Civil Service

Prevalence of Spoils System. If attention is turned from the higher officials of state administration to the occupants of minor posts and employees in general, two types of recruitment and management are found. One is the traditional spoils system which prevails in more than one-half of the states. Here all employees, high and low, may be appointed, promoted, demoted, and removed by the victors who carry state elections. In practice, to be sure, the rule is not strictly applied. Even in the most spoils-ridden states many officers and employees either hold over under terms of statutes or are permitted to keep their places on account of special talents and knowledge, or of agreements among politicians to divide the spoils. But it is custom rather than law which prevents the making of a clean sweep after every election.

States with a Merit System. By the close of 1943, twenty states were operating under comprehensive merit systems, a group including such leading commonwealths as Massachusetts, New York, New Jersey, Maryland, Michigan, Ohio, Illinois, Wisconsin, and California. In these states, civil service laws follow, in general, the national law. They provide for the division of public offices into two groups: the unclassified and the classified. The unclassified service includes offices filled by election or by the legislature or by the governor and senate, and other specified positions. The classified service comprises all other offices, which are subdivided into three groups: competitive, non-competitive, and exempt. Every state has adopted departmental merit systems for those agencies that administer the federal social security measures. Congressional legislation left them no choice in this matter if they were to receive the benefits of the federal system.

Nature of the System. The competitive branch of the state civil service includes such officers as clerks, stenographers, cashiers, and civil engineers. Positions in this group are filled by examinations or promotions and transfers. The civil service laws require all examinations to be practical in character and to relate to such matters as will fairly test the relative capacity and fitness of persons examined to discharge the duties of the service in which they wish employment. For the various places requiring technical skill—such as the positions of factory inspector, health officer, civil engineer, chemist, and expert accountant—special examinations in the respective branches are given; and in no case is reliance placed solely on book knowledge. Applicants who are successful in the examinations are grouped according to the services which they seek to enter and arranged in the order of their respective grades. When a vacancy occurs, the appointing officers must choose usually from the three names highest on the roll of candidates.

The non-competitive class includes minor employees who belong to certain crafts, such as bakers, carpenters, stone-cutters, and picture-framers. Appointments to this class are made after non-competitive examinations conducted according to rules.

In the exempt class are the deputies of the principal executive officers, the chief clerks, and skilled and unskilled laborers not included in the other categories.

Removals. As a rule, civil service laws provide, furthermore, that removals must not be made for political reasons, but only for incompe-

tence or insubordination. Ordinarily, the employee affected has the right to be heard.

Administration of Civil Service. The administration of the civil service law is generally vested in a commission composed of three members, not more than two of whom may be adherents of the same political party. But there are exceptions. In Maryland the function is entrusted to a department with a single head; it is the duty of the commissioner to prescribe and enforce rules carrying the civil service act into effect, to plan and hold examinations for the various branches of the service, to make investigations, to certify eligibles to appointing officers as called for, and to hold hearings in case of removals. The Maryland law is also noteworthy because it authorizes the commissioner to make a complete classification of the positions coming under the merit system and to assign the various offices to their appropriate classes. Furthermore he is instructed to make a study of rates paid for similar services in public and private employment and to recommend schedules of compensation for state officers to be put into effect on approval of the governor. The Maryland commissioner is called the director of the state department of employment and registration and has a place in the governor's cabinet.[11] Influenced, perhaps, by this example, California in 1929 transformed its civil service agency into a bureau in the department of finance, thus tying it up closely with the business administration in its broadest sense and making it a high executive authority.[12]

Improvement of Public Service

Growing Interest in Public Service. Although after nearly fifty years of experimentation only twenty states have introduced the merit principle generally into their civil service, it would be a mistake to assume that little progress is being made or that the spoils system is universal. The question of personnel administration is being studied with increasing interest.[13] The hands of state and municipal civil-service officials have been strengthened by the formation of a general Civil Service Assembly composed of representatives engaged in that activity. This Assembly now has a staff agency known as the Bureau of Public Personnel

[11] *National Municipal Review*, Vol. XII, p. 358.
[12] See *Public Personnel Studies*, March, 1930, p. 44.
[13] See late issues of *American Year Book*, for recent trends.

which carries on expert investigations and publishes a monthly journal reporting events, advances, and special researches in the field. And outside of the official world an association of private citizens, the National Civil Service Reform League, promotes studies and seeks to develop a favorable public sentiment.[14]

Increase in Technical Positions. As in the Federal Government so in the states, whether they have the merit system or not, there are many powerful forces operating against the indiscriminate ousting of officials in favor of party workers whenever there is a political turnover. If a century ago the duties of most public offices were so simple, as Andrew Jackson said, that any citizen could master them in a short time, that is no longer the case. The specialized functions pertaining to public works, health, housing, education, forestry, utilities, highways, and many other matters are not simple; they cannot be made simple; they are highly technical and require for efficient performance experience coupled with competence. Hence governors and other appointing officers must exercise discretion in "hiring and firing." As a result a large number of state officials and employees nominally subject to a spoils régime enjoy in fact permanence in tenure.

Organizations of Technicians. With security of tenure comes zeal for an improvement in technique, a quest for new and better ways of administration, a search for light in all quarters. Inevitably therefore officials in different parts of the country engaged in identical or similar functions tend to draw together, to pool experience, and to promote a scientific consideration of their problems. Already there are forty or fifty associations of state, local, and federal officials, sometimes including in their affiliation private citizens particularly interested in their work. By way of illustration a few may be cited: National Convention of Insurance Commissioners, Society of American Foresters, National Association of Railroad and Utilities Commissioners, National Association of Comptrollers and Accounting Officers, Association of American Dairy, Food, and Drug Officials, American Association of Highway Officials, and Conference of State Sanitary Engineers. To cut short a remarkable story of development in public service, officials representing every great functional branch of administration are now associated on a national scale. They hold periodical conferences; some of them issue regular publications; they exchange the results of experience; they encourage specialized research by public agencies, private persons, universities, and

[14] F. M. Stewart, *The National Civil Service Reform League* (1929).

private institutes. Many of them are associated with the Interstate Assembly. In some cases they are powerfully aided by branches of the Federal Government, such as the Office of Education and the Bureau of Standards, in arranging conferences, devising standards, and distributing bulletins of information. Public service in the United States has entered the professional stage.

Five Principles of Management. Along with the consolidation of state agencies of administration and the introduction of civil service reform has gone the application of the principles of systematic management to state administration. Under this general conception appear certain prominent features which are to be found scattered indifferently among the states. In none of the states do all the features appear, but taken collectively they form a kind of ideal toward which administrators are working.

First of all is the concentration of large powers and responsibilities in the hands of the governor (p. 629). These include the preparation of the budget, the appointment and removal of high officials, such as department heads, the duty of scrutinizing finances and administrative results, and the assumption of accountability before the public for the work of state government.

The second is the organization of administrative agencies in such a form that responsibility for work done, as well as for neglect and inefficiency, can be placed squarely on the governor and a few administrative chiefs.

To facilitate the discharge of these high responsibilities, special agencies of accounting and control are devised. According to L. D. White, such agencies are to be found in nearly all states.[15] They watch the spending officers of the state government and make sure that outlays of money are applied to the purposes fixed by law. They also have the duty of inquiring into the efficiency and wisdom of these expenditures. From their control figures and their studies of actual performances, they derive concrete information to aid in the preparation of forthcoming budgets.

A fourth aspect of management involves control over the purchase of supplies for the state (p. 682). Forty-three states have established central purchasing agencies which buy and distribute a large portion of the supplies used in state administration, instead of permitting separate officers and boards to buy at random on their own account. In this way also

[15] *Recent Social Trends*, Vol. II, pp. 1405 ff.

concrete information for the preparation of the budget is acquired.

Fifth, management is extended, in the states having the merit system of recruiting personnel, to the selection, appointment, training, promotion, demotion, and discipline of the several classes of state employees. In this sphere the ruling principles are: the grouping of employees in a few broad classes on the basis of similarities in duties performed, the gradation of employees within each class on the basis of complexity of duties, training, and years of service, uniform rates of pay for similar work, and methods of control, promotion, and retirement conducive to the right *esprit de corps*.

Centralization in State Administration

Although the consolidation of state agencies may be called centralization, the term is also applied in another connection, namely, to assumption by the state government of duties once performed by localities and of control over many functions still left in whole or in part in the hands of local officers. This subject is treated in other places, in connection with state functions (Chapter XXIX) and in connection with the functions of communities (Chapter XXXIII). But it is so important that it deserves emphasis in a consideration of state administration.

The centralization in administration as the phrase is here used is especially marked in the following branches: education, public health, the construction and maintenance of highways, the regulation of public utilities, and the administration of prisons, hospitals for the insane, and other public institutions for delinquents and defectives.[16]

In some places this centralization has gone far. In North Carolina and Virginia, for example, the state government has assumed responsibility for the construction and upkeep of all county roads, as well as state trunk highways. Generally however it has stopped at some point along the line between complete local control and complete state responsibility. On the whole the tendency toward state responsibility is strongly marked. Even the relief of the destitute and unemployed, once left entirely to communities, has been passing under the supervision of state officials employing state and federal funds and acting in coöperation with federal and local officials.[17]

[16] *Recent Social Trends*, Vol. II, pp. 1397 ff.

[17] See "The State Runs the Schools in North Carolina," by John Peele, *National Municipal Review*, April, 1937, pp. 181 ff.; "Effects of North Carolina's Centralization," by P. W. Wager, *ibid.*, December, 1937, pp. 572 ff.; "A Successful Experiment

This trend in state centralization is due to many forces akin to those operating in the extension of federal participation in state government (pp. 498 ff.). Highways, rapid transit, and widening markets for local produce have almost destroyed the isolation and self-sufficiency of towns and counties. The uneven development of regions within the state, as within the Union, has resulted in making some of them prosperous and has left others too poor to carry alone the burdens of education and other functions imposed by state law. In such circumstances states are increasing their expenditures for local purposes and their grants-in-aid to communities, and they naturally become more deeply concerned with the manner in which these outlays are locally administered. Also significant in this relation is the effort to eliminate waste and inefficiency in local government by enforcing higher standards of administration upon negligent and backward communities. The more wasteful the county, the more the state must spend. It is highly probable therefore that as the state increases its outlays for local purposes it will insist upon stricter supervision over local finances and administration.

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CHAPTER XXVIII

STATE FINANCES, BUDGETS, AND ACCOUNTING CONTROL

Significance of State Finances to the Taxpayer. Taxpayers who have become deeply impressed by the magnitude of federal expenditures in the last few years may be inclined to assume that state fiscal operations must be of comparatively slight importance but they will do well to check their generalizations by some references to recent statistics. For this purpose it might be well to select a year before the extraordinary requirements of the re-armament program, preceding the Global War, had distorted the normal peace-time demands upon public treasuries. In 1938 the American people paid in taxes to all levels of government a grand total of $14,811,000,000. Of this amount 41 per cent was collected by the federal, 26 per cent by the state and 33 per cent by local governments. However when these three had finished sharing and allocating these taxes among themselves the federal treasury had left as net revenues only 35 per cent of the grand total above, and state governments had only 21 per cent of it, while local governments wound up with 44 per cent of all the revenues in the United States derived from taxes.[1]

The astonishing extent to which state revenue is spent by local units that receive it under various tax-sharing plans has led Hugh D. Ingersoll to maintain that the states would present a clearer picture of their finances if funds thus granted to local governments were segregated in fiscal reports from expenditures made directly by state governments and agencies.[2]

If account is taken of the fact that a considerable share of the federal peace time collections go to pay interest on the war debts, to take care

[1] Adapted from U. S. Treasury Department *Bulletin*, August, 1938. See *Tax Administrators News*, Jan., 1941.

[2] "The Cost of State Government—A New Viewpoint," *State Government*, Jan., 1941.

of veterans, and to prepare for future military engagements, the importance of state financial operations stands out even more strongly in the current scene. It then becomes apparent that much of the tax money spent for the normal pursuits of peace in the United States is either handled directly by the states, or else regulated or affected by actions of state authorities. In the circumstances therefore state finances are entitled to proper attention in any really comprehensive study of American government and political economy.

Constitutional Limitations

Growth of Restraints. Our early constitutions laid few restraints on the power of the state governments to spend money, lay taxes, and incur debts. And the legislatures made use of their opportunities. Funds were misappropriated; legislative procedure was degraded by unseemly scrambles to get money out of the state treasury for local and private benefit; debts were accumulated and in some cases repudiated; huge gifts were made to canal, railway, and manufacturing concerns in the form of bonuses; and special privileges were granted in the way of tax exemptions. Indeed by the middle of the nineteenth century the credit of some of the states had sunk so low as to alarm investors at home and abroad. Since that time the subject of finance has loomed large in every state constitutional convention; one check after another has been devised to control legislatures. Hence it is necessary, on taking up the subject of state finance, to consider the general character of the limitations under which the state government must work.

Origin of Money Bills. The ancient rule that money bills must originate in the lower house—once so prominent in Anglo-Saxon politics—is now laid down in less than half the state constitutions. A number of them in fact expressly abrogate it. "Any bill may originate in either house of the Legislature, and after being passed in one house may be amended in the other," runs the Florida constitution; but out of courtesy the senate often concedes to the lower chamber the right of initiating money bills. It cannot be said, moreover, with due respect for the ancient and honorable doctrine, that it constitutes any safeguard against careless and corrupt finance in legislatures.

Limits on Debts. Perhaps the most important security against reckless finance is to be found in the limitations imposed on the power of the legislature to incur indebtedness. In some cases the amount is fixed at

a definite sum or a certain percentage of the value of the property assessed for taxation; possibly with a proviso that additional obligations may be issued for specific purposes if approved by the voters on a popular referendum. Generally the state legislature is utterly forbidden to lend public money or credit to any private person or association—an echo of old days when states recklessly went into debt to construct canals and to aid railway companies. As a rule also, the state is forbidden to incur debts for, or assume the debts of, cities, counties, and other local subdivisions. Coupled with such restraints, there is usually a clause requiring the legislature, on creating a debt, to provide the funds for meeting the annual interest charges and paying the principal when it falls due.

Methods of Borrowing. On the basis of a careful survey of all constitutional restraints on borrowing power, B. U. Ratchford has divided the states into three classes: (1) those that forbid the incurring of debts, with minor limitations, and therefore must have a constitutional amendment for each borrowing project; (2) states with constitutions which "require that every law authorizing borrowing shall be submitted to a popular referendum"; (3) the third group "composed of those states in which the legislature exercises the borrowing power without any immediate check by the electorate." Mr. Ratchford finds however that many of the constitutional limitations are phrased in vague language and can be evaded in practice by resort to ingenious methods.[3]

Limits on Tax Variations. When left free to tax at will, state legislatures made so many exceptions and granted so many special favors that it was found necessary to limit them closely in this sphere also. The chief device employed in the interest of regularity was a clause to the effect that all real estate, personal property, money, credits, holdings of bonds and stocks of private corporations must be assessed according to their true value in money and assessed uniformly; excepting, of course, the buildings and other property of religious, educational, and charitable institutions. At first glance the principle that all property must be taxed alike seems fair, but experience has shown that it is impossible to do justice under it. State and local assessors cannot by any process unearth the intangible property of citizens—stocks and bonds—laid away in strong boxes. Hence the owners of property that cannot be hidden, such as houses and lots, bear an unfair burden under "general property tax" laws.

[3] *Political Science Review*, August, 1938, pp. 694 ff.

Maximum Tax Rates. The limitations on the power of legislatures to fix tax rates are bewildering in number and variety, as bewildering as the conflicting interests of taxpayers, real and imagined. But two competent specialists, R. L. Mott and W. O. Suiter, have classified them under five types:[4] (1) Limits which fix a maximum rate of tax, either as blanket limits on the aggregate levy on each $100 value or maximum limits for each government unit or as maximum limits for various purposes, such as education and libraries; (2) limits which fix the amount of the levy at a certain percentage of the previous year or the average levy of several years; (3) limits based on a certain amount per capita; (4) limits expressed in a maximum number of dollars to be collected; (5) limits fixing a ratio between the revenue from general property taxes and revenues from other sources.

After the great depression began in 1929, efforts to impose restrictions on the amount or percentage of taxation on general property, especially real estate, was redoubled. In 1932–33, Indiana, Michigan, New Mexico, Ohio, Oklahoma, Washington, and West Virginia adopted blanket limits on property taxes. In Indiana the maximum rate was fixed at one per cent of the property values affected and then raised to one and one-half per cent; Ohio adopted the one per cent limit. About one-half the states now have constitutional limitations on state taxes and a larger proportion have limits on municipal property taxes.

Origins of Battle over Tax Limitation. The movement to impose limits on taxing power sprang from various sources. Farmers and real estate owners in cities found their incomes decreasing and their tax burdens mounting. Foreclosures and bankruptcies indicated the depths of their distress. So they demanded that their burden be reduced and part of it shifted elsewhere, either to consumers in the form of a sales tax (p. 678) or to the recipients of large incomes. Another group of taxpaying interests was bent on reducing the costs of government at all hazards by cutting off or curtailing expenditures for education, social welfare, and other so-called "fads and frills." This group joined real estate owners in fighting for tax limitations and at the same time waged war on income and inheritance taxes as substitutes. The only thing that the two groups could agree upon was shifting a part of the burden to consumers by imposing taxes on articles and services of consumption, and in this they were largely successful. Still another group in this contest, while agree-

[4] *Property Tax Limitation Laws* (Public Administration Service No. 36, 1934), pp. 41 ff.

ing that real estate had been too heavily burdened, insisted that the educational and other services of government should continue and that the costs should be met by imposing income taxes, or raising rates where such taxes were levied, and by heavier taxes on inheritances.

Additional Requirements. To secure regularity and publicity in legislative appropriations, it is now quite common to embody in the constitution some or all of the following principles. Money shall be paid out of the treasury only in pursuance of an appropriation by law; the yeas and nays must be taken on the final passage of a money bill and recorded; the credit of the state may not be given or lent to any private person or association; the governor may veto single items in appropriation bills; the general appropriation bill shall embrace nothing but outlays for the ordinary expenses of the state executive, legislative, and judicial departments and for some other specific purposes; no appropriation shall be made for a longer term than one or two years; and no revenue bill may be passed during the last five days of the session.

Financial Disorders, Federal Aid, and Present Problems. On account of various limitations on the power of state legislatures to tax, their unwillingness to resort to drastic measures, and the economic distress resulting from the business depression, state and local finances fell into disorder after 1930. Several states would have gone into bankruptcy, that is, stopped payments on their debts, if they had not received lavish grants from the federal treasury in one form or another. Many cities did stop paying on their debts, allowing them to go into default; and hundreds of cities were saved from a similar fate by federal aid. At present many states, cities, and other communities owe their financial solvency to federal assistance, and recent improvements in their financial condition are largely due to the economic boom created by huge federal expenditures for war purposes.

As an outcome of recent tendencies grave problems in public finance have arisen. Heavy federal taxation drains away the resources on which states and communities rely for their revenues; federal and state authorities lay drastic taxes on the same objects, such as incomes, inheritances, and the sale of goods and services. Federal, state, and local taxes and expenditures are so entangled that it is difficult to discover which government is responsible for what. The Federal Government makes grants to the states and localities for numerous purposes, such as highways, health, and old-age pensions; the state governments make grants to local governments for similar and other purposes. In laying taxes on goods

sold within their borders and on transportation, states raise barriers against the free flow of interstate commerce. These tendencies have now gone so far that a strong demand has arisen for a fundamental overhauling of federal, state, and local finances, their entangling relations, and critical needs, with reference to common and separate resources and responsibilities.[5]

Appropriations and Appropriation Methods—the Budget

Classes of Appropriations. Although the functions undertaken by the states vary and the appropriation laws embrace thousands of items, state outlays of money may be generally classified under twelve heads: general government; protection to person and property; development and conservation of natural resources; conservation of health and sanitation; highways; charities, hospitals and corrections; social welfare and security; education; recreation; public service enterprises; miscellaneous; and debt payments.

Former Confusion in Making Appropriations. Since the exact methods followed by our legislatures in making appropriations are in a state of transition, they can be understood best by a brief reference to the old ways. We have never had and do not now have in any state a finance minister responsible for presenting to the legislature and defending before it a balanced budget showing all proposed expenditures and proposed revenues. The traditional method of making appropriations was to permit each member to introduce as many bills as he pleased calling for outlays of money. Administrative measures, such as changes in ballots and election procedure, which incidentally meant expenditures for printing and employees, were introduced without a thought as to the cost involved.

Appropriation bills and other measures involving disbursements were referred to various committees, no one committee in either house having control over all projects making a charge on the treasury. These bills were taken up one after another under the system of committee control and log-rolling which prevails in the legislatures and passed seriatim without much thought as to totals. Finally at the very close of the session, scores of appropriations were rushed through at lightning speed

[5] For recent figures respecting expenditures, sources of taxation, and intergovernmental transfers of funds see *Statistical Abstract of the United States 1942*, published in December, 1943, pp. 245 ff.

and thrown upon the governor's table for approval or rejection. If the governor had the power to veto single items, he could cut and slash the bills at his pleasure. Not until he was through with his review was it possible to know just how much money had been actually appropriated at the legislative session and how much revenue had to be raised to pay the bills.

Protests and Budget Reform. As long as taxes were light, citizens paid little attention to the haphazard and wasteful methods of state legislatures, but at length the worm turned as outlays increased. Shortly after the opening of the twentieth century a movement was started to abolish old practices and introduce a budget system of combined and balanced expenditures and revenues. This movement was especially sponsored by the New York Bureau of Municipal Research, founded in 1907; and within a few years substantial results had been accomplished. Since 1926, when Rhode Island adopted the system, every state in the Union had had a budget of some kind.[6]

Responsibility for Budget Preparation. Through all these budget laws certain principles run. In the first place, there is an attempt to centralize and fix responsibility for the preparation, annually or biennially as the case may be, of a single, consolidated statement of state expenditures and revenues to be laid before the legislature as a single document. In creating agencies charged with preparing the periodical budget, lawmakers show a tendency to make the governor of the state squarely responsible for compiling the budget and laying it before the legislature. This is the "executive-budget" system adopted in Maryland in 1916 and copied in many other states since that date. An alternative method, diminishing in popularity, is that of setting up a budget board composed of administrative officers or of such officers and members of the legislature.

Consolidation of Financial Offices. A second feature of budget legislation is the consolidation of the state offices having to do with the collection and custody of revenues, the scrutiny of outlays, and the keeping of accounts. This consolidation usually results in the formation of a single financial department containing a budget bureau to assist in the preparation of the budget. It is in fact an essential accompaniment of a budget system, for the preparation of the budget document is a difficult operation, involving accurate information as to receipts, expenditures, and accounts.

[6] W. B. Graves, *American State Government*, p. 514.

Contents of Budget. In the third place, a great deal of attention is paid in budget legislation to the *contents* of the budget which must be laid before the legislature by the authority or agency placed in charge of that operation. In this respect, the Maryland constitutional amendment is very specific. It provides that the budget shall contain a complete plan of proposed expenditures and estimated revenues, with estimated surplus or deficit in revenues, for the coming fiscal period. It must be accompanied by a statement showing: (1) the revenues and expenditures for each of two fiscal years next preceding, (2) a balance sheet, (3) debts and funds of the state, (4) estimates of the state's financial condition as at the end of each of the fiscal years for which appropriations are being made, and (5) explanations of the budget by the governor who presents it.

Legislative Action on Budget. A fourth and vital element in orderly and open budget-making is the procedure to be followed by the legislature in dealing with the consolidated program after it has come from the hands of the authorities who prepare it, but this phase of the subject has not yet received the attention which it deserves. If the legislature is free to treat the budget as it pleases, tearing it to pieces, passing innumerable special appropriation bills, and ignoring the recommendations of the budget-makers, then little or no benefit may be derived even from the most careful preparation of financial plans. This is obvious, and a few states have at last faced the issues involved.

1. Maryland provides that the legislature shall not consider any other appropriation bills until the governor's budget has been finally acted upon. This rule at least requires the members to concentrate their attention on a complete and balanced program before they take up individual money bills separately introduced.

2. Shall the legislature be permitted at pleasure to increase or add to the items proposed by the governor? This is a debated point. If the legislature cannot increase the proposed budget but can merely make reductions, then it cannot enact new legislation calling for expenditures or enlarge functions already under way. Clearly that would seriously cripple the legislature and transfer to the governor all power over the initiation of new state functions. On the other hand, if the legislature can do as it likes with the governor's budget, it may ignore his program, rip it to tatters, or resort to discredited methods. This is the practice generally prevailing. Departing from the common rule, Maryland provides that the legislature cannot increase or add to the governor's items

for the administrative branch; but after it has passed the governor's budget it may make additions and increases in the form of special bills, subject to the governor's veto, and on condition that it provides the revenues required to meet the said increases and additions.

3. Shall the governor be allowed to participate at all in the legislative review of his financial plan? In Maryland the governor and administrative officers may and, on call must, appear before the legislature to defend the budget or explain it.

In Virginia the standing appropriation committees of the legislature, within five days after the receipt of the budget, must begin to hold joint and open hearings on the estimates; the governor and his representatives have the right to attend these meetings and to speak there.

Results of Budget Legislation. In those states, such as Maryland, which place a rather strict control on legislative procedure, the budget law in operation throws more light upon state finances, gives more publicity to expenditures, and checks the tendency to pass local and special bills carrying a charge on the treasury. But it can hardly be said that the ideal has been reached. Too much faith has been placed in the letter of the law and too little attention given to political custom.

Elements of an Ideal System. Recognizing the fact that larger aspects of politics are involved in the process, the New York Bureau of Municipal Research devised "an ideal budget system" which includes the following elements:

1. Consolidation of all offices, commissions, boards, and agencies into a few departments under the governor, the department heads to constitute the governor's cabinet.

2. Preparation of the budget by the executive branch, the cabinet and governor being held responsible for it.

3. The creation of a finance department containing a budget bureau in charge of budget preparation.

4. A single-chamber legislature.

5. Consideration of the budget, not by standing committees, but by the legislature in open session as a committee of the whole with the governor and his cabinet present.

6. No additions to be made to the governor's budget except in the form of special bills passed after the executive budget has been adopted and subject to the executive veto.

7. The governor to enjoy the right to dissolve the legislature and call a new election in case of a total disagreement.

Tax Features of Budget. The revenue side of budget-making has not received as much attention as appropriations. It is customary to raise part of the revenues under general laws which stand in force over a number of years, such as those imposing gasoline or sales taxes, and to secure the remainder from temporary laws passed separately at the various legislative sessions. Owing to carelessness on the part of the legislature and to the practice of rushing appropriation bills through near the very end of the session, however, there is often a discrepancy between the amount which revenue measures are designed to raise and the total expenditures authorized by the patch-work of appropriation acts. The Maryland system, which calls for a balanced budget from the governor and requires the legislature to provide the funds for any supplementary appropriations, offers the best remedy for chaotic finance, assuming that no radical changes can be made in the relation of the executive and the legislature in state governments.

Balancing the Budget. The depression of the thirties left the concept of a balanced budget severely shaken as deficits came to be accepted in the years of lean revenues. This shift in fiscal theory may have been due to the replacement of *laissez faire* as a guiding principle of governmental policy by the doctrine that government has heavy responsibility for general public well-being.[7] After the outbreak of the Global War in 1941 came a shift in the opposite direction, to surplus budgeting. The Federal Director of the Budget advised the states to coöperate by paying off debts, maintaining tax rates, and building up surpluses for postwar programs of public works. Compliance was almost complete for state and local governments would have disregarded such advice at their own risk, especially as the war boom was only temporary.[8]

Taxation and Assessments

The state derives its revenues from six main sources: (1) taxation, (2) earnings from public property such as canals, forests, and lands, (3) fees charged for licenses, franchises, and charters of incorporation, (4) fines and penalties imposed for violation of the criminal laws, (5) interest on public funds, and (6) grants in aid from the Federal Govern-

[7] J. V. Wyckoff, "The Surplus Concept in State Financing," *State Government*, Dec., 1943.

[8] *American Political Science Review*, Feb., 1943, p. 35.

ment (p. 500). Only the first of these calls for special consideration here.

General Property Taxes. For almost a century the chief source of state revenue was a tax consisting of a certain number of mills on each dollar of the locally assessed real and personal property in the state. This tax was collected by local authorities and forwarded to the state treasury. In recent years however states have turned to other and newer sources of income with such vigor that the general property tax in 1942 provided only 5.3 per cent of the revenue from all state taxes, and more than a fourth of the states levied no state property tax whatever.

The method of laying and collecting the general property tax is practically the same throughout the United States. All taxable property in each community is registered and evaluated by a local board or assessor in the town, township, or county, as the case may be. In compiling tax data the assessing authority uses printed blanks containing long lists of every conceivable kind of property—houses, lands, notes, bonds, pianos, watches, live stock, etc.; and by one process or another it secures a valuation of each class of property owned by every resident in the assessment area.

From these lists the total value of the general property in the township or county is obtained, and the amount due the state is readily discovered by applying the rate imposed by the legislature. If the township is the unit of the assessment, there is generally a county board charged with the duty of equalizing values in the different units. When it was found that county authorities habitually underrated the property under their jurisdiction in order to reduce the burden imposed by the state, legislatures then created central boards of equalization to assure uniformity in valuation throughout the state, thus correcting the work of the assessors and making each county pay its proper quota into the treasury of the commonwealth.

Growth of Intangible Property. As the country passed from an agricultural into a commercial and manufacturing stage, there arose serious difficulties in connection with the general property tax. While wealth consisted almost entirely of tangible things—lands, houses, live stock, etc.—or mortgages on real property openly recorded, it was easy for the assessor to secure a fairly complete and accurate list of the goods and chattels owned by each resident within the district. However, when corporations came into existence, investors could buy the bonds or stocks of companies organized in distant states, or even in foreign countries,

and could lock their papers in strong boxes, even outside the state; then the assessors could no longer keep track of the taxable riches within their local units.

New Types of Taxes. For this and other reasons, states have been compelled to revise their historic tax structures, to cast about for new sources of revenue, and to supplement the levies on general property by additional types of taxes. In the process many expedients have been devised. In the first place, the old rule of taxing all property equally and alike has been radically modified in most parts of the Union in favor of a classification which admits of exemptions and distinctions in valuations and rates. Some states continue to insist on assessing all property at its "true value," but apply different rates to the several forms—land, bonds, etc. Others apply uniform rates to all property but place a low valuation on part of it; for example, a Louisiana law of 1924 provided that certain stocks and bonds should be assessed for taxation at ten per cent of their market price. Still other states exempt certain intangible property entirely or differentiate between the several classes; Connecticut lays no taxes on stocks and makes a low rate for taxable bonds. In several cases favors are shown to forest lands, mines, and natural resources in private hands with a view to development and promotion. As a rule these devices for breaking general property into classes for taxing purposes bring more revenue into the state treasury from intangibles than was secured under the old system which was supposed to treat them on the same terms as houses and lands. Yet none of the methods just cited meet modern needs, and all states look elsewhere for revenues.

Estate Taxation. Among the newer sources of revenues are taxes on property or estates passing by inheritance to new owners. This tax is almost universally employed in some form, and its principles are everywhere receiving extended development. The rates are being raised; the progressive rule increasing the rate with the amount of the inheritance is more frequently applied; exemptions allowed to direct heirs are being lowered; and there is a tendency to apply it equally to real and personal property. States having this tax are continually improving the administrative machinery for collecting it, especially the methods of appraising estates for taxing purposes.[9]

The argument in favor of this tax is that it is easy to collect, falls upon

[9] Congress has encouraged the states to levy inheritance taxes by allowing payers to deduct from federal inheritance taxes a certain percentage of the amount already paid or due to their respective states.

those ablest to bear it, and permits the state to secure a revenue from intangible personal property which so largely escapes under the regular property tax. Moreover it is held that, inasmuch as the recipient of an inheritance, as such, does not render any service to the state, it is proper for the state to place a special burden on him. The chief argument against the tax is that it is injurious to business where collected in large amounts, because it withdraws capital from private enterprises, but in these days of "surplus" capital this case is not very strong.

Income Tax. The income tax has grown in favor particularly since its adoption for federal purposes in 1913 and is now used in thirty-five states, including Massachusetts, California, New York, North Carolina, Delaware, Wisconsin, and Oklahoma.

Corporation Taxes. A fruitful source of state revenue is the tax on corporations now quite generally imposed. This branch of finance however presents many puzzling problems. The taxation of a manufacturing corporation doing business at a particular point within the state is comparatively simple: the property of the corporation may be estimated and taxed just as the general mass of property within the state; perhaps a special tax varying with the capitalization may be imposed for incorporation. However, railway, telegraph, express, street car, and other corporations of a quasi-public character, operating under special franchises or privileges, often monopolistic in character, are in an entirely different class. In taxing them, the legislature confronts perplexities. A part of the total value of the property of such a corporation is in tangible form in the state, a part in the privileges which it enjoys, and a part, perhaps, is due to operations carried on in other states or in foreign countries. Take, for example, a national express company doing business in Ohio: its tangible wealth in that state—motor trucks, depots, offices, etc.—is relatively slight, but its privilege of transacting business is highly profitable, because it carries goods between points in Ohio and all parts of the Union. In fixing the total value of the business of such corporations within any state, the public authorities are compelled to rely largely on statements made by corporation officials, which are not always entirely satisfactory sources of information; and in laying taxes, states must also be careful not to burden interstate commerce. In dealing with these difficulties, a variety of expedients has been devised. Some states tax corporations on the estimated value of their property; others tax them according to their capitalization, their gross receipts, or their earnings.

Business Taxes. A large proportion of the states, especially in the

South, employ business and professional taxes for state or local purposes or both. In some of them only a few special trades, professions, occupations, and business enterprises are taxed; in others the list may embrace three or four hundred different callings and undertakings. States which have great mineral resources, such as Pennsylvania, often lay a severance tax or duty on the minerals taken out of the earth.

War on Chain Stores. In connection with business taxes note should be taken of its use in the war now being waged on chain stores in behalf of local retail merchants. North Carolina seems to have led the way in this conflict in 1929; when one tax law discriminating against chain stores was declared unconstitutional, the legislature promptly enacted another designed to accomplish the same end without running counter to judicial rulings. Maryland, Indiana, Georgia, and South Carolina had a similar experience, but the last two, undeterred by the action of the courts, came back to the fray with other weapons. In 1930 Kentucky opened a fight on chain stores by a revenue measure in the guise of a sales tax, increasing in rate with the amount of the turnover and treating the combined sales of the individual chain units of each concern throughout the state as a lump sum for ratable purposes. Undoubtedly this demand for the protection of local merchants against "foreign invaders" has created a "burning issue" in state politics and the contest will be carried on all along the line.[10] Much punitive legislation has been upheld by the Supreme Court of the United States.

Sales Tax. Similar in nature to business taxes (often included in them) is the sales tax—a levy on the sale of goods and services. This tax may take many forms. It may be levied on the manufacturer and shifted to the retailer and consumer, or it may be levied on the retailer. Usually it falls upon specific articles and services at the moment they are sold or rendered to the consumer. The rate varies from state to state —ranging from one per cent to five or six per cent of the value of the article sold or service rendered. Ordinarily there are exceptions, extending from farmers' sales of foodstuffs to commodities manufactured for export. Indeed the exceptions may be so numerous as to transform the sales tax into a kind of luxury tax. Whatever its character, it is commonly shifted to the consumer.

Although the sales tax is old, it came into widespread use in the United States after the opening of the great depression in 1929, when

[10] For an analysis of the extent and the legality of chain store taxes, see R. H. Rawson's article in *The Tax Magazine*, July, 1938, pp. 396 ff.

the revenues of states fell off rapidly and many of them were in desperate straits to raise money to meet their bills. A few states already had the tax in some form. In 1943 twenty-three states were collecting this tax. To legislatures in these states, the sales tax seemed the easiest expedient for raising revenues quickly and at a minimum cost of collection. It has been stoutly resisted however by merchants and other interests as a tax on consumers who could least afford to pay and as curtailing the buying power of the people, already at a low ebb. It has been especially supported by owners of real property, already heavily taxed, and by persons opposed to the introduction of the income tax or to increasing rates where it was already in effect.

Auto and Gas Taxes. Among the newer devices for raising revenues are two taxes relating to the use of the automobile—one of them a sales tax. Very soon after the motor car became commercially successful, the practice of imposing a small license fee upon each motor vehicle was generally adopted, partly as a means of effecting police control over reckless drivers through registration. With increasing expenditures for roads, the automobile license fee was raised until it became a producer of large returns which, in some cases, were devoted entirely to the construction and maintenance of highways. In 1919 there appeared another tax on automobile users, namely, a sales tax on gasoline laid at a flat rate on each gallon consumed. Within a few years it became universal and now yields huge sums to state treasuries. This tax, it is claimed with good reason, is more equitable than a straight license fee based, for example, on the horse power of the engine, because it represents in a fair measure the use made of the roads by each car.

Weight of the Several Taxes. The relative importance of the various classes of taxes is shown by the following table giving in percentages the receipts of the forty-eight states (not including local taxes) from various sources for 1942.[11]

Sales and gross receipts	45.1
Unemployment compensation	21.8
License and privilege	13.2
Net income	10.5
Property	5.3
Other	4.1

Trends. As indicated by references above, systems of state taxation are now undergoing profound alteration. Certainly the old general prop-

[11] "State Finances: 1942," Department of Commerce, Bureau of the Census, Vol. 2, No. 2. Supplement, Oct. 20, 1942.

erty tax for state purposes, which lumped farms, stocks, bonds, houses, and personal notes in one grand account and imposed a flat rate on each $100 in valuation is rapidly losing ground. Its place is being taken by schemes for the separate taxation of the so-called tangibles, such as farms, houses, and machinery, and the intangibles—stocks, bonds, bank accounts, and notes. The former group, which cannot readily be hidden, is still being valued by assessors in the conventional way, but mainly for local purposes. On the other hand, the difficulties of discovering the presence of intangibles have led to the adoption of new methods, such as the income tax, which dips into the income derived from the ownership of stocks and bonds. Even more universal is the tax on inheritances, which likewise reaches large quantities of intangibles. Harassed by the mounting burden of taxation, property owners have sought to shift part of their load to other groups, as by encouraging the imposition of sales taxes on articles and services bought by the lower economic groups. Supplementing the above trends is still another—toward state collection of taxes and the distribution of the proceeds among cities and other subdivisions. Indeed the separation of state and local finances has virtually disappeared in many places.

Audit and Custody of Funds—Purchase of Supplies

Nature of an Audit. All states provide for the regular audit of their receipts and expenditures although a few of them do not have special auditors or comptrollers but delegate the function to other authorities. One duty of an auditor is to see that the money appropriated by the legislature is spent according to the provisions of law and that there is no fraud in the disbursements. The auditor is concerned merely with the enforcement of the law, not with the wisdom or outcome of the expenditures.

Independence in Audit. If the reviewing of outlays is to be efficient, the officer in charge should be entirely independent of the spending agencies whose accounts are to be checked. With this objective in mind, all but six of the states prevent their governors from taking an official hand in the naming of the auditor, preferring to rely on such methods as popular election. In actuality, though, it is questionable whether the desired independence is guaranteed by popular election because the auditor is usually closely associated in politics with the group represented by the governor and other state officers. In theory at least election by

the state legislature seems better calculated to assure the expenditure of funds in accordance with the law. Indeed a few states which have elective auditors also provide that the legislature may or shall appoint an auditing committee or auditors to examine the accounts of state officers; and in many states the governor is required to make reports to the legislature on all state funds paid out by him.

Other expedients have been devised in the interest of accurate auditing. Some Southern states, notably Georgia, Maryland, and Mississippi, authorize the governor to make periodical examinations into the accounts of the auditor and treasurer without previous notice to those authorities. All states require the publication of financial reports in some form, although as a rule they are not detailed and specific enough to prevent the concealment of frauds.

Abuses in Treasuries. The custody of state revenues from all sources is vested in the treasurer, and it would seem that this function could be readily controlled by the auditor, the legislature, and public opinion; but as a matter of fact there have been numerous cases of defalcation and robbery by state treasurers. Quite generally this office is regarded as one of the choice spoils of politics, especially where the treasurer has the right to deposit state funds in banks of his own choosing. In such circumstances it is easy for politicians to organize a bank with a small capital and secure from their friend, the treasurer, a deposit of state funds which they can lend at a good rate of interest, sometimes to themselves for speculative purposes. Charles E. Merriam, in his study of the American party system, relates an interesting story of "Bull" Andrews of Pennsylvania, who, with some confederates, got hold of a small bank in that state, obtained a deposit of state funds amounting to more than a million dollars, and embarked on railway construction schemes in New Mexico!

Remedies for Abuses. Such evils, of course, can be cured by proper legislation, and nearly all states have taken steps to end them by applying, in some form, the following principles. Banks must bid for public deposits by offering rates of interest on state money. They must guarantee the state against loss by pledging bonds of undoubted soundness as security for deposits. Biddings for public deposits must be open and the awards must be made public. The interest on deposits must be paid into the state treasury. In such a case the state treasurer has no choice; he cannot favor political banks, entrust money to unsafe institutions, or derive any benefits from the use of state funds.

Control over Purchasing. Expenditures for materials and supplies form a large item in the state budget—from twenty to fifty per cent of the total current outlay. The amounts involved are so large and the opportunities for profits are so great that politics inevitably enters into the purchases and contracts of the state government. On the one hand, there is danger that the state will be charged exorbitant prices; on the other hand, there is a risk that poor materials will be supplied and the inmates of state institutions furnished with food scarcely fit to eat. Those familiar with the history of asylums and penitentiaries know how frequent are the abuses in this sphere. If each important spending officer is permitted to do his own buying, political merchants will gather around him, and there may be irregularities in one or more departments in spite of all precautions.

With a view to correcting abuses in this phase of government, Texas, as early as 1899, established a central purchasing agency to buy supplies for the various charitable institutions of the state. The example was widely followed and at the present time all except five states have provided for centralized purchasing in some form. Three types of authorities are employed in this work: a special purchasing agent, a board of control, and an *ex officio* board composed of representatives of the chief spending departments. The laws dealing with the purchase of supplies set up safeguards relative to correct specifications for goods, open bidding, and the testing of deliveries.[12]

Consolidation of State Business Management

Centralization in Finances. With the enormous growth in state functions and the multiplication of agencies to carry them into effect, which has produced the movement toward reorganization described elsewhere (p. 649), there has come a widespread consideration of the problems of managing state finances, purchases, and accounts, and a demand for centralization of control in a single responsible agency. Obviously the revenues of the state should come to a single center and their disbursement according to law should be controlled from one point. Otherwise finances would run with loose ends, daily or monthly balance sheets would be impossible, deficits would accrue here and there, surpluses in particular offices could be hidden, and neither the governor nor the legislature

[12] R. Forbes, *Governmental Purchasing* (1929).

could ever know the exact condition of state finances. Other reasons for centralization are equally compelling. All agencies of the state, whatever their functions, must employ persons, spend money, buy supplies, keep accounts, and record at least certain of their operations in statistical terms. A uniformity in these matters is indispensable to planning budgets, to checking up expenditures, and to the introduction of economy by large-scale purchases.

Consolidation of Financial Agencies. On these and other grounds the states which have reconstructed their administrative systems have rightly laid great emphasis on unification in business management, whatever leeway may be allowed to independent agencies, and have included a strong financial department in their plans. Among these states there is a marked tendency to centralize in a single branch extensive control over receipts and expenditures, the assessment, equalization, and collection of taxes, the standardization and keeping of accounts, and the purchase of supplies. In California, for example, the director of finance is really the business manager of the state government. He has broad authority to supervise the fiscal operations of the state; he is required to audit the accounts of all state agencies, to authorize with the approval of the governor expenditures in excess of existing appropriations, to stop the treasurer from paying claims authorized by the state controller which he does not approve, to invest certain state funds, lease or sell property belonging to the state with the consent of the agency involved, to approve all contracts before they are valid, and to devise a uniform accounting system for all state agencies. He also exercises a wide authority over the purchase of supplies, and assists the governor in the preparation of the budget.

Other Expedients. While refusing to effect a strict centralization of administration, other states have recognized the importance of unity in management. Massachusetts, for instance, created in 1922 a commission on administration and finance, composed of four persons appointed by the governor, with the approval of his council, for long overlapping terms. One of the commissioners serves as comptroller, one has charge of the budget, a third is known as the state purchasing agent, and the fourth acts as chairman, helping to smooth out whatever differences of opinion happen to arise in such a diversified body. Alabama has established a board of administration consisting of three members appointed by the governor and subject to his orders. A similar commission has been

organized in Kansas, with large powers over finances and purchases, particularly of institutions. Its executive director, known as the "business manager," carries out its orders in detail.

Union of Personnel Management with Business Control. In some cases duties respecting the employment of state personnel (p. 658) are vested in finance officers. This was formerly the case in the state of Maine but in 1941 the personnel board was separated from the department of finance and is now an independent agency. In the administrative reorganization of Tennessee, functions pertaining to the civil service were vested in a separate division, headed by a state personnel director, and in California, similar duties have been assigned to an independent personnel board. But whether they bear the formal titles of finance officers or not, those in charge of personnel operations nevertheless form an integral part of the business management of their respective states.

State Supervision of Local Finances

Lack of Competence in Local Finances. Of the money expended for public purposes within the state by far the major portion goes for local, not central, government. Except in the larger cities, the collection and disbursement of revenues is, as a rule, in the hands of men whose technical experience in finance and accounts is, to say the least, somewhat restricted. To limited experience is added the bane of village and county politics which always makes for waste and carelessness, and often for corruption. The history of American local government shows that communities are prone to exceed their debt limits in borrowing money; that they sometimes fail to make provision for paying off their bonded indebtedness; that they make expenditures not authorized; that outgoing officers frequently leave big debts for their successors to pay; and that local accounts are kept in a crude fashion which conceals waste and peculation. In one of the Western states it was once discovered that county officials were in the habit of playing poker in their offices and paying their losses in warrants on the county treasurer, nominally "for the purchase of supplies."

State Intervention. Attempts to correct these evils in local finance have taken the form of state supervision over local budget making, purchasing, and accounts. In a general survey of legislation relating to such supervision the following institutions and practices appear: a state bureau of supervision, the establishment of uniform accounts, the requiring of

annual reports from local authorities in specified form, periodical audits of local accounts by state officers, the development of statistics in standard form permitting comparative studies, inquiries into the management of local property and funds, supervision of the making of local budgets, and control over local building contracts. No state has yet worked out an ideal scheme complete in all details, but Indiana, Illinois, Iowa, Massachusetts, North Carolina, and New Jersey are among the leaders in this field. About one-half the states require financial reports from cities and counties. A much smaller number have a system of uniform accounts for their local governments.

With a view to providing a brake on local expenditures, the Iowa plan put into effect in 1937 creates a state board of supervision to deal with local budgets on appeal from voters, composed of the state comptroller, auditor, and treasurer, empowered to act through deputies. It authorizes "deputies to hold hearings on a local budget if one-fourth of one per cent of the voters in the taxing districts, three of whom appeared at the regular budget hearing, have filed a petition of appeal. Under the law, if the protest is against an item which appears in previous budgets, the appellants must prove its unreasonableness. If the protest is against a new budget item the taxing authority must justify its inclusion. The state appeal board may approve or reduce the budget but may make no increases. . . . Like the seldom used recall provisions of city charters, it will serve as 'the gun behind the door.' Officials will lend more willing ears to taxpayer protests which if unheeded may be taken to a higher authority." [18]

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CHAPTER XXIX

ECONOMIC AND SOCIAL FUNCTIONS

The Petty Industries of Early Days. The United States began its career as an independent nation before the steam engine and machinery had revolutionized Western civilization. When the Declaration of Independence was issued, the majority of the people earned their livelihood on farms or in the few scattered industries where the simplest of tools were used. There were no great factories filled with complicated and dangerous machinery, no railways, no large cities with their thousands of workingmen dependent for a livelihood upon mills and mines; there were no vast accumulations of capital invested in corporate enterprises; and consequently little demand for government interference and regulation, except for the promotion of commerce and industry.

The manufactured articles which were not imported from Europe were made mainly by hand in small shops where the worker was both master and laborer. And, despite the aspirations of the mercantilist school (p. 341), many statesmen hoped that the United States would never become a manufacturing nation. "While we have land to labor," said Thomas Jefferson, "let us never wish to see our citizens occupied at a workshop or twirling a distaff. . . . Let our workshops remain in Europe. It is better to carry provisions and materials to workmen there than to bring them to the provisions and materials and with their manners and principles. . . . The mobs of great cities add just so much to the support of pure government as sores do to the strength of the human body."

The Doctrine of No Government Interference

Philosophy of Small Industries. This primitive economic system, resting upon agriculture, handicraft industries, and small business undertakings, in the course of time developed its own political philosophy and jurisprudence (p. 342). The state government, according to the

theory, should interfere as little as possible with the right of the individual to engage in business or farming, to buy and sell labor and commodities on whatever terms and conditions he may choose. Thus, it was held, a wide distribution of wealth would be effected and public security founded on a broad and popular economic base—the free play of competition among small units.

Favors to Small Property Owners. This has not been a mere economic theory. In many ways state governments have favored the development of a class of small property owners to whose interests the individualistic doctrine corresponds; and at the same time they have tried in various ways to restrain the growth of corporate and other forms of enterprise tending to concentrate control in the hands of a minority. A few states, notably California, Florida, Montana, and Texas, have sought to maintain a body of freehold farmers by providing that public lands shall be sold or granted only to actual settlers. Everywhere legislatures have abolished the ancient system of primogeniture under which a landed estate usually passed on the death of the owner to the oldest male heir and was thus preserved intact; by setting aside that rule, legislatures provide for the dispersion of estates among many heirs and check the tendency to accumulation. Some states even exempt small homesteads from taxation; a few even limit the term of years for which agricultural land may be leased; and Oklahoma expressly forbids the creation of any corporation in the state for the purpose of buying, acquiring, or dealing in agricultural lands.

Efforts to Sustain Competition. While thus endeavoring to encourage widespread diffusion of farming lands, states have at the same time lent support to the class of small traders, merchants, and manufacturers by attempting to check, through legal actions, the absorbing power of great corporations and combinations. In most states, if not in all, combinations and trusts which restrain trade or in any way control the prices of commodities or the charges of common carriers are expressly prohibited and declared to be unlawful as against public policy.[1] "Free and fair competition in the trades and industries," declares the constitution of New Hampshire, "is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." Several other constitutions lay upon the legislature the imperative duty of enacting laws to prevent trusts, pools, combines, and other organizations from enhancing the prices of commodi-

[1] Such combinations in restraint of trade were, of course, illegal at common law.

ties, restraining competition in the various trades and industries, and otherwise blocking "the natural process of competition." In their endeavor to maintain the individualist system of economy, state legislatures have loaded their statute books with laws imposing heavy fines and penalties upon persons and associations seeking to control supply and demand. To protect local and individual merchants, they penalize chain-stores in various parts of the country by punitive taxation (p. 678).

The Control of Corporations

Functions of Corporation Recognized. It must be noted however that there is a difference between combinations which monopolize particular interests and mere corporations which, however large they may be, do not necessarily constitute monopolies, although they may show a tendency in that direction. Gradually our state law-makers have come to perceive this distinction, and while still attempting to restrain monopolies, they recognize the functions of corporations in modern economy, and have enacted laws relative to their creation, management, and operation.

Incorporation under General Law. In the beginning of our history it was the practice of the state legislature to authorize the formation of each corporation by a special law, but the abuses connected with this method were widespread. As a rule the legislature is now forbidden to create corporations by separate act or is otherwise limited in that respect. Therefore, corporations are now formed under general laws except when, in the judgment of the legislature, the objects of the corporation cannot be attained by that process. Georgia has provided that all corporate powers and privileges granted to banking, insurance, railroad, canal, navigation, express, and telegraph companies shall be issued by the secretary of state in accordance with the provisions of law laid down by the legislature. In Virginia the corporation commission, appointed by the governor of the state, issues all charters and amendments of charters for domestic corporations and all licenses to foreign corporations seeking the right to carry on business in the state. Whatever may be the device adopted to control the creation of corporations the aim is usually the same—to check the state legislature in granting special favors to particular concerns.

Right to Alter Contracts Reserved. To prevent corporations once chartered from claiming perpetual rights under the clause of the federal Constitution forbidding states to impair the obligation of contract (p.

484), state constitutions now make provisions for the future amendment or repeal of the laws under which corporations may be created. Indeed some states expressly forbid the granting of perpetual franchises. "No law," declares the constitution of Alabama, "making any irrevocable or exclusive grants of special privileges or immunities shall be passed by the legislature; and every grant of a franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment." Such declarations are sometimes qualified by provisions to the effect that the power of repealing and amending corporation charters cannot be so exercised as to impair or destroy property rights or work injustice to the parties concerned. In reality however this is unnecessary because the Fourteenth Amendment to the Federal Constitution protects such vested interests (p. 486). It is therefore subject to a general rule with respect to safeguarding property rights that state legislatures may create, abolish, or regulate corporations.

Control over Internal Management. The internal management of corporations is also controlled by law. To secure to stockholders their individual rights several states provide that every stockholder shall have one vote for each share which he owns. In some instances, the directors of corporations are made liable, jointly and severally, both to creditors and to stockholders, for all money embezzled or misappropriated by the officers of the corporations during their term of service.

Control over Stock-Watering and Competition. To prevent stock-watering, it is frequently stipulated by law that corporations shall not issue stock except for money, labor, or property actually received to the amount of the par value; that corporate indebtedness shall not be increased except in accordance with the general law and the consent of the persons holding the majority of the stock; and that fictitious issues of securities shall be deemed void. A model "blue sky" law providing for registration of securities, licensing of dealers, and prevention of fraudulent practices has been enacted in fourteen states. Every state now has an agency charged with the enforcement of state security legislation of some kind. The federal Security and Exchange Act (p. 414) has materially strengthened state action.[2] Wherever a public service commission exists, it is a common practice to require utility corporations to obtain its sanction for the issue of securities.

The combination of competing railway and utility corporations is

[2] *Book of the States: 1943–1944*, pp. 303–305.

usually prohibited or permitted only under state supervision. This end is ordinarily effected by forbidding every such corporation to consolidate its stock or property with that of its competitors, to purchase the franchises or property of such concerns, or to acquire any control whatever over them except when necessary to collect bona fide debts or when authorized by the state utility commission.

Banking Corporations. Banking corporations are subjected to special supervision. Legislation in this field ordinarily provides for a state department of banking which makes periodical inquiries into the accounts of banks. The fundamental purpose is to make sure that every bank conducts its affairs honestly and is in a position to pay its depositors as required by law. A few states have even gone so far in this sphere as to require all banks to contribute to a state fund which is used to pay the depositors of any bank which fails—an expedient which has proved disastrous in some cases. State banks may now insure their deposits, up to $5000 each, in the Federal Deposit Insurance Corporation (p. 273).

Insurance Concerns. Having suffered grievously from frauds and irregular practices on the part of a few irresponsible fire, life, and other insurance companies, all states now bring such concerns under public supervision. In many cases companies are required to deposit, in the state, securities sufficient to cover the payment of all sums for which they are obligated in their policies. Everywhere their finances are under close scrutiny. Indeed the great companies doing a national business are often seriously hampered in legitimate transactions by the numerous restrictions, confused and varying, imposed on them by state governments. This condition of affairs is responsible for the demand that all insurance companies doing a general business should be brought under federal control; but that action apparently would require an amendment to the Constitution of the United States or a reversal of an opinion rendered by the Supreme Court long ago to the effect that insurance is not interstate commerce.

A few states are actively engaged in certain lines of insurance themselves. North Dakota, South Dakota, and Nebraska insure the crops of farmers against damage by hail. Eighteen states insure against injuries in industry, and a few have ventured hesitantly into the field of life insurance, directly or through savings banks. Although apparently simple, the insurance business is highly complicated; it calls for great scientific skill to determine the nature of risks incurred, to assess the damages suf-

fered in various circumstances, and to invest wisely large sums of money collected in the form of premiums. The regulation as well as the management of such a difficult economic operation throws a heavy strain on the administrative machinery of the state and calls for talent as well as honesty.

New Abuses. Despite the large volume of state legislation regulating corporate practices, numerous abuses were revealed after the stock market crash in 1929, especially by a United States Senate committee's investigation of banks and stock market operations, in 1933–34. It was made evident by this inquiry that corporations, deriving their charters from states, were often used by insiders to enrich themselves, doing injury to the stockholders and the business which the companies were supposed to be carrying on. Holding companies were created to unite many individual concerns under one organization and directors of these holding companies frequently drained off the earnings of constituent concerns, to the detriment of the latters' stockholders. Corporations sometimes issued bonds, with the aid of banks as trustees, under complicated legal agreements or "indentures" which left investors practically helpless in case of default and bankruptcy. Directors of corporations often sold to the public stocks which were almost or entirely worthless, and then gambled in these stocks on stock exchanges, pushing prices up or down for their own profit. So widespread were these practices and so heavy were the losses of investors that the true function of saving and investing in the creation and operation of industries was often lost to sight. At the same time, the faith of investors in corporate management was rudely shaken.

Federal Intervention. Then Congress, through the Stock Exchange and Securities Act of 1934, established a federal commission to deal with security practices, and provided for a certain federal control over the issue and sale of stocks and bonds by corporations, banks, and other concerns. In other words, state control over corporations had sadly failed in many respects, and federal supervision was invoked. At the same time, an old proposal, espoused by President Theodore Roosevelt, was revived, namely, federal incorporation of all concerns engaged in interstate commerce. If this project were adopted, practically all large corporations would have to secure federal charters and come still more closely under direct federal control. Several purposes of this device may be largely accomplished however under the Securities Act, so that investors

will look to the Federal Government rather than the state government for guarantees of sound and honest corporate practices.[3]

The Regulation of Public Utilities

General Provisions. Railways and other common carriers and public utility corporations, state and local, are controlled in their intrastate business by special regulations so numerous and complex that only the barest outline can be given here. Railways are now generally forbidden to discriminate in their charges or facilities between places or persons or in the transportation of the same classes of freight; to issue free passes to state officials and members of the state legislature; to grant rebates and bonuses; and to deny individuals, associations, and corporations, similarly situated, equal rights in the transportation of persons or property. Most states provide some system of publicity by requiring each railway company to have a public office and to issue from time to time statistics relative to its business, profits, dividends, transfers of stock, and the like. Railroads are compelled to maintain fences, protect grade crossings, put in switches under certain conditions, adopt safety appliances, heat and light their cars, and do many other things for the safety and convenience of passengers.

Regulation of Rates. Periodically a wave of railway rate regulation has swept over the country, affecting especially the West where the shipment of grain is such a vital matter to farmers. The first of these waves came in the early seventies and the last during the opening years of this century. Several states fixed passenger rates within their borders at from two to three cents a mile. Others varied the rates according to the mileage and earnings of the roads.

It was soon found by experience that railway operation was too complex to be ruled by flat rates and rigid laws; then the legislatures began to resort to a more flexible method. They created commissions, variously known as railroad commissions, public service commissions, etc., and endowed them with broad powers in supervising common carriers and utility companies and regulating their rates and services. Under such general laws public utilities are required to furnish safe and adequate services and facilities at reasonable and just charges, not exceeding the

[3] Max Lowenthal, *The Investor Pays*; Berle and Means, *The Modern Corporation and Private Property*.

limits allowed by law or the orders of the commission. Common carriers must keep open for public inspection their schedules showing rates and fares and charges; they must grant no rebates or unjust discriminations or unreasonable preferences. They cannot assign, transfer, or lease franchises, or acquire the stocks and bonds of other common carriers, or issue stocks, bonds, or other evidences of indebtedness without the approval of the commission. The commission is especially empowered to inquire into the general condition and management of utilities; to examine their books and papers; to investigate accidents; to fix rates and services; to order repairs and improvements designed to secure adequate services; to order changes in time schedules; to inspect gas and electric meters and fix gas and electric rates.

Results of Experience with Regulation. It is evident from this brief review of legislation controlling corporations that our states are engaged in a gigantic undertaking which requires the highest type of ability; for the efficient regulation of a network of railways or a huge chain of electrical utilities is a task almost as great as actual operation. There is no doubt that the commissions have been successful in preventing some of the worst corporate abuses against which legislation has been directed. Whether the public has received the protection against high rates and charges which it was entitled to expect is however a matter of controversy. It is certain that the regulation of steam railways has produced few constructive results and that they have long been in financial difficulties (p. 396). Nor did the collapse or bankruptcy of many great electrical utility concerns after the business crash of 1929 indicate that regulation had been a complete success in that field.

Crisis in Regulation. An analytical review of the situation in 1929 revealed a crisis in the regulation of public utilities.[4] It was found that few of the public service commissions had staffs of engineers and accountants competent to deal with the complicated operations of utility concerns. Their membership was changing; frequently commissioners were translated from public service to the employment of utility companies. Commissions were constantly engaged in litigation and baffled by overruling judicial decisions. Often it took five or six years to fight a case through the courts and get a decision in favor of, or against, a given rate or regulation established by a commission. So a large amount

[4] W. E. Mosher, ed., *Electric Utilities: the Crisis in Public Control* (1929); Mosher and Crawford, *Public Utility Regulation* (1933).

of popular dissatisfaction arose and there was a demand for new strategy and tactics in utility regulation and control.

Recent Trends in Utility Regulation. Recognition of the shortcomings of previous methods has led legislatures to stiffen and strengthen state laws dealing with the subject. The tendencies of this new phase have been summed up under the following heads by Orren C. Hormell: (1) reorganization of utilities commissions, with enlargement of the governor's removal power; (2) increase in power of commissions to force utilities to disclose more minutely their books, accounts, financial operations, inter-company relations, and lists of stockholders; (3) establishment of public counsellors to render expert assistance to utilities commissions in the public interest; (4) regulation of holding companies having a number of constituent companies under their control; (5) allocating to utility companies a portion of the cost of investigation and regulation; (6) increase in taxes imposed on utility concerns; and (7) provision for public ownership of utilities—state, district, and municipal.[5]

Public Ownership. For a long time cities and other local municipalities have enjoyed, under general or special grants of power by the state constitution or legislative act, the right to construct and operate utilities of one kind or another. As a rule this right is hedged about with limitations, such as the necessity of securing popular approval on a referendum or the sanction of the state public utilities commission. As a rule also its exercise is restrained by the requirement that any municipal debt shall not exceed a given percentage of the assessed valuation of property within the boundaries of the municipality. Subject to these qualifications, the power conferred on local governments is often broad; Ohio and Illinois, for example, authorize municipalities to acquire, construct, lease, and operate utilities for their own benefit and that of their inhabitants. In recent times there has been a tendency among the states to enlarge the power of municipalities over the acquisition, construction, and operation of utilities.

Public Ownership Districts. As a general principle, the government of a city was formerly not allowed to operate beyond its boundaries, save under special legislation particularly in connection with securing water supplies. This rule prevented it from selling water and electric power to other municipalities and to persons and concerns outside its geographical limits. Hence the scope for municipal ownership and operation was often

[5] *Political Science Review*, February, 1934, pp. 84 ff.

narrow. But in recent years, especially since 1930, this old rule has been modified or abrogated by legislation in many states—Alabama, South Carolina, Indiana, Wisconsin, Nebraska, Oregon, Washington, and Minnesota, for example. The newer legislation takes various forms. In some cases, municipalities are authorized to sell electricity and services to other municipalities and residents thereof, or to persons and concerns within a certain distance from their boundaries. In other cases, notably Oregon, Washington, Nebraska, and South Carolina, provision is made for the creation of special utility districts and for authorizing them to acquire, construct, and operate utilities for the service of all inhabitants of the said districts.[6]

State Enterprises. Although the chief relation of the state to business of all kinds takes the form of regulation, several states carry on enterprises of some magnitude. Many of them have forest domains and water power sites. North Dakota has embarked on the construction and operation of grain elevators. New York administers a great canal with numerous terminals. Nebraska is developing a state-wide electric power system. All states engage in highway construction on a large scale, especially since the Federal Government has come to their aid. As an adjunct, in constructing highways and other public works, states sometimes operate cement mills. A few have power plants. But on the whole American states shrink from undertaking industrial and transportation enterprises directly; they prefer to entrust such economic functions to private initiative, subject to limitations laid down in the public interest.

Agriculture and Natural Resources

Early Legislation Touching Agriculture. Since agriculture was long supposed to be a highly individualistic pursuit, state governments were slow in assuming any important responsibilities in that connection. About the middle of the nineteenth century, to be sure, some of them came to the aid of private agricultural societies by forming central boards of agriculture, largely for the purpose of promoting state and local fairs—exhibitions of farm products and machinery. In time interest widened, partly under the stimulus of the Federal Government (p. 416). After the enactment of the Morrill law granting federal assistance, they established agricultural and mechanical colleges and later agricultural experiment

[6] Orren C. Hormell, *Political Science Review*, February, 1934, pp. 90 ff.

stations. They joined federal officials in the war on diseases among animals, in efforts to raise the standards of produce, in the collection of crop statistics, in the promotion of market facilities, and in some cases in the extension of agricultural credits. Pure food and pure milk legislation inevitably involved agriculture, and state governments were compelled to undertake serious obligations in this relation. In fact these functions have become so numerous that states have been forced to organize special departments or divisions to deal with agricultural activities.[7]

The Agricultural Crisis. It became evident about 1930 that the long depression in agriculture, which began about ten years before, was no transitory distress to be relieved by the usual process of bankruptcy, reduction in prices, and general liquidation. State governments then grew alarmed about the plight of this primary industry and cast about for more fundamental policies. Clearly doles, highways, credits, and improvements in the quality of agricultural output could not stabilize a branch of economy that was suffering from chronic "surpluses." What was to be done? In a speech before the State Agricultural Society, Governor Franklin D. Roosevelt, of New York, on January 21, 1931, outlined a public policy which awakened echoes throughout the Union. He called attention to the fact that a high percentage of the area tilled in his state consisted of poor land which should not be under cultivation at all.

Planning Land Uses. With reference to concrete measures, Governor Roosevelt proposed first a survey of all the agricultural land in the state, the classification of land according to its fertility and uses, and the reforestration by the state of enormous areas now under cultivation. Thus production on poor land that yields only a starvation return to the tillers would be curtailed. At the same time employment on forest reservations would be increased. Collaterally, a long mileage of back-country roads could thus be abandoned, materially reducing the taxes on farms for maintenance. The curtailment of dirt roads could be accompanied by the extension of improved highways throughout the cultivated area according to a rational plan providing cheaper transportation to markets and raising the standards of country life. Along the improved roads high voltage lines for the transmission of electricity could be built providing cheap power and light for farms—power to facilitate production and light so indispensable to a civilized life. Thus, Governor Roosevelt concluded, the regions

[7] For types of state administrative organization, see Bates and Field, *State Government*, pp. 354 ff.

really adapted to farming could be developed, the natural resources of the state enriched by new forests, the burden for highway maintenance reduced, and door-to-market routes established throughout the state.

Federal Intervention. Translated to the presidency in 1933, Governor Roosevelt favored action on a national scale. One phase of the recovery program was direct federal control over the production and marketing of several staple agricultural commodities (p. 427). Another part involved the acquisition by the Federal Government of large areas of sub-marginal farm lands and their utilization for purposes of forestry, water power development, erosion prevention, and other devices of conservation. A third part of the program was direct federal action in an immense region covering all or parts of seven states—the Tennessee Valley—with a view to developing its land and other resources according to a general plan. This was followed by the creation of a National Resources Board instructed to investigate and report on a national scheme for land and resources utilization. In respect of land or other facilities already acquired by the Federal Government, provisions have been made for coöperation with state and local authorities and farmers, as in the case of the Tennessee Valley Development, for instance (p. 366).

New Forms of State Action. While the Federal Government was advancing on the agricultural problem along various lines, state governments were taking independent action or offering coöperation. They sought to save farms from foreclosure under mortgage requirements by declaring a moratorium on such procedures or by affording other protection to owners in peril of losing their property. Some states joined the Federal Government also in extending financial facilities to farmers in debt or in need of credit. They passed acts facilitating collective marketing by farmers' associations. State and municipal authorities coöperated with federal agencies in preparing and enforcing agreements for the marketing of milk and milk products in many cities. And several states, New York and Connecticut, for instance, set up milk control commissions with power to allocate quotas of production to farmers and to fix the price of fluid milk to producers and consumers.

Conservation of Resources. Related at numerous points with agriculture is the conservation of natural resources. Independently or with the aid of the Federal Government (p. 361), states are giving attention to the promotion of forestry and to the execution of plans for soil conservation (p. 427). About one-third have one or more forest reservations; they are extending their areas; and other states are making plans in this field.

By 1943 forty-six states had forest parks, often in the form of small forest reservations and, with the development of the automobile, the practice of buying up "breathing spaces" is growing. In some places irrigation and in others drainage and flood prevention fall within the scope of state activities. Every state maintains an agency of some kind for surveying and reporting on its mineral, stone, and other resources. The supervision of fish, game, and various forms of animal life, not only for sport but more particularly for commercial purposes, is likewise regarded as an obligation of state governments. They conduct fish hatcheries, restock streams, and protect game during the season of propagation. Indeed by more careful planning and the wiser use of forests, wild lands, swamps, and streams the food supply of the United States could be enormously increased.

State Planning Agencies. The expansion and multiplication of state functions, especially in relation to natural resources and public works, led to the consideration of the need for coördination of the various activities and for the formulation of master plans designed to control details and to make subsidiary activities more effective in the common purpose, namely, the wiser use of our resources. Shortly after the National Planning Board (later called the National Resources Board)[8] was appointed by President Roosevelt in 1933, it suggested to the governors of the several states the desirability of creating state planning boards "to coördinate and harmonize the work of many public bodies." On January 1, 1933, "there existed in the United States no state planning board to develop a comprehensive state plan." Within two years forty-three states had official planning boards appointed by governors, and legislation was soon enacted in many states providing for permanent institutions of the kind, some with powers more or less nominal and advisory, others with substantial power to prepare plans having a certain binding force on other departments of state government, especially those concerned with resources and construction. At the opening of 1943 only Delaware was without a planning board of any type. By that time about one-fourth of the states also had provided for county and township zoning with reference to general plans.

The subjects handled by state planning boards vary according to the controlling statutory provisions but among them are: study of population, social, and economic conditions; use of lands in rural regions; construction and operation of school plants; coördination of public works

[8] Abolished by Congress in 1943.

throughout the state; highways and transportation; elimination of railway grade crossings; outdoor recreation facilities; development and distribution of industries; water supply and sewage disposal; and flood control. During the Global War state planning agencies concentrated on the preparation of such materials as maps and data to facilitate the location of camp sites and recreational facilities for troops, air ports and flight strips, war industries, emergency housing and required utilities. Looking to the future some of them prepared for post-war economic crises by developing long-term plans for public works and urged local communities to do likewise!

The accomplishments of state planning boards, as a matter of course, have differed from state to state, according to the provisions of statutes and the energies of the board members, but most of the boards have exerted considerable influence in the way of unifying and rationalizing numerous state activities carried on by independent and often conflicting agencies. Whether any state planning board will become as authoritative as some of the strongest city planning commissions, as in New York City, for example, remains for future determination.[9]

Labor and Social Legislation

The Working Class and Its Ideas. The great inventions which revolutionized industry have done more than call into being immense corporations and combinations of capital, rivaling in wealth and power the state itself; they have created a new social group—a working class, dependent in the main upon the sale of its labor power to the owners of the machinery of production. Like all other estates in history, this new class evolves political ideas of its own, and demands from the government protection, security, and special legislation.

Generalizing from a survey of such legislation, we may say that the following topics form the subject matter of state law-making in this sphere; but it should be remembered that in many respects state standards have been supplanted or supplemented by federal actions (pp. 437 ff.).

Legal Position of Trade Unions. First of all there is the question of the

[9] *Book of the States: 1943–1944*, pp. 223, 224; Beard and Smith, *Current Problems of Public Policy*, pp. 409 ff.; American Society of Planning Officials, *New Horizons in Planning*.

status and conduct of trade unions—a theme over which bitter conflicts have been waged for more than a century. It was once a widely accepted, though not universal, maxim of law that a mere union of laborers, formed for the purpose of raising or fixing wages and reducing hours of work, was *ipso facto* a conspiracy in restraint of trade and hence illegal. Under judicial decisions and modern legislation this maxim no longer prevails. A trade union formed for the above purpose is not in itself unlawful. Nevertheless during the early 1940's state legislation designed to fix the responsibility of labor unions and to restrict and regularize the activities of laborers in controversies with their employers was enacted in Arkansas, California, Idaho, Kansas, Maine, North Carolina, Michigan, Mississippi, Missouri, New Jersey, Rhode Island, South Dakota, and Texas.[10]

Strikes. The chief instrument brought into play by trade unionists as a last resort in realizing their demands is the strike. The legality of such an operation depends upon the purposes and methods of those who conduct it. If the end is to increase wages or prevent a cut, it is permissible; but if the object is merely to assist another union, a sympathetic strike in other words, it is in general unlawful. A strike to prevent the employment of non-union men, the transformation of an open into a closed shop, is also likely to encounter legal obstacles. Nevertheless, as soon as we leave general principles, we are lost in a maze of conflicting laws, practices, and judicial decisions.

Picketing. The methods employed by a union during a strike are subject to minute restrictions. Theoretically, "picketing" is legitimate; that is, strikers may parade in front of their former places of employment and use peaceful means in persuading others to quit work or abstain from taking their jobs. For example, in 1940 the Supreme Court of the United States held an Alabama statute making the picketing of a place of business a misdemeanor to be an unconstitutional restraint "of freedom of speech and the press." The Court held that the dissemination of information concerning labor disputes is within the area of free discussion.[11] In fact however the decisions of the courts often run against strikers wherever specific acts are challenged by employers; so that no generalities on this point are safe (p. 493). The same is true of "boycotts," that is, notices attacking an employer, declaring him to be

[10] *Book of the States: 1943–1944*, pp. 126, 127.
[11] Thornhill *v.* Alabama, 310 U. S. 88.

"unfair," and urging the public not to patronize him. In some states peaceful boycotts have been legalized but strikers are frequently penalized in fact for such actions. In 1940 however the Supreme Court of the United States held a municipal ordinance denying picketers the right to display a sign, banner or badge near a place of business in order to discourage people from patronizing it to be a denial of the "liberty" guaranteed by the Fourteenth Amendment.[12]

Injunctions. Since the injunction is an instrument relied upon by employers to check trade union action, it is liberally used by state courts to forbid "unlawful" conduct on the part of strikers (p. 447). Trade unionists who refuse to obey may be fined and imprisoned for contempt of court. As in the federal sphere, so in state jurisdictions, numerous attempts have been made to limit the power of the courts to issue injunctions, but much of this legislation has been ineffective and some of it has been declared unconstitutional. In spite of restraining laws, injunctions are still granted with great frequency to forbid acts which seem lawful in themselves, such as holding meetings in trade union halls and distributing pamphlets calling upon working people to leave their employment. However the Supreme Court of the United States raised a warning hand in 1941 when it reversed an Illinois court decree declaring that the common law of the state limits peaceful picketing to cases in which the controversy is between employer and employees.[13] In 1942 it reversed a decree of a New York court enjoining the picketing by union teamsters of bakeries and retailers who were dealing with nonunion peddlers of baked goods.[14]

Mediation and Arbitration. With a view to preventing strikes or at least mitigating the harshness of industrial disputes, a large number of states have made provision for mediation and arbitration in labor controversies Massachusetts led the way in 1886 by authorizing the state industrial commission to act in this relation. Whenever a strike is about to occur, the commission may intervene by attempting to induce the parties in interest to reach a voluntary agreement or to submit the issues to arbitration. If the disputants consent, the commission itself may act as the board of arbitration, hear both sides, and make an award. At all events the commission may lay the pertinent facts in any controversy before the people and thus bring the pressure of public opinion to bear

[12] Carlson v. California, 310 U. S. 106.
[13] American Federation of Labor v. Swing, 312 U. S. 321.
[14] Bakery Drivers' Local v. Wohl, 315 U. S. 769.

on the contestants. In time more than half the states followed the example of Massachusetts in providing for mediation and arbitration, with good results on the whole.

In spite of such legislation strikes continued to be numerous and sometimes costly to the public because one or both parties concerned often refused to accept the good offices of the state authorities. Bent on finding a sure remedy, Kansas enacted in 1920 a law creating a state industrial court with power to summon the representatives of capital and labor, hear disputes, and issue decrees binding upon participants. Drastic in its terms, this measure precipitated a bitter controversy, which did not come to an end until the Supreme Court at Washington, after some hesitation, finally declared the entire law unconstitutional.[15] A less radical method of dealing with labor disputes has been adopted in Colorado under an act of 1915 forbidding strikes in certain industries until an official investigation can be made—a method pursued with some success in Canada. In 1935 Congress by the Wagner Labor Relations Act supplemented state legislation on a national scale (p. 449) and this action was followed by the passage of corresponding laws for intrastate industries in Massachusetts, New York, Rhode Island, and Utah. Michigan, Minnesota, Pennsylvania, and Wisconsin added to the provisions of the Wagner type of legislation by outlawing certain unfair practices on the part of employees, such as coercion and intimidation of fellow employees.[16]

Regulation of Hours. The length of the working day is a subject of extensive legislation. Although, in general, adult males were long supposed to be able to take care of themselves in the struggle for existence, they were not left to the tender mercies of competition in all cases. Many states have established eight hours as the normal day on public works undertaken by state and local governments. The hours of labor for persons engaged in unusually arduous or dangerous employments are often limited by law; for example, it is a common practice to fix the length of the working day in mines, smelters, and similar industries, and especially on railways where long hours induce negligence and endanger the safety of the traveling public. Oregon has taken the position that substantially all industrial employments are of a special character and that the state may with propriety regulate the hours of labor in them.

[15] Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923), packing houses; Dorchy v. Kansas, decided March 10, 1924, coal mines; *American Year Book* (1925), p. 139.

[16] *Book of the States: 1943–1944*, pp. 236, 239.

Although legislation of this character in New York was declared void by the Supreme Court of the United States in the famous Lochner case of 1905, it was sustained twelve years later in the Oregon laundry case.[17] Now the National Wages and Hours Act of 1938 fixes the maximum week in practically all great industries (p. 443).

Special Laws for Women and Children. Women and children have been singled out by special legislation.[18] In 1943 all but five states had statutes fixing maximum hours of work applying, in nearly all of them, only to women and minors. The precise number of hours differs from state to state, but, though relaxed somewhat during the Global War, the general tendency is to fix it at a figure ranging from forty to forty-eight per week, and varying according to industries. In Massachusetts, certain forms of night work are closed to women altogether. As a rule the states prohibit the employment of children under a certain age in factories and, in addition, fix the hours of those children above the age limit actually employed. Night work for children is also forbidden in most progressive commonwealths. Generally speaking, child labor laws tend to place the minimum age limit at about fourteen years and to require for each child a stipulated amount of education. The fact that a child is fourteen years old however is no guarantee that he or she is able to work in a mill; and it has been suggested that a physical test, supplementing the age limit, is necessary to adequate protection of health and welfare. Under the federal Wages and Hours Act of 1938 (p. 443) efforts are being made to abolish "oppressive" child labor and to place women on the same basis as men in respect of hours and wages, through federal action (p. 443). But by 1943 the maximum eight-hour day established by that Act for minors of both sexes under eighteen had been matched by only twelve states and the District of Columbia while only two states had adopted its 40-hour maximum for a week. Four other states had adopted the 40-hour week for children under sixteen.[19]

Regulation of Wages. The regulation of wages[20] is a field of private economy which the state has been slow in entering. State and local governments must of course fix the wages of their own employees; sometimes they go further and provide that contractors engaged on public

[17] Lochner *v.* New York, 198 U. S. 45; Bunting *v.* Oregon, 243 U. S. 426.

[18] Legislation of this character is vigorously opposed by many women who insist that women should stand exactly on the same footing as men before the law.

[19] *Book of the States: 1943–1944*, p. 241.

[20] R. J. Swenson, *Public Regulation of the Rate of Wages*.

work must pay "the prevailing rate of wages," which means in practice the trade union rate in the locality.

A somewhat radical departure with respect to wages was made by Massachusetts in 1912 with the enactment of a law establishing a commission to supervise the wages of women in industry. In any trade in which the commission finds the wages too low to maintain the female employees properly, it may set up a board to ascertain the minimum which should be paid, and it may request the employer to pay it. If the employer refuses, the commission may announce the fact to the public but it cannot impose any penalties on him for his refusal. California, Colorado, Nebraska, Oregon, and Washington speedily followed the example of Massachusetts, but sought to make the wages fixed by public authority binding on employers. For a time the development of minimum wage legislation was halted by a decision of the Supreme Court in 1925 declaring null and void the minimum wage law of Arizona, on the basis of a previous decision against a similar act for the District of Columbia. After the Court reversed itself however in the Oregon minimum wage case in 1937 (p. 493) the way was open for the states to go ahead again. By 1943 twenty-seven states had legislation in this field usually applying to women and children. In 1938 Congress had strengthened state action by providing for national wage standards for men and women in industries involved in interstate commerce (p. 443).

Safety and Convenience. The safety, health, and comfort of all persons —adults as well as children—employed in mines, factories, and other places of industry are covered by an ever-growing body of state laws. The principles applied in this sphere are fairly definite and are usually sustained by the courts under the police power. Factories and workshops must be ventilated; dangerous machinery must be safeguarded; penalties are placed upon employers using unsafe and improper scaffolds, ladders, and mechanical contrivances in building work; fire escapes must be provided for factories over a specified height; boilers generating steam and heat for factory purposes must be kept in good order and periodically examined; public laundry work must not be done in living rooms, and all laundries must be kept in clean condition and free from vermin and impurities of a contagious nature; tenement houses cannot be used in the manufacture of a large number of article, and tenement-house manufacturing in general is closely restricted; certain standards of cleanliness must be observed in rooms used as bakeries; mines must be ventilated,

timbered, and provided with suitable outlets; proper sanitary arrangements must be installed in factories and mercantile establishments.

Early Law on Injuries in Industry. The payment of compensation to persons injured in industry or to their families in case of death is now a general rule. Under the old common law, employers were liable for damages in case of injury only when they were themselves personally responsible—that is, they were not liable when an accident was due to "unpreventable causes or to the carelessness of the employee himself or one of his fellow employees." In other words, the employee had to assume practically all the risks of the industry; the result was often poverty for himself and his family in case of serious injury and poverty for his family in case of his death. Studies of accidents revealed appalling conditions —that more persons were killed and injured in American industries in proportion to the number employed than in any other country in the world. It was shown that more than half the accidents were not the result of carelessness on the part of the employees, but arose from occupational hazards themselves. Moreover when employees had legitimate claims for damages, they could only realize them by lawsuits which were long, tedious, and expensive.

Later Legislation. The injustice of this system early attracted the attention of labor leaders and reformers, and after searching for a remedy they came to the conclusion that the human risks of industry should be borne by industry and that employers should be required to insure against accidents as well as against fires, charging the cost to operating expenses. A long and stubborn battle ensued, but about 1910 there set in a decided movement in the direction of shifting the burden of accidents from the unfortunate victims to industry itself—in fact, to the consumers of the goods produced and society as a whole. This movement bore fruit in two classes of legislation.

Compensation for Injuries. In the first place, state after state swept away the rules of the common law noted above and required employers to pay injured workmen compensation in certain amounts, according to the nature of the case, whenever accidents were due to the negligence of employers, their agents, or employees, or to the necessary risk or danger inherent in the industry. In New York, where a law of this character was declared unconstitutional by the highest state court, a constitutional amendment was adopted in 1913 authorizing compensation laws with or without an insurance plan. By 1943 every state but Mississippi had set

aside or materially modified the doctrines of the common law in respect of damages for accidents in industry.

Industrial Insurance. In the second place, there was devised a system of industrial insurance designed to make compensation for accidents automatic and simple. The ordinary damage suit brought by an employee against his employer, even in the best of circumstances, involved high costs and long delays. To obviate such evils progressive states enacted statutes providing the terms and conditions on which compensation should be granted to injured persons and created industrial commissions empowered to hear accident cases and to make awards. Thus the technicalities of the law are avoided and quicker action is guaranteed. As a financial safeguard the system is accompanied by the requirement that all employers coming within its scope must insure their employees against accidents, either in a private company or through an insurance fund established under public auspices. By 1943 only one state was without any provisions for workmen's compensation.

Industrial Diseases. Closely related to accidents are certain diseases directly associated with occupations. Indeed there are some industries which induce specific diseases among people who work in them. It is asserted therefore, and not without reason, that society should carry the burden of industrial diseases as well as accidents. The American Association for Labor Legislation advocates a plan for general insurance against sickness and invalidism. The plan includes: (1) universal and compulsory insurance against sickness for all those below a certain level of income; (2) a system of voluntary insurance for all those above the level fixed by law; (3) cash benefits and medical service in case of sickness; (4) the framing of legislation designed to prevent sickness and improve conditions affecting the health of employees. Already many states have extended their industrial compensation laws to cover diseases arising from occupations, bringing such hazards within the scope of insurance. The general and more sweeping program outlined above is merely in the stage of discussion and argument, but, as federal health insurance is in the process of formulation (p. 473), action on such a program is among the probabilities of the not distant future. At present twenty-five states have provided for compensation covering occupational diseases.

Vocational Rehabilitation. It is not enough to pay damages to those injured; wherever possible the victim should be restored to usefulness.

In a large number of cases this can be done by a process known as vocational rehabilitation. If an expert watchmaker is suddenly blinded in an accident, of course he cannot make watches. His insurance fund will save him from poverty, but by re-training for another trade he may become a useful wage earner again. Under the Industrial Rehabilitation Act of 1920, as we have seen (p. 503), Congress makes appropriations to aid states in providing reëducation for civilians injured in industry.

Unemployment. Unemployment is another specter that lurks in the modern industrial system. Business revolves in "cycles"—prosperity, depression, prosperity, depression, and so on through the decades. During each crisis thousands, sometimes millions, of people are out of work through no fault of their own; then, as night follows the day, come poverty, discouragement, crime, and social unrest. There was a time when periodical unemployment and the resultant misery were viewed as plagues were viewed in the Middle Ages—as terrible visitations which the human will could not prevent. More recently the conviction has arisen that mankind can curtail, if not wholly eliminate, the evils of unemployment by concerted measures, just as it reduces the evils of epidemics by positive actions.

Such measures were adopted on a national scale when the great business depression opened during the administration of President Hoover, with the enlargement of public works by the Federal Government, with loans to states and municipalities for self-liquidating local works, and with executive efforts to encourage combined action on the part of business men and labor leaders. They were extended and supplemented under President Franklin D. Roosevelt in the form of a general economic program (p. 351) and provision for the unemployed through the Works Progress Administration (p. 439) in which states and communities cooperated with federal agencies (p. 352). Encouraged by federal grants, designed to aid in the expense of administration, every state now has an unemployment insurance system of one type or another (p. 471).

Labor Departments. By 1943, every state had a special state department, bureau, board, or office charged with the supervision of labor interests. In many cases the board is preferred on account of the semi-judicial and legislative functions which must be discharged, such as making awards in compensation cases and issuing ordinances expanding the principles of the state labor code. The duties of the labor department or commission also usually include the inspection of factories and mines, the enforcement of labor laws, the collection of industrial statistics, and

the execution of provisions relative to arbitration and mediation in strikes. State employment bureaus, maintained independently or in cooperation with the Federal Government (p. 438), are supervised by the labor department.

Improvement of State Labor Legislation. Although states were already rapidly extending their legislation respecting hours, wages, workmen's compensation, safety, and better working conditions generally, they were undoubtedly stimulated to greater activities as the Federal Government advanced in this field. From year to year after 1933 the old industrial states expanded and tightened their labor legislation and other states long regarded as backward in this relation came into line. In the single year 1937, for example, Illinois and Pennsylvania thoroughly overhauled and enlarged their labor codes; Arkansas and Georgia brought about a coördination of their labor laws under state labor departments; five states provided compensation for certain occupational diseases; Oklahoma applied minimum wage legislation to men as well as women; North and South Carolina raised the age for children in industry to sixteen; and five states passed laws modelled on the National Labor Relations Act.[21] By 1943 at least seventeen states had materially limited the use of injunctions in labor disputes and nineteen had outlawed the notorious "yellow dog" contract which bound a laborer as a condition of employment not to join a labor union.

Public Warfare on Disease and Poverty

In addition to the social functions just surveyed, all of which bear upon human welfare broadly conceived, the state assumes several specific functions pertaining to the control of disease, the care of the sick and unfortunate, and the provision of social security.

Prevention of Diseases. First among them may be placed government action designed to eliminate conditions which breed disease. This is a comparatively recent development in the history of mankind. It was not until about the middle of the nineteenth century that the health laws of our states went far beyond attempts to control, usually in a very ineffective manner, smallpox and other contagious maladies. The terrible cholera epidemic of 1848 and 1849 brought an awakening of public interest in the whole question of sanitation and its relation to general welfare. In the latter year Massachusetts appointed a commission to investigate the

[21] H. W. Toll in *The American Year Book*, 1937, pp. 155 ff.

sanitary conditions of the entire state; the result was a report which formed the basis for public health legislation not only in that commonwealth but in all parts of the Union. One after another the states created boards of health, and by the opening of the nineteenth century all had followed the example of Massachusetts.

Official Agencies and Functions. On the side of organization, a thorough-going health law provides for a state health department and for local health authorities in counties, cities, and villages. The head of the state department usually makes inquiries into the causes of diseases; investigates the sources of mortality; and studies the effect of localities, employments, and other conditions upon the health of the persons affected. He obtains and preserves information useful in the discharge of his duties; he may compel the attendance of witnesses and force them to testify in matters before him; he may nullify the regulations and ordinances of local boards of health in certain circumstances.

Generally speaking, the state health department also regulates the practice of medicine, surgery, dentistry, and veterinary medicine. It registers and regulates pharmacies and drug stores, especially in the sale of narcotics. It supervises undertaking, embalming, optometry, and chiropody. It provides for the inspection of institutions for orphans, destitute children, delinquents, and other wards of the state. It thus has supervision over conditions bearing directly upon health and over persons concerned with the care and cure of the sick.

Local health authorities have large and arbitrary powers over life and property in the case of epidemics and a general control over all conditions inimical to health. They may make ordinances, conduct investigations, and order the abatement of nuisances and the elimination of noxious practices.

Elements of Health Code. The health code of a progressive state is a voluminous document of a hundred pages or more, which cannot be surveyed in the narrow compass of this chapter. Note should be taken however of the special efforts made to prevent the manufacture and sale of adulterated food and drugs—efforts supplementing the enforcement of federal legislation (p. 458). Food is usually regarded as adulterated if any substance has been mixed with it in such a fashion as to reduce, lower, or injuriously affect its quality or strength; or if inferior or cheaper substitutes have been introduced; or if any valuable constituent of the article has been wholly or partly abstracted; or if the article is an imi-

tation sold under the name of some other substance; or if it contains wholly or in part diseased or decomposed animal or vegetable matter, or, in the case of milk foods, is a product of diseased animals. Most health laws further provide for maintaining certain standards in drugs and for a certain degree of purity in "soft drinks" and confectionery.

Hospital Services. Those who fall sick in spite of all precautions, if they are unable to look after themselves, may find care in hospitals, institutions, and services maintained by the state directly or in conjunction with local governments, now with aid from the federal treasury and in coöperation with federal agencies (p. 472). Our states spend more each year on hospitals, asylums, reformatories, and charities than on any other branch of work except education and highways, and the burden grows heavier every year. The number of persons to be cared for increases rapidly. The spirit of science and humanity advancing into this field makes ever greater demands upon the public treasury. The idea of rehabilitation and cure leads the state to gather into its institutions many people who in olden times would have been left at large, to sink down to the bottom of the social scale. It seeks to educate and care for them in accordance with the latest scientific view of their troubles and maladies.

Specialization in Institutions. As science moves forward by specialization, so state institutions tend to divide and subdivide in order to concentrate upon different classes of ills. An enlightened state will now maintain institutions for feeble-minded children and adults, idiots, epileptics, inebriates, crippled and deformed children, the deaf, dumb, and blind, persons afflicted with tuberculosis, decrepit and enfeebled persons, juvenile delinquents, unfortunate women, unprotected girls, orphans, and often soldiers and sailors and those dependent upon them. In addition to specializing in institutions, our progressive states are constantly working to improve the facilities and methods in each service. Associations of doctors, nurses, teachers, and persons particularly interested in the several specialties hold annual meetings, report their findings, and build up a body of scientific literature.

Centralization of Management. Inevitably, the management of these institutions, involving large outlays and the command of high technical skill, constitutes one of the gravest problems in state government. According to historic practices the usual organ of administration has been a separate board for each institution—asylum, hospital, prison, etc.—a board endowed with power to appoint employees, buy supplies, and con-

trol policy. At the present time however there is a strong tendency to place all institutions of a given class under one state authority, and a few states have gone so far as to centralize all charitable and penal establishments under a single agency, subordinate to the governor. The arguments of the Illinois Efficiency and Economy Committee in favor of such action fall under three heads:

1. It makes uniformity possible in the organization and administration of institutions—the standardization of services, salaries, accounts, methods, and reports.

2. It promotes economy by eliminating duplicate officials and employees, by establishing a more vigorous supervision over expenditures, and by centralizing the purchase of supplies.

3. It contributes to efficiency by the centralization of power and responsibility. A single central agency giving its whole time to its public duties can keep in close touch with conditions in the different institutions and bring all to common standards. It can easily be held to account by the governor, the legislature, and the people.

Problems of Management. Whatever form of management is adopted, central or local, the administration of state institutions calls for constant watchfulness on the part of citizens. The purchase of supplies and the erection of buildings offer opportunities for peculation which are tempting to politicians of the lower order. Even positions of control which call for technical skill of the highest kind are frequently made subjects of political spoils, and institutions degenerate under the direction of men who are often incompetent and sometimes brutal; then the inmates of institutions suffer from poor food, insufficient clothing, and cruel treatment. Scandal after scandal has marked the course of institutional management, and nothing but unremitting vigilance can uphold high standards in personnel, materials, and services.

Mothers' Pensions. Institutions, especially for the normal poor, are at best unsatisfactory substitutes for homes, and there is a marked tendency today to give public aid, when necessary, in a form that helps to keep families together in their own households. By 1934 all states except Alabama, Georgia, and South Carolina had laws providing for mothers' pensions to be paid to widows and deserted wives who have small children and are without adequate means for their support. Thus homes need not be broken up and children sent to public institutions. The cost to the public is, perhaps, not much greater than the old system of support in charitable institutions, and the advantages of a mother's care may

be secured. It is customary to grade the amount of the pension on the basis of the number and age of the children.

Old-Age Pensions. Following close on the heels of mothers' pension legislation came the demand for a complete system of old-age pensions, as a substitute for the poorhouse, if nothing more. A Pennsylvania commission appointed to inquire into the matter reported in 1920 that "forty-three per cent of the population fifty years of age or over in that state have no means of support except what they earn themselves." The secretary of the commission estimated that only thirty-eight per cent of the wage earners surveyed by the commission had property of any kind. Other figures compiled by expert investigators pointed to the astounding conclusion that approximately one-third of the persons in the United States sixty-five years of age or older were dependent upon public or private charity. The remedy recommended was an old-age pension and by 1934 at least twenty-eight states, including Montana, Nevada, Wisconsin, Kentucky, California, Minnesota, Utah, Wyoming, and New York, had enacted legislation providing pensions for the aged poor. In 1935 the Federal Government came to the aid of the states by offering to match dollar for dollar, up to a fixed monthly limit, any old-age pensions they might see fit to grant. Under federal stimulus old-age pensions have been made universal throughout the Union (p. 471).

State Departments of General Welfare. Owing to the bulk of social legislation now in force, as a result of state and federal action, the states have created departments of public welfare or reorganized old agencies concerned with the care of the sick, dependent, and handicapped. The single year 1937 saw the establishment of such departments in eighteen states ranging from Washington to Florida, from New Mexico to South Dakota. By 1943 every state had either such a department or some other agency responsible for administering its public welfare functions. To sum up developments, old-fashioned poor relief is being abolished, poor houses are being abandoned or transformed, and the treatment of persons suffering from the misfortunes of life is being put on a regularized and humane basis, increasingly under the directions of specialists in social work. As a rule state welfare legislation provides for coöperation between the central department and cities, counties, and other local subdivisions. Often grants from the state treasury are employed to supplement local grants. Such, for example, is the relation created by the Virginia act of 1936; the state makes appropriations in aid of communities and encourages the establishment of local welfare departments for adminis-

trative purposes; and nearly all cities and counties in the state have set up such agencies, chosen locally with state approval.[22]

Housing. While attacking the problems of misery directly, several states approached it by a circuitous route through control over urban housing. Those with large industrial regions adopted sanitary codes and measures regulating the sanitary and other conditions of tenement houses but such legislation only touched the fringes of the worst abuses. Early in the twentieth century however a few states made beginnings in the direction of promoting the construction of model houses and apartment buildings. New York, for example, sought to encourage private enterprise to enter the housing field. It sought to take the profit-making and speculative elements out of home building for wage earners in the lower scale, by authorizing the formation of special corporations for that object, limited as to operations and the dividends they may pay. To administer the law, it created a state housing board and under its supervision extensive plans were formulated for clearing slum areas in New York City and constructing model dwellings with the aid of loans from insurance companies, savings banks, the Federal Government, and private capitalists. In spite of the difficulties involved in acquiring land for such enterprises—corruption and high prices allowed by political judges—schemes of this character received increasing attention.

When the Federal Government embarked on its recovery program in 1933, it sought to stimulate the construction of houses by limited dividend corporations by offering loans to them on generous terms. Several states replied by enacting supplementary legislation to facilitate their operations. The Housing Division of the federal Public Works Administration received several hundred applications for loans but had granted only seven by October, 1934. On the whole this line of activity was regarded as a failure and the Federal Government began to buy land and plan for the direct construction of homes in about thirty municipalities, as "a demonstration" of the possibilities in low-cost housing.

With a view to stimulating communities to proceed directly with government housing, Congress established the Federal Housing Authority in 1937 and proffered aid from the federal treasury in promoting the construction of low-rental apartments and dwellings and in clearing slums and insanitary areas (p. 506). In 1943 all but seven states had enacted housing laws in conformity with federal legislation and made provisions for the establishment of housing authorities to take advantage

[22] H. I. Baumes, *National Municipal Review*, May, 1937, pp. 247 ff.

of the federal offers. Some of them limited the operations of the law to one or more cities; about half extended them to cities, towns, and rural regions. Citizens of the communities affected can now appeal to the mayor, council, or both, urging them to establish a local housing authority, to secure a loan from the Federal Government, and to begin clearing insanitary areas and erecting low-rental houses.

Control of Intoxicating Liquors. With the repeal of the Eighteenth Amendment, the liquor problem was handed back to the states, save for certain federal matters (p. 467). One by one, the "bone dry" states took advantage of their new independence to go "wet," until by 1937 total prohibition had been abandoned in every state in the Union. With the general legalization of liquor, the states enacted numerous statutes regarding such items as the time, place, and manner of making sales. An analysis of this legislation reveals the existence of three distinct plans. In a small minority of the states, only light wines or beer may be sold. In others, liquor is marketed by private dealers, expressly licensed for the purpose. In still a third group, liquor is sold through government stores. By 1943 the public ownership system was in operation in Alabama, Idaho, Iowa, Maine, Michigan, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. It represents an effort to curtail the profit motive in liquor sales and thus the pushing of liquor upon customers by interested dealers. Its effectiveness however is materially reduced by the insistence of the states in question upon deriving a substantial revenue from the business by various forms of taxation.

Education

State and Local Responsibilities. Education in the United States is regarded as a state and local function. Even the project for establishing a national university, which has been periodically before Congress since the early days of the Republic, is no nearer realization than it was a hundred years ago. It is true, there is an Office of Education in the Social Security Agency, but the commissioner in charge has no direct administrative control over the educational systems of the several states. His functions are limited principally to a study of educational problems, the publication of useful data, and coöperation with state authorities in certain cases. Still, it should be noted that the Federal Government renders financial assistance to state educational enterprises and couples

with its grants of money a degree of control over the administration of the work subsidized from the national treasury (p. 500).

Constitutional Provisions. The principle that "knowledge and learning generally diffused throughout the community are essential to the preservation of a free government and of the rights and liberties of the people" is embodied in some form in many state constitutions; and several of them control, in more or less detail, the establishment of educational institutions. The constitution of Wisconsin, for example, requires the legislature to provide for the establishment of a system of free schools, in which all persons between the ages of four and twenty may be educated—a provision to be found in some form in the constitutions drafted since the middle of the nineteenth century. The fundamental law of Oklahoma orders the legislature to provide for the attendance at some public or other school, unless other means of education are afforded, of all the children in the state between eight and sixteen years of age, who are sound in mind and body; and fixes the minimum education for such children at three months in each year. The constitutions of several Western states now provide for a state university; and in a number of cases, institutions of higher learning have been established under general sanctions—such as that found in Indiana, making it the duty of the legislature "to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement."

State Administration. As a rule, the supervision of the educational interests of each state is vested in a commissioner or superintendent of education, sometimes acting in conjunction with a board and sometimes alone. Generally speaking, the state superintendent or commissioner of education is rather narrowly controlled by law and has very little power over the subjects taught in the schools or the methods of teaching. It is usually his duty to visit the various parts of the state; to coöperate with county superintendents and other local educational authorities in developing higher standards; to collect statistics and other data; to devise plans for the improvement of the system; and to make reports to the governor and legislature upon which new legislation may be based. Frequently normal schools and institutions for the training of teachers are placed under the supervision of the state superintendent, but the state universities stand on a more independent basis.

The powers of central boards of education vary greatly from state to state. In some instances they are simply charged with the guardianship of school funds and school lands; in others, their function is merely to

advise the state superintendent or commissioner on educational policies; in others, they are given a large authority over the whole system of the state, including the power to make rules and regulations affecting the curriculum, books, methods of instruction, examinations, and appointment of teachers.

State Universities. In the Northeast, where there are many private colleges and universities older than the Republic itself, the states have not made elaborate provisions for higher education, such as are to be found in other parts of the country. In that region, to be sure, state colleges and universities and municipal colleges are to be found but they occupy no dominant position in higher education. On the other hand in the South and West, where there are also many private institutions of higher learning, the state university is looked upon as the crowning institution of a great popular educational system, beginning in the kindergarten and running through the elementary and high schools to the college and graduate departments.

State University Functions. During recent years there has been a marked development, particularly in the state universities, away from the classical models of earlier days. The university is becoming less of a scholastic institution and more of a public service institution. In this connection it is making opportunities for general culture available to a wider circle of the population than ever before. Extension departments are now conducted by the greater institutions, public and private. In Wisconsin, for instance, centers are established throughout the state, and university lecturers are sent out to deliver regular courses on general subjects such as literature, art, history, and social science; and a correspondence school is maintained so that the humblest citizen with a little leisure at his disposal may carry on systematic study under expert guidance. In addition to encouraging the diffusion of knowledge respecting those subjects which are commonly regarded as scholastic in character, universities have widened the curriculum to include the practical arts and sciences: engineering, agriculture, and domestic science.

Special Courses. Moreover special arrangements are made for those busily engaged in a calling and unable to attend the regular courses of instruction in the "practical arts" offered at the university. Wisconsin, for example, has established "short courses" for farmers, which they can take during the weeks when their farm labors are the lightest. The extension department also makes provision for carrying to the agricultural and manufacturing districts, by means of lectures and correspondence,

the practical bearing of higher researches upon the problems of farm and factory. Thus the college, originating as a center for the cultured few, may become the servant of the whole community. In the ancient times culture rested upon slavery and exploitation; American democracy is trying the great experiment of combining learning with what the Greeks regarded as the "vulgar" pursuit of earning a living.

Besides maintaining its own institutions, the central government of the state controls by special and general acts the incorporation of private colleges, seminaries, and schools for higher education. It is from the state that such establishments secure the power to grant degrees.

Local Districts. The actual direction of secondary education is, for the most part, regarded as a local matter and is vested in county, city, township, and other local authorities, although state supervision is steadily widening. Outside of New England we usually find a county superintendent or a county board of education, or both, having somewhat the same relation to the schools of the county which the state superintendent or board bears to the whole system of the commonwealth.[23]

Provision is generally made by law for the division of the county into school districts, but usually township lines are not crossed in the formation of these units. In fact, the township is often the lowest division of the state educational system; where this is the case, the administration of educational matters is left to a trustee or to a special authority locally elected.[24] In cities the administration of education is vested in a board, sometimes appointed but often elected by the voters.

Trends in Education

Increase in School Population. When attention is turned from general provisions of law and administrative organization to institutions of learning and curricula themselves, certain striking tendencies are revealed.[25] The first is the enormous increase in the number of boys and girls in schools and colleges. Between 1900 and 1938 the number of students in universities, colleges, and teacher training schools rose from 284,683 to 1,346,856. In 1938 the total enrollment in all public elementary and

[23] In New England the local school system is generally in the hands of school committees or supervisors elected in the town.

[24] Townships are frequently divided into school districts with a special authority in each.

[25] For a brief and authoritative statement, see C. H. Judd, *Recent Social Trends*, Vol. I, pp. 325 ff.

secondary schools combined stood at 25,975,000. With the spread of legislation against child labor the number of youths entrusted to the schools or in need of education steadily increased, adding to the burden of organization and financial support. Even the business depression which curtailed expenditures for education helped to swell the school population in all ranges, creating a demand for more teachers at a time when less money was available for salaries.

Changes in the Educational Structure. Among the institutional changes the following are fundamental: Rise and development of public high schools, reflected in the increase in the secondary school population from 519,251 in 1900 to 6,226,934 in 1938. Growth of junior high schools, permitting "experimentation with new subjects and with types of social, recreational, and health training formerly not recognized as parts of the school program." Rise and spread of junior colleges which bring two years of collegiate training to pupils out of reach of the regular colleges. Increase in the number of institutions for training teachers and of post-graduate schools for higher university work. Diversification of curricula and provisions for vocational, technical, and professional training. Establishment of closer and more expert supervision over instruction in secondary and elementary schools. Consolidation of local school districts into large geographical units, construction of central schools, and transportation of pupils by motor bus. Introduction of military training into colleges and high schools under the direction of the War Department of the United States Government. Provisions for adult education, that is, for men and women beyond the school years who wish to continue study for cultural or vocational purposes.

State Control over Content of Instruction. State legislatures are showing a tendency to interfere with the power of local school boards by prescribing subjects which must be taught in the schools. Among the themes of instruction now commonly made mandatory are the federal Constitution, the state constitution, patriotism, Flag observances, health, evils of strong drink, conservation of life and property, kindness, religious and moral topics, and vocational training. A few states prohibit by law "the teaching of the doctrine of biological evolution in state supported institutions." Thus an effort is made to force certain themes and ideas into public education and to keep others out.

Rising Expenditures and Federal Aid. These expanding educational activities have cost huge sums of money. Between 1900 and 1938 the total annual expenditure for public elementary and secondary schools

rose from $214,965,000 to $2,233,110,000. Outlays for the construction of school buildings and plants more than kept pace with current expenses, for the value of public school property increased during this period from $559,000,000 to $7,155,377,000. Even more striking is the rise in the value of school property per pupil from $35.48 in 1900 to $273.93 in 1938, indicating the additional conveniences, facilities, and luxuries provided for teachers and students.[26]

As the state and local tax burden for the support of education grew in size, efforts were made to enlist the aid of the Federal Government. For a long time it had been the practice of progressive states to grant large sums from their central treasuries in aid of local schools, thus bringing the poorest and most backward districts up to better standards. It was easy to carry this idea over into the national field. Congress had already made lavish grants of land to agricultural colleges and other institutions of learning. It had assisted in promoting education in agriculture, domestic science, and industrial vocations. After the opening of the business depression in 1929, the Federal Government had made loans to local authorities for the construction of school buildings. Now it is asked to allocate federal funds to the states on the basis of their respective school enrollments. In this way only, the argument runs, can the states with smaller resources of wealth at their command cope with the burden of educating, guiding, and preparing for life the immense number of boys and girls entrusted, for a lengthening span of years, to the public school system. A special committee appointed by President Roosevelt reported in 1938 a general plan for regular grants from the federal treasury to the states in aid of education. The most recent bill for such aid was voted down by Congress in 1943.

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CHAPTER XXX

COURTS AND THE LAW

Contacts of the Citizen with Courts. It is to the courts that a citizen (or person) can always appeal when he believes that his personal or property rights have been violated by public authorities or private persons. If he has a case and able counsel, he can usually obtain a hearing. It is to the courts that citizens are summoned when they have violated the legal rights of other persons or transgressed the criminal law. As a business man, the citizen may have to resort to a court to collect a debt or settle a dispute with some other business man. If injured in an accident, he may have to sue the responsible party for damages. He may have to appear as a witness in a civil suit over property or to testify in a criminal case about matters known to him. Then practically every man, and in several states every woman, not legally exempt, is liable to be called upon to serve on a jury, and thus become a part of the regular judicial machinery. These are only a few of the numerous instances which illustrate the place of the courts in the life of the citizen. Then, in addition, the safety of life, limb, and property may depend upon the efficiency and honesty of the courts.

Under the American system of government the great mass of law cases is handled by state and local courts, for the business of the federal courts is rather closely defined by the Constitution. Moreover in many cases the state courts have a concurrent jurisdiction with the federal courts, and a litigant has a choice of tribunals before which to carry his case.

Structure of the Courts

Ascending Scale of Courts. In every state the courts are arranged in a progressive series. At the bottom of the scale stand the justices of the peace, who have jurisdiction over civil cases involving small amounts of money and over petty offenses. In large cities the criminal and civil juris-

diction of the justices of the peace is often divided between two sets of courts: the police courts and the municipal civil courts.

In most states there are county courts, generally of limited jurisdiction. They have cognizance of actions involving considerable sums and usually review appeals from judgments of justices of the peace. They also have jurisdiction over most of the criminal offenses. Occasionally, they have certain administrative functions in addition to their judicial duties.

Often there is a superior, circuit, or district court, immediately above the county court, which possesses broad original jurisdiction in civil and criminal matters and may try all cases over which the lower courts have no authority. The judges of this tribunal are generally elected or appointed for districts larger than the county, but hold terms of court within the several counties of their circuit.

At the head of the judicial system of each state stands the appellate court of last resort, which ordinarily deals only with appeals on points of law, not of fact. It is known by various names, such as supreme court, court of appeals, court of errors and appeals, or supreme judicial court.

Special Courts. In addition to these courts, there are sometimes special tribunals for particular purposes: chancery courts, which administer equity (p. 727); probate or surrogates' courts for the settlement of estates of deceased persons [1]; children's courts dealing with offenses committed by children; courts of claims for hearing claims against the state; and administrative courts, such as industrial commissions, which hear and decide cases within their respective fields.[2]

Court Officers. All courts, with the exception of the very lowest, have clerks to keep the record of their proceedings and to perform ministerial functions such as the issue of processes and writs. In many states, the offices of county clerk and court clerk are combined in one person, who is an elective official.[3] In other states however there are separate clerks for the courts, in some instances appointed by the judges, and in others, particularly in the South and West, elected by the voters for short terms.[4]

[1] Below, p. 734. Where such courts are established, there is usually a separate one for each county. They are ordinarily known as courts of probate, but in some cases as surrogates' courts, or as orphans' courts.

[2] For this development see *Recent Social Trends*, Vol. II, pp. 1470 ff.

[3] A clerk is chosen for each county, even in cases where several counties are grouped in one judicial district, for it is desirable for each to keep its own records.

[4] There seems to be little reason for making the court clerk an elective official. His duties are generally purely ministerial and are performed under the direction of the

Prosecutor. An account of the judicial system would not be complete without some consideration of the prosecuting attorney (p. 742). As a rule he is an elective county officer, but in some instances he operates in larger districts.[5] He represents the state in criminal cases and conducts the prosecution. He makes preliminary investigations into crimes and determines whether a prosecution should be instituted. If he decides in the affirmative, he presents the case to the grand jury.[6] If the grand jury returns an indictment—that is, declares that the accused should be held —the prosecuting attorney takes charge of the prosecution at the trial. In one respect, his functions are similar to those of the counsel for the plaintiff in a civil suit. Yet, in another way, he is much more than that. He should not be interested in securing a conviction at any cost. He is a quasi-judicial officer and is, or should be, interested in getting at the truth and doing justice. In addition to performing his functions in criminal trials, he also represents the county in civil cases and is the legal adviser of other county officials.

Three Methods of Selecting Judges. In the great majority of the states judges are chosen by popular vote and on a partisan ballot in more than half of those states. Judges of the lower courts are elected for short terms; those of the higher courts hold their office for a long period, usually varying from six to twelve years. A few states have experimented with even longer terms. Thus judges of the Maryland court of appeals are elected for fifteen years, while in the neighboring state of Pennsylvania the term of the judges of the supreme court is twenty-one years. In general it may be said that the tendency is toward the longer term.

As suggested above there are a few states that do not vest the selection of judges (especially of the higher courts) in the people. In Delaware, for example, the chancellor, chief justice, and associate judges are chosen by the governor and senate; and in New Jersey the chief justice, together with the associate justices of the supreme court, are appointed by the governor. A unique arrangement prevails in New Hampshire, for there all the judges are named by the governor with the approval of his council—a small, popularly elected body which is distinct from the state legislature. Other states, including Rhode Island, Vermont, and Virginia, leave the choice to the legislature. In Massachusetts and New

judges, who ought to have the power of appointing and removing him. The highest court of the state has a separate clerk, who is also, in some cases, an elective officer.

[5] He is known variously as prosecuting attorney, district attorney, state's attorney, attorney for the commonwealth, county attorney, and county solicitor.

[6] For a discussion of the grand jury, see "Criminal Procedure," below, p. 741.

Hampshire the judges have practically life terms unless removed for cause; but in other states the term is fixed at a number of years.

Naturally there is difference of opinion respecting the three methods of choosing—namely, selection by the legislature, the governor, and popular vote. Which is the most likely to advance the cause of justice? It is generally agreed that the first is not at all desirable; the choice is too often made by log-rolling tactics when it is entrusted to the legislature. On the other hand, there is much to be said on the merits of the other methods—popular election and appointment by the governor, subject to confirmation by the state senate.

In the last ten years the urge for judicial reform has produced a new method of selecting judges. In California, for example, appellate judges are nominated by the governor before being considered by a judicial council. If confirmed by the latter the appointee serves until the next election at which he must be re-confirmed by the electorate if he is to continue in office. Missouri has adopted a somewhat similar system involving the governor, council, and the electorate.[7]

Argument over Election *vs.* Appointment. Friends of popular election insist that choice by the people seems to be the only democratic way of selecting important officials, that appointment by the governor renders the judges too independent of the popular will and tends to make them arbitrary. They point out also that, in the case of local judges, the people of the district are likely to know more about the qualifications of the candidates than the governor who is obliged to depend on recommendations of third parties—that is, on the recommendations of a local political machine. Again, the champions of the elective system contend that on the whole it has worked successfully and that excellent judges have been obtained under it. The higher courts of states like New York with elective judges have generally been composed of men of integrity and legal standing; judges who have served a long time are often renominated by both parties and thus reëlected without a contest. Finally, the advocates of popular election point out that in so far as judges have the power to declare laws void their functions are political, and therefore they should not be removed from popular control.

To offset these arguments, those who favor appointive judges say that where good judges have been obtained, they have been secured in spite of popular election, not because of it. Massachusetts, whose judges are highly esteemed by lawyers for their character and learning, is usu-

[7] *Book of the States: 1943–1944*, p. 292.

ally cited as the state in which the appointive system has proved eminently successful. It is argued that the people do not have the capacity necessary to pass upon qualifications required for a successful judge and often select the most popular man rather than the one most fit. Making the judge an elective officer, advocates of the appointive system continue, makes him dependent on political leaders; party service—not fitness—is made a test for the office; in order that the republican form of government may be a success and justice be done between man and man, the judiciary must be absolutely independent; the judge must not be afraid to render an unpopular decision which may perhaps cause his defeat if he is a candidate for reëlection. Therefore, they conclude, the appointive system is the only one which puts the judges in a position to do justice without fear or favor.[8]

Recall of Judges and Decisions. Akin to the older question of elective judges is the issue of the recall of judges by popular action (p. 551). The adoption of this device has been brought about by popular dissatisfaction with the action of the courts in declaring unconstitutional acts of state legislatures, particularly those dealing with labor and social reforms. As we have seen (p. 553), some of the states which have adopted the recall have exempted judges, while other states, Oregon, California, and Arizona, for example, apply it to all officers, including judges. The machinery for the recall of judges is the same as that employed in the case of ordinary administrative officers. It is likewise subject to the same variations but is found in at least six states.

Arguments over the question of the recall of judges are almost identical with those formerly employed when the question of popular election of judges was discussed.[9]

Compensation. The salaries of judges are usually rather low in comparison with the compensation afforded to judicial officers in Europe, or with the income of the first-class practicing lawyer. There has been however a tendency to increase the salaries of judges, and in some states they are well paid. Chief justices receive salaries ranging from $3,000 in North Dakota to $20,000 in Pennsylvania. The median salary of this official in the 48 states is $7,500 found in eleven states. In most states the chief justice receives the same salary as his associates.

[8] The American Judicature Society proposes a novel compromise, namely, the election of the chief justice of the state by popular vote and the appointment of the other judges by the chief justice.

[9] Beard and Shultz, *Documents on the Initiative, Referendum and Recall*, pp. 55 ff.

The Sources of Law

1. The Common Law. The first great source of American jurisprudence is the English common law.[10] Its characteristic feature consists in the fact that its rules are not to be found in a code enacted by the legislature, as is generally the case on the continent of Europe, but in decisions of the courts spread over several centuries. The law is thus built up and developed by judicial rulings. To discover the principle that governs in any particular question, an attorney practicing in a jurisdiction where the common law prevails must find out what has been previously determined by the courts on the point and be guided by their decisions.

Origins. The common law began its development in medieval England. When a case came before the royal justices in the Middle Ages they tried to ascertain the prevailing custom bearing on the subject and decide the question in accordance with it. Theoretically they did not make the law, but merely formulated the practices of the community into legal rules and gave them an official sanction. As a matter of fact they did make law, for they interpreted the customs and had the power to select some and discard others, especially if there was a conflict. When another case involving the same point was brought before the judges, they generally followed the rule laid down in the decision of the first case. If however it was thought that the original finding was incorrect or that conditions had changed, they would override the previous decision and work out a new doctrine. Thus flexibility was always possible—one of the best features of the common law. In this way a body of precedents was built up and a set of legal doctrines developed. When an entirely novel case came up, some "general principle" of the common law was invoked in its determination.

Equity. As the common law developed, it gradually became more and more crystallized and less pliant. The judges tended to be technical, and any litigant whose case did not fall within certain well-defined classes was liable to be denied the relief really due him. In numerous instances in which obvious injustice was done there was no remedy at law.

These deficiencies of the common law were countered by the development of a new body of jurisprudence along with it—a system known as

[10] Louisiana, whose law is derived from the continental system, is an exception. There are some southwestern states which are not regarded as common law states.

equity. It was customary for a person who felt that he had been wronged and could obtain no remedy at law to petition the king, or the king's chancellor, for special consideration. The granting of this favor was at first considered an executive act and purely a matter of grace, but gradually the chancery evolved into a regular court with its own body of equity principles, which were much more elastic and far less technical than the ordinary law. Equity therefore gave relief when none could be had at law; and in many instances where the legal remedy was inadequate it accorded the satisfaction that was really demanded by the plain justice of the situation.

For example, the only redress granted at law for wrongs done to persons or property is money damages, but equity goes much farther and will command a person to do something which is for the benefit of the plaintiff. Thus, in some kinds of contracts, a court of equity will compel the party in default actually to perform his part of the agreement on pain of imprisonment. Again, equity will command a person, by an order called an "injunction," to refrain from doing something which is injurious and unjust to the plaintiff.

English Law Carried to America. The English systems of law and equity just sketched were brought to America. When the colonies cast off allegiance to Great Britain, some of the state constitutions provided that the common law should continue in force; but without such a provision, it was binding in American courts and is applied today in so far as it has not been modified by legislation. Very few commonwealths however have retained the system of separate chancery courts.[11] Generally the same court administers both law and equity, and the term "common law" has come to include both law in its technical sense and equity.

State Variations. Although the common law as administered in the various states constitutes a single system of jurisprudence, it has undergone modification in the different jurisdictions. Thus, for instance, on many points the "common law" of Massachusetts and New York will be found to differ. In each state the interpretation which is binding is made by its court of last resort; and as different courts will hold varying views on what is or ought to be the law on a particular topic, the rules applied in different commonwealths will vary. But the courts of each state by no means disregard the decisions of sister states. While the latter are not considered as authoritative as the precedents of the state in

[11] New Jersey, Tennessee, Alabama, Delaware, and Mississippi.

which the case is tried, they are treated as advisory statements of the law and have a great moral weight, particularly in matters which have not been passed on in that jurisdiction.

2. Legislative Law. The second important source of the law is the statutes enacted by the state legislatures.[12] Though the number of acts passed by the forty-eight legislative bodies is enormous, the majority of them, probably nine-tenths, are administrative in character. They relate to the structure and functions of the government—elections, powers of officers, etc.—and do not generally affect the private law enforced by judicial tribunals. There are a few branches of private law however which it is customary to cover by statute.

Types of Codification. During the last fifty years several fields of the common law have been occupied by statutes, grouped in "codes."

(1) One of these is criminal law. In many states there is a penal code or penal law defining the various crimes and providing punishments for each of them. It is generally declared in such cases that only acts prescribed as crimes in the code shall be penalized, and the common law of crimes is abolished, except in so far as it is used as a guide for the interpretation of the statute.

(2) Criminal procedure is another subject that is commonly covered by statutory enactment. Special codes or laws regulating in detail such procedure now exist in a large number of the states.

(3) A third very important field now frequently occupied by statute is civil procedure. Through legislation of this character the technical and cumbersome system of common law pleading has been simplified and modified. New York was the pioneer in this reform and many other states have since followed the example.

(4) Another type of encroachment on the common law is to be found in the codification of the rules on particular topics and their enactment in statutory form. Thus in New York—one of the states which has gone far in this direction—we find a real property law, general business law, lien law, etc. The tendency toward codification has been expedited by the National Conference on Uniform State Laws consisting of commissioners appointed by the governors of various states. It has made model codes on many subjects, particularly those relative to commerce, and has recommended its proposals to the state legislatures for adoption. For example, the commissioners drafted the negotiable instruments law,

[12] In the broadest sense, state and federal constitutions, executive orders, etc., are to be included among the sources of the law.

which has been enacted by all the states and a warehouse receipt law which all but one state has enacted. Further evidence of their success is seen in the facts that the statutes of thirty-four states now include sales of goods acts, forty states narcotic drug acts, thirty states bill of lading acts, and thirty-one states criminal extradition acts.

(5) Finally, some states have attempted to codify *the entire domain of law*. Louisiana adopted a code soon after its annexation by the United States. California, North Dakota, South Dakota, and some other states, in the West or South, have enacted codes which purport to include all the principal rules of the common law. In those commonwealths the code, instead of previous decisions, must be examined in order to find the law that governs a particular case. But even there vestiges of the common law remain, for no legislature, no matter how wise, can foresee every possible set of circumstances that may arise and provide in advance for every question of law that may come up.

Objections to Complete Codification. Most lawyers consider the codification of the whole common law undesirable. In the first place, they contend that a civil code fails to accomplish the only purpose for which it is enacted; namely, that of making the law more definite and certain. It is conceded that no code can provide for all contingencies and therefore its rules must be made sufficiently general and elastic to allow their application to novel cases. Quite as much litigation is likely to arise over the interpretation of its terms as over the application of common law rules to particular subjects.

In addition, opponents of systematization urge that a civil code involves a number of positive disadvantages. It increases the diversity of law among the various states. While the development of private law is in the hands of the courts, the tribunals of one state are guided to some extent by the precedents of other commonwealths, and at times they modify their views in accordance with the general weight of authority, thus working toward a desirable uniformity throughout the United States. But the moment that the law is codified, the diversities among the states are crystallized and they may increase under subsequent legislative amendments.

The greatest objection however brought against complete codification is its tendency to make the law rigid. Where the common law is in force, the courts, by distinguishing new cases and at times by overruling former precedents, may easily adapt its rules to new conditions and keep it more or less up to the needs of the community. But as soon as the

law is codified, this power is taken away from the courts; henceforward the terms of the law can only be modified by legislative action, which leads to constant tinkering and uncertainty.

The Civil Law

The whole domain of the law falls into two divisions: civil and criminal. The purpose of the former is to protect the rights of the individual and to redress his wrongs. The rights of the individual may be classified under three heads: personal security, personal liberty (pp. 19 ff.), and private property. The last is the most complicated of the three and to it we now turn.

1. Real Property. Property is divided into two classes, real and personal. Real property consists, in general, of land and rights connected with land, while personalty includes movable things and rights not connected with land. Real property is again subdivided into corporeal, or tangible, and incorporeal, or intangible. The former is land and buildings, while the latter includes all the rights which a person may have in the land of another, such as a right of way through his neighbor's farm, a right to pasture cattle in another's meadow, etc.

According to legal theory, land is not owned absolutely. The so-called owner has an interest or an "estate" in the land. These "estates" are of various kinds. The highest estate that one can have in land is an estate in fee simple, which virtually amounts to absolute ownership, and the person who has such an estate in a plot of land is ordinarily regarded as the owner. He may use it for any purpose that does not violate another's right or a public regulation, and dispose of it in almost any way that he chooses. Next to the estate in fee simple comes the estate for life. The person who owns land in fee simple may convey it to another to hold during life. The latter thus gets a "life estate." Then there are life estates which arise by operation of law; in most states a husband has a life estate, which is called curtesy, in his wife's real property, after she dies. In the same way, if the husband dies first, the wife has a life estate, or dower, in one-third of all the real property owned by the husband during their married life.[13]

[13] Estates in fee simple and estates for life are called "freehold estates," all others being named estates less than freehold. The most important one in the latter category is the estate for years. A person who leases land or a building from another for a period longer than one year is said to have an estate for years. Estates can be created to commence in the future. For instance, a person may grant an estate for life, at the

2. Personal Property. Personal property is divided into four main classes. Leases of lands or buildings are personal property and constitute the first class; they are known as chattels real. The second group includes everything which is ordinarily known as personal property; that is, tangible things, such as watches, pianos, clothing, etc. The third group consists of rights which do not extend over any tangible things, either immovable or movable, but are directed against particular persons or corporations, such as claims against debtors, notes, stocks, etc.; they are called in law "choses in action." The fourth group consists of trademarks, copyrights, etc.

3. Torts. Violations of private rights recognized by law are called "torts." A person guilty of a tort may be sued for damages by the person whom he injures. For convenience, we may subdivide torts into three classes: those directed against the person, those aimed at property, and those which are invasions of both person and property.

(1) False imprisonment—one of the torts in the first class—consists of arresting or detaining a person without sufficient cause. Somewhat akin to false imprisonment is malicious prosecution. Another tort directed against the person is assault and battery.[14] All the various forms of disturbance in family relations are torts, such as abduction of a wife or child, alienation of affection, etc. Finally, there is the tort of defamation of character. It occurs in two forms: libel, which is expressed in print or writing; and slander, or oral defamation.

(2) Of the torts directed against property, the most important is trespass or disturbance of another in the possession of his property. This is found in two forms: trespass upon land—mere unauthorized entry on another's land is sufficient to constitute such an invasion; and trespass to goods, which consists in wrongfully taking or destroying personal property.

(3) Some torts affect both person and property. The first of these is nuisance. In law any disturbance of another's reasonable use and enjoyment of his own property constitutes a nuisance. Thus the maintenance of smelting works which give out unpleasant odors, unreasonable ring-

same time specifying that when the life tenant dies a certain person shall get the estate in fee simple. Estates may also be made conditional. To illustrate, a person may leave all his real property to his widow for life, provided she remains unmarried. Then if she marries, she generally loses the estate.

[14] Putting another in fear of personal injury is an assault, while inflicting violence upon him constitutes a battery.

ing of bells, noises which interfere with sleep, and numberless other acts are called nuisances. Finally, there is the tort of negligence, which consists in the failure to perform the duty of care which one owes to others. For instance, the reckless running of a railroad train which results in an accident, negligent driving in a city street, the collapse of a building due to defective construction, are actionable torts.

Although a person may be guilty of a tort, there are circumstances under which no recovery is allowed against him. If the injured party was himself guilty of negligence and his negligence was one of the causes that led to his injury, ordinarily he cannot recover damages.

4. Contracts. A large group of rights arises from agreements between individuals known as "contracts." To constitute a contract there must be an offer made by one party and an acceptance of the offer by the other. If Smith says or writes to Jones, "I offer to sell you my house for $10,000," and Jones replies "I accept your offer," in legal terminology their minds have met and there is a contract between them. Smith is then bound to convey the house, and Jones to accept and pay for it. A contract, to be valid, must be made for a "consideration"; that is, each party must give up something. In the illustration above, one promises to convey the house, while the other agrees to pay for it. A mere promise made by one party, when nothing is offered in exchange for it, is not binding. A contract need not always be expressed in so many words, but is often implied from the transaction. For instance, if one orders goods from a store, a promise to pay their reasonable value is implied.

If one of the parties to a contract fails to perform his obligation, the other may sue him and get such damages as were caused by the breach. But in some cases the injured party may do more. He may bring a suit in equity (p. 727), and the court of equity will order the other party to carry out his part of the contract. This relief, which is known as "specific performance," is limited however to certain classes of contracts, such as agreements for the sale of real estate.

5. Domestic Relations. One of the important branches of the law deals with marriage and all the relations growing out of it. At common law no particular formality was necessary to constitute a valid marriage. An agreement to live as husband and wife was sufficient. This rule is now generally modified by enactments requiring a formal license and solemnization of marriage. But no marriage may be consummated anywhere between close relatives or by persons below a certain age, and any mar-

riage induced by fraud or duress may be declared void at the instance of the injured party. Mental or physical incapacity is also a ground for annulment of marriage.

At common law, all personal property belonging to a woman becomes the property of the husband on her marriage; the husband is obliged to support his wife, and for this reason he is liable for all necessaries furnished to her, if he fails to provide them himself; he is also liable for debts contracted by his wife previous to their marriage; a married woman is incapable of making a binding contract, unless her husband has abandoned her; the husband may be sued for any torts committed by his wife, and at the same time he may recover for any injury done to her. All these common law rules however have been materially modified throughout the United States; in the most advanced commonwealths married women now have substantially the same property rights as men; and there is a strong movement in favor of giving women complete equality with men before the law.

In every state except one, South Carolina, the marriage tie may be dissolved by divorce. In certain cases where a sufficient cause for an absolute divorce does not exist, a limited divorce or a separation may be granted. The principles on which a divorce is allowed vary greatly in the different states, the rule being very strict in some commonwealths and very liberal in others. In New York, the only ground for divorce is adultery, but in some states mere incompatibility of temper or abandonment for a period is sufficient. Certain Western states make the process of divorce so easy that persons from other parts of the country desirous of dissolving their marriage ties flock there to bring proceedings. In 1942 the Supreme Court of the United States reversed a long standing rule by holding that a state could no longer disregard the "full faith and credit" clause of the federal Constitution in respect of a divorce obtained in another state (p. 496).

6. Inheritance. A branch of the law somewhat akin to domestic relations deals with the distribution of the property left by deceased persons who have made no wills. Naturally rules of succession vary greatly in the different states. Often there are separate rules for the disposition of real and personal property. If the deceased has left a valid will, the law provides for its enforcement and the disposition of the property in accordance with its terms. Usually a person names in his will an executor, who is to administer the property and distribute it to the legatees. In case there is no will, the court of proper jurisdiction may appoint an ad-

ministrator to take charge of the property and distribute it in accordance with the requirements of the law.

7. **Corporations and Associations.** Finally, the law governs the various forms of associations among individuals and regulates the rights and liabilities of the members. The principal forms which these associations take are partnerships and corporations, between which there are several important distinctions. A partnership can continue in existence only so long as the partners are living, but a corporation is permanent and is not in the least degree dependent upon the lives of its original members. Partnership action in important matters may require unanimity; in corporations, the will of a majority prevails. Every member of a firm is generally liable for all the partnership debts, while a stockholder of a corporation is usually responsible for no more than the par value of his stock. An interest in a partnership cannot be transferred without the consent of the other partners, while shares in a stock company may be conveyed by the owners at will.

Civil Procedure

Starting a Suit at Law. If a person wishes to enforce some legal right which he thinks has been violated, he must bring an action in a court. Ordinarily a suit is commenced by the preparation of a statement, called the complaint or declaration, setting forth the facts on which the plaintiff's grievance is based; this is served on the defendant, together with a summons calling upon him to answer within a certain time. If the defendant admits the facts but believes that the plaintiff has no right of action, he may file what is called a "demurrer." An argument is then had before a judge on the question whether, granting the facts alleged in the complaint to be true, a sufficient cause of action has been established. The other alternative before the defendant is to challenge the facts alleged in the declaration. He must then serve on the plaintiff what is called an answer or plea, either denying the whole or a portion of the complaint or acknowledging its truth and making some affirmative defense. The plaintiff now has his choice of demurring to its sufficiency or replying to the facts.

Wherever the original common law procedure prevails, an interchange of pleadings, as these various statements are called, can go on indefinitely until an issue is reached, one of the parties affirming some fact and the other denying it. But the various codes of civil procedure in

force (p. 729) frequently limit the number of steps to two—the plaintiff's complaint and the defendant's answer; sometimes they also allow the plaintiff to reply to the answer.

Judge and Jury. As soon as its turn on the court calendar is reached, the case comes up for trial. If it is a suit in equity, it is ordinarily tried by a judge alone. If it is a suit at law, it is generally tried before a judge and a jury, unless the amount of money involved is small or jury procedure is waived by agreement of the opposing sides. In a jury trial, the principal duty of the judge is to supervise the conduct of the affair and to pass on matters of law, while the function of the jury is to decide questions of fact under the guidance of the judge.

If a jury is to be employed, several possible jurors are summoned; they are examined by the opposing counsel; and if it is shown that any one of them is legally exempt or incompetent to serve on account of bias or otherwise, the judge may excuse him. Besides this, each side may challenge a certain number of jurors without stating any cause. When the jury of twelve members—in some states, a smaller number—has been secured, the actual trial begins.

Presentation of the Case. Usually the plaintiff's counsel opens by describing the nature of the case to the jury and stating the main facts which he expects to prove. He then calls his witnesses and examines them one by one, the defendant's attorney being given an opportunity to cross-examine at the close of each direct examination. The questions that may be asked are regulated by rules of evidence, and an error on the part of the judge in the admission of improper evidence or the exclusion of competent testimony is ground for reversal of the judgment on appeal to a higher court.

After the plaintiff's side of the case has been laid down, the defendant's side is presented in the same manner. His attorney makes a statement to the jury and then examines his witnesses, the counsel for the plaintiff being allowed to cross-examine. The plaintiff and defendant may be witnesses if they wish. After the defendant rests, the plaintiff may introduce evidence in rebuttal, and then the defendant may bring forth testimony in sur-rebuttal. At the close of the evidence the attorneys for the opposing sides may address the jury.

Action of the Court. If the plaintiff has failed to make out a prima facie case, the judge may dismiss the complaint without sending the issue to the jury. Or if from the evidence that has been presented only one conclusion of fact is possible, the judge may instruct the jury to return a

verdict in accordance with that conclusion. If, in such circumstances, a verdict for the plaintiff is directed, the only question to be decided by the jury is the amount of damages or the award. But if there are controverted matters of fact, as is usually the case, decision with regard to them is left to the jury, subject to instructions from the judge with reference to the law to be applied.

The jurors then retire to consider the evidence and reach a decision. They must find a verdict either for the plaintiff or defendant, or agree to disagree; and if they decide for the plaintiff, they must also assess the damages. As a rule the verdict must be unanimous; but there is a tendency in many states to allow decision by less than the total number. If the members of the jury are unable to agree, the case, unless the plaintiff drops it, will be tried again with another jury. If a jury is not employed, the procedure is practically the same, except that the judge passes upon all questions himself.

Verdict and Execution. Since the customary remedy at law is money damages, a judgment for the amount of the verdict is entered against the defendant. If he does not pay voluntarily, an "execution," or an order to the sheriff, may be issued. Armed with this writ, the sheriff or one of his deputies takes possession of the defendant's property and sells enough at auction to satisfy the award to the plaintiff and all legal charges. Of course, if the defendant should be a man without property, the plaintiff has no redress. In litigation over title to real estate, the usual judgment simply authorizes the plaintiff to enter upon the premises. If the defendant then resists the plaintiff, he may be evicted by force.

Decree in Equity. In equity cases the decision of the court is called a decree. It does not ordinarily award money damages, but orders the defendant to do or not to do something. The decree may, for instance, command him to carry out his part of a contract and convey to the plaintiff land which he agreed to sell to him, or it may enjoin him from maintaining a nuisance. In fact, a decree in equity may take on any one of innumerable forms, but it always is in essence a command to do, or not to do, some specific thing. If the defendant fails to obey the decree, he is guilty of contempt of court, and may be fined or imprisoned until he complies with the order.

Grounds for Appeal. After the case is decided, the losing party may appeal, alleging (*a*) that errors of law have been committed by the judge, or (*b*) that the verdict was contrary to the weight of evidence.

The party that loses on appeal may sometimes carry the matter still higher, until it finally reaches the supreme court of the state or of the nation. Usually an appellate court passes only on questions of law.[15]

If the highest court which the case can reach affirms the judgment of the trial court, that ends the litigation. If the judgment is reversed, the case is usually sent back for a new trial (p. 739). Then the party that loses on the second trial may compel his adversary to run the gantlet of the appellate courts. If the judgment is again reversed, a third trial may be had and the same process may be repeated. If the party that loses at each stage desires to appeal, there is no way of ending the litigation until a judgment of the trial court is affirmed on the highest appeal.

Appeal Abuses. In some instances this freedom of appeal results in practical injustice. There is one case on record in New York which was in the courts for twenty years. In 1882 a brakeman who was injured while in the service of a railroad brought suit against the company.[16] In 1884 he recovered $4,000 damages, but two years later the verdict was reversed on appeal. On a new trial he got a verdict for $4,900. This was appealed to two courts successively. The first affirmed and the second reversed the judgment. The company was successful at the third trial in 1889. Two appeals by the brakeman followed, the court of last resort deciding in his favor in 1897. The case was then tried for a fourth time, and the brakeman recovered $4,500. The company then appealed and met with success. A fifth trial was necessary, and the jury awarded the plaintiff $4,900 damages. The judgment was again set aside on appeal. A sixth trial followed with the same result. In 1902 the seventh and last trial took place. The plaintiff recovered $4,500. Again the company appealed, and was defeated. Thus the chapter was closed.

This is, of course, an extreme case. Appeals are generally taken only when the counsel in charge feels that there is a fair chance of success or of wearing out the opposing party. Most appeals are unsuccessful, so that only a minority of cases have to be tried more than once.

Criticism of Appeal Abuses. Nevertheless, freedom of appeal and long drawn out litigation have been made the subject of severe criticism. De-

[15] The appellate courts always consist of two or more judges, and the opinion in each case is written by one of them. The opinions of the highest court of each state, and sometimes those of some of the inferior courts, are published and become precedents for future decisions. If one or more of the judges dissent from the opinion of the majority of the court, a dissenting opinion may be handed down. In most states there are special reporters, whose duty consists of publishing the official reports of the decisions of the court.

[16] Baldwin, *The American Judiciary*, pp. 366–367.

lays in civil cases are far more frequent than in criminal cases, and, as has been truthfully remarked, often amount to a denial of justice. But, on the other hand, it is hardly practicable to restrict freedom of appeals without making arbitrary rules that would be bound to work hardship at times. To allow appeals only in controversies involving large amounts would give unjust privileges to wealthy litigants. Moreover cases of trifling pecuniary significance sometimes involve legal principles of great importance, which should be passed upon by the higher courts.

It has been suggested that appeals should not be made a matter of right, as they usually are today, and that no appeal should be allowed unless permission is specifically granted by the trial judge or by the proper appellate court. However it is pointed out that such a system might frequently result in a denial of review in cases in which injustice had been done and should be righted by a higher tribunal.

Generally, when an appellate court reverses a judgment, it has the power to enter a final judgment for the other party. But this authority is rarely exercised; ordinarily the case is sent back for a new trial. In some instances, such action is inevitable, particularly when the proof of essential facts has been shut out at the original hearing or damages have been assessed on an improper basis. Yet very often the appellate court has sufficient data on the record before it to warrant making a final disposition of the case. If this were done whenever it is possible, one of the largest sources of delays would be abolished.

Criminal Law

Crimes as Public Wrongs. We have briefly surveyed the principal wrongs against which the state protects the individual, and have examined the methods for redressing them. We must now consider another class of wrongs—public wrongs, or wrongs against the state or community. Wrongful acts included within this class are known as "crimes," and are punished by the state. While in most cases these acts primarily harm some person, they are also regarded as injuring the state, because it has an interest in the safety of the lives and property of its citizens.

Inasmuch as a criminal act may at the same time contain the elements of a civil injury, a person guilty of a crime may lay himself open to a suit for damages as well as to punishment. Thus if one person assaults another, he may be prosecuted by the state as a criminal and also sued for damages by the injured party.

Classes of Crimes. Crimes are divided into two broad classes: felonies and misdemeanors. The former include all graver offenses, generally those punished by death or by confinement in a state's prison. Lesser offenses constitute the second class. They are ordinarily punished by fines or imprisonment in a penitentiary or county jail for comparatively short terms.

Types of Felony. The principal felonies are murder, manslaughter, arson, burglary, robbery, and larceny. Murder is the intentional, and manslaughter the unintentional, killing of a human being. In some states murder is divided into degrees according as it is premeditated or unpremeditated. Manslaughter may take any number of forms and sometimes is also divided into degrees. Thus if a person dies as a result of a blow which was not intended to cause death, or if he is run over and killed by an automobile driven in a negligent manner, or if he meets his death in a railroad wreck brought about by the failure of the proper employee of the company to give the required signals or set the switch, the act in each case constitutes manslaughter. Intentional killing in a sudden heat of passion caused by adequate provocation is also generally regarded as manslaughter, not murder.

Arson is the willful and malicious burning of a building. Any incendiarism, however slight, is sufficient to constitute the crime. Burglary consists in breaking and entering into the house or building of another with the express intention of committing a felony therein. It makes no difference whether the offender actually commits some crime within the building: the breaking and entering is itself burglary. Robbery is taking another's property from his person or in his presence by force. Picking a man's pocket is larceny; but taking money from a person at the point of a pistol or knocking him down and stealing something from him is punishable as robbery. Stealing the personal property of another is larceny. Every form of theft and swindling is larceny; it is often divided into grand and petty larceny, according to the amount stolen, the former being a felony and the latter a misdemeanor.

In addition to those enumerated above, many other offenses are often treated as felonies. Forgery generally comes in this category. It consists in making or altering a written instrument to defraud another. Thus, writing another's signature on a check or changing the amount called for constitutes forgery. Kidnaping is usually made a felony. Bigamy, that is, having more than one wife or husband at the same time, falls

within this class. So also does perjury—the willful giving of false testimony while testifying under oath.

Misdemeanors. Other offenses are misdemeanors. They vary in enormity and from state to state. As a rule bribery is a misdemeanor though at times it is made a felony. The same is true of knowingly receiving stolen goods. Assault and battery, disturbance of the peace, violations of the pure food laws, the use of false weights and measures, spitting on the floor of a street car or other public conveyances, and innumerable minor offenses are misdemeanors.

Attempts and Accomplices. It is not alone for offenses actually committed that punishment is inflicted. It often happens that a person conceives the design of committing a certain crime and takes steps toward carrying out his purpose, but is, for some reason, prevented from effecting it. In that case he may be punished for the attempt to commit the crime.

Not only the principals who actually commit a crime are punishable for it; their accomplices are liable as well. Accomplices are of two classes: accessories before the fact and accessories after the fact. The former category includes anyone who in any way advises or assists in preparations for a crime which is afterward committed. In some states, accessories before the fact are put on the same level with principals and are punished as such. An accessory after the fact is one who assists in the escape of an offender or helps to cover up a crime.

Element of Intention. To be convicted of a crime, a person must have a criminal intent. This is ordinarily presumed. A small child cannot have such an intent and his wrongful acts do not constitute crimes. On similar grounds an insane person is not to be held responsible for his acts. But legal tests of insanity are stricter than medical tests, and often persons considered lunatics by physicians are held to be sane in law. An intoxicated person is responsible for his crimes, voluntary drunkenness being no excuse, though it may be regarded as a mitigating circumstance.

Criminal Procedure

Arrest and Preliminary Hearing. While civil actions are brought by the injured party, criminal prosecutions are conducted by a prosecuting officer in the name of the state. When an offense has been committed, a police officer or a private individual may make a complaint before a

magistrate who will thereupon issue a warrant or order of arrest against the person or persons accused. But in many cases an arrest may be made without a warrant, particularly when the crime occurs in view of the person who apprehends the criminal, or when the officer in charge knows that a crime has been committed and has reasonable grounds for believing that the one whom he is taking into custody is guilty. The exact rules defining the cases in which an arrest may be made without a warrant vary in the several states.

After a person is arrested, he is brought before a magistrate [17] as soon as possible. The proper judicial officer holds a preliminary examination and hears any evidence that may be produced; but neither at this nor at any subsequent stage of the proceedings may the accused person be questioned, unless he himself desires to testify. This is one of the cardinal principles of English and American criminal procedure and is one of the main distinctions between the Anglo-American system and that in vogue on the continent of Europe where the accused may be and usually is subjected to questioning; but in many places in the United States it is a pious fiction owing to the use of "third degree" methods by the police.

Bail. If the magistrate before whom a prisoner is arraigned finds that there is probable cause for holding him for trial, he commits the accused to jail, or allows him to give bail unless the offense is especially grave. By giving bail is meant that one or more individuals, called sureties, sign a bond obligating himself or themselves to pay a certain sum of money to the state or county if the accused person fails to appear when his case is called for trial. If bail is given, the person is released.

Indictment by Grand Jury. The case (unless it is a petty offense) is now ready to enter upon the next stage of the proceedings, namely, indictment by the grand jury, to which the matter is presented by the prosecuting attorney. The grand jury is one of the oldest institutions of the common law and for a long time it was cherished as a safeguard against needless and oppressive prosecutions. It is a body of citizens drawn from qualified inhabitants of the county. Its duty is to pass on all charges involving important crimes; if it decides that there is at hand sufficient evidence, it finds an "indictment" against the accused and the case goes to trial. If the grand jury determines that the evidence is insufficient, the charge is dismissed and the prisoner is released from jail or his bondsmen are discharged, as the case may be.

The proceedings of the grand jury are secret and it hears only one side

[17] For the writ of habeas corpus, see above, p. 28.

of the case—the prosecution. Generally evidence is presented by the prosecuting attorney, who also prepares the bill of indictment and, if the grand jury approves, it indorses the bill. Its decisions need not be unanimous; a majority vote of the whole body is sufficient. The grand jury is not limited to passing on matters presented to it by the prosecuting attorney; it may undertake investigations of its own, but in practice it seldom takes the initiative. If the accused in a particular case has not been arrested, grand jury proceedings may, of course, mark the preliminary stages in a criminal process.

Indictment by Information. In some states indictment by grand jury, even in serious crimes, is not necessary to bring a person to trial. There the end is accomplished by "information"; that is, by an accusation lodged in the proper court by the prosecuting attorney. This procedure gives more power to the prosecuting attorney, as he then has the sole right to determine whether a case shall be brought to trial or not. As a general rule, prosecution by information is employed for minor offenses in all parts of the country.

Charge and Pleading. After a person is indicted, he is brought before the court, the charge is read to him, and he is directed to plead. If he pleads guilty, no further proceedings are had, and the judge imposes sentence either at once or at some later date. If he pleads not guilty, a trial is accorded to him.

Selecting the Jury. When the date set for the trial arrives, the case is formally called by the presiding judge. A jury is empanelled, usually twelve in number. The various citizens summoned for jury duty are examined in turn by the prosecuting attorney and the defendant's counsel. At times the process is a long one, particularly in important and sensational affairs. Anyone who states that he has formed a definite opinion about the case is incompetent to serve, and this rule always excludes most intelligent persons if the crime has attracted much attention and has been extensively discussed by newspapers. In addition to this, each side may challenge a certain number of jurors peremptorily without giving any reason.[18]

Case Developed by Prosecutor. After the jury has been selected, the prosecuting attorney opens his case, inasmuch as the defendant is presumed to be innocent and the burden of proving him guilty rests on the

[18] The old process of selecting jurymen has been severely criticized within recent years on account of the great expense and waste of time. In the famous Gilhooly case in Chicago it took three months to secure a jury and the costs of that process to Cook county are estimated at $18,000.

state. In his opening speech, he generally describes the circumstances in which the alleged crime was committed and indicates the line of evidence by which he expects to convict the prisoner. The prosecuting attorney then summons his witnesses one by one, and examines them about the facts of the case. After he finishes with a witness the defendant's attorney may cross-examine.

The questions put to each witness are limited by rules of evidence; no irrelevant matter may be introduced and his testimony must be confined to facts with which he is personally acquainted. In principle the purpose of these rules is to prevent the jury from being misled or prejudiced by opinions and allegations unconnected with the merits of the issues. If either lawyer believes that the other is asking an improper question, he may object, and the judge then decides whether the objection should be allowed. If the defendant's lawyer is dissatisfied with a ruling against him he takes an "exception," with the thought of an appeal should he lose. If he believes that grossly prejudicial questions have been asked of witnesses, he may ask the judge to declare a "mistrial," which means stopping the proceedings and starting a new trial.

The Defendant's Side Presented. After the prosecution completes the presentation of its side of the case, the attorney for the prisoner presents the other side in about the same manner. He first makes an opening statement to the jury, and then calls and examines his witnesses one by one, the prosecuting attorney being given a chance to cross-examine as soon as each direct examination is finished. The prisoner is not questioned at any stage of the trial unless he wishes to go on the stand as a witness in his own behalf, and in that event the prosecuting attorney may cross-examine him in the same way as the other witnesses for the defense.

Charging the Jury. On the completion of the testimony, the prosecuting and defending counsels make speeches to the jury; then the judge delivers his charge. He sums up the evidence brought out by each side, and outlines to the jurors the law applicable to the case before them. Thus, he tells them what must be shown in order to constitute the crime with which the defendant is charged, describes the different degrees of that crime (if the particular offense happens to be divisible into degrees), and states how much proof is necessary. The jury must feel convinced beyond a reasonable doubt that the defendant is guilty before it decides against him; otherwise it must find a favorable verdict or report inability to agree.

The Verdict. When the judge finishes his charge, the jurors retire to deliberate. They must, as a rule, arrive at a unanimous verdict, and often that takes many hours.[19] If they are unable to agree, they are discharged, and the prisoner may be tried again, should the prosecution so decide. When the jury comes to an agreement, it returns to the courtroom and the foreman announces its verdict. If the defendant is found not guilty, he is discharged at once. If he is convicted, the judge imposes sentence either immediately or at some future date.

Punishment. The punishment for serious crimes is usually imprisonment. For minor offenses a fine is often imposed, but sometimes the sentence consists of a combination of both. The type of imprisonment varies from a short confinement in the county jail or penitentiary to imprisonment at hard labor in a state prison for life. Generally the law lays down minimum and maximum limits of punishment for the various offenses, and the trial judge has discretion within those extremes. In a few states convicts are compelled to work in the open air in chain-gangs. Formerly it was a common practice to let them out on contract to private employers; but this system has awakened great opposition and is being abandoned.

Rewards for Good Behavior. For good behavior the prisoner usually receives a substantial reduction in the term of his sentence, and it often happens that he is pardoned by the governor before it ends, if there are extenuating circumstances warranting mercy.[20] To encourage reform among convicts, several states have devised a new scheme of punishment known as the "indeterminate sentence." Where it is in effect the judge imposes a minimum and maximum term, and the actual period of confinement within those limits depends upon the conduct of the prisoner himself. If he is liberated before the close of the maximum term, he is generally kept on parole and obliged to report to prison officials or to special authorities at stated intervals until the end of the period.

Death Penalty. For murder the death penalty is inflicted in most states, and in a few commonwealths it is also imposed for some other crimes. Execution is sometimes carried out by hanging, but in a number of commonwealths electrocution or lethal gas has been substituted as more humane. Several states—Maine, Michigan, Wisconsin, Rhode Island, Minnesota, and the two Dakotas—have abolished capital punish-

[19] In a few states a verdict by nine or ten out of the twelve jurors is allowed in some minor cases.

[20] On the pardoning power, above, p. 635.

ment entirely. Opponents of this extreme penalty claim that the fear of death does not diminish the percentage of crimes, and that juries are reluctant to convict where they know that the result will be death, often choosing a lesser degree so that the prisoner may be punished by imprisonment. Although cases in which innocent persons are, by a miscarriage of justice, put to death are rare, still several are on record, and a mistake may be made at any time on account of the circumstantial character of the evidence frequently admitted. Finally, the reformation of the offender, as well as the protection of society—not retaliation—is the end of enlightened punitive justice, and the death penalty is inconsistent with such a humane notion.

Appeals. When the prisoner has been found guilty and sentenced, his resources are not yet at an end. He may appeal to a higher tribunal if serious mistakes have been made by the trial judge. Alleged errors in the admission or exclusion of evidence or incorrect statements of the law applicable to the case made in the judge's charge afford legal grounds for reversal. If the appeal is decided against the prisoner, he may, in some instances, carry the case still higher, until finally it is passed upon by the highest court of the state or by the Supreme Court of the United States, should a federal question be involved, especially due process of law under the Fourteenth Amendment (p. 487). If he wins on the appeal, a new trial is usually granted, and the case is sent back for a rehearing to the court in which it was originally tried. If he loses his appeal, the defendant must acquiesce in the sentence, unless the governor can be persuaded to pardon him.

Problem of Appeal Abuses. A great deal of criticism has been evoked against liberality of appeals in criminal as well as civil procedure and the consequent failures of justice. It cannot be denied that the verdicts are too frequently reversed for purely technical reasons, involving few, if any, issues of justice, but there are enough instances of palpable wrongs righted by higher courts to put us on our guard against restrictions too rigid. The remedy certainly does not lie in a narrow limitation of appellate jurisdiction. If a prisoner has no absolute right to appeal, many serious mistakes will go uncorrected. A middle ground is possible. Appellate courts may adopt the practice of confirming each verdict unless the alleged errors at the original trial could have actually wrought a prejudice in the minds of the jury.

Criticism and Constructive Tendencies

Nature of Criticisms. There is undoubtedly a great deal of dissatisfaction with the administration of the law on the part of members of the legal profession and others interested in the matter. In addition to protests against delays and appeals and against the conduct of local courts, there is a growing criticism of the judicial system itself. It is said that there are too many separate courts having jurisdiction over the same classes of cases and that they render conflicting decisions and opinions respecting identical laws. Legal tradition generally requires judges to abstain from rendering an opinion relative to the constitutionality or meaning of a law except when considering an actual lawsuit brought before them. As a result, the public in many cases cannot know what is lawful or unlawful without resorting to legal proceedings; and such proceedings are costly, besides being tedious. Disputes among business men even though slight in nature, if long delayed, may work inconvenience and loss in production and trade. Poor persons or persons of moderate means are often unable to obtain justice without a lawsuit for which they have no money to pay. Hence they suffer losses which are small in amount but ruinous to them. Finally, it is pointed out that state courts often set aside state laws by a small margin or four to three judges, or three to two, creating uncertainty and dissatisfaction among the people interested in the fate of the measures in question. All these matters are now vigorously discussed by members of bar associations and other citizens, and out of the analysis of the situation have arisen a number of constructive remedies.

Judicial Consolidations and Councils. To meet the criticism respecting overlapping and conflicting jurisdictions, it is proposed to create one consolidated system of high state courts in which the supreme court, as the Michigan constitution runs, "shall have a general superintending control over all inferior courts." Louisiana gives the supreme court power to assign and distribute judges in such a manner as to secure a prompt administration of justice and also to supervise and coördinate the work of lower courts. More than half of the states have created judicial councils for the purpose of scrutinizing the operations of the courts, expediting their business, and bringing order into their transactions.[21]

[21] L. B. Orfield, "A Judicial Council for Nebraska," *Nebraska Law Bulletin*, March, 1938, pp. 106–125. J. A. C. Grant, "The Judicial Council Movement," *Political Science Review*, November, 1928.

Declaratory Judgments. Perhaps more important is the reform that permits private citizens to appeal to the courts to find out what the law is on some point without resorting to expensive lawsuits. The answers of the courts, in the form of "declaratory judgments," have been upheld as constitutional in thirty states. If, for example, under this plan, the heirs of a dead man are uncertain as to their rights under his will, without engaging in a lawsuit they may call upon the proper court to tell them just where they stand. Thus, as one writer has put it, the courts are made "authorized legal advisers to the people." Akin to this is the practice of allowing the highest court of the state to give "advisory opinions" to the governor and either branch of the legislature as to the constitutionality and general legality of any proposed act or law.[22] This system prevails in New Hampshire, Massachusetts, Maine, Rhode Island, Florida, Alabama, Colorado, Delaware, South Dakota, and North Carolina.

Arbitration and Conciliation. An attack has been made on the law's delays by the establishment of courts of arbitration and conciliation. Strictly speaking, these are not courts at all, but are institutions intended to make lawsuits unnecessary by substituting arbitration. Illinois in 1917 and New York in 1920 authorized special procedures designed to enable business men to settle their disputes about commercial matters entirely outside of the judicial arena.[23]

In 1921 North Dakota took a novel step by establishing a state-wide conciliation system permitting citizens to adjust controversies involving small sums of money without going to the courts at all. The district judges are to appoint in each county a conciliation board from which contestants may choose conciliators. If a citizen has a claim against another, he can appeal to one of the mediators who will notify the opposite party to appear and will attempt to effect an "amicable settlement." If both parties agree to abide by the decision of the mediator, it has the force of a decision of law.[24]

Extraordinary Majorities in Constitutional Cases. The complaint that state courts sometimes declare laws unconstitutional on doubtful grounds as evidenced by four-to-three or five-to-four decisions is met in a few states by a provision that an extraordinary majority shall be required in such cases (p. 538). But this expedient has been attacked by

[22] A. R. Ellingwood, *Department Coöperation in State Government.*

[23] On the point of law reform, see W. F. Dodd, *State Government* (1928), pp. 322 ff.

[24] R. E. Cushman, *Political Science Review*, Vol. XVII, p. 434.

conservative lawyers and has not won widespread acceptance. Indeed it involves considerations other than those of a purely judicial character.

Failures of Justice. More alarming than delays and confusion at law are repeated failures of justice brought forcibly to public attention. Again and again notorious malefactors able to employ shrewd criminal lawyers manage to escape conviction and to ply their trade without interruption. On the other side are numerous cases of innocent persons rushed to trial by ambitious prosecutors, hounded by community and press clamor for a victim, wrongly accused or identified by witnesses, and condemned by excited juries. In a volume as judicial in tone as a law book and as exciting in content as a detective story, Edwin Borchard has given an insight into the practice of convicting the innocent.[25] While sins of omission and commission continue, the number of cases before the crowded courts increases by leaps and bounds. The annual load of federal cases alone rose from 47,000 in 1911 to 196,000 in 1930—an increase ten times greater than the increase in population.

For such problems no easy solutions are to be found in mere legal procedure, for the roots of the troubles are deep in the nature of American society and the spirit of the people. "Politics" of the baser sort is responsible for many failures of justice. In October, 1932, a report to the American Bar Association declared that gangsters "are often able to elect to judicial office their own attorneys, and when charged with crime waive a jury trial and place their case before their own judge, who acts as judge and jury." Three judges recently acted as honorary pallbearers at the funeral of a notorious gangster, "first of the big shots in the Chicago bootleg trade." Two judges and an ex-judge marched with city and state officials in the funeral procession of another "gangster, convict, and killer." [26]

Hence efforts are being made to "take the courts out of politics." Neither popular election nor appointment by miscellaneous executive officers has succeeded in excluding influences of the grosser kind. So another project is taking form in contemporary thought. It contains the following elements: (1) unification of all courts in the state from the highest to the lowest; (2) appointment of one or more chief judges by the governor, subject to impeachment by the legislature, and perhaps to confirmation at a subsequent election (p. 725); (3) appointment of all other judges by the chief judge or judges selected by the governor; (4)

[25] *Convicting the Innocent* (1932).
[26] Mitchell Dawson, "Judging the Judges," *Harpers Magazine*, September, 1934.

establishment of a judicial council to exercise administrative and disciplinary control over the entire system.

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CHAPTER XXXI

MUNICIPAL ORGANIZATION AND FINANCE

City Government and General Welfare. Modern civilization is predominantly industrial and the industries are in the cities. For this reason, municipal government bears a vital relation to the economic life of the nation. The efficiency of labor has an inescapable connection with housing, transportation, education, recreation, public health, and all the other service functions of the city administration. The cost of production for the manufacturer is affected by the manner in which the city handles its fire hazards, freight terminal facilities, traffic, and other features of municipal economy. When city government is conducted with competence and skill, the nation benefits. When it is wasteful and negligent, the whole nation has additional burdens to carry in economy and in taxation and finance.

It is not merely in matters purely economic that municipal government is associated with general welfare. If dishonesty reigns in a city, if racketeers are allowed to prey upon businessmen and trade unions, if fire and health regulations can be defeated by the bribery of inspectors, if corrupt party machines dominate police departments, demoralization will spread into state and national affairs. Municipal bosses have more than once become masters of state governments through their grip on city affairs, as did Boss Tweed in New York long ago (p. 567); and their henchmen have been sent to Congress to make laws for the nation. Indeed Thomas Jefferson was once led to exclaim that the "mobs of great cities" are "sores on the body politic"—a menace to good government everywhere. When cities are well managed, when corruption is put down, when the vital functions of city government are efficiently conducted, repercussions are felt in the state and nation. The doings of mayors and city councils devoted to the public welfare do not make startling newspaper headlines but the history of American city government is filled with the records of such distinguished, if little celebrated, public authorities.

Rapid Growth of American Cities. From the early days of the Republic, American cities have been beset by special difficulties and there was some warrant in 1888 for James Bryce's declaration that "the government of cities is the one conspicuous failure of the United States." First of all it is to be noted that American cities have grown pell mell with amazing speed. When George Washington was inaugurated first President there were only three cities with more than ten thousand inhabitants—Boston, New York, and Philadelphia. The census of 1940 reported 416 cities and urban areas of more than twenty-five thousand inhabitants. There were five cities with more than a million: New York, Chicago, Philadelphia, Los Angeles, and Detroit. Nine other cities had above a half a million. More than half the people of the United States now live in towns and cities having 2,500 or more inhabitants. Chicago, an overgrown village of about 100,000 in 1860, has become a metropolis of over three millions. New York has far more inhabitants than the entire country had when Washington first took the oath of office in Wall Street. Indeed that city alone in 1940 had more inhabitants than any save the three most densely populated states. Considered in terms of financial development, the growth of cities has also presented grave problems to urban dwellers. In President Washington's day there were doubters who thought that the whole country could not carry a national debt of some sixty million dollars; in 1937 the gross bonded debt of all cities of more than 30,000 inhabitants was about $8,300,000,000, or about two and one-half times as great as the gross bonded debt of all the states.

Nature of Population. The great masses that have crowded into these growing cities have been as a rule without experience and without traditions in urban government. They have embraced shrewd and ambitious Americans who have flocked in from farms in pursuit of employment, careers, and fortunes. They have included millions from foreign countries, mainly peasants, or at best people who had little or no share in the government of cities in their native lands. For a long time it was not an uncommon thing to find that one-fourth or one-third of the inhabitants of a great city were of foreign origin; the percentage is declining with the decline in immigration, but the proportion is still striking and significant. To the alien groups of every race and language must be added the Negro population which in some Southern cities is fifty per cent of the whole. The descendants of slaves, the Negroes too were without historic experience in the arts of self-government and the management of great affairs.

Complexity of Problems. During the very period in which these masses have been crowding to the cities, the suffrage has been made universal. Staggering burdens have been thrown upon municipal administration and everybody—Tom, Dick, Harry, and Will, and Bridget, Jane, and Susan, to modify a lament of James I—has been invited to help solve the manifold problems of city life. Before condemning the government of American municipalities one should pause to reflect upon the perplexing functions suddenly thrust upon peoples untrained to deal with them—functions relative to health, housing, sanitation, water supply, sewerage, lighting, transportation, education, street paving, and finance. The right discharge of these grave responsibilities calls for economic skill as great as that employed in the most gigantic business concerns, and statesmanship of a supreme order.

Rapid Changes. Moreover the scene is constantly shifting. Who could have foreseen that the horse car would take the place of the omnibus, that the cable car would supersede the horse car, that electricity would drive them both off the streets, and that the automobile and subway would almost paralyze the surface lines in the great cities? In meeting these wholly new technical problems, the past offered no guide, for the oldest cities of Europe began their experimentation with them about the same time as cities in America. When the municipal crisis became acute some fifty years ago, there were no books on municipal organization and finance, municipal utilities, and the thousand other technical matters involved in city government. There were no courses of instruction on city administration in colleges and high schools. There were none of the great technical and civic societies that now work with zeal and understanding at the problems of administration. There was no philosophy of urban planning, no appreciation of the rôle which it was to play in the development of American civilization. So looking at the whole matter calmly and without chauvinism, one may with justification express surprise that waste, inefficiency, corruption, and above all ineptitude have not been greater. Bryce, on looking over the ground many years after his book was first published, was moved to say that his stringent criticism was no longer true.

Federal and State Relations of Cities

Unlike the city states of ancient Greece and many commercial municipalities of the Middle Ages, American cities do not stand apart from

superior governments—federal and state. As they are affiliated with the rest of the country through industry and commerce, so they are associated with federal and state governments in ways numerous and bewildering. Their relations with federal authorities are fairly recent in origin.

Growth of Federal Contacts. There was a time in American history when the Federal Government had nothing to do with municipal affairs as such. It maintained a post office in each city, of course, and perhaps a customs house or some other federal establishment; it did occasionally, in time of great stress, lay a tax on lands and houses in cities; but these things were connected merely with the discharge of federal functions. After the opening of the twentieth century, this isolation was gradually broken down, as the Federal Government began to help finance cities indirectly through grants to the states for certain educational purposes and, especially after a crisis struck the country in the autumn of 1929, through coöperative activities. A survey of the situation about 1931 showed at that time "over five hundred more or less informal contacts between the various departments of the Federal Government and the municipalities. For instance, the Department of Commerce has for some years aided cities in preparing zoning and planning acts, the Office of Education has conducted numerous educational surveys for municipalities, and the Public Health Service not only makes health surveys but has carried on a wide range of public health work directly touching municipal health work."[1] In 1941 Albert Lepawsky found some seventy federal agencies, bureaus, and divisions providing various urban services.[2]

Federal Emergency Functions. As the depression of the 1930's deepened, the Federal Government had to go to the aid of cities all over the country to prevent them from sinking into bankruptcy and ruin. It lent them money for public works to aid in providing work for the unemployed. It gave hundreds of millions outright to them to feed the hungry and house the homeless and transient. In doing these things it exercised a certain scrutiny and control over city finances. In 1934, after more than a thousand cities had defaulted on their debts, Congress passed a municipal "bankruptcy" act[3] authorizing federal courts to take jurisdiction over cases involving cities heavily in debt and unable

[1] P. V. Betters, *The Municipal Year Book* (1934), p. 33.

[2] "The Future of Our Cities," *State Government*, Dec., 1941.

[3] By 1934 about 3,000 local units were in default on debts. See C. W. Ilam, *National Municipal Review*, June, 1934, pp. 296 ff.

to straighten out their financial affairs by their own efforts. After the Supreme Court declared this law unconstitutional, Congress enacted another. In 1934 also it decided to aid them in catching kidnapers, bandits, bank-robbers, and other criminals by passing six laws drawing federal authorities into the operation of enforcing criminal law. The National Housing Act of 1937 and additional federal legislation have drawn cities into closer relations with the Federal Government (see Chapter XXI, especially pp. 498 ff.).

State Supremacy. With reference to the state in which any city is located, the first principal to be noted is the complete subjection of the city to the state legislature except in so far as it is protected by constitutional limitations enacted in its behalf. In other words, there are no such things as "inherent rights of local self-government." The charter of the city establishing its form of government and defining its powers, save in the circumstances discussed below, is merely an act of the legislature. And the charter is only the beginning, for it is supplemented by innumerable acts, general and special, affecting the form and functions of municipal government. Anyone who will follow Professor Arthur W. Macmahon through his ingenious analysis of *The Statutory Sources of New York City Government* will discover how tangled is the maze of laws in which a city must work; between 1901 and 1921 at least 550 amendments were made in the charter of New York City by the state legislature, and 1,002 special acts relating to the City were passed in addition to the formal amendments. To these statutes must be added general election, education, transit, civil service, and other measures affecting the powers and duties of the city government.

Abuses in State Control. During the nineteenth century, the city everywhere was practically at the mercy of the state government. Legislatures often granted franchises to utility corporations authorizing them to operate in cities contrary to the wishes of the inhabitants. They sometimes were brazen enough to take utilities away from municipalities and sell them to private companies. They imposed financial burdens on cities to give employment and profit to politicians. In 1870, for example, the legislature of Pennsylvania created a commission for Philadelphia, authorized it to erect a city hall and other buildings, to tax the people to pay the bills, and to spend the money without consulting the government of the city. Where they were not corrupt, the legislatures insisted on interfering constantly with the government of cities; at every session they poured out a stream of local, special, and general bills limiting the

powers of municipal authorities, imposing new duties on them, and laying additional burdens on city finances.

Demand for City Autonomy. Before the end of the nineteenth century such abuses became so flagrant that there arose a popular movement to restrain legislatures on the one hand and enlarge the powers of cities on the other. Proposals in this connection ranged from minor limitations on the legislative sphere to somewhat radical schemes for "home rule"—namely, the largest possible freedom for the city in choosing its form of government and in determining the functions to be undertaken.

Arguments for Home Rule. Champions of municipal home rule insist that the state legislature is unfitted to exercise control over matters which affect only the dwellers in large cities. It is mainly composed of countrymen or residents of small towns who are not familiar with the requirements of urban life. Owing to the general rule of constitutional discrimination against them in the apportionment of representation, cities are not even accorded the hearing to which the number of their inhabitants entitle them. In such circumstances municipalities often have forced upon them legislation more suited to rural than urban life and are denied the legislation demanded by their special conditions. Besides, the legislature is always busy with other affairs and in cases of doubt respecting the demands of cities is likely to take the word of municipal bosses instead of making independent inquiries into urban problems. Apart from all this, it is contended by advocates of home rule for cities that purely municipal questions cannot hold the continuing interest of the people of the state at large. With good reason they ask: What do villagers and farmers and even residents of other cities care about the need of any particular city for paving and lighting improvements, rapid transit, the establishment of markets, and other services essentially local in nature?

Counter Arguments. To these contentions the reply is made that there are few, if any, purely municipal functions which do not have an interest for the state as a whole. If a city wishes to establish water works, it must sometimes go, as New York City has gone, a hundred miles or more into the country and must secure watersheds by a state concession. With the growth of rapid transit, urban regions have spread far beyond the boundaries of municipalities, raising issues with which cities alone are not competent to deal. A notable example of such a situation is afforded by New York City, which is really the metropolitan center for a

huge district extending fifty miles or more in nearly every direction. Owing to the large number of voters in municipalities, the integrity of every state election may depend upon the effectiveness with which the municipal police uphold the election laws and secure an honest count. Finally, the tenements, industries, health, and progress of each city raise state and national problems of taxation, natural resources, labor legislation, and social control. Speaking generally, it appears that the state as a whole, even the nation, has a fundamental interest in the health and well-being of city dwellers, and accordingly there is hardly a question of municipal administration that is not vitally connected with the larger aspects of government.

When these arguments are duly weighed it becomes apparent that no sharp dividing line can be drawn between interests purely municipal in nature and interests that are state-wide, even national in scope. But it is also evident in the records of history that cities have suffered grave abuses at the hands of state politicians—abuses both positive and negative. Legislatures have often interfered with municipal functions, not with a view to urban welfare but at the behest of pressure groups, political and economic, bent on private advantage. Again and again, through indifference or under the influence of lobbyists, they have withheld from cities the power to deal effectively with matters of deep concern to them. In response to such experience special devices have been adopted to check legislatures and to enlarge the authority of cities to handle their own affairs. Broadly speaking, these devices fall under four heads.

1. **Special Legislation Forbidden.** An attempt has been made to cut off state interference by forbidding special legislation applicable to single cities. For example, the constitutional convention of Pennsylvania in 1873 sought to solve the problem by providing that the state legislature should not pass any local or special laws regulating the affairs of counties, cities, townships, wards, or school districts. Literally construed this meant that every law dealing with Pennsylvania cities had to be general, that, for instance, a law designed to improve the harbors or the docks of any city had to apply to all cities whether they had any harbors or not. To escape this narrow construction, the Pennsylvania legislature resorted to the practice of classifying cities and then enacted laws for Philadelphia by making them applicable to all cities of more than 300,000 inhabitants, that is, Philadelphia alone. When this scheme was challenged at law a high court held it valid. "If the classification of

cities," said the court, "is in violation of the constitution, it follows of necessity that Philadelphia, as a city of the first class, must be denied the legislation necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs. For if the constitution means what the complainants aver that it does, Philadelphia can have no legislation that is not common to all other cities of the state. . . . Must the legislation for a great commercial and manufacturing city with a population of more than a million be regulated by the wants or necessities of an inland city of 10,000 inhabitants?"

2. **Special Legislation Subjected to Local Approval.** A second type of check on state interference with cities is a development of that just cited; special legislation is forbidden, except when approved by the city concerned. An example under this head is to be found in Illinois. Formerly the constitution of that state had a provision against incorporating cities, towns, or villages, and amending their charters by special law. This proved to be too rigid; so, for the purpose of permitting a separate treatment of Chicago, it was provided by an amendment in 1904 that the legislature could make changes in the system of government for that municipality, subject to the stipulation that all such special legislation, before going into effect, must be approved by a majority of the legal voters of Chicago voting thereon at an election. This amendment has worked well in a negative sense; proposed changes in the city's government have been defeated by the voters on several occasions. They can at least reject undesirable legislation even though they cannot get what they want. Negation is not a remedy; and attempts have been made in Illinois to establish more local autonomy, thus far in vain.

3. **Right of City to Choose Type of Government.** A modification of the Chicago scheme is the "optional charter" device which gives the city a choice between two or more projects of city government, such as the commission form, the city manager type, and the mayor and council plan. New York adopted this idea for certain classes of cities in 1914 and the example has been followed, with modifications, in different parts of the country. While it does not satisfy the most ardent advocates of municipal autonomy, it at least grants to cities a voice in determining their form of government. Like all other schemes, however, it leaves uncertain the boundary between state and municipal powers.

4. **Home Rule.** The fourth, and judging by current tendencies, the most popular method of controlling state legislatures is that known as

"home rule." This device was first adopted in 1875. The Missouri constitution of that year gave each city having a population of more than 100,000 inhabitants the right to frame a charter for its own government consistent with and subject to the constitution and laws of the state. It stipulated that in every case the charter shall be drafted by a board of freeholders elected by the qualified voters of the city, shall be laid before the voters for their judgment, and shall go into effect on receiving at least four-sevenths of the votes cast in the election at which it is submitted. Some such plan has been adopted by California, Oregon, Washington, Minnesota, Colorado, Oklahoma, Michigan, Arizona, Ohio, Texas, Nebraska, Maryland, New York, Wisconsin, Nevada, Utah, and West Virginia.[4] In Ohio, whether or not the opportunity to frame their own charters is taken advantage of, the constitution provides that "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws."

Issues Left Uncertain. At first glance the matter looks simple, but in fact it is very complex. The people of a city may draft their own charter. Yes. But what may they include in the charter? What powers may they confer on the municipal authorities they create? It really does not mean anything very definite to say that cities may frame charters for their "own government," and exercise "all powers of local self-government." In the absence of appropriate court decisions it is impossible to make a comprehensive list of the functions which belong to cities and those which belong to states. Ingenious attempts have been made to do it, but they always end in litigation in the courts. A searching examination of the whole subject by H. L. McBain shows that home rule, in effect, takes the ultimate fate of the city out of the hands of the legislature and places it in the hands of the courts, which must define by endless decisions the respective rights of the cities and the legislature.[5] Whether the city fares well or ill depends on the opinions, prejudices, and reasoning of the courts.

Supremacy of State Interest. Although many questions are open, we may say that in general the form of government which a city has may very well be left to the determination of the voters within its borders.

[4] G. C. S. Benson, pp. 166–196 in *The Municipal Year Book* (1938).

[5] *The Law and the Practice of Municipal Home Rule.* See also S. C. Wallace, *State Administrative Supervision of Cities* (1928).

They are not likely to make any more mistakes than the members of a state legislature in this respect. There is warrant in experience for saying that certain specific powers should be conferred upon cities, such as the right to own and operate municipal utilities, but there are many fields of legislation in which the state as a whole has a valid interest. Great improvements have been made in urban life by the establishment of state-wide standards in health, education, civil service administration, financial management, utility regulation, and other matters of deep significance. State administrative authorities in these fields have exercised a salutary influence on the conduct of municipal affairs. Moreover there are numerous cases in which coöperation is required among cities, especially in securing water supplies and hydroelectric power. Since the problems of all cities are so much alike, the pooling of experience and establishment of general standards are highly desirable. Massachusetts, for example, lends valuable aid to her cities by state supervision over water resources for the metropolitan district in and around Boston and over municipal finances and city planning.

Relations of City to County. The relation of a city to the county and to outlying urban areas is also important. In this connection are presented some of the most perplexing problems of municipal science. When a city occupies a large part of a county, there is usually a conflict between city and county authorities, if not a duplication of work; in fact, confusion can only be avoided by a consolidation of the two governments as in the case of Denver and San Francisco, or a complete separation of city and county functions. If a city contains within its limits one or more counties, there is likewise a waste of effort and money in administration, but the county politicians are generally able to prevent an application of the remedy, namely, the abolition of county government.

City and Adjoining Communities. Even more frequently the city has scattered about in the neighborhood a number of satellite communities, each jealous of its independence. Sometimes it is possible to effect a union of these districts such, for example, as was brought about by the creation of Greater New York in 1898, but the political difficulties inherent in the operation are almost insuperable. In spite of persistent efforts for many years, Boston has been unable to consolidate the entire metropolitan area under one government. Pittsburgh has had similar experience.

Equally perplexing is the problem presented by the haphazard growth

of suburban districts beyond the boundaries of the city, subject to no control in the interest of the whole community. Here is a situation which calls for a super-municipality or for regional planning on a large scale.[6] To make matters more troublesome, the automobile has broken down the borderline between city and country, the daily flow of population in and out along radii extending fifty miles or more creates entirely new social relations—often involving two or more states as in the case of New York City.

Organization and Election of Municipal Legislative Bodies

The Old Bicameral System. Every city has a legislative body of some kind endowed with some powers of local government. In the later colonial period the urban legislature was known generally as the "city council." Ordinarily, it was a unicameral body with two classes of members, common councilors and aldermen; but after the Revolution many states began to remodel their city governments, trying a number of experiments. Broadly speaking, there were two outstanding characteristics in the new schemes. The councils were as a rule composed of two chambers and the members of one or both houses were elected from districts by popular vote.

Single-Chamber System. The bicameral system did not work well in practice. It contributed to confusion and irresponsibility in government. Hence the system came under the fire of the reformers. By 1910 five of the ten largest cities had single chamber councils—New York, Boston, Chicago, Cleveland, and San Francisco; and five still clung to the bicameral plan—Philadelphia, St. Louis, Baltimore, Pittsburgh, and Buffalo. Within a little more than ten years however all of the latter group had abandoned the old system in favor of one chamber, Philadelphia surrendering in 1920 and Baltimore in 1923. So today practically all great cities have the unicameral system. Still the double chamber plan remains in sixteen cities such as Atlanta, Georgia; Richmond, Virginia; Springfield and Worcester, Massachusetts; and in a number of smaller New England municipalities.

Election by Districts. The fire of criticism which resulted in the adoption of the unicameral system was accompanied by an attack equally

[6] I. Loeb, "Government for St. Louis Metropolis," *National Municipal Review*, June, 1930; L. W. Lancaster, "Hartford Adopts a Metropolitan Charter," *Political Science Review*, August, 1930; Committee on Metropolitan Government of the National Municipal League, *The Government of Metropolitan Areas* (1930).

vigorous on the practice of electing councilors by districts. In many instances the councilors were men of small caliber and low ideals, ignorant respecting matters of public policy, and bent on benefiting their districts and on finding jobs in the administration for their constituents. After an official investigation a committee in Boston reported in 1909 that membership in the legislative body of the city was a discredit rather than an honor and that it was difficult to induce representative men to become candidates for either branch. Yet in spite of similar verdicts in all parts of the country, most of the largest cities, such as Chicago, Philadelphia, Los Angeles, Cleveland, and Boston, have retained the district plan of election. In 1943, of the 2030 cities with populations over 5000, 27.8 per cent elected their councilmen by wards and only 13.3 per cent elected them by a combination of representation by wards and at large.

Election at Large. In the same year, of the cities with more than 5000 population, 56.9 per cent had broken completely with the district system and were governed by legislative bodies in which all members were elected at large on a general ticket. Where election at large is made the rule, the legislative body, whether known as the city council or the city commission, is usually a compact body of three, five, or seven members. There is indeed a distinct tendency toward smaller councils for small cities, perhaps on account of the slighter demand for group representation in municipalities of that size.

Unequal Representation. But criticism of the city council has not been silenced. It is urged against both the district system and election at large, under the ordinary scheme of nominating and balloting for candidates, that they still permit professional politicians to carry trivial party fights into city elections. It is also pointed out that neither system provides for the representation of minorities. If a victorious party in a municipal election carries its districts by small margins and the defeated party carries its districts by large margins, the victor may in fact represent less than half the active voters of the entire city. At all events, under the district system there is always a considerable minority not represented at all. This is equally true of elections at large. If a party or group carries the city by even the smallest possible margin, it nevertheless secures all the seats in the council or commission as the case may be.

Non-Partisan Elections. To remove these features deemed objectionable, two devices are offered. For the purpose of eliminating or reducing the amount of petty party politics ordinarily found in municipal affairs,

the non-partisan election has been widely adopted. Although the non-partisan system varies in many details, it presents generally two striking features. The nomination of candidates for municipal positions by political parties is forbidden, and the emblems and names of political parties are excluded from the ballot. As a rule candidates are designated by petitions signed by voters, a preliminary sifting is made at a primary election, and then a limited number of candidates' names is placed on the final election ballot, without any signs or words indicating their party affiliations. Of the municipalities with a population of over 5,000, 56.2 per cent had non-partisan election systems in 1943. Of the cities having the commission or city-manager plan, the overwhelming majority operated on the non-partisan principle. It cannot be truly said, of course, that the non-partisan scheme entirely prevents party manipulations, but it certainly does reduce the virulence of party hatreds and controversies in municipal affairs.

Proportional Representation. With a view to assuring minority groups in cities a fair share of representation on the city council or commission, reformers have long urged the adoption of full proportional representation or at least some kind of preferential voting which assures representation to minorities. However on the fiftieth anniversary of the formation of the Proportional Representation League only ten American cities could report the use of the system: New York, Long Beach, and Yonkers, New York; Cincinnati, Toledo, and Hamilton, Ohio; Cambridge and Lowell,[7] Massachusetts; Boulder, Colorado and Wheeling, West Virginia.

Many varieties of proportional representation are possible, but the system most commonly urged in the United States contains certain general features. In the first place, the members of the city council or commission are elected at large on a single ticket, as is the case in Toledo, Ohio; or they may be elected in groups from large districts such as New York City's boroughs. The voter on election day indicates by arabic numbers, "1," "2," "3," and so forth his first, second, third choices, and so on, among the candidates whose names appear on the ballot. At the close of the poll a "quota" is obtained by dividing the total number of valid ballots cast by one more than the total number of members to be elected, and adding one to the result thus obtained. This quota is the number of votes which any candidate must receive to be victorious. All

[7] For the first election in Lowell, see *National Municipal Review*, January, 1944, pp. 45–49.

candidates who have a quota of first-choice ballots are at once declared elected. The surplus votes not needed by these successful candidates and afterwards the votes of the candidates at the bottom of the poll are distributed among the other candidates according to the other choices indicated on the ballots, until at length the total number of vacancies (commissioners or councilors to be elected) is filled by candidates having the required quotas. In practice, it seems to give all the important groups of the city representation roughly according to their respective numbers.[8]

Preferential Voting. Another device designed to obviate some of the evils of mere plurality elections and insure fairer representation is the plan of "preferential voting" introduced in Grand Junction, Colorado, in 1909, and afterwards adopted in some form in a number of other towns and cities, particularly for direct primaries. Under a typical preferential plan, the names of the candidates are arranged in one column on the ballot and after the names are three blank columns, headed "first choice," "second choice," and "third choices." The voter may thus specify one first and one second choice for the office in question, and if he has sufficient regard for other candidates he may indicate any or all of them as acceptable by marking their names among the "third choices." If any candidate receives a majority of first choices, he is declared elected; if not, then the first and second choices of the candidates are added, the candidate with the highest number winning if he has a majority. If this second step does not produce a majority, then all the choices of each candidate are added together and the man standing highest wins whether he has a majority or not.

The Powers of the City Council

Powers Are Specific. Unlike the state legislature, the city council or commission, as the case may be, has no "inherent powers." The position of the council in this respect is akin to that of Congress; it can only exercise those powers which are granted to it by the constitution and laws of the state; but at the same time it enjoys the implied powers necessary and proper to carry into effect those which are enumerated. Indeed some state laws, following the language of the federal Constitution, authorize the council to pass all ordinances which are essential to

[8] R. P. Goldman, "Analysis of Cincinnati's Proportional Representation Election," *Political Science Review*, August, 1930.

carrying into execution the powers expressly granted. Moreover in practice there may be a loose or strict construction of the law as in the case of the federal Constitution. Some judicial decisions are liberal in spirit and others are narrow.[9]

Police Power. First among the general powers of the city council may be placed its "police power." The city charter usually provides that the council may exercise the "powers necessary to preserve the peace and good order of the community and promote the public welfare." The council ordinarily may make, amend, or repeal ordinances relating to health, parks, fire protection, and buildings, except in so far as such power is conferred on other agencies or otherwise limited by state or federal law. The council may make ordinances relative to beggars, vagrants, intoxication, fighting and disorder in the streets, public amusements, markets, gambling, bathing places, suppression of vice and immorality, the use of firearms and firecrackers in the streets, parades, steam vessels, advertisements, circuses, and obnoxious industries.

Finances. In the matter of finance—appropriations, taxation, and debts—the city council works under definite limitations. Nowhere can it make appropriations, lay taxes, and incur debts at will. In some instances the amount of money which it can appropriate is fixed at a certain percentage of the assessed valuation of the property within the city limits. Even methods of making appropriations—the time, form, and manner—may be prescribed in great detail by state legislation relative to the budget. Moreover mandatory state legislation compels the city to provide funds for interest on its debt, the support of schools, and many other objects, leaving the city no discretion at all in the premises.

In a few cities, New York and Boston, for example, the initiation of appropriations is taken out of the hands of the city council. In New York it is vested in the city's board of estimate, composed of the mayor, comptroller, president of the city council, elected at large, and five borough presidents, each chosen from one of the five boroughs into which the city is divided. In Boston the mayor initiates the budget. In neither city can the council increase or add to the proposed items; it can merely reduce or eliminate them. As to taxation, the council may lay only those kinds of taxes authorized by state law. As to debts, it can incur such obligations only for specific purposes and to an amount fixed by state law—often a certain percentage of the total value of the real estate assessed for taxation within the city.

[9] McBain, *American City Progress and the Law*, chap. ii.

Control over Utilities. The power to charter public utility companies and to authorize them to use the streets was once generally enjoyed by the city council and still is exercised by it in many cities, especially of the second rank. In some cases however proposed charters for corporations must be referred to popular vote or at all events the citizens may compel such reference by filing a petition in due course. Everywhere cities are more or less limited by state law with respect to utilities —legislation dealing with the term of years for franchises, rates of charges, character of services, and other vital matters; and utilities chartered by municipalities are generally subject to regulation by state utility commissions just like other concerns of that class (p. 693).

Control over Administration. In administrative matters the council or commission wields a great deal of influence. Sometimes its members are themselves administrators (p. 770) or at least select and remove the chief executive of the city (p. 771). Even where it does not have these large powers, its influence is by no means negligible. Sometimes it initiates the budget which provides the money for administrators, but where it has lost the right of initiation it can exercise control over them through its power to approve the budget. At least it can cut salaries and allowances; by threatening officers with reductions, councilors can force the appointment of their friends and political adherents to posts in the city government. In addition, the city council may, as a rule, appoint committees to examine the books and papers of departments and conduct investigations of a most searching character. Hence it happens that a belligerent council may exercise an obstructive or wholesome influence on the course of municipal administration.

The Executive under the Mayor-and-Council Plan

Extent of the Plan. Whatever their names, composition, or powers, the legislative bodies of nearly all cities, towns, and villages are fitted into one or another of three main frameworks of government, known respectively as the mayor-and-council, the commission, and the city-manager plans. The first of these is still the most popular, being employed in 1943 in all the largest cities, namely, those having more than 500,000 inhabitants, and in 67.5 per cent of all places having more than 5,000 inhabitants.

Election and Term of the Mayor. Originally, the mayor-and-council system provided for a city council which in turn chose a mayor who was

little more than a figurehead. In the course of time however the mayor grew in independence and power, until today he is popularly elected and occupies a post of importance as chief executive of his city. Under the modern arrangement, the mayor is elected on a partisan or non-partisan ballot for a term of service fixed by law, which varies from one to four years, the commonest period being two years. The turnover is high, nearly a third of the mayors in cities having a population of over 10,000 being replaced in 1937. Nevertheless 1938 saw George H. Lysle still mayor of McKeesport, Pennsylvania, after twenty-four years in office, while Daniel W. Hoan of Milwaukee, Wisconsin, with twenty-two years, was not far behind in length of service.

Legislative Functions. The powers of the mayor extend to legislative, financial, and administrative matters. He may recommend measures to the city council; he enjoys the veto power, including, as a rule, the right to strike out single items in appropriation bills. Following the example of the state constitutions, our city charters generally provide that a vetoed ordinance can become law only when repassed by the council by an extraordinary majority, sometimes two-thirds and in some instances even more; but in a few smaller cities the mayor's veto may be overriden by a simple majority.

Financial Powers. The financial powers of the mayor vary from city to city. The mayor not only enjoys, as we have seen, the power of vetoing financial measures, but he also has, in a number of instances, a very large control over the making of the city budget. In Boston the preparation of the budget is vested in the mayor. In New York City, the mayor enjoys a very peculiar position with regard to finances. He is a member of the board of estimate which initiates the budget and as such possesses three votes out of a total number of sixteen. He also has the right to veto financial measures passed by the board of estimate and the city council and it takes a three-fourths vote to override an exercise of this power. In Baltimore, the mayor is likewise a member of the board of estimate and he is a member of the commission on finance in charge of the sinking funds.

Appointing Power. As to the appointment of municipal officers and the direction of municipal administration, the power of the mayor is increasing. At the beginning of our history, municipal officers were generally appointed by the city council; in the course of the democratic revolution during the first half of the nineteenth century, many of the important offices, boards, and commissions were made elective. It was

found however by practical experience that popular election did not actually secure responsibility to the voters; for, owing to the number of offices and the complexity of the election operations, the selection of candidates actually fell into the hands of expert politicians, who made the "slates" and thus secured possession of the municipal government (p. 569). In order to check the corruption which resulted from this system, the device of "bipartisan" boards and commissions was sometimes adopted with the hope that the representatives of one party would hold in leash the representatives of the other party; but, in practice, it turned out that they often made combinations and divided the spoils of office.

Finding that the elective system did not really secure popular election and that the bipartisan device did not block the spoilsmen, municipal reformers determined to try the experiment of concentrating the appointing power in the hands of the mayor—thus making him responsible for the conduct of the whole administration. This development reached a high degree in the city of New York, where the mayor appoints the heads of important branches of the municipal administration and enjoys the unrestricted power of removing municipal officers, except members of the board of education, judges, and a few others.

Nevertheless it is dangerous to generalize about the appointing power in American cities, so varied are the practices. Take, for example, the great cities having separate health executives: in some of them the mayor alone appoints; in a few he nominates and the city council confirms; in others the health officer is chosen by the director of welfare; elsewhere he is selected by the director of public safety, by the board of public safety, by the city commission, by the city manager, or under civil service rules. What accurate broad principle could be derived from these various cases? Besides, a large number of cities still have boards and commissions elected by popular vote and independent of the mayor and the city council.

Commission Government

Origins. A considerable proportion of the smaller cities and some of the larger municipalities do not conform to the mayor-and-council pattern just described. Among those that operate on a different basis are the cities with commission government, a product of the acute emergency that developed in the port of Galveston, Texas, after the great

storm of 1900, which destroyed a whole section of the city. For a time, the municipal administration was paralyzed, because the trying problems connected with restoration were too much for the old political machine in control. After a spirited contest, the government of Galveston was vested in a board which, as it exists today, consists of a mayor-president, a commissioner of finance and revenue, a police and fire commissioner, a commissioner of streets and public property, and a waterworks and sewerage commissioner, each elected at large for his particular office. The mayor-president serves as chief executive, exercising a general coordinating influence over the board, whereas the four commissioners supervise the specific matters indicated by their titles. Each commissioner may appoint, with the approval of his colleagues on the board, the officers and employees who are to serve under him. The board meets frequently for the transaction of public business, very much as the directors of a corporation assemble to discharge their functions.

Spread. The commission form, with modifications, spread rapidly throughout the country, especially as several states, by general law, authorized their cities to choose their own form of government; within fifteen years approximately four hundred cities had adopted it. Then the tide began to turn. A few cities, such as Buffalo, Denver, Nashville, and Lowell, tried the plan only to return to the mayor-and-council form of government. A still larger number gave it up in favor of the city-manager scheme. By 1943 their ranks had been thinned to such an extent that barely a quarter of the cities with a population of over 25,000 had commission government. Among them were Newark, New Orleans, Birmingham, Memphis, Portland in Oregon, Omaha, and St. Paul. However commission government is still used in slightly more than sixteen per cent of all cities with a population of more than 5000.

Nature. The commission plan varies somewhat from city to city, but the fundamental principle is the same everywhere—the concentration of executive and legislative power in the hands of a small body, usually five members, elected at large by the voters of the municipality. Many of the cities have added a system of initiative and referendum and also a device whereby a certain percentage of the voters may "recall" any one of the commission—that is, force a new election for the office. There is also a general tendency to abolish party methods of making nominations and to substitute a non-partisan primary which excludes party emblems from the ballot and permits anyone to run who induces a

certain number of voters to sign his petition. Several cities allow each candidate for the commission to run for a specific office, such as commissioner of health or finance.

Commission government, as Professor Goodnow points out,[10] is a return to the original type of city government in the United States in so far as it concentrates all powers, administrative and legislative, in one body. It differs however from the original council system in that its members do not represent single districts, but are elected at large. From the standpoint of pure business administration, the commission form of government has many features to commend it. It centralizes power and responsibility in a small group of officers constantly before the public and subjected to the scrutiny of public criticism; it coördinates the taxing and spending powers, thus overcoming the maladjustment so common to American public finance; and it throws down that multiplicity of barriers behind which some of the worst interests in American municipal politics have screened their anti-social operations.

Log-Rolling in Commission. Four decades of experience with the commission plan have revealed certain intrinsic weaknesses. In the first place, there is still a diffusion of power in making appropriations and enacting ordinances. Each commissioner is head of an important department, is jealous of his prerogatives, and naturally seeks to secure enough money from the city treasury to conduct it according to his concept of its importance. He is likely to resent interference by his colleagues with the management of his affairs or with his proposed program of expenditures. Thus no one person can be made responsible for the entire administration of the city, with authority to check and control all branches in the interest of policy, economy, or efficiency. In practice the commissioners, or three of them at least, often engage in log-rolling; that is, they agree to support one another's plans and by majority vote carry them all through the commission. Thus the program of expenditures may consist of a mosaic of five different pieces.

Administrative Difficulties. In administration also there are difficulties. Often the commissioners are not chosen for any specific office, but are assigned to their departments by the commission as a whole. Here politics enters. Usually the commissioners are business men, professional men, or labor representatives without actual experience in municipal administration. In the course of things, it may happen that an undertaker is made commissioner of public works and a retired real

[10] *Municipal Government*, p. 176.

estate dealer, head of the fire and police department. In other words, the commission plan does not assure expertness in administration any more than does the mayor-and-council organization.

Concentration of Power. Another and also important criticism of the commission scheme is based on the contention that, in the light of our municipal experience, it concentrates too great a power in the hands of a small body and makes it easier for political "bosses" to get possession of the city and for corruptionists to buy favors from it. In recognition of this possibility a number of commission cities have abolished the partisan election system (p. 762) and many have introduced the recall in addition (p. 552). Thus, it is said, stumbling blocks are placed in the way of politicians, and rascals can be ousted at any time.

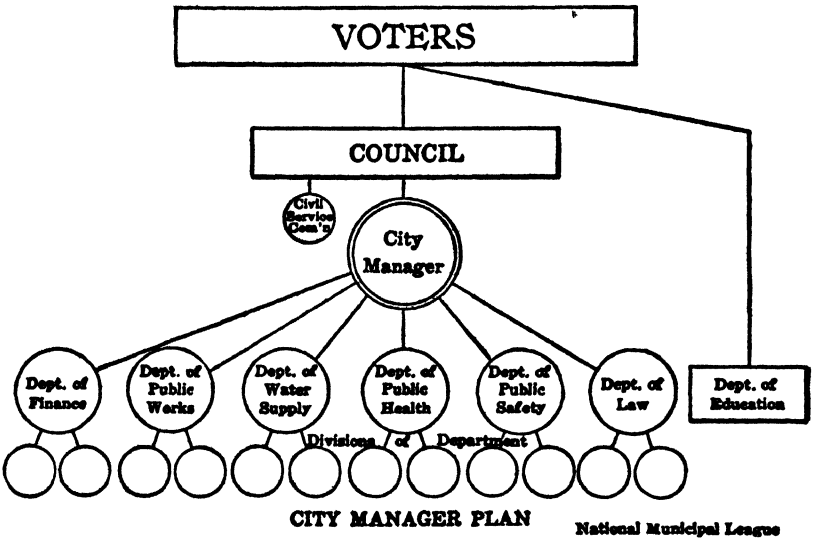
City-Manager Plan

The Legislative Body. In addition to the mayor-and-council and the commission forms of government already covered, there is still a third, or city-manager, variety. A basic element in the city-manager plan is an ordinance-making assembly, frequently containing only five or seven persons, and bearing the title of "commission," though, except for size and name, it is a very different body from the "commission" of a commission-governed city. But smallness is not the universal rule, for there are cases of legislative units in city-manager cities having nine, ten, eleven, thirteen, and even seventeen members. Such units, being as big as, or bigger than, many councils under the mayor-and-council plan, are often called "councils." Regardless of whether it is a small "commission" or a large "council," the legislative body of a city-manager city enjoys substantially the same ordinance-making powers as the corresponding legislatures under the other forms of local government.

Distinctive Executive Organization. While the city-manager city is not particularly distinguishable from other cities in the legislative organization, it differs markedly from them on the administrative side. Under the city-manager plan, the commission or council appoints and removes a city manager who serves as the responsible head of the city's administration. In this regard, it stands apart from the mayor-and-council system where the people elect a mayor who serves as the chief executive. The city-manager plan is likewise distinguishable from the commission type in that the administration is centralized under a single manager in the former case and is divided up among department heads of equal rank

in the latter case. Moreover executive officers cannot take part in making ordinances under the manager plan as under the commission plan.

The Position of Manager. The manager constitutes the distinctive feature of the city-manager plan. Practically all executive functions of the city are vested in him. He is chosen and removed by the city council or commission as the case may be. He appoints and removes heads of departments and other city officers, subject to limitations imposed by the civil service rules and to certain exceptions.



CITY MANAGER PLAN National Municipal League

It is the duty of the manager to direct various branches of municipal work, initiate the budget, and lay plans before the city council. He may attend meetings of the council to defend and explain his proposals. He may be summoned before it to render an account of his stewardship. The business of the council is to legislate and scrutinize; the business of the manager is to execute. In fact in some cases the council is strictly forbidden to interfere with administration in any way.

The manager is supposed to be a technician trained in the science and art of municipal government, an administrator, not a politician or manipulator of votes. In order that it may search widely for technical fitness, the council or commission is ordinarily not bound to choose the manager from among the residents of the city. Indeed, it frequently selects a successful executive from another city. Within a decade after the first establishment of the plan there had been at least sixty-five

promotions from small cities to larger centers. Then cities began to show a tendency to "keep the jobs for home-town boys."

Careers Open to Talents. Yet there has been opened to men who are trained in municipal administration a profession which is nation-wide in its reach. This feature of the system is of great promise because it makes possible a new career in public service—that of city manager. A man may start in at the bottom in a small town and rise to the position of head of a great city. Moreover the profession is organized; it has formed the International City Managers' Association, which holds annual conferences, exchanges ideas, and promotes public interest in the movement.

Spread of System. Such are the outlines of the system. The history of the plan really dates from 1913 when Sumter, South Carolina, adopted it, although Staunton, Virginia, claims the honor of having tried the project first, in 1908. During the intervening period it has spread rapidly. In 1943 almost the same number of cities above 5,000 inhabitants were using the city manager as the commission type of government, in each case a little more than 16 per cent. Most of the places using city-manager government are of minor importance in population and wealth and no city of over 500,000 inhabitants has it in force. Only seven cities between 250,000 and 500,000 employed the manager system in 1943: Cincinnati and Toledo, Ohio; Kansas City, Missouri; Rochester, New York; Dallas and Houston, Texas; and Oakland, California.

Advantages. Advocates of the city-manager plan summarize its advantages in the following fashion. It centralizes responsibility for administration. It overcomes the difficulty involved in obtaining technical ability for high office by a democratic process. It broadens the field of choice for the city to include the whole United States, placing national talents at the disposal of the council. It removes political influences from technical administrative work in which they do not belong. It shifts public interest in elections from personalities to issues, by eliminating contests over the possession of the mayor's spoils.

Lack of Political Leadership. Nevertheless those who know the system best admit that it is marked by certain intrinsic shortcomings, especially for great cities. It makes no provision for political leadership in the highest sense of the word. The city manager is a technician, a reporter of facts, and an adviser to the council. Strictly speaking, it is not his business to formulate controversial public policies, to bring them

before the people, to propose needed innovations, to carry on vigorous battles against opponents, to win the support of the voters and the council for large undertakings calling for vision and great energy. If a manager should oppose the council, he might be removed by it and could not appeal to the voters for support. Besides, by taking part in such controversial matters, he would cease to be an administrator. Where then is political leadership in a great city having the manager plan to come from? The members of the council are all equal. Will a leader like a prime minister arise in the councils of such cities and assume the rôle of political director?

Problem of Planning. A quarter of a century has now elapsed since the first experiments were made in administration by city managers, and certain tendencies have been clearly revealed. Those who seemed to imagine that the manager scheme was a simple system, perfected in all its parts, completely integrated, and in full possession of the science and art of municipal government have been compelled to take note of limitations on their theory. City managers themselves did not and could not automatically develop a beautifully balanced science of municipal government. They did not have the background for it and in many cities, if not all, they found several branches of administration outside of their jurisdiction, notably, education, planning, and zoning. Furthermore they have been and still are divided on a fundamental issue: Is the manager to assume leadership in the formulation and promotion of grand policies or is he merely "a servant of the city council," commissioned to carry into execution ordinances and projects adopted by that body? If the former is his duty, then he becomes involved immediately in politics, abandons his position as a technician, and takes on the rôle of a mayor, whatever his nominal title. If the latter is his true function, the analogy of business management disappears, because the president of every great corporation is responsible for formulating the policies of his concern as well as for carrying into execution the program approved by his board of directors.

General Competence Not Guaranteed. This of course is not surprising. There was no reason for expecting omniscience on the part of city managers. While the engineering profession has furnished the largest single quota of managers, the major portion, by far, have come from walks of life still less related to municipal administration; into the fellowship have been gathered real estate and insurance agents, editors, lawyers, physicians, druggists, contractors, veterinarians, accountants,

merchants, mechanics, carpenters, firemen, plumbers, and undertakers. If the entire body had been drawn from the engineering world, that would have been no guarantee of all-around competence in municipal affairs. There is a wide range of municipal administration—social, esthetic, economic, and moral—which lies more or less outside of the realistic world dominated by engineering. With respect to the miscellaneous sciences, arts, and skills represented by the other brethren in the city managers' fraternity, no generalization can be safely made, except that few of them provide for any special mastery of urban government.

Lack of Managerial Skill. Even if we take municipal administration in the narrow technical sense of policy execution, there is no reason for expecting miracles from engineers or the other "practical" men drafted for managerships. Administration calls for special talents pertaining to finances, budgets, and the employment of large bodies of skilled and unskilled labor. Training and experience in mechanical, civil, or electrical engineering or in a small business enterprise do not necessarily provide competence in this wider sphere. Indeed L. D. White could truly say in his work on the city manager, published in 1927, that up to that year managers had not made "significant contributions to the art or science of management. Their ability to invent and contrive has often been illustrated in small matters but not in the larger strategy of management. The manager movement has raised the standards of integrity in municipal administration, but it has not developed the practice of management in any noteworthy particular." To be sure, since that time, the managers' association has established a staff agency for research and is widening the borders of its vision, but in so doing it seeks enlightenment in the wider knowledge of mankind, confessing the inadequacy of the training and experience thus far developed in the science and art of municipal administration.

Political Practices Revive. Besides these tendencies relating to the inner development of the city managers' profession, there are others not less significant, pertaining to outward circumstances. Mr. White, to whose work reference has just been made, finds that after the initial burst of enthusiasm, the councils in manager cities tend to decline and to fall into the hands of "politicians" of the old type. The effort of the more daring managers to inject imagination and brains into city government, he discovers, leads to conflicts which threaten to undo much of the good work accomplished by efficient administration. In the third place, there is an increasing inclination on the part of cities to choose

local men as managers rather than men who have already seen long service in that field.

Gains Despite Difficulties. Yet when all is said that can be said by way of criticism and adverse comment, it remains a fact that city managers have raised the efficiency and integrity of municipal government. They are steadily developing a wider vision of their responsibilities and opportunities. They have effected enormous economies in the construction and maintenance of public works; and many have displayed the soldier's devotion to their tasks, lifting the level of civic morality by their labors, enthusiasm, and sacrifices. Owing in no small measure to the achievements which may properly be set on the credit side of their ledger, the promise of urban life in many cities, notably Cincinnati, is more secure than ever before in our history.

The Administrative System of the City

Prime Importance of Administration. Although the work of administration—carrying out laws and ordinances in detail—varies in some respects under the three plans of city government, its importance is fundamental under them all. There is little that is spectacular in the regular discharge of administrative duties, but upon this hour-to-hour work depends, in a growing measure, the excellence of the city's government. The making of laws is a relatively simple matter; the execution of them against thousands or millions of people and enormous property interests is the task which throws the greatest strain upon human nature. The council may speak its will and adjourn; the executive officers' work and responsibilities continue day and night. It is easy to make a model law relative to housing, for instance, but the condition of the homes of the people may depend upon the efficiency and policy of the department in charge more than upon the details of the law. How to organize administrative departments and make them efficient and enlightened is one of the great problems of city government.

Haphazard Growth of Administrative Functions. The problem of organizing and making effective the work of administration has been rendered acute by the steady increase in the number of functions cities have been called upon to perform. Special groups, bent on forcing municipalities to undertake new duties, have frequently fixed their attention on their own separate, narrow projects and insisted on the creation of new and distinct agencies to carry them out. For a long time little or

no effort was made to coördinate many of the newly created offices with the older branches of administration and as a result there grew up a jumble of semi-independent bodies often accompanied by duplication of work and conflicts of authority. Nor was there usually any agreement as to how the various bodies should be directed, for cities tried ordinary boards, bipartisan commissions, single-headed departments with advisory boards, and single-headed departments without advisory boards.

Administrative Reorganization. As the functions of cities expanded, many cities were virtually forced to remodel their administrative structures or run the risk of a break-down in municipal activities. To guide them in the process, certain fundamental principles were evolved. One of these is that all functions of the same character should be placed under the supervision of the same agency. With the growth of commission government and the city-manager plan there also runs a tendency to group all agencies under a few departments such as public affairs, accounts and finance, public safety, streets and public improvements, parks and public property. But in the larger cities, owing to the volume of work, the number of departments will run to fifteen or twenty. It seems to be generally conceded that each department should be placed under a single executive, although exceptions are sometimes made. In addition to the great departments, there will be found in most cities one or more boards—for education, assessment, parks, health, libraries, and civil service—appointed by the mayor or elected by popular vote.

Choosing the Chief Administrative Officials. Quite as essential to efficient government as the proper organization of departments and assignment of functions is the task of securing competent directors. In dealing with the problem of the best methods for choosing higher ranking officials, our cities have tossed about in uncertainty. They have tried election by the city council, appointment by the mayor with the approval of the council, popular election, appointment by some state authority, and appointment by the mayor or city manager alone. The last of these methods was devised for the purpose of fixing responsibility so that the citizens can know whom to hold accountable. The tendency of current practice is in its favor and the results of experience indicate that it is best calculated to promote both democratic control and efficiency in the performance of official duties.

Recruiting Personnel. However well organized and staffed the overhead administration of a city may be, its strength in action depends upon a numerous body of officials and employees all the way down the

line to the lowest subordinate. The problem of recruiting and maintaining a loyal and efficient personnel from top to bottom is serious business, for the welfare of the city depends in such a large measure upon the skill and industry with which the rank and file of employees, who are usually unknown to the public and receive slight honors, do the work entrusted to them. In approaching this problem of securing an efficient personnel, our cities have made numerous experiments. The spoils system had its day and still holds sway to some extent. In the greater cities the principles of civil service reform have been adopted. Although the Federal Government pioneered in introducing this reform in 1883, municipalities have more recently taken the lead in perfecting the technique of the system. Cities having more than a million inhabitants, namely, New York, Chicago, Philadelphia, Los Angeles, and Detroit, and more than 100 other municipalities have separate civil service commissions which administer the rules for examining and promoting city employees. In a few states, on the other hand, the civil service law is enforced by a state commission which supervises the personnel systems in all the major cities within its jurisdiction.

Municipal Finance

Appropriations. The funds required for the support of the executive establishments just described and for other municipal purposes are periodically supplied by appropriations authorized by the city council or commission. Appropriations may be classified according to purposes: to meet current expenses for salaries, wages, supplies, and materials; to cover the cost of permanent improvements such as buildings and bridges; and to pay fixed charges such as interest on the municipal debt. In the detailed purposes for which expenditures are made the policies of the city government are given concrete form—the culture of its people is reflected. Indeed a history of urban civilization can be written in terms of appropriations, for they show what the citizens think is worth doing and worth paying for. In the methods of making these appropriations, the city government demonstrates its business ability or lack of it.

In the beginning of our municipal history, city councils had no general budget plan. They authorized outlays from month to month as the members were moved to offer suggestions or the city officers made demands for money. No one could ever tell in advance how much would be spent in the year or whether the fiscal period would close with a

surplus or a deficit. Appropriations were usually made in large amounts —lump sums—and spending officers were given a free hand in fixing wages and salaries, buying supplies, and signing contracts. There was a lack of planning, foresight, and control. Waste and corruption on a huge scale flowed from these loose practices.

Budget System. It was in the cities that the advocates of budget reform did effective work long before it was taken seriously by the state and national governments. Since the principles of budget making have already been discussed (p. 670), they need not be reviewed here, for they are of general application. It may be said however that in all our larger cities there is to be found some kind of budget—some kind of systematic planning of expenditures for definite periods of time and more or less rigid accounting control over the disbursement of funds.

Initiation of Budget. As noted above, there is a marked tendency to take the initiation of the budget out of the hands of the city council and vest it in some smaller body or the mayor. In New York City, it is adopted by the board of estimate and then it is submitted to the city council. The latter can reduce or strike out items, but not add to or increase them. In Boston, the mayor initiates the budget, with the assistance of the budget commissioner; as in New York the council may reduce but not increase. In Philadelphia, the mayor prepares the budget, but the city council is free to make alterations at will in his schedule of proposed expenditures. In city-manager cities, the manager usually assumes this function.

Budget Hearings. It is customary for various civic bodies to take an active interest in municipal budget-making. When the estimates for the coming year are first made public in tentative form, open hearings are frequently granted. This may be done a second time when the consolidated budget is ready for final adoption. At these hearings persons and agencies interested in various features of the proposed budget can present their claims and protests and can draw the attention of the city government and the public, through the press, to the points at issue. Thus the budget, as a program for community welfare, can be carried beyond the council chamber to the whole city.

General Revenues. After a city government has decided upon its program of expenditures, it must provide the revenues. Its chief source of income is, of course, taxation, but its powers, as we have remarked, are closely restrained. A survey of all the largest cities, namely, those having a population of more than 100,000, shows that in 1943 they

derived almost sixty per cent of their current revenue from the general property tax on real estate and personal property such as machinery, furniture, and merchandise. And of 883 cities with over 10,000 population 779 reported that they had not developed any other sources of revenue in the previous two years. To this prime source of revenue must be added a small percentage for poll, business, sales, and license taxes.

Grants in Aid. Next in importance as a revenue source, and constituting about nineteen per cent of the total income of cities with over 100,000 inhabitants in 1940, were grants in aid—federal, state, and miscellaneous.[11] For a number of years cities had been receiving sums from states in support of education and other special functions. Prior to the depression which began in 1929, federal grants for various purposes went directly to the states which in turn distributed the allowances to the cities, as was the procedure in the case of vocational education. But as municipal revenues began to decline sharply in 1932 and the burden of assisting the unemployed mounted, the Federal Government commenced to make loans directly to cities for public works and other purposes. Later it supplemented loans by huge grants directly or through state authorities, to provide food, clothing, and shelter for the hungry and homeless and work for the unemployed under the Works Progress Administration. Under the Social Security Act (1935), the National Housing Act, and other federal legislation (p. 500), cities derive direct or indirect assistance or subventions from the Federal Government.

Other Sources of Revenue. Also important among the revenues of cities are earnings of public service enterprises, such as water works and electric light plants. These are supplemented by income from rents of municipal property, earnings of departments from fees and license charges, fines and forfeitures, and levies on employees for pension funds. To miscellaneous sources must also be added special assessments. Among newer sources should be mentioned parking meters, business licenses and service charges such as for refuse collection. Some cities are supplementing their revenues by taxes on pin-ball machines and juke boxes.[12] It is well known that public improvements, such as water mains, sewers, and pavements, add to the value of adjoining land. If such improvements are paid for by general taxation, then citizens who may receive no direct advantage contribute an unearned increment to those who do benefit. Hence there has come into favor the practice of laying all or part

[11] *Statistical Abstract of the United States*, 1942, p. 264.
[12] *Municipal Year Book*, 1943, pp. 254 ff.

of the cost of public improvements upon the owners of abutting or neighboring property. This tax is known as the special assessment. The justice inherent in it is almost universally recognized and it is applied with increasing frequency.

Assessment. The assessment or valuation of property for taxation involves many complex and difficult problems, but the most progressive American cities have worked out effective methods, among which the following are especially significant: (1) the assessment of land and buildings at full value; (2) separate valuations for land and buildings; (3) lot and block maps showing the size and shape of every piece of land in the city; (4) the preparation and publication of land value maps indicating the value per front foot placed on all land in the city; (5) the adoption of uniform principles for ascertaining the special values of corner lots, long and short lots, etc.; (6) hearings on tentative assessments; and (7) the creation of an efficient assessing agency continuously devoted to the scientific study of property values and valuation.

Debts—Practices and Reforms. Another division of municipal finances embraces debts. As a rule the amount of debt which a city can incur is limited, often to a certain percentage of the assessed value of the real property. There was a time when the city could borrow freely to pay current bills, and there is a notorious case of one city that issued fifty-year bonds to pay for second-hand fire hose which lasted a few years. This was an easy way of reducing taxes and making the coming generations pay. But such practices are now discredited; sound principles forbid the borrowing of money for current expenses, except in emergencies, and require the city to provide for all such borrowings in the next year's budget if not earlier. Sound principles also require the city to make provision for paying the interest on its debt and for laying aside a certain sum each year to discharge the principal amounts as they fall due. Equally important is the doctrine that the term of every bond issue shall bear some relation to the life of the improvement for which it is to provide. To authorize fifty-year securities for a pavement that lasts ten years is obviously unbusiness-like. The generation that consumes should pay, and in recognition of this fact many cities now employ serial bonds for such improvements—bonds which fall due in installments spread over a period of years.

The Debt Crisis. Many forces have conspired to pile up municipal debts. The pride of citizens has led them to embark on costly improvements—pavements, parks, boulevards, air ports, and public buildings.

Real estate dealers, contractors, and local "boosters" have induced cities to extend their boundaries, lay out new streets, build expensive schoolhouses, construct golf courses and airports, and undertake elaborate enterprises of one kind or another. According to estimates, the cities, towns, villages, and school districts of the United States had a net debt of $10,875,000,000 in 1932; to this huge sum were later added bond issues to meet the problems of unemployment and poverty. Then came a crisis, as tax revenues fell off. By 1934 at least 3,000 units of local government had defaulted on some or all of their obligations—failed to meet their debt payments. Some of them were able to make terms with the bankers and their other creditors; others tossed about in financial distress. Then Congress came to their aid by passing a municipal "bankruptcy" act, allowing federal courts to take jurisdiction over controversies between cities and their creditors under certain conditions (p. 754). Though declining slowly, the gross municipal debt aggregated $9,917,000,000 in 1941.

Accounting Methods. Indispensable to the exact operation of even the best financial devices is a scientific system of records and accounts. In this field there has been a remarkable advance in recent years. Accounting, to the layman, is a dull subject, but it is none the less significant. Speaking generally, an adequate system of records and accounts in the hands of treasurers and auditors acts as a check on spending offices by showing where every dollar goes in paying wages and salaries, buying material objects, and securing other services. It also affords a statistical record for executive officers, enabling them to review past performances and plan future work in terms of cost.

Municipal Leagues

Local Associations. Although our cities are legal entities and proceed with the management of their own affairs under state laws, they all have kindred problems and can derive great benefit from an exchange of experience. A growing realization of this fact is recorded in the formation of municipal leagues and societies of municipal officers. In 1942 forty-two states had such associations composed of affiliated municipalities within their respective borders. Among those which have carried this coöperative movement to the highest pitch of success are Colorado, Florida, Illinois, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Virginia, and Wisconsin. In some cases, notably Minnesota, Wis-

consin, and California, the leagues are connected with universities and receive inspiration and direction from professors in the field of political science. Besides holding annual conferences, a few of the municipal associations maintain a secretariat, prepare legislative proposals, and promote or carry on research.

National Societies. Crowning the state municipal leagues is a general federation, the American Municipal Association, which is affiliated with three other organizations concerned with similar problems: the National Municipal League, the International City Managers' Association, and the Governmental Research Association—the last named representing the various private bureaus and institutes of municipal research in different parts of the country. The American Municipal Association, representing more than 7,000 cities and villages, has become a powerful central agency for the study and solution of municipal problems, for the pooling of experience, and for the distribution of workable information to officials on the firing line of city government in every part of the Union—making the knowledge of the greatest available even to the least.

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CHAPTER XXXII

MUNICIPAL FUNCTIONS

Municipal Functions a Phase of Civilization. An interesting story of humanism in America could be told in terms of accumulating municipal functions—increasing provisions for public safety, public works and utilities, public health, education, social welfare, and city planning. In the prosaic pages of statutes and city ordinances is reflected the determined spirit of American citizens striving to make cities more convenient and secure for life and work, more healthful, and more beautiful. Of achievements there can be no doubt. If proof is required, it can be found by comparing the conditions of any large American city at the middle of the nineteenth century with those prevailing at the present time. Over against unpaved streets, dirty and swimming in mud at each rainfall, dimly lighted at night, if at all, may be set paved streets, cleaned and washed by municipal authorities, and brilliantly lighted at night. With primitive sanitary arrangements may be contrasted engineering triumphs for supplying water and disposing of wastes. For general illiteracy has been substituted universal education. On the one side this story of municipal improvements touches every branch of science, engineering, and esthetics; on the other, the health, safety, comfort, liberty, and property of citizens. It is marred, to be sure, by folly and corruption; slums, misery, poverty, and degradation yet remain as challenges to renewed energies; but considered in historical perspective it is a promise of greater work to be accomplished.[1] Progress is recorded in each issue of the *Municipal Year Book*.

Stages in Growth of Functions. Broadly speaking, the history of municipal functions falls into two periods. The first opened with the rise of American cities after 1825 and ended about 1915. It was marked by the rapid multiplication of municipal activities connected with paving, lighting, water supply, sanitation, health, housing, and education.

[1] For American cities after the Civil War, see A. M. Schlesinger, *The Rise of the City*.

The second period extends from about 1915 to the present time. In this period few new functions were added to those already adopted. There was an expansion of old functions, particularly education, health, and recreation. There was also an increase in the expenditures of cities as measured in dollars. But if the growth in urban population is taken into account and the dollar is reduced to its buying power, then it must be recorded that in nearly all municipal functions there was a relative recession between 1915 and 1929.[2]

State and Federal Intervention. While the growth of municipal functions was being checked, there was an increasing tendency for state governments to assume new responsibilities in connection with health, education, welfare, and housing (p. 662). Slowly it was being recognized that cities were not isolated economies, that they were vitally related to state and national economies, and that alone they could not adequately cope with problems of congestion and poverty. This fact was strongly emphasized by the economic crisis, and then the Federal Government was called upon to aid both the cities and the states in wrestling with their problems (pp. 498–504). Even crime has ceased to be purely local in respect of control; state and federal aid has been invoked. It seems therefore that we are at the end of an epoch in the history of municipal functions. They are still numerous and important, but many burdens are being transferred to state governments and the Federal Government, or carried in coöperation with them.

Public Safety—Police and Fire Administration

One of the oldest municipal functions is that of keeping order and protecting life and property. In the smaller American cities this function is generally confided to a single department called Public Safety; in the larger cities it is divided between the police department and the fire department. Even where police control and fire protection are combined under a single department, each function is entrusted to a separate division.

Variety of Police Duties. Historically, police control has usually been associated with the prevention of ordinary crime and the arrest and punishment of criminals, but in the modern city the police authority performs many other duties of vital importance to public welfare. It must direct traffic—one of the difficult functions of city government. It

[2] C. H. Wooddy, in *Recent Social Trends in the United States*, Vol. II, pp. 1307 ff.

must provide for the requirements of particular sections and institutions of the city, such as parks, rivers, harbors, manufacturing and residential districts, theaters, and public meeting places. It must report cases of distress and the many violations of city ordinances. It must deal with the juvenile mischief maker as well as the hardened offender. Three of its manifold functions run to the very basis of life and liberty; namely, the enforcement of the criminal law, the management of strikes, and the control of public meetings. "The truth of the matter is," writes Austin F. Macdonald, "that the police department has become a sort of municipal waste basket; functions not readily assigned elsewhere are placed in its keeping." [3]

Amount of Crime. It cannot be denied that the amount of crime in America is a blot on our record. According to a statement made late in 1938 by J. Edgar Hoover, Director of the Federal Bureau of Investigation, there were at that time more than 4,600,000 criminals in the United States. "Would these facts be more realistic," he said, "if I pointed out that last year in this country a serious crime was committed every 22 seconds; that 3,879 serious crimes were committed every day; that nearly 1,500,000 serious crimes, such as murder, manslaughter, rape, robbery, burglary, and aggravated assault were committed during the year; that 37 murders were committed every day; that one robbery was committed every nine minutes, and that one larceny was committed every forty seconds? . . . The annual cost of crime is estimated to be $15,000,000,000, . . . 25 per cent more than our total annual tax bill of approximately twelve billion dollars." The publications of the Federal Bureau of Investigation revealed a substantial downward trend of the crime rate during the 1930's and after 1941, an upturn, especially in the amount of juvenile crime.[4]

Racketeering and Kidnaping. After the World War closed in 1918 two crimes, known as "racketeering" and "kidnaping," sprang into prominence and flourished widely. The first took many forms. It was connected with efforts to evade the law by the illegal manufacture, importation, and sale of intoxicating liquor. Then it spread into business and organized labor. In origin it was old but it presented many startling and novel aspects. Although difficult to define, it has certain general characteristics. It is organized and dominated by "gang" leaders. These leaders choose a given industry, such as trucking, marketing, or the

[3] *American City Government and Administration* (1941), p. 463.
[4] *Uniform Crime Reports*, Quarterly Bulletins

motion pictures. They make a number of "rules" for the industry: persons engaged in it must buy from certain firms, or they must employ members of a certain trade union. Employers, employees, or merchants brought within a "racket" by gang leaders are compelled to obey the "rules" and to pay the gang leaders for "protection." If they do not pay, they may find their places of business bombed or destroyed by fire. Workingmen who do not join the trade union and pay big fees cannot otherwise find employment, or, if they do, may be beaten or murdered. The crime of kidnaping persons of wealth and holding them for ransom is also old, but in daring and ingenuity modern kidnapers have outstripped all precedents. Owing to the fact that huge sums of money may be "made" in racketeering and to its wide-reaching ramifications throughout the economic world, it has become a menace of immense proportions and in some places has defied or even dominated police authorities and courts by bribery and terroristic methods. Recently, kidnaping has declined, but racketeering continues on a large scale.

Enforcing Moral Standards. The difficulties of enforcing the ordinary criminal law are augmented by attempts of rural communities to impose upon the cities moral standards which the latter do not accept. Furthermore there is in the United States a marked tendency to penalize every action which religious people regard as sinful. We have upon our statute books hundreds of laws imposing fines and other penalties for actions which the majority do not regard as even harmful. There are statutes forbidding card playing, tennis, and golf on Sunday. In some states the sale of soda water, tobacco, candy, and chewing gum is unlawful on that day. A police raid in Baltimore once rounded up more than one hundred terrible offenders against such legislation, including a man who was painting a gate in his back yard when he should have been at church. In New Orleans, we are told by Raymond Fosdick, the enforcement of the law forbidding the sale of tobacco on Sunday was in a state of compromise when he made a study of it: "Green curtains were hung to conceal the sale of tobacco on Sunday. The curtains served the double purpose of advertising the location of the stand and of protecting the virtue of the citizen from visions of evil." Of course it may be said that such laws are rarely enforced. Still they are on the books; every now and then a moral earthquake in the community drives the police force to arrest luckless people who assume that the law is asleep. At all events, police commissioners are always in mortal fear of being criticized or discharged either for neglecting or for enforcing such laws.

Labor Disputes. In dealing with strikes and other labor disputes, the police commissioner of a city is always between two fires. He often has it in his power to make any strike a success or failure. If he sympathizes with the employers he may order the arrest of labor leaders on real or trivial charges, dissolve meetings of strikers, prevent them from congregating near their old places of employment, and forbid them to persuade other working people to refuse their vacant jobs. The situation is thus summed up by Mr. Fosdick in his careful survey of police administration: " 'We lock them up for disorderly conduct,' a chief of police told me when I asked him about his policy in regard to strikes and strikers. 'Obstructing the streets' is another elastic charge often used on such occasions. Sometimes the arbitrary conduct of the police passes belief. Newspapers favoring the strikers' cause have been confiscated and printing establishments closed on the supposition that they would 'incite to riot.' Meetings of workingmen have been prohibited or broken up on the theory that the men were planning a strike. . . . I asked the chief of police of a large industrial city on what legal ground he denied the privilege of assembly to the striking operators of an extensive plant. 'We assume that their meeting halls are disorderly houses,' he replied." [5] In 1938 Mayor Frank Hague of Jersey City forbade representatives of the Committee for Industrial Organization to hold meetings in the city and declared himself to be "the law." This high-handed conduct was rebuked by the Supreme Court of the United States in the declaration that the function of the police at public meetings is not to prevent speakers from expressing their views but to preserve order while they speak. Hague had been denying the "privileges and immunities of citizens of the United States" and depriving them of the "liberty" of the Fourteenth Amendment.[6] On the other hand, the mayor or commissioner may allow strikers a free hand verging even upon violence to attain their ends, if his sympathies are on their side—a thing which seldom happens.

The correct course to pursue—that of even-handed justice—is described by Arthur Woods, in orders issued to his subordinates when he was police commissioner in New York City. He laid down the fundamental principle that the business of the police was to protect life and property, to maintain public peace, to take no official interest in the merits of labor controversies, to assume that the purposes of a strike are

[5] *American Police Systems*, p. 322
[6] Hague *v.* C.I.O., 307 U. S. 496.

legal unless otherwise instructed by courts of law or military officers, and to permit strikers to hold meetings or persuade other workers to go on strike provided they did not block the traffic or resort to physical violence or use language offensive to public decency. Surely these ideas are sound and deserve the allegiance of all citizens except those blinded by prejudice.

Questions of Free Speech. During strikes and on other occasions the police force has to deal with matters of opinion and the expression of opinion. Theoretically speech is free, but practically there are and must be limits on it. Obviously it is not possible to allow a speaker to set up a soap box in a crowded thoroughfare and block the traffic with his audience, no matter what theme he wishes to discuss. Likewise it is impossible to allow the organizers of parades and demonstrations to fill the streets with banner-waving throngs whenever the spirit moves them. Accordingly it is the general custom to require those who wish to organize street meetings to secure a permit from the police headquarters in advance. Clearly here is an opportunity for the commissioner to express his likes or dislikes, and he frequently does so. In his control over public places, he may go even farther, and break up meetings and assemblies on flimsy pretexts.

On the other hand, police commissioners sometimes use excellent discrimination. A wise policy was adopted by Arthur Woods to whom reference is made above. His predecessor had been in the habit of "smashing" radical meetings in Union Square, but Mr. Woods stopped the practice. He placed a large force within quick call, scattered plain clothes men through the crowd, and prepared to halt any violence as soon as the sign appeared. "The change of method," he reported, "was almost unbelievably successful. There was no disorder; the crowd was very large but well behaved, and at the end of the meeting when everything was over and many had gone home three cheers were proposed and given for the police." [7] Arbitrary actions on the part of the police are more likely to stir up disorder or bad temper than to allay it. Certainly the average policeman is hardly fitted by education and experience for the delicate task of estimating the degree and quality of danger contained in every printed or spoken word. Moreover municipal councils must proceed with caution in enacting anti-labor legislation since the Supreme Court of the United States has countered such action in the

[7] *Policeman and Public*, pp. 73–78; Chafee, *Freedom of Speech*, pp. 173 ff.

Hague decision and in another case, invalidating a California municipal ordinance severely limiting picketing.[8]

Departmental Organization. With such extensive and perplexing functions to discharge, police organization presents thorny problems. Should there be state or local administration of police functions? In three great cities—Boston, St. Louis, Baltimore—and in some minor ones, police control is in the hands of a commissioner or board appointed in whole or in part by the governor of the state. This expedient has been tried in many other cities, including New York and Chicago, but it has been generally abandoned in favor of local autonomy. Broadly speaking, police administration in America is vested in a branch of the city government.

In organizing that branch the usual experiments have been made with boards and single-headed departments. At the present time the greatest cities have single-headed departments, while many cities of second rank in population retain the board system. Among specialists there is some division of opinion on the subject, but the trend of thought favors the concentration of responsibility in one man. Such is the view of Mr. Fosdick and Dr. Graper, who have carefully examined both the law and practice on this point.[9] As a general rule the board or head of the police department is chosen by the mayor or manager of the city, while in the commission-governed cities one of the commissioners assumes the responsibility. In several Southern cities the common council elects and then sometimes divides responsibility, patronage, and "pull" with the officer chosen.

Officials and Patrolmen. The operating police force under the police board, director, or commissioner consists of the chief, his subordinate officials, and the rank and file of patrolmen. The chief, or technical director of the force, is generally subject to the spoils system prevailing in municipal politics, and comes and goes with the changing fortunes of parties, but efforts have been made, as in Massachusetts, to give more permanence of tenure under civil service rules. In a number of cities tradition runs against the removal of the chief for political reasons, and works for continuity of service.

As to the rank and file of the force the principles of the merit system,

[8] Carlson v. California, 310 U. S. 106.

[9] Fosdick, *American Police Systems*, p. 158; E. D. Graper, *American Police Administration*, pp. 12–27.

now effective in about five-sixths of our cities over 100,000, are applied to appointments, promotions, and removals. Even the power to remove is so restricted in New York City that the commissioner has only provisional authority; a discharged policeman can appeal to the courts for a hearing and may be reinstated by judicial order. Examinations for admission and promotion are designed to test the fitness of the candidate for the multifarious duties of a policeman, and in the most progressive cities well-equipped schools have been established in the police departments to give specialized training. As police work increases in complexity, separate squads are drilled for specific duties, and women police officers are frequently employed to deal with certain classes of offenders. Where the merit system prevails, pensions for the police force are usually established to afford security to old age as well as assistance in cases of injury and sickness.

Professional Police Administrators. Police administration long since left behind the rule of thumb and is rapidly acquiring the dignity of a distinct profession. Scientific crime detection has doomed the rubber hose technique even in the relatively few backward departments where it still persists. Systematic methods of personnel selection and record keeping are other signs of the trend. The University of California and the University of Wichita grant degrees in police work. Northwestern University and the University of Denver have courses for traffic officers.[10]

Mechanical Equipment. It is on the side of technical equipment that police departments have made the most rapid advance during recent years. Automatic traffic lights give them control over the flow of traffic in the streets. Mechanical contrivances, such as the radio for broadcasting news of crimes to police cars on patrol and to police authorities in distant places, enable them to spread wider nets for catching offenders. The two-way radio permits men on patrol to report news quickly to headquarters and to receive orders promptly. Finger-printing and other ingenious devices for recording the characteristics, careers, and operating methods of criminals aid in the processes of search and identification. For the purpose of coping more effectively with robbers, racketeers, and kidnapers possessing swift and powerful motor cars, the Congress of the United States has come to the aid of cities by enacting legislation and setting up federal agencies (p. 208) specially equipped to coöperate with municipal and state police forces in widening the

[10] See Stuart A. McCorkle, *Municipal Administration*, pp. 288–9.

range of search and arrest. Perhaps in this domestic armament race, government may overtake private enterprise.

Opportunities for "Graft." Police administration, whether good or bad, is always likely to be involved in politics. Rich opportunities for "graft" are offered day and night to every member of the force, from the roundsman on his beat to the commissioner in the central office. There are everywhere opportunities for favoritism and persecution. Gamblers, illicit-liquor sellers, quacks, fakers of all kinds are willing to pay handsomely for "immunity," and it is easy for the police to overlook violations of the law. All the disorderly elements of the city are willing to share their gains with the protecting policemen, and the pressure is often too great for human nature to endure.

Municipal Courts. Closely connected with the police force are the municipal courts in which are tried the offenders, great and small, who are arrested by the patrolmen. The selection of judges for these courts is a serious matter, for such judges have control over the fate of millions of men, women, and children. It is important that they be in close and sympathetic touch with the social and economic conditions under which the people who are brought before them are compelled to live. A kind word, a gentle rebuke, or a helping hand at the right moment may stay a new offender on his downward course, or may save from despair some unhappy person whose only offense is his ignorance, or who may have been arrested without warrant by an equally ignorant policeman. On the other hand, brutality or indifference in a police magistrate may fill the prisons with people who have no business there; may embitter a large portion of the population against what purports to be a system of "justice"; and may add to the hopelessness which overwhelms thousands in their fight against the poverty, unemployment, and dependence so prevalent in great urban centers. In the best of circumstances, grave injustice is often done in our municipal courts, especially to the poor who through ignorance and want of able counsel are imprisoned, fined, and often browbeaten by incompetent judges. This is not a matter of speculation. It is a matter of fact established after a careful inquiry under the auspices of the Carnegie Foundation.[11]

Choice of Judges. An argument is often advanced in favor of popular election of police magistrates, to the effect that it will bring them in

[11] R. H. Smith, *Justice and the Poor* (Carnegie Foundation for the Advancement of Teaching).

close touch with the life of the district in which they preside. But it has been found in a number of instances that the system of popular election only brings the police justices under the control of political bosses supported by the elements which pay for immunity against the enforcement of the criminal laws. Thus it may happen that police magistrates are selected, not because they understand sympathetically the conditions of their respective districts, but because they will "protect" the lawless cliques which, operating through party organization, put them in power. The recognition of this fact has led several large cities to abandon the elective system. In New York City, for example, the municipal magistrates, having power to try petty criminal offenders and hold prisoners for trial, are appointed by the mayor for a term of ten years; and the justices of the court of special sessions are likewise chosen by the mayor for the same term of years; but as the scandals of 1931 proved, district "bosses" continued to select judges in spite of the change in the law, at least for a time.

Court Reforms. The reform of municipal judicial systems in general is receiving special attention at the hands of individual students and also of associations, such as the American Judicature Society. Many important changes in the structure and procedure of the courts have been suggested and a model scheme has been worked out (p. 747). Reform has gone beyond theory. City after city has completely reorganized its judiciary during the past decade and the main lines of advance have been laid down. First among the new measures is the creation of a great consolidated central court composed of an adequate number of judges who are assigned to certain geographical divisions of the city or to try special classes of cases as daily needs arise. When this reform is accomplished, we do not find the calendar of one court crowded, with resulting delays, while another court in a law-abiding residential district has nothing to do. Second among the new projects of reform is the establishment of special courts or sections of the central court to deal with important classes of cases. Such courts include traffic courts to try offenders against traffic laws, domestic relations courts to deal with matrimonial and other family controversies, and technical courts to try offenders against the administrative orders of the city relative to buildings, tenements, fire hazards, and similar matters. A general feeling that women ought not to be tried in the same courts and at the same hours as men has led to the establishment, in a few cities, of women's courts with judges pre-

sumed to be specially fitted to handle the problem of the woman criminal. The difficulty the poor sometimes have collecting money due them has led Chicago, Cleveland, and some other cities to set up small claims courts with a simplified and inexpensive procedure.

Juvenile Courts. Among these special tribunals, separate mention should be made of children's courts which are to be found in all the large cities. The purpose of the juvenile court is to remove young offenders from the routine for old and hardened law-breakers and to treat them, not as criminals, but as delinquents who need proper care and supervision. Trials in these courts are not surrounded with the pomp and circumstance of the law, but are usually conducted in a home-like chamber in which the judge holds consultation with the accused, parents, and witnesses. Ordinarily first offenders are not committed to institutions of any kind, but are released on probation unless their home influences are bad, or their parents testify to their incorrigibility. Usually connected with the juvenile courts are probation officers whose business it is to visit the homes of first offenders to see whether the instructions of the courts are being obeyed or the home environment is conducive to reform. Obviously the effectiveness of this system depends largely upon the tact, humanity, and wisdom of the probation officers, but it is a step in the right direction, because it recognizes the importance of helping offenders to better ways early in their careers, and it also takes into account the influence of family environment and social conditions in the creation of the criminal.

Public Defender. Another attempt to attain the ends of justice has been made by the establishment of an office known as that of "public defender." In every criminal case the accused is prosecuted by an officer of the state whose business it is in practice to secure conviction, although theoretically he is merely concerned with equal and exact justice. The accused on his part is defended by a lawyer whom he employs. If he is rich he may summon to his aid powerful and skilled counsel who may baffle both the prosecutor and the judge. If he is poor he must hire a cheap lawyer or trust his cause to the mercies of a lawyer appointed by the court—one who may be lacking in knowledge and zeal. The public defender, on the other hand, is a regular official charged with the duty of defending the poor and unfortunate with the same skill that is displayed by the prosecutor. This office was created first in Los Angeles in 1914. Since then, it has been placed in operation in the

California cities of San Francisco and Oakland, as well as in Chicago, Illinois, three major Connecticut cities, and at least a dozen other cities.[12]

Extent of Fire Hazards. A second branch of work coming under the head of public safety is that of protecting the community against fires, explosions, and other hazards which tend to multiply as chemical and other dangerous industries increase in number and variety. As in crime, so in fires, the United States seems to lead all Western nations. Each year two or three thousand persons are killed at fires and many more wounded. At intervals, the public is horrified by an appalling disaster like the Triangle fire in New York in which more than one hundred workers were burned to death or killed by jumping from the upper floors of a tall building. Every year the losses of property by fire amount to more than a quarter of a billion dollars.

The Fighting Force. In all cities, even those which combine police control and fire protection in a single department, the function of fire fighting is placed under a technical chief. Like policemen, firemen are subject to the spoils system or to civil service rules respecting appointment, promotion, and dismissal, as the one or the other prevails (p. 791). In all the larger municipalities however civil service legislation assures a certain permanence of tenure; and fire training schools have been established to give systematic instruction in technical methods to candidates for admission and to men already in service.

Equipment. To cope with complicated dangers, our fire departments and inventors are constantly creating new appliances and increasing efficiency in fire fighting. The motorization of fire engines is practically universal. Non-inflammable asbestos suits, search lights, gas masks, and all kinds of safety devices are supplied to firemen working under special hazards. Separate mains are laid in certain districts to supply enormous quantities of water for fires at a high pressure which would be dangerous to ordinary water users. Fire alarm telegraph systems, insulated as far as possible from dangers of fire and earthquake, provide quick and sure communications throughout the entire fire fighting force of the city. Water towers reach fires far above the street, and safety towers remove imprisoned occupants of buildings from the path of destruction.

Fire Prevention. Despite the technical improvements for fighting fires, appalling losses of life and property have continued, and the attention of fire departments has been turned with increasing emphasis to the work of preventing fire. Here two special operations are carried

[12] For efforts to improve judicial procedure in general, see pp. 747 ff.

on. One pertains to fires that are accidental in nature or arise from defects in structures and industrial methods. The other is concerned with fires that are deliberately started, often for the purpose of collecting insurance. To deal with the first type, ever stricter regulations are made with respect to employing fireproof materials in buildings and to controlling structures which present special hazards. The use of inflammable and explosive substances within the city limits is subjected to minute specifications. Theaters and auditoriums for public assemblies are required to provide safety devices and proper exits. Fire prevention bureaus are established to study the causes of fires, devise remedies, and carry them into effect. Inspection forces are created to pry into every nook and cranny where hazards may lurk and to cause the arrest of persons responsible for violations of fire-prevention rules and ordinances. Persistent programs of education in fire prevention are carried on through the schools and otherwise. During 1940, 1,012 cities entered the fire prevention contest sponsored by the National Fire Protection Association.[13]

Incendiary Problems. Different in nature and calling for police action are fires of an incendiary origin. Studies made in 1933 revealed that fifty-five per cent of the fire losses in Fort Worth, Texas, and twenty-five per cent in New York City sprang from this source, despite the criminal laws against arson. Two conditions hamper the work of fire prevention in this sphere. One is the tendency of certain insurance companies to allow property owners to take out insurance in excess of the value of their property. The city manager of Fort Worth found that "seventy-five per cent of the buildings subject to incendiary fires were overinsured as measured by the assessed valuation." The other barrier in the way of reducing the amount of arson is the difficulty of securing evidence against offenders and then convicting them in the courts.[14]

Public Works and Utilities

Extent of Progress. Under this head may be grouped all the great engineering and public service enterprises of the city: the paving and maintenance of streets and sidewalks and the construction, management, or regulation of parks, water works, sewers, docks, and terminal facilities, gas and electric light plants, street railways, subways, and elevated lines. It is in this field that modern technology has made many of its

[13] *The Municipal Year Book* (1941), p. 396.
[14] *The Municipal Year Book* (1934), p. 80.

greatest triumphs in the interest of human comfort and convenience. Indeed critics are inclined to disparage our achievements in this sphere as savoring of "materialism," but before anyone grows too captious he should visit some of the great cities of the Orient where miles of streets may be found without sidewalks, unpaved, and swimming in mud ankle-deep after every downpour, where millions of people in crowded sections have no sewer services, where cesspools abound on every hand, where water must be boiled before it is safe for drinking purposes, where public parks are seldom to be found, and where sometimes a metropolis of half a million people may have no street car lines. Art and literature may flourish there, but also discomfort, needless disease, suffering, and death, which American critics of our "materialism" would not want to face.

Streets and Pavements. In mileage of paved streets and sidewalks, American cities lead the world. Even towns of two or three thousand inhabitants will have brick, asphalt, or cement streets. Enormous sums of money have been spent in this work and extensive opportunities for waste and corruption have been exploited to the full. But science is closing in on the grafters and wasters. It has worked out with great skill the kinds of pavement adapted to various uses—business, industrial, and residential. It has provided by laboratory research and road testing a body of exact specifications for materials and methods of construction—specifications which relate quality to costs. It has demonstrated how expert supervision of construction, whether carried on by contractors or by city employees, can guarantee the application of specifications necessary to standard work. There is no longer any need for even the smallest city to suffer from wasteful and inefficient engineering in this field.

Sewage Systems. The same is true of sewer construction and the scientific treatment of sewage, which, strange to say, are not as widely adopted as road improvements. There are many cities with well-paved streets that do not have sewers at all or are inadequately supplied. New Orleans and Baltimore did not complete their sewers until the twentieth century was well advanced. Even in the heart of great cities there are still to be found primitive sanitary arrangements which are a danger and a disgrace. In many smaller cities where health administration is lax, citizens may connect their houses with sewers or not, as they please, and thousands of them prefer the ancient ways. Still this is no fault of the engineers. They have worked out their standard specifications and are ready to make the "spotless town" whenever they are called into ac-

tion. They are ready to provide sewage filtration and treatment plants that work with marvelous precision, but unfortunately many of our cities prefer to pollute the public waters by discharging sewage into rivers, lakes, and bays.

Water Supplies. If we have been negligent in the field of sewage disposal, the same can hardly be said of our efforts to supply an abundance of pure water to city dwellers. The history of public water works in the United States seems to run back to the establishment of a plant in Boston in 1652, but in the year 1800 there were only sixteen plants in the entire country. New York really set the example in gigantic enterprise by constructing the Croton reservoir and aqueduct which were finished in 1842. This historic achievement was quickly followed by large undertakings in other cities; even villages now have public water supplies.

With increased facilities, there has been a steady rise in the per capita consumption of water in our cities, until now it is on the average two or three times that in European municipalities. This is due to the fact that sanitary appliances are more widely adopted by all classes, to the liberal policies of our municipal governments, and to the generous use of water for street cleaning and sprinkling. There is no doubt a great loss due to negligence and leakage—a loss which might be checked by fixing charges on the basis on the amount consumed as measured by meter rather than on the flat rate principle; but most of our cities regard a liberal policy which permits waste as better than a strict régime that tends to prevent the generous use of water.

Municipal Cleansing. With the development in street improvements, sewerage, and water supply has gone a steady advance in the technique of street cleaning, snow removal, and waste disposal. We have gone a long way from the old days when pigs wandered around through the streets of our cities helping themselves to overflowing wastes, although we have by no means reached the highest standard attainable. In this field of municipal activity New York, perhaps on account of necessity, has assumed a position of leadership. In 1881, a separate department of street cleaning was established in that city, in charge of a commissioner appointed by the mayor. A noteworthy revolution was made in the organization and methods of the street-cleaning force under the administration of Colonel George Waring, a man of military experience in the service of the United States, who was appointed commissioner by Mayor Strong in 1895. He applied to the organization of the force—then an

army of 1,400 sweepers and nearly 1,000 drivers—the principle of military discipline. In spite of considerable resistance, he compelled the sweepers to wear white uniforms; he provided another uniform for the carters of ashes and garbage; and, finally, he devised a plan to secure harmonious coöperation throughout the whole force. The result was astonishing; it dignified the work of street sweeping, and was a high example soon followed in various respects by other cities of the United States.

Disposal of Wastes. The disposal of the wastes collected by city forces constitutes a very difficult problem in city administration, for with the growth of the city the old rough-and-ready methods of filling in water fronts or dumping on the outskirts have become not only objectionable but dangerous. Colonel Waring also made a contribution to the solution of this problem by laying down rules to be observed by private citizens in the preparation of their wastes for disposal. He required them to separate decaying vegetable matter from ashes and waste papers, and also established a plant for the reduction of the materials collected by his force of cleaners. Most of our large cities now employ similar methods and have plants for the treatment of wastes; and many of them derive considerable revenue from this source. In this sphere as in other branches of municipal engineering, technology has done its part and inventive ingenuity has devised the appliances. The latest of these makes possible the grinding of wastes in kitchens and discharging them into sewers, thus obviating house to house collections but this throws new burdens on treatment plants. Technical literature abounds; and a city government in search of higher standards can readily discover them.

Public Utilities. Far more important than other municipal enterprises, in terms of capital invested, are the great utilities for supplying gas, electricity, and transportation. Our cities began to wrestle with utility questions long ago, without experience and without guidance. It was in 1823 that the first American gas plant was established at Boston. The horse car appeared in the streets of New York in 1852; Edison made his successful demonstration of the electric street car in 1880, and two years later established in New York City a central electric light plant, the first in America. By the end of the nineteenth century the capital invested in municipal utilities reached a total of more than three billion dollars. In the meantime municipal utilities and municipal politics had become hopelessly mixed.

Utility Politics. The great functions of supplying gas, electricity, and transportation to the public were, as a rule, vested in the hands of private capitalists usually organized as corporations. Before a corporation could begin operation in the streets of any city, it had to secure a charter or franchise from the city council or some official agency; every time it wanted to make an extension of its lines or pipes or to renew its franchise, it again had to apply to public authorities. As such privileges were highly profitable and competition for them was keen, the unscrupulous city councilor or state legislator could often obtain money in return for his vote in favor of a corporation applying for a charter. If the company did not approach the politicians in the first place, it might be "seen" by some of their representatives and "blackmailed" into making gifts of money in return for votes. So it happens that the story of utility politics in the United States has been a sordid one. Conditions have doubtless improved during the past quarter of a century, but the end of corruption, or at least inefficiency, is not yet in sight.

The Ownership of Utilities

Extent of Public Ownership. The principle of public ownership and operation is not extensively applied in the United States except in the field of water supply. This service is so vitally connected with public health that it is generally regarded as a proper function for city governments to assume. At any rate in 1938 more than eighty per cent of the users of public supplies, living in cities of 3,000 or more inhabitants, were served by the various municipal systems.[15] Next in importance are local power developments, a group of enterprises which has recently had the benefit of extensive federal construction loans and outright cash grants. Owing to national assistance and other factors, the installed capacity of generators in city electric systems increased about twenty-five times faster in 1937 than the capacity of private equipment. By the opening of 1941, the trend had reached the point where municipal power systems, in the aggregate, comprised over eight per cent of the nation's generating capacity, and were producing about five per cent of the country's electrical energy.[16] Among the largest cities operating in the electrical field are

[15] Figures from the Burns and McDowell Engineering Company, as reported in the *American City*, August, 1938, pp. 53–54.

[16] *Statistical Abstract of the United States*, 1942.

Detroit, Cleveland, San Francisco, Los Angeles, Columbus, Seattle, Nashville, and Des Moines. Though gas stands as a competitor of electricity, only forty-seven cities of over 5,000 population were reported producing their own gas in 1943 with thirty-five more merely owning the distributing systems. Of 2,018 cities of this class only 244 reported no municipal ownership of any kind and a majority of these had populations under 10,000. If one includes places under 5,000 in population, over two thousand municipal electric plants can be counted in the United States.

In recent years a limited number of cities have even undertaken the ownership and operation of transit facilities for the general public. San Francisco, Seattle, and Detroit are now among the outstanding examples in municipal ownership and management of surface lines, while New York has gone a step farther and entered the rapid transit field. By a constitutional amendment adopted in November, 1938, New York City was empowered to issue a huge block of bonds outside the debt limit for the purpose of buying and unifying (in part, with lines already publicly owned), under municipal ownership and operation, practically the entire rapid transit system of the municipality.

Provisions for Public Ownership. There is undoubtedly a great deal of sentiment in the United States in favor of municipal ownership—sentiment which finds expression in statutes and constitutional amendments empowering cities to buy, construct, and operate utilities (p. 695). For example, the Colorado constitution was amended in 1902 to authorize Denver to own and operate "waterworks, light plants, power plants, transportation systems, heating plants, and any other public utilities." Michigan six years later conferred this power generally on all cities and villages, subject to the proviso that bonds issued by any city for such a purpose in amounts beyond its debt limit should constitute a lien merely on the property and revenues of the utility in question—not on the taxpayers in general. Provisions authorizing municipal ownership are found in other state constitutions (p. 695); but usually they are not necessary because the state legislature under its general powers may confer on cities the right to own and operate utilities.[17]

Difficulties in Way of Public Ownership. Whatever the powers conferred upon the city, there are numerous obstacles in the way of its embarking upon municipal ownership on a large scale. The streets and

[17] For a current discussion of the legal powers of cities, see G. C. S. Benson, "Sources of Municipal Power." *The Municipal Year Book* (1938), pp. 149–165.

other public places are generally occupied by existing utility concerns operating under long-term, if not perpetual, franchises. If a question of buying up an old company arises, there is sure to be an almost interminable legal battle over the amount of money to be paid for its property and rights. Seattle and Detroit learned this by bitter experience. If the city can get over these two hurdles, it then confronts the problem of finance. Usually, thanks to the sins of the fathers, it is already in debt to the limit of its borrowing capacity, and finds itself unable to float the bond issue required to purchase any important utility.

General Conclusions. It is questionable whether arguments in the abstract on the subject of municipal ownership are of any practical value. Most opinions which are now rendered as to the respective merits of public and private ownership are *ex parte* statements. It may be said accurately that in some places municipal ownership and operation have succeeded remarkably well, and it may be added also that, in other places, they have been connected with corruption and inefficiency. No general conclusion seems possible at the present time except that municipal ownership will not succeed in any city unless high standards of civil service are established and there is a large and influential group or class permanently and deeply interested in the economical and efficient management of the enterprise in question.

Regulation of Utilities

Abuses to Be Remedied. Refusal to embark extensively on programs of municipal ownership does not mean however that cities are allowing utility corporations to pursue their own course unchallenged. On the contrary, the management of utilities has been made the subject of much scientific inquiry and detailed legislation. Studies of the abuses arising in this connection have shown how cities may suffer where the old policy of "drift and muddle" is followed. Perpetual franchises will be granted without safeguards, saddling private corporations upon the community forever unless their property is bought by the city at a high figure. There will be mergers and consolidations of companies with resulting stock watering, that is, the issuance of stocks and bonds far in excess of the value of the property. High charges will be made and services may be poor in quality and deficient in quantity. Tracks and pipe lines will not be extended to meet expanding needs. Accounts will be juggled to conceal corruption and exorbitant profits.

Limited Franchises. But remedies have been devised to meet these evils. It is no longer the fashion to grant perpetual franchises; it is rather the rule to limit new franchises to a term of years—twenty-five or fifty —and to prescribe in them the precise conditions on which a city may terminate the charters and assume ownership itself. The newer franchises contain a long list of provisions relative to standards of service to be rendered, publicity of accounts, capitalization, new capital issues, profits, rates, and extensions. To guide cities in safeguarding their rights, the National Municipal League has devised a "Model Franchise" embodying the tested principles required in the public interest.

Regulating Agencies. At the same time utility corporations are being subjected to continuous public supervision by other means. In the eye of the law they are quasi-public corporations "affected with public interest" and are liable to regulation by state or municipal authorities either through laws and ordinances or orders from public agents. Following the example of the Federal Government in regulating interstate utilities, our states have provided central or local commissions to regulate utility corporations (p. 693). This practice began with the establishment of a railroad commission in Wisconsin in 1905 to which was given, two years later, large powers over all municipal utilities in the state. Within ten years the practice had spread to nearly every state in the Union, although in some cases regulatory bodies were set up for particular cities.

Principles of Regulation. Under model franchises and commission regulations certain great principles of utility control have been worked out. There shall be no overcapitalization; stocks and bonds issued shall represent bona fide property, not inflated values. The services rendered shall be adequate; the gas and electric power sold must comply with established scientific standards as to quantity and quality. Meters, if used, must be accurate. Companies must extend their lines or mains subject to certain precise conditions. Accounts must be kept according to uniform and exact principles and made public.

Finally rates must be "reasonable." The problem of rates is the heart of the matter, for it involves the charges made to the public and the profits of the companies. Hence many a bitter battle has been waged over this point. In determining reasonable rates, it is necessary, under the Fourteenth Amendment to the federal Constitution, to allow the companies a fair return on their capital (p. 491). That raises, as we have seen, perplexing questions of fact. What is the true capital of the com-

pany? In dealing with such questions, state or municipal utility commissions must get the data and make their orders as to rates. Then there usually follows a long and expensive legal fight which may be carried to the Supreme Court at Washington.

Conflicts over Rate Regulation. Millions of dollars have been spent by utility companies and public service commissions in battles over the "valuation" of plants for rate-making purposes, and other phases of utility regulation. In times of changing costs for materials and labor, disputes of this nature multiply. If prices are rising, utility companies naturally demand an increase in their rates. If prices are falling, communities naturally demand a reduction in rates. In an effort to escape from needless litigation, experts in the field are trying to provide for adjusting rates in accordance with changes in prices as reflected in price index numbers. This is a departure from the established practice of fixing a permanent "value" for a plant and then fixing the rate for service in such a way as to yield a fair return on the established value. If price fluctuations continue, as during the past twenty years, some new regulatory device will be necessary to cut down the volume of bickering and litigation which disturb communities and fill the utility business with uncertainty. Moreover the scandals in the field of utility propaganda and the collapse of gigantic concerns, such as the Insull companies, spreading ruin among stockholders, have conspired to bring about a fresh consideration of the whole subject of utility regulation (p. 695).

Public Health

Hospital Care of Sick. Apart from the very important function of keeping vital statistics, the work of the municipal health department falls into two main divisions: assistance and care for the sick and the prevention of disease—with increasing emphasis on the latter. In the construction and maintenance of hospitals the humane spirit of America has found perhaps its noblest expression and American science has rendered its most generous service. Private gifts and public subsidies bear witness to a deep-seated sense of social obligation. Every year sees the rise of new hospitals for special diseases. Every year sees an improvement in hospital technique: more comfort and convenience for the sick, stricter control in the execution of physicians' orders, and advances in the training of nurses. Scientific literature on hospital construction and operation grows apace, driving ignorance before it and spreading light

into the smallest out-of-the-way hamlet. Even during the depression years 1930–1935 the number of beds in American hospitals increased substantially.

Functions of Prevention. To the work of preventing disease equally splendid energies are being devoted. Indeed prevention is an outstanding characteristic of American health administration today, and prevention inevitably leads into a study of the social and economic, as well as the hereditary, sources of disease. Hence the development of special agencies for child hygiene, milk stations for the sale of pure milk, school inspection, visiting nurses, mothers' clinics, and dental clinics. Hence public control over the quality of milk, meat, and other foodstuffs; public supervision of markets, restaurants, and other public places; special campaigns against communicable diseases like tuberculosis, against flies, mosquitoes, and impure water that spread germs far and wide. As many diseases, such as lead poisoning, arise from the nature of the industries in which people are employed, there has sprung up a science of industrial hygiene which looms larger and larger in the great warfare on disease. Finally, the warfare is carried into the schools, homes, and factories in campaigns of health education which inform and warn the people, young and old, preparing them to take precautions against the specter that lurks everywhere to impair and destroy human health.

Branches of Administration. A committee of the American Public Health Association in coöperation with the Federal Public Health Service, after a survey of American conditions, has outlined an ideal health department, for a city of more than 100,000 inhabitants, embracing eight bureaus. The names of the proposed bureaus indicate the range of modern health work: (1) administration, to include office routine and public health education, (2) sanitation, (3) foods and milk, (4) communicable diseases, (5) child hygiene, including infant and school hygiene, (6) nursing, (7) laboratories for research, and (8) vital statistics.

Relation to Medical Profession. The wide-reaching activity of modern public health service has a profound effect upon the medical profession. It stimulates scientific research in ways and means of combating disease. It summons the whole profession, too likely to be engrossed in the routine and profits of private practice, to a sense of social obligation. In public esteem it places beside the eminent surgeon and skilled physician, the trained leader in public health nursing and the trained director of public health administration. It invites the great universities to estab-

lish schools of public health. After the opening of the business depression in 1929, masses of people were deprived of private medical services and thousands of doctors were idle or only partly employed; and in these circumstances the idea of public health responsibility was widened to include a discussion of "socialized medicine" in some form (p. 473). In general this means a community organization to provide medical service for everyone, whenever needed, at fixed annual rates.

Public Education [18]

Rise of Popular System. Education is essentially a local function in America (p. 715), although state and federal aid are given to raise standards and augment municipal resources. It is along educational lines that our cities have made some of their greatest advances during the past fifty years. Although America was supposed to have put stress upon universal education early in her history, practical application lagged far behind the theory. It was not until about the middle of the nineteenth century that the foundations of universal and free elementary education were securely laid, but since that time there has been an almost steady growth in the percentage of children of a school age enrolled and attending classes. The development of high schools belongs to a still later period, for even in 1880 there were only about one-half as many children in public high schools as in the private academies; in less than twenty years however they outnumbered the latter four to one.

Yet illiteracy was not conquered. The multitude of Negroes in the South and foreigners in the North made the struggle against it especially difficult; but during the World War (1917–18), citizens who had been indifferent about the matter were startled out of their apathy by official reports that more than one-fifth of the men in the draft army could not read a newspaper or write a letter home. Then, in connection with a proposal for federal aid (p. 720), a more effective campaign was launched to increase the number of schools, teachers, and pupils.

Improvement of Facilities. It is not merely in statistics that our educational progress can be measured. The advanced state of the design, construction, esthetic features, and conveniences of our modern city schools will be appreciated by one who contrasts a building of 1944 with one of 1850. The standards of scholarship required of teachers have also improved immeasurably, and the notions of popular education have ex-

[18] For recent educational tendencies, see above, pp. 718 ff.

tended far beyond the mere routine of the three "R's." Indeed the schools of our cities are slowly becoming social centers; playground and recreational features are being developed; vacation schools, affording social life to the children of the congested areas, have been established; and there is a constant searching among educators for better methods of instruction and for more effective ways of raising through the school system the standards of intellectual, physical, and moral life in crowded urban districts.

Extension of Responsibilities. Special attention is being given to the problem of fitting pupils for their double task as bread winners and as citizens; vocational schools, to prepare them for efficient work in some trade or profession, are now operated all over the country; instruction in citizenship has an important place in every curriculum. The care of the health of children is no longer entrusted entirely to their parents; medical inspection is becoming one of the functions of the public schools; in order that the bodily ills discovered by this scrutiny may not go unheeded, dental and medical clinics are frequently attached to schools. For the weaker pupils, particularly those affected with tubercular troubles, open-air schools are being founded, and many schools maintain lunch rooms where undernourished children may obtain food free of charge or at a nominal cost.

Adult Education. Perhaps the most striking developments in American education during recent years have been in the field of "adult education"—in projects for the promotion of knowledge and taste among the masses beyond school age. Ordinarily such activities spring from private enterprise, from the interest and enthusiasm of trade and correspondence schools, Chautauquas, religious associations, university extension societies, and trade unions, which offer courses of instruction, practical and cultural, at hours convenient to people regularly employed. But city governments aid and encourage such undertakings when they are not conducted for profit. They maintain night and continuation schools, they lend the use of their school buildings to educational associations, and some of them support or furnish facilities for free public lectures in science, art, literature, history, and political economy.

Libraries. Adult education in the United States has been especially facilitated by the establishment of public libraries. It seems that Boston led the way, for as early as 1847 the city council at the suggestion of Mayor Quincy passed a resolution asking the state legislature for permission to open a free library supported by taxation. A majority of states

have followed the precedent set by Massachusetts. Our great cities not only have central libraries well stocked with books for general reading and research work, but they have been steadily developing a system of branch libraries which makes the books easily available to the inhabitants of every district.

After lagging behind for a long time, New York City now stands at the forefront. In the great public library at Forty-second Street and Fifth Avenue are stored the valuable collections of the Astor, Lenox, and Tilden foundations, supplemented continually by new gifts and purchases, which form one among the first libraries in the country. A large gift by Andrew Carnegie made it possible for the city to erect and maintain branches at well-selected points. It is estimated that over four million books are freely at the disposal of the citizens of New York and that the annual circulation amounts to more than five million volumes. An ever-increasing attention is given to the needs of children through the school libraries and through the special collections now to be found in the public libraries. Near the city hall has been founded a splendid municipal reference library to furnish city officers and the public with technical information of every kind on municipal affairs.

Independence of Educational Administration. The administration of education in American cities is usually vested in a board which is either a branch of the municipal government or an entirely separate body elected by popular vote. Of the first type, New York City is an example; the board is appointed by the mayor. In a large number of cities the board is an elective body standing apart from the city government and enjoying the power to raise and disburse funds for education on its own motion. Indeed there is a marked tendency to make the school board an almost independent agency whether it is appointed by the mayor or elected by the voters. It usually can lay taxes up to certain limits or draw upon the city treasury for specified sums; whatever its source of income, it can spend money without much interference from the city government. It erects buildings, employs teachers, buys supplies, and arranges the courses of study on its own authority. Even where it must submit its budget to the city government for approval, both law and custom give it a high degree of autonomy. If the city council should attempt a deep cut in a school appropriation, a storm would break over its head.

This independence for school authorities, established partly to secure freedom from political influences, has in fact been carried so far in many

cases as to cripple the financial power of the city in dealing with other matters. About one-third of the normal outlay of our cities for current purposes is for education. In this respect the school board stands highest on the list, its total outlay being often greater than the expenditures for police, fire, health, and hospital administration combined. Autonomy in making such heavy expenditures means that it is difficult for the city government to prepare a consolidated budget and to effect economies, particularly in the field of building and purchasing.

Social Welfare

Change in Ideas of Charity. From the earliest times there has always been more or less public and private charity in American cities. This has taken the form of institutions for the poor, hospitals for the sick, and doles to the needy. Formerly the stigma of pauperism was generally placed upon all recipients of public relief. But today cities seek to discover the sources of undeserved poverty, to devise measures of prevention, and to make most types of public assistance matters of right. In many great cities departments of charity have become departments of public welfare.

Why this change? It is due in part to the magnitude of the problems raised by the changing economic conditions which have subjected city dwellers to new hazards and deprived them of sunlight, air, outdoor exercise, and certainty of employment. With the progress of democracy, moreover, there has come a demand for a higher standard of individual enlightenment, comfort, and welfare, even at the sacrifice of that exaggerated notion of private rights which would allow every person to do as he pleases as long as he does not positively deprive his neighbors of life and limb.

Scope of Social Work. Under the head of social welfare our cities are coöperating with the state and national governments (p. 469) and taking independent measures to relieve existing poverty and to prevent needless poverty, sickness, and misery. From one point of view social work is a synthesis of all municipal activities designed to improve the physical and moral status of the people. In a narrower sense it includes a number of specific activities which may be briefly summarized here.

Institutional Care. At the outset there may be mentioned various institutions—charitable hospitals, homes for the aged, incurable, and orphaned, and municipal lodging houses for homeless men and women.

In connection with many charitable establishments, there is often co-operation between the city and religious bodies—a practice which leads to many complications of policy and politics and is utterly forbidden in some states; Massachusetts, for example. Reference should also be made to such measures as mothers' pensions, old-age pensions, and workmen's compensation laws administered in cities under state authority (p. 709)—all of which helps to support people at home and relieve the institutional load.

Housing Control. Vitally related to conditions of life in crowded urban areas is the tenement house department charged with the duty of maintaining certain standards in private dwellings with regard to light, air, sanitary conditions, and fire protection. This is one of the later developments in American municipal administration, for it was not until several investigations, near the opening of this century, disclosed the horrible housing conditions of Chicago, New York, and other cities that the state legislatures could be brought even to recognize the imperative necessity for action.

In this movement, New York took the lead in 1902 by establishing a tenement house department. The reform spread rapidly to other states and a National Housing Association was founded to promote model housing laws throughout the Union. Such a law usually includes the following elements. Under the head of light and ventilation, the percentage of the area of a lot which a tenement may occupy is stated and the height of new tenements fixed. Under the head of sanitary provisions, a proper water supply for each apartment is ordered and the size of the rooms and the window space in each are prescribed. Owners of tenements are required to keep the courts, areaways, halls, and yards clean and to comply with the standards set up by the tenement department. A corps of officers is provided to inspect tenements periodically and to report violations of the law and the rules of the department.

State of Housing in Cities. Despite legislation respecting the construction and maintenance of private houses and tenements, all great cities and most smaller places have areas of so-called "residential" property which are scarcely fit for human habitation, where overcrowding, filth, diseases, and vile sanitary conditions mock our boasted civilization. It is also well known that even in times called "prosperous" the wages of a considerable portion of urban workers are too low to secure decent housing conditions for them through purely private enterprise, when ground values and building costs are taken into consideration.

Public Housing. Recognition of such facts led to a campaign to "end slums by public action" and to provide better houses for literally millions of people. Tentative steps were taken in New York years ago by the creation of limited dividend corporations empowered to buy land and erect low-rent houses, on condition that profits were to be limited to a fixed rate. But these institutions, though often successful in a small way, scarcely touched the fringes of the problem. When after 1933 Congress sought to stimulate economy by public expenditures, provisions were made for lending federal money to municipalities and to limited dividend associations for housing purposes, and the Federal Government itself cleared away slum areas in several cities to make room for new houses erected under its own authority. These experiments were followed in 1937 by the passage of the National Housing Act, authorizing federal loans and conditional gifts to municipalities for the purpose of building and repairing houses (p. 714). Forty-one states now have statutes on their books enabling cities to take advantage of federal aid. In these states municipal councils may establish housing authorities endowed with power to secure grants under federal law, acquire land, erect dwellings, and supervise the repair of sub-standard properties. Henceforward the housing achievements of American cities will depend in a large measure upon the energy and abilities of municipal governments. That they are not indifferent as to the opportunity is attested by the fact that in 1942 more than 90,000 units in 214 projects were put under construction.

Parks and Playgrounds. Long before effective attacks were made upon the housing problem, cities began to realize that the provision of healthful recreation for great masses of the people is a collective function which must be undertaken largely by the municipality at public expense. In the construction of parks and boulevards, the cities of the United States have made giant strides within the last quarter of a century. Boston takes a high place, for, besides the famous Common and Public Garden, that city has numerous small parks and playgrounds—in addition to the local parks and the reservations in the environs. New York City has also given attention to the problem of reserving breathing spaces. Almost in the heart of the city there is the famous Central Park; Brooklyn has the scarcely less beautiful Prospect Park; and to the northward New York has reserved Riverside, Washington, Van Cortlandt, and Bronx parks. Every city of importance has now one or more great open spaces.

But in making these provisions city governments have too often over-

looked the fact that many small parks, conveniently scattered through the congested areas, are of far greater utility than wide areas on the outskirts of the city, or at best so situated that they can be reached only by the payment of car fare—an important matter for multitudes of people. It must be admitted however that the evils of inaccessible parks are being recognized, and some cities that have been the worst offenders in this respect are making amends, often with the aid of federal funds granted for public works.

Extension of Recreational Facilities. Cities are also endeavoring to make the parks more useful by providing athletic sports, such as baseball, tennis, golf, and skating. Many give band concerts in the parks in summer time and public fêtes on holidays, that are widely advertised to attract adults as well as children. The physical and social value of healthful play for children is being recognized more and more in the establishment of playgrounds, not only in parks, but in connection with the public schools and at special points in the congested areas. Boston has equipped the school yards as playgrounds for children and provided teachers to take charge of the games and gymnastic exercises. New York has followed this example, and now has a law requiring the provision of a playground with every new school building. In the winter time, Chicago, New York, Boston, and other cities flood certain playgrounds and turn them into skating rinks. Chicago has provided rinks, lighted by electricity and open day and night.

Marketing Facilities. In their efforts to cope with some of the problems of welfare involved in the high cost of living, a number of our municipalities have either gone into trading enterprises on a small scale or sought to reduce the expenses of handling food by providing market facilities. The constitution of Massachusetts expressly authorizes the cities of the state to buy and sell the necessaries of life subject to certain restrictions. Far more significant are the experiments in municipal markets. In this field, New York, Cleveland, Pittsburgh, Indianapolis, New Orleans, and Milwaukee may be counted among the leaders. In character, municipal markets vary greatly. At one end of the scale are rather primitive shelters to which farmers may bring their produce and retail it to consumers; at the other end are splendid modern buildings, equipped with refrigerators which are rented to citizens for the storage of commodities bought in large quantities.

When it is remembered that owing to traffic conditions the cost of transporting a pound of butter a few blocks in a city may be greater than

the cost of shipping it four hundred miles by rail, the significance of such market facilities becomes apparent. Here is a great field of municipal economy in which the city, without affecting adversely the genuine services rendered by private enterprise, can assist in materially reducing the cost of marketing and delivery within its own boundaries. Indeed, under the auspices of state marketing agencies, it may reach out into the countryside and cut deep and direct channels of communication between the producer and the consumer.

City Planning

Inter-Relations of Municipal Functions. The municipal functions which we have just reviewed have been adopted one after another as a result of the demands of interested citizens, each representing some particular reform such as housing, lower food costs, or public health. Out of the enthusiasm of citizens great reforms have been effected; but associations founded to promote specific enterprises are likely to be narrow in their outlook; they attack their particular problem as if it were a separate problem; they often fail to consider the community as a whole—the connection of the thing they are interested in with other phases of municipal life.

In fact all the functions of city government are related. Health, for example, is connected with a pure water supply, clean streets, the sanitary conditions of homes, schools, and factories, transportation facilities to relieve congestion, the ownership and taxation of land, parks, and playgrounds. Transportation is related to the distribution of factories and business concerns, the drift of the population, the development of suburbs, and so on through the labyrinth of municipal affairs.

The Idea of City Planning. Gradually there emerged from the recognition of such facts the idea of planning the city, under the full light of science, with a view to promoting the good life as well as economy in industry and transportation. It is true that a few of our older cities, Washington, for instance, were constructed with more or less reference to plans made in advance by competent engineers, but most of them grew up in a haphazard fashion—a wilderness of stores, factories, and homes—with little regard to comfort, welfare, esthetics, and efficiency. And at first the idea of planning cities deliberately fell on stony ground.

Growth of Movement. Not until near the opening of the twentieth century was the idea of city planning in a broad sense taken up in Amer-

ica. Signs of the growing concept appeared in the surveys of cities made by the New York Bureau of Municipal Research, in the surveys of the Russell Sage Foundation, in treatises based partly on European experience such as the writings of Charles M. Robinson, George B. Ford, Nelson P. Lewis, and John Nolen, and in the rise of the profession of city planning consultants. In 1907 a city planning commission was created for Hartford, the first in America; three years later the National City Planning Association was founded and held its first annual conference, which finally led to the organization of the City Planning Institute and, in 1925, to the publication of a magazine.

Scope of Planning. In the beginning, the idea was somewhat nebulous. It was associated with the planning of parks, boulevards, public buildings—show places—rather than the practical requirements of business and trade and the pressing problems of housing and congestion. Gradually it broadened until it included the laying out of all streets and avenues, the construction of parks, relief and prevention of congestion, control of traffic, distribution of buildings for residential, industrial, and commercial purposes, railway terminal facilities, the coördination of public utilities with reference to the city plan, the control of fire hazards, extension of water and sewer facilities, the provision of parks and playgrounds, and the relation of the city to the outlying "region."

Planning Legislation. In order to make paper plans effective, states and cities have enacted a large body of legislation. By 1937 about 1,200 cities and towns had set up continuous planning boards or commissions, many of which were authorized to carry out their ideas on an extensive scale with the help of federal public-works or relief money. Over three-fourths of the states have empowered city authorities to divide the areas under their jurisdiction into zones and to require that land lying within each zone be used only for specified purposes.[19] For example, one section may be set aside for single-family residences, and factories or department stores prohibited there. Notwithstanding the drastic nature of such governmental intervention in the use of private property, the courts have sustained it. States may also permit their cities to make excess condemnations, that is, to take more land than necessary for any particular improvement and use the balance for public purposes or sell it or lease it.[20] Cities are sometimes authorized to make plans for the area beyond

[19] According to a survey made by the National Resources Committee in 1937, there were more than 1,300 municipal zoning ordinances in force.

[20] R. E. Cushman, *Excess Condemnation*.

their borders and, by one process or another, to compel all landowners to conform to such plans in laying out new building sections.

War and City Planning. After the opening of the global war in 1941, interest in city planning was stimulated largely in the hope of countering the danger of post-war unemployment by comprehensive programs of public works. The challenge of the prospects produced some radical thinking. "The new city is on the way," wrote Charles E. Merriam. "But those who try to put new wine in old bottles will be doomed to futility and disappointment. The new city will not be built by timid tinkering with old models, but will be part of a new streamlined, post-war civilization built on a modern model." [21] And somewhat more specifically Alvin H. Hansen concluded that any attempt to grasp the problem of the city's future in its entirety leads to the conclusion that most of the towns and cities must be replanned and rebuilt.[22]

Increasing Dependence of Municipal Functions on Federal and State Activities

The Nature of Federal Aides to Cities. No complete statistical analysis has yet been made of all the forms of assistance given to cities by or through the various agencies of the Federal Government. In a few great cities the Public Works Administration cleared insanitary areas and erected multiple dwellings by direct action and later turned them over to the Federal Housing Authority. Through that Administration huge loans were made to cities for the construction of municipal works and utilities, but no analytical tabulation of all results has been compiled. Nor is it easy to discover just what proportion of the funds paid out for old-age pensions, unemployment insurance, and other social security objectives has gone to the inhabitants of cities.

Reports of the Works Progress Administration showed allocations by states rather than by classes of cities, and the extent to which municipalities as such have benefited from them must be a matter of surmise rather than exact figures. A breakdown of the appropriations under the Emergency Relief Act of 1938 revealed the following divisions: (1) Highways, roads, and streets, $484,500,000; (2) Public buildings, parks, utilities, airports, and other transportation facilities, flood control, conservation, and other purposes, $655,500,000; (3) Educational, professional, cleri-

[21] "Make No Small Plans," *National Municipal Review*, Feb., 1943.
[22] "The City of the Future," *National Municipal Review*, Feb., 1943.

cal, cultural, recreational, production, service . . . and miscellaneous nonconstruction projects, $285,000,000.

Selections for the list of "physical accomplishments on Works Progress Administration projects" through October 1, 1937, taken in connection with the huge appropriations laid out for such purposes, gave the clear impression that the Federal Government was carrying on directly or indirectly almost every kind of municipal function: (1) Highways, streets, and related facilities—urban roads, curbs, bridges, lights for streets, street signs, removal of car tracks; (2) Airports—landing fields, runways, air beacons, air markers; (3) Recreational facilities—athletic fields, parks, playgrounds, swimming pools, handball courts, ice-skating rinks, outdoor theaters, band shells; (4) Water supply and drainage—water mains, reservoirs, storage dams, treatment plants, storm and sanitary sewers, catch basins, mosquito control; (5) Navigation aids—docks, wharves, piers, bulkheads; (6) Electrical and other utilities—power houses, transmission lines, police and fire alarm signals; (7) Grounds improvements—landscaping, lighting facilities, and fountains; (8) Miscellaneous—tracks, paving, tunnels, monuments, gas lines; (9) Medical and dental—clinics, examinations, and nursing visits; (10) Education—literacy, vocational, adults, nursery schools, and others; (11) Cultural—art, music, theater, and recreational projects.[23] A mere glance at this swift summary indicates that federal projects just prior to the war boom of 1939 ran into practically all the functions conducted by city governments and contemplated in city plans. Will another post-war depression witness a renewal of such federal activities?

A New Stage in Municipal Development. When we review all that has been said about the extension of federal functions in relation to economy and security and about the growth of state functions in the same connection (pp. 712–715), and trace their effects upon city administration, we find that municipal government has entered upon a new stage in its development. For the discharge of the heavy obligations now assumed with regard to general welfare, housing, health, and public works, all involving large outlays of money, the city can no longer rely mainly upon revenues derived from ad valorem taxes on real and personal property within its borders. In fact the amazing increase in land values which accompanied the rapid rise of American cities has come to an end in the older communities and a period of stagnation, in some cases actual recession, has set in. Taking into account the plight of the

[23] *Report on Progress of the WPA Program*, June 30, 1938, pp. 21 ff.

cities, state governments attack urban problems in numerous ways; for example, old-age pensions, appropriations for relief, and grants for the provision of employment. The Federal Government, by direct loans and grants and by indirect grants through state governments, assists cities in maintaining education, public health, and other services, and in constructing houses, utilities, and other public works. City planners have widened their interest to include regional and state planning—with a view to finding in larger areas the solution of problems beyond the competence of city authorities. So far had this movement gone by 1944 that nearly all states had state planning boards of some kind (p. 699). Having reached, apparently, the limits of independent advance in many respects, efforts in the field of municipal improvement and planning overleaped urban boundaries and merged with federal and state efforts on a wider scale.

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CHAPTER XXXIII

RURAL LOCAL GOVERNMENT

Neglect of Rural Life. At the opening of the twentieth century interest in municipal affairs overshadowed interest in rural affairs. For many decades there had been a steady drift of population toward the cities, and writers generally assumed that the tendency would continue indefinitely, until perhaps the United States would reach the stage of Great Britain where fourth-fifths of the people dwell in cities of more than ten thousand inhabitants. Editors, writers, and makers of public opinion lived mainly in the cities. Questions of capital and labor, problems of municipal government, crowded the pages of books and newspapers; while agriculture received scant attention, save in time of populistic agitations, and then little or no discriminating attention. As a result we had whole libraries on city government and relatively speaking a handful of volumes dealing with government in towns, villages, and purely rural regions. Only recently has the balance been redressed by a growing recognition of the importance of rural economy.

A Sharp Turn in Affairs. As a matter of plain fact less than one-third of the American people live in cities of more than fifty thousand; about fifty million live in the country and in villages of less than 2,500. The heavy drift to the cities had been checked before the Global War temporarily, at least, reversed the trend. The question of redistributing the population of congested industrial areas has even come to the front. That cheerful optimism which contemplated an ever-growing industrialization to the neglect of agriculture has been challenged by events. And an economist of great competence, Erich Zimmermann, in his work on *World Resources and Industries*, has indicated clearly that there are limits to growth in urban areas at the expense of agricultural regions. Meanwhile American cities slowed down their social and economic functions (p. 786) and during the economic crisis beginning in 1929 demonstrated their utter incapacity to cope independently with the issues of poverty and unemployment.

Rural Problems Now Pressing. Then it was recognized, more thoughtfully than ever, that town and country are really linked together in a common fate and that the industrial branch of American economy cannot permanently flourish while agriculture languishes. When the Federal Government set about grappling with the crisis in economic affairs it had to deal with rural regions as well as cities and to coöperate with counties and villages as well as states and municipalities in promoting human welfare and conserving natural resources. It was soon discovered that rural communities had problems of unemployment, poverty, floods, soil erosion, and disordered finances no less pressing, if less spectacular, than the problems of the cities. They quickly reached the limits of their autonomous powers and were compelled to invoke federal guidance and aid. From every direction their historic forms were penetrated by state and federal activities, and the issue of their future was put at stake. Whatever the outcome, it is certain that important functions of rural government are being transferred to the state and federal governments (pp. 839–840) and traditional methods of rural government are being reconstructed. At the same time the study of local government is receiving some of the consideration which it deserves.

Types of Local Government [1]

Local Subdivisions. Despite growing federal intervention in local affairs, despite the increasing control that the state exercises over them, despite widespread efforts at reorganizing county government, the historic subdivisions of rural regions remain for the most part undisturbed —counties, towns, townships, and villages. There are, of course, differences among them but there are many common features which may be properly emphasized before beginning a consideration of the diversities. Every state in the Union, except Louisiana, is laid out into counties, and the lone exception is divided into parishes. In more than half the states, the county is divided into townships. The more thickly populated centers in rural districts are, or may be under certain circumstances, erected into separate corporations, known as villages or boroughs. Counties, towns, and villages are units for specific financial, judicial, police, and local improvement purposes. These local communities enjoy a large measure of self-government through elective officers; that is, they are

[1] William Anderson, *The Units of Government in the United States* (1942), an important descriptive and critical study.

not provinces ruled by officers appointed at the state capital. Finally, subject to a few general provisions in the state constitution, the county and its subdivisions are under the control of the state legislature, which can create and abolish offices, distribute functions among the various authorities, and in other ways regulate by law even to the minutest detail the conduct of local government.

Special Districts. Supplementing the historic divisions of the state—counties, towns, townships, villages, and boroughs—are many special districts created for particular public purposes under state and federal legislation. In swamp-infested regions will be found drainage districts; in arid regions, irrigation districts; in eroding areas, soil conservation zones; in Washington, Oregon, and other states, special districts erected for the production and distribution of electric power (p. 695). Indeed, with the development of modern technology, which ignores political geography, the tendency to establish separate regions for the assumption of special functions becomes more marked. In some cases independent governments are set up with the power to incur debts, levy taxes, and execute policies.

Differences in Distribution of Powers. The main differences that occur among local institutions relate to the manner in which functions are divided between the authorities of the county and of the town or township and to the manner in which the inhabitants of the county subdivisions, where such units exist, participate in the conduct of their local affairs. On this basis of differentiation our states have been classified into the three famous groups: (1) those of the New England type in which the town and its open meeting overshadow in importance the county; (2) those of the South and far West where the county predominates and the township is absent or appears only in the most rudimentary forms; and (3) those of the middle type, like New York and Pennsylvania, in which the town, or township as it is sometimes called, has a large and important place, but is subordinate to the county administration.[2] These three types of local government have been carried westward with the expansion of the country and have formed, with varying emphasis, the basis for the development of local institutions west of the Alleghenies. Despite many variations in forms of government and the new functions they have recently undertaken, the ancient local units remain unbroken.

[2] For another classification based upon a more minute analysis see Porter, *County and Township Government in the United States*, pp. 44 ff.

The County

Number and Size. There are 3,050 counties in the United States, varying in size from the county of Bristol, in R. I., with a land area of twenty-five square miles, to the great county of San Bernardino, California, covering more than twenty thousand square miles. The divergences in population are even greater, for at one end of the scale we have Cook County, Illinois, the heart of a metropolis, with about four million inhabitants, and at the other end, small rural counties with a few hundred residents widely scattered. Delaware has three counties; Texas, 254.

Common Features. Every rural county has a county seat, in which are located the offices of administration. In nearly every state is to be found a county board [3] in charge of certain matters of finance and administration, and each county has a group of officers connected with the administration of justice, police control, finance, and miscellaneous matters. Besides being a unit for the satisfaction of purely local needs, the county is also a subdivision of the state for the discharge of many central functions, especially in connection with finance and elections.

The County Board. Except in the few counties which have adopted the manager plan of administration (below, p. 830), the government of the county is in the hands of miscellaneous groups of officials, which may be called, for convenience, legislative, judicial, and executive. The legislative authority is the county board. From the point of view of organization, county boards may be divided along the lines laid down by Professor Porter [4] into five general classes: (1) the relatively large board composed in most cases of representatives elected from the townships; (2) the small board of from three to seven members elected at large from the whole county or from districts; (3) the *ex officio* board made up of the county judge and the justices of the peace or some other judicial officers; (4) the hybrid board composed of the county judge and a few specially elected members; and (5) miscellaneous.

A majority of the boards fall within the first two classes. Each of the two types, the small board and the large representative body, has its advantages. The former can meet readily on call; it transacts business with facility; it can, with some certainty, be held responsible for the due discharge of its legal duties. The latter is more representative in principle, affords fewer opportunities for collusion among the members, and

[3] The Louisiana parish also has a board.
[4] *Op. cit.*, p. 70.

may be deliberative in character. In point of fact however both systems have been severely criticized as wasteful, inefficient, and sometimes corrupt; and several attempts have been made to institute other organs of local or state government to check and control the county board.

County Court. County judicial functions are vested in one or more judges aided by several officials, especially the prosecuting attorney and the sheriff.

The practice of having a separate judge and court for each county obtains in about one-third of the states, while some other states have separate courts for the populous counties. The more common rule is to group counties in judicial districts and have one judge go on circuit from county to county, holding sessions of court. In about three-fourths of the states all judges, district and county, are selected by popular vote for varying terms—often six to twelve years. In other states they are selected by the governor in conjunction with a council, the senate, or, as in Connecticut, the legislature. In two commonwealths, Vermont and Virginia, they are chosen by the legislature. Sometimes there is associated with the county judge a special officer, usually known as the probate judge, who is charged with the settlement of estates.[5]

The jurisdiction of the county court, that is, the range of matters which may come before county court judges, of course, varies greatly from state to state. In a few states, the county court has no judicial functions at all, but is merely an administrative agency; in two states, Kentucky and Tennessee, it possesses both judicial and administrative functions; and in some others the duties of the county court are confined to probate business.

Prosecuting Attorney. Next in importance to the judicial officers of the county is the prosecuting attorney, known in New York as the district attorney and in some other states as the county attorney.[6] He is generally an elective officer and is charged with instituting and conducting criminal prosecutions and with representing the county in civil suits. He usually has the power of appointing assistant prosecuting attorneys for the various localities within the county. Sometimes he derives his salary from fees—a device which furnishes an incentive to activity but is discarded by many places in favor of a fixed salary, as less likely to encourage useless prosecutions.

[5] There is always attached to the county court a clerk who keeps the judicial records and sometimes has miscellaneous functions in addition; see above, p. 723.

[6] This latter term is applied in some states (including New York) to an attorney appointed to represent the poor in courts.

The chief business of the prosecuting attorney is the enforcement of the law against criminals of every kind—from the petty thief to the murderer or the defaulting or dishonest public officer. Clearly therefore the good order of the community and the efficiency of its government depend in a large measure upon the character of the prosecuting attorney; and it is small wonder that heated political contests are sometimes waged over the selection of the man to fill this position. There is nothing so important to a county political "machine" as the office of the prosecuting attorney, for it is practically within his power to decide whether corruption and malfeasance shall be tolerated in the various departments.[7]

Grand Jury. The prosecuting attorney however does not have sole control over the institution of criminal proceedings, for in most states there is a grand jury which may take the preliminary steps in hearing evidence and bringing indictments. The prosecutor has no legal power to force or prevent action on the part of the grand jury; but, as a matter of fact, he usually determines what cases shall come before it; his advice as to the proper line of action is generally taken; and frequently he may dispense with the grand jury and start legal proceedings by "information" or complaint filed against an alleged criminal (p. 743).

The Sheriff and His Duties. The chief police officer of the county is the sheriff, who is elected by popular vote in every state except Rhode Island, where he is chosen by the governor. The sheriff always has power to appoint one or more deputy sheriffs. His term is usually two years but, in some states, it is four years. The sheriff receives either a fixed salary or fees or a combination of both. He is custodian of the county jail; he summons witnesses, arrests indicted persons, sells the property of private persons for taxes or debt under judicial order, and executes the processes of the court.

The sheriff is also conservator of the peace in the county; that is, he may "upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace and bind anyone in recognizance to keep it. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers and commit them to jail for safe custody. For these purposes he may command the *posse comitatus*, or power of the county; and this summons everyone over the age of fifteen years is bound to obey." This power is of special importance in case of disorder.

[7] See Goodnow, *Principles of the Administrative Law of the United States*, p. 416.

The sheriff is to a large extent the guardian of life and property in the rural county. The zeal or laxity with which he takes precautionary measures will often determine the seriousness of a local disturbance; there are many instances of sheriffs allowing their fears or sympathies to outweigh their strict obligation to execute the law. Indeed in unsettled communities the contest over the election of sheriff is waged with great vigor on account of its significance to the lawless elements. In serious disturbances however the governor of the state may take the police control temporarily out of the hands of the sheriff by declaring martial law and using state troops. He may do this, of course, at the request of a sheriff unable to maintain order with the ordinary resources at his command.

State Police. Every State now has a state-wide law-enforcement force and in thirty-five states full police power is exercised by it, while in the remaining thirteen states authority is confined to traffic violations. These constabularies supplement the work of the county sheriff. State patrol cars are generally equipped with radio, many with two-way units, while Connecticut, Maine and New Jersey have installed three-way units.[8] The state constabulary is organized on military principles and is under the direction of the governor. It is frequently used in labor disputes, thus arousing opposition among trade unions.

Coroner. Closely associated with the sheriff is the coroner, whose office is not quite so ancient, but nevertheless has a long and interesting history. Usually there are two or more coroners in a county, and, except in a few states, they are elected by popular vote. It is the duty of the coroner to view the body of any person murdered or killed by accident or in whose death there is involved a suspicion of crime. The inquest is made by a jury, generally of six, empaneled by the coroner; witnesses are summoned; all facts relating to the death of the person which can be ascertained are recorded; and at the conclusion of the inquest the jury returns a verdict to the effect that the deceased met his death in some particular manner; if foul play is unearthed, the offender or offenders may be named.

This crude system of ascertaining the cause of accidental deaths works fairly well in rural communities but is hopelessly obsolete in densely populated centers where deaths result from many complex industrial causes and mysterious crimes are committed daily. Early recognizing the special difficulties connected with inquests in urban counties, our law-

[8] *Book of the States: 1943–1944*, pp. 273–277.

makers provided for calling in one or more medical specialists to give expert testimony before coroners' juries. Indeed in some cases expert medical examiners are substituted for coroners and there is a growing demand that this practice be universally adopted. Among the planks in the platform of the local government reformers is the abolition of the office of coroner.[9]

Treasurer. As in the states which have not consolidated their administrative systems (p. 644) the executive functions of the county are scattered among a number of independent officers, generally elected by popular vote. Several of these independent officers are primarily concerned with financial affairs. Among them is the treasurer. His principal duties are fiscal in character; he generally collects taxes and transmits to central authorities that portion of the revenues which goes to the state. He is the guardian of the public funds and chooses the banks in which to deposit them. Unless the law forbids it, he may select banks at will and retain the interest accruing on his accounts. Obviously this is a possible source of spoils and corruption. Even in those states where the law requires the treasurer to deposit his balances with the banks which offer the best terms, he may enter into secret negotiations with them and receive a reward for accepting a low rate of interest. This is an evil which can be cured by specific legislation requiring open bidding for county deposits and providing for state supervision over treasurers' accounts. Naturally, county politicians do not look with favor upon the loss of such a "choice plum."

Auditor. About one-third of the states, particularly in the north central group, have a county auditor whose business it is to scrutinize the accounts of county officers, prepare a periodical statement of finances, and issue warrants on the treasury. Until a few years ago it was the custom to allow county auditors to keep their books in almost any fashion; as a result, all kinds of irregularities crept into their practices. But during the opening years of the twentieth century, as we have noted (p. 684), legislatures began to enact laws providing for state supervision of local finances. The system in California, for example, embraces a board of control, a staff of expert accountants, a uniform system of accounting and reports "for all officers and persons in the state who have the control or custody of public money or its equivalents," and finally a scheme for auditing local books. The absolute requirement of uniform accounting is the basis of any efficient system of state supervision of local finance

[9] Porter, *op. cit.*, p. 296.

and this is now found in Indiana, Iowa, Mississippi, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Washington, and West Virginia. Eleven states still have no such control.[10]

Assessor. In a number of states, especially those in which the township is only slightly developed, notably in the South, there is a county assessor who is usually elected. It is his duty, with the aid of local assistants, to make out or compile the roll of all the tax-payers residing in the county and the value of the property assessed against each person. Generally the tax-payers list their own property for the information of the assessor, but, of course, he may alter valuations as he sees fit, subject, perhaps, to a review by higher authorities. Associated with the assessor there is sometimes a board of equalization whose duty it is to pass upon the assessments of the entire county, correcting inequalities and hearing appeals from tax-payers against the valuations placed on their property.

One group of executive officials has duties that are mainly clerical. This group includes a clerk who often combines the custody of court documents with other work, such as recording deeds and mortgages, administering election laws, distributing ballots, and compiling election returns. In about half the states there is a separate recorder or register, who takes charge of written instruments affecting titles to property.

Other County Officers. Administrative functions of a service nature are vested in a number of special officers. Among them are included, with exceptions for certain regions, the superintendent of education, the county engineer in charge of public works, the manager of the county poor farm, the director of the county hospital, and the health commissioner. Some of these officials are elected by popular vote and others are appointed, frequently by the county legislative board.

County Functions. The functions of county government fall into two classes which may be called, for convenience, historic and modern. Among the historic functions are the maintenance of order, administration of justice, poor relief, school superintendence, care of highways, administration of tax machinery, administration of election machinery, recording of land titles and mortgages, and performance of minor duties imposed by state governments. The modern functions, which have increased rapidly with the growth of state and federal activities, include: administration of parks, libraries, and hospitals, special care of certain types of defectives and dependents, extensive public health activities.

[10] W. B. Graves, *American State Government*, p. 823.

soil conservation, zoning and planning, fire control, flood control, cooperation with federal agents in agricultural work and in the administration of old-age pensions, other forms of public activity connected with general welfare and security, and coöperation with the Federal Housing Authority.

Indeed within the past few years the historic functions of counties have been outstripped in importance by newer activities, calling for a different type of politics and public service. The number and variety are little short of bewildering and an adequate description of them would fill a volume. An impression of their importance however may be gained from the study of Clyde F. Snider's admirable summary, "County and Township Government in 1936–1937." [11] Speaking of the "newer functions," Mr. Snider says: "A great deal of legislation in states of the South, West, and Mid-West had as its purpose the conferring upon counties and other units of powers to deal with problems of agriculture and conservation. Counties in Oklahoma and Oregon were authorized to take measures for the prevention of wind erosion; while Kansas enacted a new county wind erosion law designed to meet the objection of the state supreme court to an earlier law declared unconstitutional in 1936. Several South Carolina counties were authorized to purchase terracing machinery and to make agreements with farmers for the performance of terracing work on their farms; while in Oklahoma provision was made whereby counties may make state-owned terracing machines available to their farmers. In Iowa and Wisconsin, counties were empowered to make feed loans to farmers in drought-stricken regions, Iowa counties also being authorized to operate limestone quarries and sell lime to farmers. . . . Oregon counties were empowered to reforest lands acquired by devise, gift, exchange, or tax foreclosure, and to sell, exchange, or lease such lands. . . . Perhaps most important of all the legislation of the year relating to agriculture and conservation are the laws enacted in twenty-two states authorizing the establishment of local soil conservation districts with powers to engage in coöperative action to combat soil erosion. . . . Arkansas and Pennsylvania authorized counties to establish planning agencies. . . . The legislature of Georgia proposed, and the voters of the state ratified, two constitutional amendments conferring power upon the legislature to authorize county planning and zoning. . . . It may be noted that most of the zoning enabling

[11] *Political Science Review*, October, 1938, pp. 936 ff.

legislation of the year contemplates the regulation of building construction and use in urban and suburban areas outside incorporated municipalities rather than the regulation of rural land use."

It is scarcely an exaggeration to say that within the past twenty-five years a revolution has taken place in the functions of county government and that great strain has been thrown on the old-fashioned machinery of government largely inherited from colonial times, upon county public services, and upon the watchfulness and energies of citizens in rural regions. The days of the county jail and court house as the chief centers of county interest are rapidly passing.

Rise of the County-Manager Idea. Although in practically all the rural counties, the old form of government by a board and miscellaneous officials has continued amid the drastic changes in county functions, that system has long been under a fire of criticism, as financially wasteful, as incapable of discharging its duties efficiently, and as lacking in the simplicity and unity which assure a high degree of responsibility to the voters. With the spread of the city-manager plan in cities has come a demand for the adoption of a similar scheme in counties, and the agitation has begun to bear fruit, especially in counties with large urban communities. By 1944 eight counties had the manager type of government in force, three in Virginia and one each in California, North Carolina, Montana, Maryland, and New York. A few states have, by constitutional amendment or statute or both, granted a measure of home rule to counties, including the right to adopt a county-manager plan; and the subject is under general discussion in connection with the larger movement for the reconstruction of local government considered below (p. 837).

Nature of the Plan. In its essential features the county-manager project is like the city-manager scheme. A county board is elected by popular vote. It selects the manager of the county, and he in turn chooses, with the consent of the board, the chief administrative officers, such as the county engineer, the administrator of county institutions, the treasurer, and the tax collector. Several officers however may be made independent and subject to popular election or choice by another agency, the school board, for instance. Among the officers excluded from manager control may be found the sheriff, the district attorney, the auditor, and the school superintendent. Leaders in education usually oppose a union with other branches of administration; they prefer to stand outside of "politics," so called, and to have financial and administrative

independence. But as the burden of educational support increases, they are finding it difficult to maintain their autonomy.

Current Changes in County Government. Whoever assumes that rural local government is static is unfamiliar with persistent stirrings within it. Despite the absorption of American citizens in the demands of total war in 1942 one who records and publishes these changes year by year found the organization of soil conservation districts proceeding apace, 887 such areas having been organized in 42 states; California counties were consolidating certain county offices; Kentucky enacted enabling legislation authorizing the consolidation of adjoining counties; Petroleum County, Montana had joined the slowly growing number of those having the manager system of county government; and the 55 New York counties which had not previously established a merit system chose plans of personnel administration. These were but a few of the changes in county government in that year.[12]

Town and Township Government; Villages

Peculiarities of New England. On the basis for classifying local governments laid down at the opening of this chapter—that of the organization and functions of county subdivisions—the New England states stand in a group by themselves. In that section of the Union, every county is divided into towns, or, to use the word in a Western sense, townships. Many diverting attempts have been made to trace the origin of these rural hamlets to that "great cradle of liberty, the forests of Germany," and as a matter of fact they do have a very long and interesting history. In the more sparsely settled districts, they have remained almost unchanged in their form of government amid the political revolutions of the modern age. It is customary to call them pure democracies because they are governed by assemblies of all the voters in open town meetings, and possess most of the important powers which are elsewhere vested in the county.

The New England Town. New England towns are as a rule irregular in shape, owing to the fact that they were originally settlements laid out roughly before an official survey was made. Generally speaking, they vary in size from twenty to forty square miles, although the rectangular

[12] Clyde F. Snider, "County and Township Government in 1942," *Am. Pol. Sci. Rev.*, Dec., 1943.

township of thirty-six square miles is found in the northern part of Maine. The town is usually a rural region containing one or more "villages," varying in size from very small hamlets to settlements containing three or four thousand inhabitants. Thickly populated urban centers are often organized as city corporations distinct from the town, but this is not always the case. Occasionally a town of ten thousand people or more retains a primitive town government; or, perhaps, it may set up a city government alongside the town meeting. The feature of the system which is particularly striking is the combination of rural with municipal government; for in many instances considerable villages or even small cities, containing several thousand inhabitants, are not separated from the surrounding agricultural district but are governed with the rest of the community by one meeting of electors, rural and urban. In rural districts where primitive conditions have been undisturbed by the rise of the factory system or by the influx of immigrants, and where everyone knows everybody's business, the town meeting preserves much of its ancient vitality and interest, but to a considerable extent the business of the meeting is determined in advance by a caucus of the adepts in rural politics. It is only when some matter of special importance is to be debated, such as the laying out of a street or the erection of a new school building, that the town meeting is likely to be more than a perfunctory affair.

Town Government. The administrative work of the town is carried on by a group of officers elected for terms of one or more years at the town meeting. The chief executive officers are the selectmen, varying in number from three to nine. Their emoluments and the character of their duties are largely determined by the size of the town. They execute the special orders of the meeting, lay out highways, draw warrants on the town treasury, act as assessors, health officers, and election clerks, and grant licenses. The town clerk is an important and often an interesting character, for his knowledge of local matters and family histories is sometimes stupendous. He issues marriage licenses, serves as a registrar of marriages, births, and deaths, records the proceedings of the town meetings, and in Connecticut and Rhode Island is a recorder of deeds, mortgages, and other documents relating to land titles. The funds of the town are guarded by a treasurer, and sometimes there is an auditor to supervise all accounts. The peace of the town is in the keeping of the constables, who often have other duties, such as the serving of writs and the collection of taxes. Minor cases at law, civil and criminal, are heard by

the justices of the peace. There are in addition numerous other minor officers, such as poor guardians, pound-keepers, library trustees, and fence-viewers, sometimes elected, and sometimes appointed by the selectmen.

The Town or Township in Other States. In a great group of Northern and Central states the town, or township, as it is often called, has a position of weight in the county; but these sections are not marked by the intense localism which has made the town such a vital part of the New England system. In New York, New Jersey, Michigan, Illinois, Wisconsin, Minnesota, Nebraska, North and South Dakota, for example, the town meeting with variations is frequently found, but its functions are of slight importance, and with few exceptions the voters do not take a lively interest in its proceedings. In Pennsylvania, Ohio, Indiana, Iowa, Kansas, and Missouri there is no township assembly at all, the local business being transacted by elective officers.

Decline of Town Meeting. The decline or disappearance of the town meeting in the Middle West is principally due to the fact that in most cases the township is an artificial unit laid out by the surveyor, not a settlement of neighbors and friends such as we find in New England. There the county organization came first, when the regions were only sparsely settled, and it has retained most of the functions assigned to it in the beginning. Those states furthermore were settled by immigrants from all parts of the East and from Europe, and conditions did not favor that spontaneous coöperation which naturally arises among people closely associated in long historical traditions. It must be remembered also that in this group of states the more populous urban centers are cut off from the rural regions by special village or city organization, thus leaving only the scattered farmers to conduct their rural affairs by themselves. In most of the states which have established the town meeting, the authority of that body is by no means as great as in New England, although in a few it theoretically enjoys substantial local powers.

Township Officials. Those states which do not have township meetings vest the local functions in elective officers, such as trustees, clerks, assessors, treasurers, justices of the peace, and constables. These officers are charged with certain definite duties by statute, and there is no occasion for by-laws and debate. In Indiana, for example, the most important officer is the trustee, who prepares the township budget, supervises the common schools in rural districts, and, generally speaking, occupies the place of the town board in New York or the selectmen in New Eng-

land. Curiously enough the manager system is invading even this unit of local government. In 1942 six Maine towns and one in Vermont adopted manager government while four Vermont towns voted to retain it. One Pennsylvania township adopted the system.[13]

Decline of the Township. Outside New England the town or township is on a decline, that is, it is losing its old functions and is in some cases being extinguished. The prime duties of old—maintenance of roads, management of schools, and care of the poor—are in process of transfer to other agencies. Trunk highways and subsidiary lines, subsidized by state and federal grants, pass under the administration of county and state highway departments. The one-room school house disappears, as schools are consolidated and children conveyed by buses to and from the central schools. Old-age pensions, provided out of state and federal funds, diminish the need for outdoor relief. Little independent work remains for townships to do, save assess property for taxation, and even that is subject to state or county review.

Searching investigations of township government, as A. W. Bromage shows in a review of them, condemn township government as obsolescent, wasteful, and inefficient, if not entirely useless.[14] A few states, for instance, Oklahoma, Minnesota, and Michigan, have arranged to extinguish some townships or to transfer their functions to counties. "Bit by bit the townships are worn down to make way for county units." It would seem that these "pure and elementary republics," as Jefferson called them, are doomed to become little more than administrative districts for county, state, and federal authorities. Not much public business remains to make the township "a training school for democracy and a center of community life." After all good roads and the automobile have extended the radius for easy community intercourse from five or six miles to twenty or thirty miles, and it is difficult to imagine any reversal of the trend away from the old unit of local self-government toward a larger unit. Intercommunication in the county today is swifter than it was in the township fifty years ago.

Subdivisions of County in South and Far West. The rural subdivisions of the county in the South and Far West need not detain us long, for they are generally of slight importance historically or practically, and attempts to introduce the township system of the North and

[13] Clyde F. Snider, "Rural Local Government, 1942," *Am. Pol. Sci. Rev.*, Dec., 1943.

[14] *National Municipal Review*, October, 1936, pp. 585 ff.

East have not been at all successful. In some of the Southern states the county subdivisions are known as magisterial districts, in others as election districts or precincts. These divisions are frequently used as the units for electing justices of the peace, constables, and members of the county board or for school administration. But the voting of appropriations and the general functions of government vested in the New England town meeting are, in the South and West, entrusted to the county board.

Villages and Boroughs. In all the states outside of New England—and to some extent, even there—it is the common practice to separate populous centers from the surrounding rural districts and to incorporate them as villages or boroughs. The number of such minor municipalities in the United States is more than ten thousand, ranging in population from a handful to several thousand. Sometimes they are incorporated by special acts of the state legislature, but more commonly in accordance with a general law providing the conditions under which the inhabitants of any thickly settled region may set up a government of their own.[15] The village government consists of a small elected board and a chairman or president usually chosen by the board, but sometimes it is headed by a mayor elected by popular vote. Its business includes the management of local finances, public buildings, streets, pavements, and drains, and the maintenance of order.

Criticism and Reform

Rise of Criticism. Although more than half the people live in the country under county, town, and village government, the subject of local administration has only recently become a matter for critical comment and constructive suggestions (p. 836). Bryce, who devoted so much attention to the evils of our cities, passed lightly over rural affairs; but during the past ten years or more, general assaults on the time-honored scheme of local management have been coming from many directions—from students of the subject and from legislative committees of investigation.

Abuses Listed. From various sources we have now laid before us an appalling bill of indictment. The large, representative county board is denounced as cumbersome, wasteful, negligent, and inefficient, even

[15] For a discussion of the character and legal powers of villages, boroughs, and towns, see Chapter XXIII, pp. 495–505, in J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930).

where honest. The long list of county officers is described as "a smoke screen" which confuses the voters and hides "the invisible government" of county bosses. The methods employed in assessing property, collecting taxes, building and maintaining roads, administering jails, poorhouses, and other county institutions, preparing budgets, reporting expenditures, letting contracts for construction work and printing, buying supplies, and transacting business generally are assailed as obsolete, crude, and extravagant where not actually and willfully corrupt. "Most counties and towns have no budget systems, no adequate audit, and no systematic purchasing. . . . Collectors of taxes have come to the county treasurer with handbags full of tax money, who did not know how much they had. . . . County and town printing is extravagant. . . . County, town, and village payrolls have been used as a pension system for superannuated citizens"—so run a few of the charges brought by a New York legislative committee only a few years ago. That is not all. As the powers conferred upon the county board by state law are usually enumerated or narrowly limited, citizens are constantly running to the state legislature to secure special legislation or to protest against interference with their local affairs. Thus home rule is violated, confusion is added to county politics, and the burdens of the legislature are increased.

New Local Troubles. Many forces have operated to augment the troubles of rural government. In some regions the decline in population and wealth has made it almost impossible for the counties and townships to support local governments adequately. In other regions a growth of population and corresponding burdens of maintaining health, educational, engineering, and other public-service functions have rendered obsolete and ineffective the old agencies, such as the county board, the township trustee, and other independent authorities. In large areas township functions have been transferred to the county, and county functions to the state until nothing except a shell of local government remains. Then, to crown these changes, the intervention of the Federal Government has been invoked to secure financial assistance.

Remedies Proposed. The remedies offered for the improvement of local government are in the main those which have been found more or less effective in cities:

Home rule for counties
The consolidation of sparsely settled counties
A small county board elected at large, perhaps by proportional representation

Abolition of all elective officers, except sheriff, auditor, and prosecutor

Adoption of the manager plan for counties (and perhaps for villages), similar to that in force in many cities

The grouping of all executive officers under the leadership of the manager

Establishment of a budget system for counties and subdivisions

Installation of modern accounting devices

State control and supervision of accounts

Enforcement of state and national standards for local services

Transfer of many functions from townships to counties and from counties to the state government

Consolidation of county with city government in densely populated urban counties

Criticism and proposals for changes have been followed by constructive actions in various parts of the Union, and in many forms, by amendments of state constitutions and statutory enactments. These constructive actions include provisions authorizing home rule for counties, the adoption of different plans of county government including the county-manager scheme, the consolidation of counties, and improvements in personnel. It is not improbable that coming years will see changes in rural government as significant as those which have taken place in city government since Bryce published his *American Commonwealth* in 1888.

Home Rule in California. As a result of a long agitation California adopted in 1911 a constitutional amendment empowering counties, through boards of freeholders, to frame their own charters or plans of government and on popular approval to put the same into effect. Steps to establish autonomy under this provision may be taken by the county board of supervisors or may be initiated on petition of fifteen per cent of the voters. The charter-drafting board is elected by popular vote and it is authorized under the state constitution to make a substantial revolution in county government—in the nature of many of the county offices, the methods of choice to fill them, and in the functions which the county may undertake. The charter as drafted by the board must be approved by popular vote and also by the state legislature.

The first community in California to try the plan was Los Angeles county, which approved a new scheme of local government in November, 1912. The elements of the Los Angeles scheme are as follows:

Commission government, in the form of a board of five members, in control of county affairs

The appointment by this board of county officers, excepting the sheriff, assessor, and district attorney

Creation of new offices, including corporation counsel, a purchasing agent, superintendent of charities, and a public defender

Appointment of three civil service commissioners by the board of supervisors

The creation of the office of road commissioner with full power to manage the road system of the entire county under the direction of the board of supervisors.

Other States Provide for County Home Rule. Years after California had broken the path other states followed. In 1932 Virginia authorized the voters of her counties to choose one of two plans of self-government: (1) a county-executive form permitting the county board to select the administrative officers and (2) a county-manager form empowering the county board to appoint a county manager endowed with authority to choose the chief administrative officers. Acting under the powers conferred three Virginia counties had adopted the manager plan by 1938. In 1933 Ohio adopted a county home-rule amendment permitting alternate forms of county government from which the voters could make a choice; and that same year, a constitutional amendment in Texas conferred home rule upon counties having more than 62,000 inhabitants. After a long struggle on the part of reformers the voters of New York approved in 1935 a constitutional amendment for county home rule, with distinctions between the counties in New York City and the remainder of the state. Acting under this amendment, the state legislature supplemented previous legislation on the subject in such a manner as to permit the voters of a county to retain its existing system or adopt a county-manager form, an executive form with an executive either popularly elected or chosen by the board, or a board form with five, seven, or nine members. In spite of much agitation and legislation however only eight counties had adopted the county-manager plan by 1944 and county voters had not seen fit to exercise their powers of home rule on an extensive scale in the ten states that authorized it.

Additional County Reforms. A few states have made provision for allowing the consolidation of adjoining counties by popular vote, thus making savings in government where the population and wealth of single counties are not large enough to warrant separate establishments. Wisconsin and Oregon took this step by legislative enactment in 1935. Under a constitutional amendment of 1936 the legislature of Montana, the following year, provided a method by which two or more adjoining counties could be consolidated by popular vote. More significant for

the efficiency of county government has been the development of state control over county debts, revenues, expenditures, and borrowings and state scrutiny of accounts (p. 684). Recognizing the fact that the new functions imposed on county and town officials call for increased competence, New York chartered a Town and County Officers' Training School in 1937 for the purpose of instructing officials in better methods of conducting business. In the same year 169 counties were operating under the merit system. And with the growth of the merit system in the states (p. 658), the expansion of better personnel management in local government may reasonably be expected.

Changing Relations with State Affairs. While we are only at the beginning of a reconstruction in local government, we have advanced far on the way toward state control over the processes of local administration and the transfer of local functions to higher authorities.[16] The dogma that the people of a locality, even in the remote towns of the New England hills or the mountain regions of Tennessee, know more about their own affairs than anybody from the state capital or from Washington has received many hard knocks during recent years. Moreover, as a result of radical changes in our economic life, affairs that were once of purely local concern have become of state-wide and even national importance. It does not matter much to neighboring counties whether any particular county keeps the weeds cut along the roadside or allows fences to fall into decay, but in these days of swift and constant intercommunication it does matter whether the county safeguards its inhabitants against contagious diseases, keeps its highways in order, allows the children to grow up in ignorance, or permits factories to pollute the major watercourses.

Forms of State Supervision. As a result of increasing state-wide interests, there has come a demand for more state supervision over local institutions. We now have state boards of health with large powers over local sanitary arrangements, food and dairy products, water supplies, and other matters affecting the health of the state generally. We have state factory and mining inspectors, railway commissions, highway boards, charity and correctional boards and officers, tax supervisors, excise commissioners, and educational officials. Only recently many states have sought to standardize the whole system of local finances and to secure efficiency and honesty in local financial administration by instituting

[16] P. W. Wager, in *Municipal Year Book* (1938), pp. 136 ff.; J. E. Pate, "Trends in County Government," *Social Forces*, March, 1938.

state bureaus of inspection (p. 684). State legislatures are more and more subjecting local authorities to uniform standards in the matter of education, sanitation, highways, and finance. Consequently, through both legislative and executive centralization, local authorities have become in many respects mere subordinate officers, carrying out state-wide laws dealing with all matters of fundamental importance.

Transfer of Functions. The transfer of local functions to state governments proceeds rapidly, so rapidly that there are relatively few left entirely in local hands (p. 662). North Carolina, for example, has placed the construction and supervision of all county highways in the state highway department. As state governments and the Federal Government are called upon to assume financial responsibility, they will inexorably insist upon acquiring more administrative power over the execution of projects for which they have to pay.

Need for Skilled Officials. Indeed, since the opening of the twentieth century, we have begun to realize dimly that rural districts need skillful administration and the application of natural science to human service quite as much as do the cities. The movements which have been launched to improve the politics and living conditions of great urban centers are beginning to be noticeable in many parts of the country.[17] We no longer assume that anyone with a fair degree of intelligence can manage a farm, a household, or a village without the assistance afforded by the accumulated knowledge of modern times.

Scientific Study of Rural Life. We have at last begun to study in a scientific way the conditions of life for large sections of our farming population. We are, for instance, beginning to find out something about rural sanitation which was once supposed to take care of itself automatically. As a result of many studies made in different parts of the Union, the federal Public Health Service declared in 1920 that in less than two per cent of the rural homes in the United States were the most essential principles of sanitation consistently followed in practice, and that for less than three per cent of our rural population was the local health work approaching adequacy. The Service also discovered that "certain diseases which are caused by infections spreading from person to person are, notwithstanding the sparser population, much more prevalent in our rural sections than in our cities. Hookworm disease and malaria are now almost entirely of rural origin. In many sections of our country typhoid

[17] C. F. Snider, "County and Township Government," *Political Science Review*, October, 1937 and December, 1943.

fever and dysentery are more prevalent in the rural districts than in the cities. Tuberculosis is appallingly common in our average farming community." [18]

Breaking Down Barriers. Fortunately such conditions are passing away. Owing to the demands of automobile owners and manufacturers and the support of federal and state authorities, improved highways break down the boundaries between town and county (p. 756). State and federal health agencies attack rural sanitary problems directly by going to the people with expert information and scientific demonstrations. They wage war on communicable diseases, on pollution of the soil and water supplies, insanitary conditions in the schools, unscientific diets ruinous to health, and the diseases of children.

To aid in the advancement of agriculture and home life on the farms, county extension agents acting under state and federal authority carry the lamp of science to the door of the humblest farmhouse. A. F. Macdonald has described this work with clearness and insight. "The county agents," he says, "are usually selected from among the graduates of the agricultural colleges. Their duty is to disseminate information regarding proper methods of farming and this they do, wherever possible, by means of personal contact with the rural population. They conduct actual demonstrations on the farmer's own land, explaining the proper use of fertilizers and showing how to prune, spray, and otherwise care for trees. . . . They even furnish plans for homes, suggest how farm buildings should be constructed, help establish new pastures, and renovate old. Through the bureau of agricultural economics . . . they sell nitrate of soda direct to the farmers. Women employed as demonstrators carry on similar work in and about the homes. They teach gardening and poultry raising and show how to preserve foods." [19]

Results. The results of these varied activities and indeed all combinations between federal, state, and local agencies in rural service have been good in the main. There is a steady and marked advance in the scientific standards applied to the improvement of rural life, though immense difficulties are yet to be surmounted. All this is in keeping with the spirit of the American experiment—a union of private initiative with coöperative enterprise.

Common Fate of Town and Country. Since the opening of the economic crisis in 1929, it has become increasingly evident even to

[18] *Federal Public Health Service Reports*, Nos. 570, 613, 615, 708.
[19] *Federal Subsidies to the States*, pp. 30–31.

superficial thinkers that the fate of the industrial cities and the agricultural regions is a common fate. While industry was prosperous, with the aid of foreign lending and trade, and agriculture was prostrate between 1920 and 1929, the plight of rural areas could be genially ignored by urban inhabitants. But after town and country began to sink together into distress, the reality of the ties binding them into one economic mesh became more apparent. And the Federal Government after 1929 gave increasing recognition to this inexorable fact by the enactment of legislation respecting rural economy and life and by entering into coöperative relations with state and local agencies (p. 504 ff.).

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Appendix

APPENDIX

CONSTITUTION OF THE UNITED STATES

WE the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes[1] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the

[1] See the 16th Amendment, below, p. 857.

[2] Partly superseded by the 14th Amendment. (See below, p. 857.)

executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof,[3] for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[3]

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualifications to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day. [See 20th Amendment.]

SECTION 5. 1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

[3] See the 17th Amendment, below, p. 858.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time, and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disap-

proved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. 1. The Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitu-

tion in the government of the United States, or in any department or officer thereof.

SECTION 9. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.[4]

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four

[4] See the 16th Amendment, below, p. 857.

years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[5] The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed. and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.[6]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.[7]

[5] The following paragraph was in force only from 1788 to 1803.
[6] Superseded by the 12th Amendment.
[7] See 20th Amendment.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. 1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times,

receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a state and citizens of another State; [8]—between citizens of different States,—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

[8] See the 11th Amendment, p. 855.

SECTION 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

[Names omitted]

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures or conventions in the several States pursuant to the fifth article of the original Constitution.

ARTICLE I [9]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

[9] The first ten Amendments adopted in 1791.

liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI [10]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII [11]

The electors shall meet in their respective States, and vote by ballot for

[10] Adopted in 1798. [11] Adopted in 1804.

President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE XIII [12]

SECTION 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV [13]

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[12] Adopted in 1865. [13] Adopted in 1868.

2 Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State

3 No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof But Congress may by a vote of two thirds of each House, remove such disability

4 The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void

5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

ARTICLE XV[14]

SECTION 1 The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude

SECTION 2 The Congress shall have power to enforce this article by appropriate legislation

ARTICLE XVI[15]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration

[14] Adopted in 1870

[15] Passed in 1909, proclaimed, 1913

ARTICLE XVII [16]

The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII [Repealed by 21st Amendment] [17]

After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the states by Congress.

ARTICLE XIX [18]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The Congress shall have power by appropriate legislation to enforce the provisions of this article.

ARTICLE XX [19]

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and

[16] Passed 1912, in lieu of paragraph one, Section 3, Article I, of the Constitution and so much of paragraph two of the same Section as relates to the filling of vacancies; proclaimed, 1913.

[17] Submitted by Congress, December, 1917; proclaimed January, 1919.

[18] Proposed in 1919; adopted in 1920.

[19] Proposed in 1932, adopted in 1933.

such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

ARTICLE XXI [20]

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[20] Proposed in February, 1933, and received the approval of the requisite three-fourths of the states by November, 1933.

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