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GOVERNMENT

of the American People

GOVERNMENT

OF THE AMERICAN PEOPLE

An Integrated Presentation of Its Political, Economic, and Social Functions

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D. C. HEATH AND COMPANY

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Offices: Boston, New York, Chicago,
San Francisco, Dallas, Atlanta, London

Preface

THIS is an integrated text. The variety and complexity of modern civilization require unification and coöperation among the so-called geographic units of government. Political, economic, and social problems are no longer bounded by the lines of single states and smaller geographic areas. Latent possibilities of integration and coöperation in government are progressively coming to light.

The integration in this text is twofold. There is an integration of agents and processes and an integration of functions. The integration of agents and processes unites the legislative in one section, the administrative in another, and the judicial in a third. It is believed that the similarity of the agents and processes is a better unifying principle than the relationship of the agents to particular units of government – federal, state, or local. Whether one seeks an understanding or improvement of government, or both, the nature of the agent and the nature of the process are more fundamental than their geographic distribution.

The integration of functions groups government activities about individual topics in the manner which has proved so popular in the problem courses in economics and sociology. There is a great deal of interest in these topics as topics, and the integration of government activities permits the student to get in a single chapter the whole range of governmental activity in dealing with each topic. This method invites him to attempt a "solution" of each problem. A number of recent texts have moved in the direction of integration; however, integration, particularly in the field of social welfare, has probably been used more extensively in this text than in any other. Moreover, some of these social welfare topics, including the family and civic planning, have received little treatment in other texts, new or old.

Since the great mass of government activities at present, perhaps ninety per cent, are applied economics and sociology, students of

government are rightly giving more and more attention to the work of government in those fields. Non-governmental aspects of economic and social problems may be left to the economists and sociologists, but governmental aspects are highly important for students of government. If the old statement, "By their fruits ye shall know them," is true, probably these applied aspects of government are the most important of all. The chief end of government is, after all, the result on the field of action.

This text has preserved the common historical approach to American government. It attempts to fix in the student's mind the fact that our government is the fruitage of history and political experience. It suggests that government continues to change and grow, that in a democracy each citizen may and should play some part in influencing the direction and rate of change and growth. The historical introduction is followed by a statement of the leading features of the American system, that the general pattern may be in mind as the course proceeds.

Each chapter includes a list of leading questions suggested by the text. These are intended to stimulate discussion and lead to individual and class investigation in connection with the preparation of reports and papers.

Each chapter closes with a list of selected readings. These readings serve two purposes: (1) they are authoritative books that indicate material which can be used by ambitious students to broaden and deepen their knowledge of the text; (2) they also furnish a guide to the material used by the authors in the writing of the text. The authors of this text gratefully acknowledge their indebtedness to the authors and publishers of the books listed. Full credit is given in the footnotes.

J. S. Y.
J. W. M.
J. I. A.

March, 1940

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PART I

Formation of Our Federal Republic

CHAPTER I

Colonial Background

THIRTEEN English colonies in North America were the nucleus from which the government of the United States today has developed. The original states that adopted the first constitutions and established the new Union were transformed colonies; and most of the thirty-five states that have been added since 1789 went through a territorial or "colonial" period of probation before being admitted to statehood.

FOUNDATION AND EARLY GOVERNMENT OF THE ENGLISH COLONIES

Patrimonial Attempts and Failures. Underlying the English colonization in North America was the patrimonial conception that the king, on the basis of discovery and exploration by Englishmen, was the rightful owner of the territory and could dispose of it as he saw fit. On this theory the king made grants [1] to John Cabot in 1497, to Hugh Elliott in 1502, to Sir Humphrey Gilbert in 1578, to Sir Walter Raleigh in 1584. These patrimonial attempts at colonization were not successful.

Chartered Companies. King James I turned to the English East India Company for the model of a plan that could found a successful trading company in North America. It had become clear that chartered trading companies, while they might be successful in the Old World, could not flourish in the New World unless accompanied and supported by thriving colonies from the mother country.

James's charter of 1606 establishing "The Treasurer and Company of Adventurers and Planters of the City of London for the First Colony of Virginia" provided for a double-headed company. The London Company was granted the right to colonize the southern part of "Virginia" – 34° to 38° north latitude – and the Plymouth

[1] These grants were in the form of a fief such as the county palatine in Chester and Durham. A fief in England was land granted by the king as a royal privilege to be held for him. The holder was to render some service such as a military service.

Company was granted the right to colonize the northern part – 41° to 45°.

For the government of the London Company there was a superior council in England with general powers to provide and direct a subordinate council in the colony that governed according to the laws of England. The colonists had no share in their own government, but they were guaranteed the liberties, franchises, and immunities of Englishmen, such as jury trial, the writ of *habeas corpus,* and free speech. The company had the power to make and enforce laws for the colony. These laws had to be in harmony with English laws. The members were required to take the oath of allegiance to the English king and be Protestants. The charter was not so liberal as that of the East India Company – in fact it was highly autocratic.

The colony established at Jamestown languished until King James, under pressure, granted more liberal charters in 1609 and 1612. In 1619 instructions to Governor Yeardley provided that the colonists scattered over eleven districts might elect from each and be represented by two deputies or burgesses to sit with the governor and council. Here is the provision for the first representative American assembly.

The Plymouth Company, after an unsuccessful attempt at planting a colony at Sagadahoc, procured from the king in 1620 a charter which changed the Plymouth Company to the New England Council. The Council was not successful in establishing colonies itself, but it subgranted territory around Massachusetts Bay. In 1628 these settlements requested and secured a charter which granted governmental powers similar to those conferred by the Virginia charters of 1609 and 1612. By it they became the Massachusetts Bay Company. The members of the Massachusetts Bay Company could elect their own officers and make their own laws provided they were not repugnant to the laws of England. The London Company remained in England and organized a government for Jamestown; the Massachusetts Bay Company elected officers from people willing to migrate to America and assume the burdens of colonization. Self-government prevailed from the beginning, whereas in Virginia it had to be wrested from the king.

Georgia, the last colony to be founded by a company, was established by a benevolent or philanthropic company which had no intention of making a commercial profit. General Oglethorpe and

other public-spirited persons who wished to relieve the debtor prisoners of England by making colonists of them secured a grant from the king in 1732. The company was a body politic. After twenty-one years it became a royal colony and served as a buffer between the early English and Spanish colonies.

Voluntary Associations. The Plymouth settlement is a good example of a voluntary colony, although it was not so planned from the beginning. Necessity gave the opportunity, and the Pilgrims embraced it. When these congregational adventurers set out from England they had patents for lands in Virginia under the London Company charter grant, but no plan of government, as they intended to settle on territory where there was an established government. Driven by storm or misguided by a Dutch pilot, they took shelter in Cape Cod Bay in the beginning of winter and decided to remain in that vicinity. There they were not within the jurisdiction of the London Company, and there was no legal authority to control certain individuals who threatened to take advantage of this situation. The English instinct for law and order asserted itself. The result was a voluntary association organized on shipboard, November 11, 1620, which adopted the famous Mayflower Compact.

Much rhetoric and oratory have been devoted to praise of this document. It was made to meet an emergency and contains no details. It is neither a charter nor a constitution. It did not form a new state, for allegiance to England was acknowledged. The supreme legislative power was vested in and exercised by the whole body of male inhabitants, who were charter members. Here is an example of a voluntary association that did not receive assistance from the home government or a chartered company.

The early history of Connecticut affords another important example of voluntary association. The "River Towns" of the Connecticut valley, feeling the necessity of union, drew up the Fundamental Orders of Connecticut in 1639. This constitution served them until 1662, when they united with New Haven and received a royal charter from Charles II.

Rhode Island, the product of a rebellion against Massachusetts, is also an excellent example of a colony that was established by voluntary action and developed in harmony with local needs and conditions.

Proprietary Colonies. Though feudalism was a vanishing type

of government in Europe, after the Restoration in England an attempt was made to utilize it as a form of government for the colonies. The proprietary colonies rested upon the feudalistic idea that the king owned the land and could grant it as a special privilege or monopoly to anyone. The proprietor enjoyed the ownership of the soil and the right to govern its people either directly or by deputy. The proprietor was a petty king, but he usually granted large governing powers to his colonists. The colonies that had permanent or transitory proprietors were Maine, New York, New Jersey, Delaware, New Hampshire, the Carolinas, Maryland, and Pennsylvania.

The proprietors of Carolina adopted a constitution framed by the philosopher, John Locke. Here was a feudalistic plan that might have won a measure of success in a densely populated territory, but was doomed to failure in a sparsely settled region where simple, not to say primitive, conditions prevailed.

The charter of Maryland made Lord Baltimore the proprietor with power to make emergency laws without consulting the colonists; but these laws must be "agreeable to the laws of England." This so-called feudalistic colony became quite democratic.

William Penn's grant allowed him to make laws "by and with the consent of the freemen." The grant said "make laws." Penn and his colonists decided that this authorized them to make a constitution which would be a fundamental law. In 1682 Penn published a frame of government which provided for a governor, council, and representative legislature. The Fundamental Orders of Connecticut is the first colonial charter or constitution indigenous to the American soil; Penn's constitution is the second.

The constitution opens with a preamble stating that government is of divine origin and a part of religion. It defines a free government in the following sentence: "Any government is free to the people under it (whatever the frame) where the laws rule and the people are a party to these laws, and more than this is tyranny, oligarchy, or confusion." Penn held that government depends on men, and not men on government.

The council was large. Evidently Penn intended that it should be a second branch of the legislature, but this intention was never carried out. The council was to originate all legislation; the assembly was to accept or reject the proposals as a whole. The council had power to try impeachments brought to it by the assembly. The

word *impeachment* is found for the first time in Penn's frame of government. Later the Pennsylvania method of impeachment made its way into most of the state constitutions and into the Constitution of the United States. The Penn constitution was the first to provide a definite method for its own amendment. It was also the first to provide a specific agency for the execution of the laws, as follows: "The governor and provincial council shall take care that all laws . . . be duly and diligently executed." Essentially the same provision was incorporated into the state constitution. It also appears in the Constitution of the United States in the following terse phrase: "He [the President] shall take care that the laws be faithfully executed." Appended to Penn's frame of government were "laws agreed upon in England" which furnished a basis for many future bills of rights in American constitutions.

CLASSIFICATION OF THE COLONIES IN 1775

At the opening of the Revolution the colonies, regardless of their beginnings, conformed to three types – royal, proprietary, and charter.

The *royal colonies* were Georgia, New Hampshire, New Jersey, New York, North Carolina, South Carolina, and Virginia. In these colonies there was no written charter guaranteeing the rights of the colony. The king dominated the government. He granted commissions and issued instructions. The government consisted of (1) a governor and council appointed by the king; (2) a legislature consisting of the council as an upper house and a lower house elected by property owners; (3) a judiciary of judges appointed by the governor and the council, with the council acting as the highest court.

The *proprietary colonies* were Delaware, Pennsylvania, and Maryland. In these colonies the territory had been granted to a proprietor by the king. The proprietor did not try to make profit out of the colony. Although he was a petty king he granted the people more privileges than did the king in the royal colonies. The government included (1) the executive department, consisting of the governor and the council appointed by the proprietor; (2) a legislature consisting of the council, except in Pennsylvania, and an elected assembly; (3) a judiciary like that of the royal colonies with the supreme court appointed by the governor.

The *charter colonies* were Connecticut, Massachusetts before

1775, and Rhode Island. In these colonies the king granted a charter which provided for the rights of the colonists. In Connecticut and Rhode Island the government consisted of (1) a governor and council elected by the legislature; (2) a general court or a legislature consisting of the council or assistants and an elected assembly; (3) a separate supreme court. The government of Massachusetts immediately prior to 1775 consisted of (1) a governor appointed by the Crown and a council elected by the assembly: (2) a legislature or general court consisting of the council and an elected assembly; (3) a separate supreme court.

LOCAL GOVERNMENT IN THE COLONIES

Very little thought was given to municipal government in the colonies. Attention was centered on rural local government. Two leading types were developed, and these have been transferred to our western states almost unchanged.

New England Town. The leading unit of local government in New England was the town. There are several reasons for the development of the town form in New England. (1) The soil had few fertile spots; hence the people were obliged to settle in close contact. (2) Free labor and intensive cultivation of the soil prevailed. (3) Most of the settlements were small congregational church units with democratic government, and this fact influenced the political government. (4) Close, compact settlement was necessary as a defense against the Indians, the Dutch, and the French. The powers of the town were exercised principally by the voters in mass meetings.

Southern County. An institution called the parish was founded in the South for church purposes. The chief unit of local government was the county. In contrast to New England, (1) the soil in Virginia and the South was generally fertile, permitting expansion over large tracts; (2) the slave form of labor necessitated extensive agriculture on plantations; (3) the prevailing form of church government was centralized and aristocratic, and had a political parallel in the centralization of the power of the county at the county seat; (4) the southern colonies did not need compact settlements for defensive purposes. The county officers consisted of an appointive board that selected various officers.

County-Town of the Middle Colonies. There is a slight distinction between the New York type and the Pennsylvania type of

county-town. New York developed the supervisory type. One set of officers acted for the town, and a board of supervisors of one or more persons chosen from the towns acted for the county. This emphasized the town. Pennsylvania developed the county-commissioner type. One set of officers, elected in the town, exercised power in the town, while another set, elected in the county at large, exercised power in the county. These mixed types have spread to the West, especially the Pennsylvania system.

The units of local government had only such power as the central government delegated to them. The New England town fostered democracy and a high average of political intelligence and education, while the county tended toward aristocratic forms of life and government and developed great political leaders.

THE COLONIAL FRANCHISE

Present-day qualifications for the electoral franchise and its exercise are an outgrowth of colonial political activity. Each colony had its own qualifications for voting. Every colony limited the franchise to property owners. Eight required that voters own real estate, and five that they own personal property. Sometimes there were religious qualifications. Massachusetts required a voter to be a male Christian of "orthodox belief." Catholics and Jews were generally disfranchised. Quakers were disfranchised in all the northern colonies except Pennsylvania and Rhode Island. The proportion of voters to the whole population exceeded the ratio in England. In Pennsylvania ten per cent could vote in the country and two per cent in Philadelphia. In Rhode Island nine per cent could vote; in Connecticut and Massachusetts sixteen per cent. Only a small percentage of those entitled to vote actually voted. Election districts were large, means of transportation and communication were poor, and party organization was feeble. The political parties, as in England, consisted of Tories who supported royal power, and Whigs who opposed it.

ORIGINS OF FEDERALISM

The adoption of the Constitution in 1787–1789 consummated the establishment of a state with a federal form of government. The essence of the federal form is a central government with jurisdiction over a limited number of matters, and local governments with jurisdiction over other matters – in other words, a division of pow-

ers between two sets of governmental agents. Essentially this was but a continuation of the situation when the thirteen English colonies were a part of the British Empire, and of the situation later when the thirteen new states were parts of a loose union under the Continental Congresses and the Articles of Confederation.

Not only was there a distribution of powers, but, as Lincoln contended, there never was a time when the local colonies and the succession states were free from some kind of overlordship such as the central government of Britain or the Congress that fell heir to the central powers of Great Britain. The adoption of the Constitution did not make any change in this particular.

In the colonial period the fundamentals of federalism were evidenced either expressly or implicitly in the British government's exercise of power over such general matters as foreign affairs and commerce, the army and navy, war and peace, and Indian and postal affairs, while such local matters as taxation, local commerce, and elections fell to the colonial governments.

Furthermore, the idea of coöperation and union reached back into the colonial period. The following examples of coöperation, which will be described in the next section, may be noted: (1) the adoption of the Fundamental Orders of Connecticut, by the small settlements that united to establish the colony of Connecticut; (2) the formation of the New England Confederation; (3) the Albany Plan of union suggested by Benjamin Franklin; (4) the Stamp Act Congress; (5) the two Continental Congresses.

It is not difficult to follow the local stream of our federalism from the charters of the trading companies and colonies to the state constitutions and our present forms of local government. The central stream of federalism flowed from the powers exercised by the English government, the central governments of the colonies, the central governments of the states, and the Continental and Confederation Congresses to the present central government of the United States.

Federalism as incorporated in the Constitution of 1787 is a product of evolution. It is found in the relation of the English and colonial governments, in the coöperative exercise of powers by groups of colonies during the colonial period of our history, in the proposed plans of colonial union before the Revolution, and finally in the plans for and the actual coöperative activities in the Revolutionary struggle with England.

COLONIAL UNIONS

Union of Towns Resulting in the Formation of Connecticut. The colony of Connecticut was the result of coöperation between two distinct groups of settlements that had united at first locally, and later joined together to form the colony of Connecticut. The first group of towns comprised Windsor, Weathersfield, and Hartford, which united under the Fundamental Orders of Connecticut, the "first written constitution in history that formed a government." The second group included New Haven and the associated towns of Milford, Guilford, Southland, and Greenwich, which had tried out an Old Testament theocracy resting upon a democratic basis.

The outstanding features of the Fundamental Orders of Connecticut are: (1) that the people were sovereign and distributed the powers between the central and local governments – general matters, such as taxation, Indian affairs, all land policies, and war powers were exercised by the central government, while local matters, including the fixing of voting qualifications, were retained and regulated by the towns; (2) that each town was represented in the assembly by four deputies; (3) that a single executive was provided; (4) that the single house of the assembly had two kinds of representation – one based on population, the other on units of local government; [1] (5) that the will of the majority was the supreme law of the colony, a feature that bears a strong resemblance to the "supreme law of the land" clause in the federal Constitution of 1787.

The New England Confederation. In 1643 commissioners from Massachusetts, Plymouth, Connecticut, and New Haven [2] met at Boston and agreed upon articles of confederation.

The Confederation adopted the name "The United Colonies of New England." The members entered into a firm and perpetual league of friendship and amity for offense and defense, for mutual advice and succor, for preserving and propagating the truth, for safeguarding the liberties of the people, and for their own mutual safety and welfare. The agreement contained a self-denying ordinance that the central government would not interfere in the internal affairs of the members of the union. In addition to its power over war, the Confederation could deal with the Indians and with

[1] This is the model for representation in Congress.

[2] Rhode Island, Maine, and New Hampshire were not included because of differing religious practices.

the return of fugitives from justice and of servants who had fled from their masters.

The importance of the Confederation ceased about 1662 when New Haven united with Connecticut, but the commissioners continued to act in occasional meetings until 1684. Thus the coöperation of these four New England colonies lasted for a period of approximately forty years.

PROPOSED PLANS OF UNION

Various plans of union that would make the colonies more useful to the Crown and one another were proposed in the pre-Revolution period. We may mention William Penn's plan, the plan proposed by the Lords of Trade in 1697 for uniting the colonies on a military basis and taxing them for military purposes, and Robert Livingston's proposal in 1701 that the colonies be divided into three distinct groups for ease of administration. The best plan was submitted by Benjamin Franklin in 1754.

The Albany or Franklin Plan of Union. The Board of Trade and Plantations advocated a plan of colonial coöperation which looked toward military efficiency in the French and Indian Wars. To further this aim, a congress was held at Albany, New York. Benjamin Franklin of Pennsylvania was one of the delegates. The union he proposed was the most comprehensive of all the plans for colonial coöperation.

Franklin's plan embodied the true federal conception. (1) The central government was to rest upon the popular basis of consent of the governed, and was limited to general purposes; (2) the laws were to apply to individuals, and were to be executed by the officers of the general government; (3) the local governments were to legislate and execute their powers on the same individuals, but within the local sphere.

The plans just reviewed looked toward colonial coöperation within the British Empire. Part of this effort was directed at improving intercolonial affairs. Another aim was to secure larger power for the colonies as component parts of the Empire.

COLONIAL COÖPERATION IN CONDUCTING THE REVOLUTION

As the relations between the English government and the colonies became more strained, the colonies dropped the idea of union within the Empire and resorted to union through Congresses that

were revolutionary since they rested on no legal basis. The first of these is known as the Stamp Act Congress.

The Stamp Act Congress. On October 7, 1765, representatives of nine colonies met in New York and adopted a Declaration of Rights. The Declaration stated that the colonists were subjects of the Crown, and therefore entitled to the rights of Englishmen; that the power to tax was one of these rights; that the colonies could not be taxed by Parliament since they had no representation in it; and that " no taxes ever have been or can be constitutionally imposed on them, but by their respective legislatures." Parliament repealed the Stamp Act at once, but asserted its right to legislate for the colonies internally as well as externally.

The First Continental Congress. The First Continental Congress had its inception in a movement at Boston which took the character of stubborn opposition to the English program. Two days after the Boston Port Bill reached Massachusetts (May 10, 1774) a meeting of the Boston Committee of Correspondence was held with similar committees from eight other towns. This joint session addressed correspondence committees in all the colonies, recommending suspension of trade with Great Britain and advising that the other colonies come to the support of Boston, which was suffering for the common cause. The suggestion was made that a commercial non-intercourse act should be passed.

The body called the First Continental Congress began its work in Carpenters' Hall, Philadelphia, on September 5, 1774. It was in no sense a modern legislative body. Its function was advisory or consultative. It did not undertake sovereign acts, but it prepared the way for the gradual assumption of authority by the Second Continental Congress in 1775 by adopting the Association of 1774, an agreement designed to put in force the suspension of trade with Great Britain which the Congress proposed. The colonies agreed not to import or consume tea or any other British goods. The Association of 1774 is virtually the beginning of the federal union. It has some semblance to a written constitution.

The Second Continental Congress. There was no adjustment with England as a result of the First Continental Congress. The Second Continental Congress met in 1775, but the dispute with England had now been referred to the arbitrament of war. The Congress assumed powers and acted as a clearing house for the colonies in conducting the Revolutionary War. It did not pretend that it had

inherited the sovereignty and rights of the Crown. It was acting as the mouthpiece of the patriotic party in the colonies. It disposed of sundry applications on behalf of individuals; recommended measures to local authorities; considered requests for advice and aid to individual colonies, but did not go beyond recommendation; planned offensive and defensive measures which it then urged upon the individual colonies; raised, organized, and regulated a continental army which it called upon the states to support; assumed the general direction of military affairs; administered a continental revenue but turned to the states to redeem its financial pledges: formulated peaceful plans and measures for the general good, such as superintending Indian affairs and making a postal system, but in all this it regarded taxes as under control of the colonial assemblies; regulated trade; appointed executive committees; issued paper money and negotiated loans; established a court of appeals for hearing prize cases – a court that became the model for the present Supreme Court; assumed the conduct of diplomatic relations; advised the colonies on the formation of independent state governments; issued the Declaration of Independence; and formed the first constitution of the United States – the Articles of Confederation.

The task of the Second Continental Congress was difficult because its powers were undefined. It exercised the most imposing powers of sovereignty without a constitution. It had no legal warrant for its acts except the acquiescence of the people; but this, in the opinion of some persons, is the highest sanction government can ever enjoy.

The activities of the Stamp Act Congress and the two Continental Congresses emphasized unity of action but did not achieve union. In the midst of all the revolutionary activity, two additional plans of union were formulated. Joseph Galloway proposed an imperial union; Benjamin Franklin proposed a confederation that should operate until England redressed the grievances of the colonies. Neither of these plans was adopted.

QUESTIONS

1. Compare the charter of the London Plymouth Company with the charter of the English East India Company. Why was the Mayflower Compact not a constitution? Why was the Fundamental Orders of Connecticut a constitution?

2. Were the proprietary colonies feudalistic in operation? What were the essential differences between royal, proprietary, and charter colonies?
3. What was the background of colonial federalism?
4. Compare the following plans of colonial union: (1) Penn's plan; (2) the New England plan; (3) Franklin's plan.
5. How did the colonial plans influence the formation of the later legal unions?

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CHAPTER II

Our First States and Independence

THE transformation of the thirteen English colonies into states and the adoption of the Declaration of Independence are the central facts of the Revolution. These acts meant the secession of a part of the British Empire and eventually a new member in the family of nations.

THE FIRST CONSTITUTIONS

The transformation of the colonies into states was effected by the adoption of state constitutions which were based on a long line of English documents, such significant colonial instruments of a general character as the Fundamental Orders of Connecticut, and the more specific colonial charters.

As soon as the American Revolution developed into a real civil war, the colonial governments virtually ceased to function and the colonies appealed to Congress for advice. Congress cautiously suggested that the colonies should exercise the governmental powers until a governor appointed by the Crown should consent to govern the colonies according to their charters. Acting on this suggestion New Hampshire and South Carolina adopted provisional constitutions, calling themselves colonies and not states. On May 15, 1776, Congress advised all the colonies to adopt such governments as "would best conduce to the safety and happiness of their constituents in particular and America in general."

After the congressional resolution of May 15, 1776, the colonies adopted regular and not provisional constitutions. This meant that they had crossed the Rubicon, especially after the adoption of the Declaration of Independence by Congress.

Rhode Island and Connecticut modified their colonial charters and continued their essentially republican government under these instruments — Rhode Island until 1842, and Connecticut until 1818. All the other colonies adopted constitutions. All of these consti-

tutions, including those of Rhode Island and Connecticut, rested upon the popular theory of the consent of the governed.

Formulation of the Constitutions. No uniform method of formulating and adopting these constitutions was followed. In general, there was a realization of the difference between the content of a statute and of a constitution. There was a less clear appreciation of the distinction between the acts of a legislature and the acts of a convention acting in a constituent capacity. The supreme court of South Carolina decided [1] that the first two constitutions of South Carolina were merely statutes. A recent writer [2] maintains that the same was true for the first constitutions of the other states except Massachusetts, New Hampshire (1784), and Delaware, whose constitutions were drafted by conventions of delegates elected for the sole purpose of framing a constitution. The constitutions of Virginia, South Carolina, and New Jersey were framed by conventions acting as temporary revolutionary governments, but without specific authority to draft constitutions. The other proposing bodies were authorized to draft constitutions, but as a rule they were not chosen for this single purpose.

The Bills of Rights. Virginia enacted a separate bill of rights, the first document of its kind in our history. It was the work of George Mason. This bill of rights embodied the principles (1) that all men are by nature equally free and independent, with certain inherent rights; (2) that all political power is vested in, and consequently is derived from, the people; (3) that all governments exist for the common benefit; (4) that the people have the right of revolution when government becomes despotic. The other state constitutions followed the Virginia statement closely. The Massachusetts bill of rights announces that the three departments of government should be sharply separated "to the end that it may be a government of laws, and not of men." The English Bill of Rights insisted upon the specific historic rights of Englishmen. The state bills of rights expanded charter rights in generalized form for the civil protection of individuals. Several features of the Virginia bill of rights appeared a few weeks later in the Declaration of Independence, which was also penned by a Virginian. The leading features of these early bills of rights are imbedded in the first ten amendments to the federal Constitution and are parts of our present state constitutions.

[1] *Thomas v. Daniel*, 2 McCord, 211.
[2] Cleveland, F. A., *Organized Democracy*, p. 67.

Other Features. These early state constitutions limited not only government but democracy as well. Many of the white male adults were not granted the franchise, because they did not own the prescribed amount of land or taxable property. Even Jefferson's draft of a constitution for Virginia required a land qualification for voting.

Only six of the state constitutions contained provisions for their own amendment. If the people had the right to change the form of their government by revolution, they likewise had the right to amend a constitution.

Massachusetts was the first colony to carry out in full the theory that the people are sovereign and the constitution must emanate from them. The voters in the towns chose delegates to a convention whose sole business was to draft a proposed constitution which was submitted to the voters for consideration. This method has become universal for the making of state constitutions. The federal Constitution of 1787 was drafted by a convention, and was ratified by state conventions whose members were elected by the voters.

As to form, the first state constitutions were brief, or a mere frame of government. Future legislatures were to erect a superstructure upon the frame. With the exception of the constitution of Massachusetts, they were illogically arranged like Magna Carta. As to origin, they reveal the political philosophy of the times, especially that of Vattel, Locke, and Montesquieu. The influence of the English common law and constitution is clearly evident. The trading company and colonial charters are the direct models that were followed. As to content, the constitutions contained preambles, bills of rights, provisions for three departments of government so arranged as to separate and limit the powers of government and provide a system of checks and balances, a method of amending the constitutions in the future, and finally an enacting clause for the whole instrument, or a series of enacting clauses for different parts of the constitution.

PROVISIONS FOR STATE GOVERNMENT

Legislative Department. The colonial assemblies had made the fight against the royal governor and the kingly prerogative. Consequently they stood high in the estimation and affections of the people. Under these circumstances it was natural that the legislative department should receive large powers.

The people did not wish to use *Parliament* as the name of the legislature. Massachusetts and New Hampshire retained the name

General Court. Other states used *General Assembly.* The structure of the legislature, as of the colonial assemblies, was bicameral in all the states except Pennsylvania and Georgia. Property was the basis of representation in most of the states. In Massachusetts, New York, and Virginia the basis was property and population. The geographic units of representation were the town in the North and the county in the South.

There was no uniformity in the names of the houses of the legislature. For the lower or only house the following were used: House of Assembly, by Delaware and Georgia; General Assembly, by New Jersey; House of Commons, by North Carolina; Assembly, by New York; House of Delegates, by Virginia and Maryland; House of Representatives by all the others.

As a rule the members were elected annually, except in South Carolina, and must be residents of the districts electing them. In every state the legislatures judged the qualifications and election of their own members, made their own rules, punished their own members, and usually had the power to impeach state officers. In all states the requirements for membership in the upper house and for voting for candidates for this branch were higher than for the lower house.

The names for the upper house were as follows: Legislative Council in New Jersey and Delaware; Senate in all other states that had an upper house. The upper house was an outgrowth of the colonial council, which had been appointive in most of the colonies. It remained a small body – nine members in Delaware, forty in Massachusetts. Unlike the colonial council, it now became elective. In some states the terms of all members expired at the same time. In others there were classes with overlapping terms. Like the colonial council, the upper house became a coördinate branch of the legislature and exercised some judicial powers, such as the power to try impeachments brought by the lower house.[1] It exercised some executive power by sharing with the lower house the power to make appointments and to administer the laws, and by using its own committees. The upper house was intended to act as a stabilizing balance wheel for the supposedly impetuous lower house.

Executive Department. The state governors suffered in the popular reaction against the royal colonial governors. In the royal colo-

[1] In New York the upper house tried impeachments in conjunction with the judges of the supreme court.

nies the governor exercised the executive power of enforcing the laws; of commanding the military forces; of appointing military and civil officers; of representing his colony in dealing with other colonies, with the English government, and to a limited extent with foreign governments. He played a considerable role in legislation since he summoned, prorogued, and dissolved the assembly, sent messages and recommendations, and, like the king before 1707, exercised the power of absolute veto. Indirectly he could exercise a legislative power since he nominated the members of his advisory council, which served as the upper house of the legislature. His judicial functions included the power to pardon and to act as chancellor or the head of the highest equity court. As governor he was the ecclesiastical head of the established church. The new state constitutions reduced the governor's powers almost to the vanishing point.

The people elected the governor in Massachusetts, New Hampshire, and New York. In the other states he was chosen by the legislatures, which had the power to impeach, convict, and remove him from office. He had a short term and must meet high residential and property qualifications. He had no pardoning power and no independent veto power except in Massachusetts. His chief business was to enforce the law, repel invasions, and suppress insurrections. There was a provision for a lieutenant-governor, following the charters of the trading companies and the colonies.

The colonial council advised and restrained the governor. It also had legislative and judicial power. The legislative and judicial powers of the colonial council passed to the new state senates. The new constitutions in all the states except New York and New Jersey provided for a council with administrative or advisory functions.

Judicial Department. The judicial system of the colonies was taken over by the states practically unchanged. Following the English system, there were usually three classes of courts: (1) justice of the peace courts; (2) a county court, or court of quarter sessions; (3) a supreme court.

New methods for the selection of judges had to be adopted. Colonial judges were appointed by the king or the governor. Georgia authorized the popular election of judges. In most of the other states the judges were either elected by the legislatures or appointed by the governor with the consent of the council or the senate. In New York a commission of four senators appointed the judges.

The methods of the English courts were followed by the new state courts. After the example of the judicial committee of the Privy Council in England, the state courts assumed the power of declaring legislative acts null and void because of unconstitutionality,[1] a practice followed later by the federal courts.

INDEPENDENCE

Adoption of the Declaration. The growth of colonial opposition to the aggressiveness of the English government culminated in actual armed opposition in 1775. The preliminary activities of the Stamp Act Congress and the First Continental Congress paved the way for the Second Continental Congress to assume the powers of sovereignty in the name of the people of the colonies. Waging war against a state of which the colonies were legally a part was an incongruous situation; independence was a political and legal necessity.

On June 7, 1776, Richard Henry Lee of Virginia proposed the following resolution:

> *Resolved*, that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.

When the vote on this resolution was taken on July 2, there were only three negative votes. The formal declaration was adopted on July 4 and signed by the members of the Congress on August 2, 1776.

Contents of the Document. The Declaration includes (1) an explanatory statement setting forth its purpose and avowing faith in the laws of nature and nature's God; (2) a philosophy of government; (3) an enumeration of the acts of George III that justified a declaration of independence; and finally (4) an enacting clause.

The political principles are set forth in part of the second paragraph, and read as follows:

> We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain un-

[1] For state cases on unconstitutionality see *Holmes v. Walton*, in *American Historical Review*, vol. 4, pp. 456–469; *Trevett v. Weeden*, R. I. 1786; *Bayard and Wife v. Singleton*, 1 Martin (N. C.) 42 (1787); *Commonwealth v. Caton*, 4 Call. (Va.) 5 (1782).

alienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

The main points in this statement include the following:

(1) The declaration that human beings are created equal. This does not mean equal physically, socially, or economically, but with an equal chance under the law.

(2) The declaration that human beings are divinely endowed with certain natural or inalienable rights, including life, liberty, and the pursuit of happiness. The phrase "pursuit of happiness" was substituted for "property," a word used by most political philosophers of that time.

(3) The announcement of the minimum objects of government. The Declaration is predicated on the theory of the social contract, which assumes that, when government was agreed upon, man was in a state of nature, in which no one had a right to interfere with fundamental natural rights of others. After the social compact was adopted, men subordinated themselves to a superior who must govern for the common welfare. The objects or purposes of government are to secure the rights mentioned.

(4) The declaration that the source of just governmental powers is the consent of the governed. This is based on the social contract theory and is the foundation principle of popular sovereignty and the right of the majority to rule.

(5) The statement of the doctrine of political revolution. If the government becomes destructive of the objects set forth, the people have a right to substitute a new for the existing government.

The first four principles are enunciated to justify the fifth, the doctrine of revolution. The declaration of the source of political power and the statement of the doctrine of political revolution are the most important principles announced.

Appraisal of the Declaration. Most people in the United States approve the Declaration of Independence. It states the principles and theories that justified the colonies in withdrawing from the

British Empire. Furthermore, it sets a high political ideal towards which men in all times and places may strive. The underlying theories of the Declaration of Independence have been accepted by many other states.

QUESTIONS

1. Why was the transformation of the colonies into states the core of the Revolution?
2. What were the leading features of the first state constitutions?
3. How did the fact that the first state courts declared legislative acts unconstitutional influence the federal courts?
4. Outline the political theory of the Declaration of Independence. Has the Declaration of Independence any legal significance?
5. Collect historical facts to confirm Jefferson's indictments of George III.

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CHAPTER III

Our Constitutional Unions

THE CONFEDERATE UNION

THE colonies had been transformed into states, but an agency was needed to take over the powers that had been exercised by the English government. Beginning with 1639, plans of colonial union within the British Empire had occupied the attention of the colonial mind. In the early part of the Revolution, the extralegal Continental Congresses acted as a central government. These were *de facto* and not *de jure* governments. There was no constitution to measure their powers. Hence the demand for a central government with defined legal powers arose.

The First Union under a Constitution. With the resolution declaring the colonies free and independent which Richard Henry Lee moved on June 7, 1776, was coupled a provision for the appointment of a committee to draw up "Articles of Confederation." As we have seen, the first part of the resolution resulted in the Declaration of Independence; the second resulted in the formation of the first union under a constitution. On July 12 the committee to draft the Articles or constitution was appointed. John Dickinson, the chairman, following Franklin's draft of 1775, reported a plan of union after but eight days' consideration. This proposal was debated from time to time and was finally approved by Congress on November 15, 1777.

Four years elapsed before all the states ratified the new constitution. The delay was caused chiefly by Maryland's refusal to ratify until the states that had western land claims offered to surrender them to the union for the common benefit of the whole country. When New York expressed a readiness in 1780 to give up its vague land claims, Congress urged all the states that had such claims to take like action, and promised that the lands so relinquished would be disposed of for the benefit of the United States, and be settled and formed into distinct republican states "which should become

members of the federal union and have the same rights of sovereignty, freedom, and independence as the other states." The states ceded their lands on the basis of this promise. This is the beginning of our public domain, out of which at least twenty-eight states have been carved, after having gone through a territorial or colonial status which was new to the world.

Maryland, having accomplished its purpose in securing these land cessions, ratified the Articles of Confederation on March 1, 1781, and the Second Continental Congress was then superseded by the Congress under the first constitution for the United States of America.

The union formed by the Articles was a league of friendship, made by and for the states but not for individuals. The states agreed to unite for the common defense, general welfare, and the security of their liberties. Each state reserved " its sovereignty, freedom, independence, and every power, jurisdiction, and right " not expressly delegated to the Confederation.

The Articles imposed a few limitations upon the states. No state without the consent of Congress could send or receive any ambassador; enter into any interstate treaty, confederation, or alliance without specifying the purpose and the period it should continue; levy any imports or duties which might interfere with treaties with foreign countries; keep war vessels in time of peace; engage in war unless actually invaded; or grant letters of marque until Congress had declared war. Finally, each state was required to keep a well-disciplined militia, properly equipped for service.

This was a better union than any that had been previously proposed. It was not a mere alliance, but a confederated union, a *Staatenbund* or band of states, and the states could secede at any time – despite the fact that the Articles in three different places referred to the union as " perpetual."

Structure of the Central Government. The powers delegated to the central government were committed to a unicameral legislature or diplomatic body called Congress. Originally there had been considerable debate on the question whether the states should be represented equally or in proportion to population. The final decision was supposed to be a compromise. Each state was privileged to send not less than two nor more than seven delegates or congressmen. Within this sliding scale it might be represented according to its numbers and hence have debating power, but in voting power the states were equal. Each state had one vote, which was determined

by a caucus of the state's delegates. If this caucus was a tie, the state lost its vote. It took nine votes to pass important measures, such as making war and treaties, borrowing money, or emitting bills of credit. Congress, through fear of a dictatorship, elected its own president or presiding officer for a year at a time, lest he become too powerful. The congressmen were chosen, paid, and recalled by the state legislatures. They were chosen annually and could not serve more than three years in any term of six years. Neither could they hold any other office under the United States. They enjoyed the usual parliamentary immunities of freedom of speech and freedom from arrest and imprisonment in going to and from Congress, except for treason, felony, or breach of the peace.

There was no provision for an executive department as such. The conduct of the war required considerable administrative work on the part of Congress. This need was met by the appointment of committees or boards whose chairmen became practically heads of departments. A committee of Congress headed by Robert E. Livingston was appointed to report on the reorganization of the administrative work. This committee recommended single heads of departments instead of continuing the committee system. Congress appointed the following heads of departments: (1) Secretary for Foreign Affairs; (2) Superintendent of Finance; (3) Secretary of War; (4) Secretary of Marine; (5) Secretary of Postal Affairs. These heads of departments had *entrée* to the floor of Congress and wielded considerable influence. The departments of Foreign Affairs and Finance continued into Washington's administration. It has been said that Robert Morris, Secretary of Finance, and John Jay, Secretary of Foreign Affairs, were in effect the first Presidents of the United States. The fact that Congress set up this administrative machinery has been cited as the reason the Convention of 1787 did not provide directly for a cabinet. It assumed that Congress would. Under the Articles "a committee of the states," consisting of one delegate for each state, acted for Congress during its recesses. This committee was only an agent of Congress and not a cabinet.

The Articles made no provision for an independent judiciary. A clumsy method of settling interstate disputes was followed, Congress acting as a court of last resort. There was also a provision empowering Congress to establish prize courts and courts for the trial of piracies and felonies committed on the high seas.

Powers of Congress. The Articles of Confederation are stamped

with the thought of the day. They were drafted in the midst of a war waged by the colonies against a distant, powerful government. It was only natural that the states should be reluctant to give the central government much real, enforcible power. On paper Congress had almost every power that was admittedly national in character, except power to raise revenue, to regulate commerce, and to deal directly with individuals. It was expressly granted power (1) to make and terminate war; (2) to determine the legality of captures on the high seas; (3) to make divisions of prizes; (4) to issue letters of marque and reprisal; (5) to provide for admiralty courts; (6) to coin and borrow money and emit bills of credit; (7) to settle interstate disputes, especially those concerning boundaries and territories and their government; (8) to raise and equip an army and navy; (9) to regulate such internal matters as Indian and postal affairs; (10) to make treaties and alliances; (11) to establish a system of weights and measures.

Interstate Relations. The Articles made some progress toward interstate amity and coöperation by providing that full faith and credit should be given in each state to the records, acts, and judicial proceedings of the courts and magistrates of every other state. Extradition of fugitives from justice was guaranteed; there was a mutual recognition of the privileges and immunities of citizens of the several states; and the freedom of interstate migration and general intercourse was protected.

Constructive Services of the Central Government. Despite the contempt that has been heaped upon the pitifully weak government created by the Articles, the central government has several constructive achievements to its credit. Under it the Revolution was fought to victory for the new state, and a substantial diplomatic victory was won when the British government recognized the independence of its former possessions.

Congress was given the power to settle interstate disputes, especially those concerning boundaries. Under this power the central government, through arbitration or specially constructed courts, settled boundary controversies between Massachusetts and New York, South Carolina and Georgia, Pennsylvania and Connecticut, and New York and New Hampshire concerning Vermont. It restrained Maine from seceding from Massachusetts, Franklin from North Carolina, Kentucky from Virginia.

Perhaps the greatest constructive achievement of Congress was

its activities in connection with the public lands and the government of the territories relinquished to the central government by the states. After the establishment of the public domain through the cession of the western lands by the states, Congress passed an act providing that the public lands should not be sold until they were surveyed into townships six miles square and systematically numbered and marked. The Ordinance of 1787 set up the form of government for the territories and provided for their admission into the union, after a period of probation, on an equality with the other states. The provision that a territory or colony was not to be kept permanently in a subordinate status is a noble memorial to the statesmanship of the Confederation Congress.

Weaknesses of the Government and Their Consequences. Much was expected of the central government set up under the new constitution. The war held the states to unity of action, but once it was over, conflicting state interests and centrifugal influences made themselves felt, and the fundamental weaknesses in the central government became evident. These weaknesses were chiefly: (1) inadequate financial powers; (2) lack of commercial power; (3) inadequate control over foreign affairs; (4) ineffective coercive power; (5) a poor amending process; (6) absence of a national judiciary; (7) ineffective executive control.

The new government had a huge legacy of debt from the war, especially to France and Holland; large amounts were due on certificates of indebtedness issued to the soldiers of the Revolution. In addition, its running expenses were a great burden for the slender resources of the new government. Since the government had no independent power of taxation, in desperation it resorted to issuing paper money until it was "not worth a continental." The states as well issued paper money in large amounts. The central government also adopted the expedient of borrowing money from foreigners. Still another method of raising revenue was that specifically authorized in the Articles, which provided that all expenses "shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within the state." This tax was to be levied by the authority and under the direction of the several state legislatures.

In 1781 Congress requisitioned the states for $5,000,000; not one-tenth was paid. From 1783 to 1788 Congress asked the states for $6,000,000; but less than $1,000,000 was paid. Most of the states

were apathetic; some were defiant. By 1786 only Pennsylvania and New York made any pretense at paying their requisitions. These financial difficulties reduced Congress to bankruptcy, which it acknowledged in a public resolution. A government that cannot raise revenue, pay its debts, and balance its budget is palsied.

Commercial impotence was another serious weakness of the central government. Congress had no real power to regulate foreign, interstate, or Indian commerce. It could make commercial treaties, but it had no power to enforce them. Foreign countries were reluctant to deal with Congress. Washington said: "We are one nation today and thirteen tomorrow. Who would treat with us on such terms?" The regulation of foreign commerce usually involves the imposition of tariffs. Congress lacked this power; the states were virtually making their own tariffs.

Since Congress had no power over interstate commerce or the establishment of free trade, the states entered vigorously into commercial rivalry with each other. They established customhouses at their boundaries, set up barriers, and granted favors as their individual interests dictated. New York was in a favorable commercial situation because of its fine harbor. It levied a high tax on Connecticut firewood and New Jersey garden truck. Connecticut retaliated by stopping the delivery of wood to its hated neighbor, preferring to "let the New Yorkers freeze." New Jersey imposed a heavy tax on a New York lighthouse located on New Jersey soil at the entrance to New York harbor. Maryland taxed Virginia for the use of the Potomac, and Virginia retorted with a "Cape tax" on all the Maryland commerce that passed the Virginia Capes entrance to Chesapeake Bay. Madison, writing of these conditions, said: "New Jersey, placed between Philadelphia and New York, is like a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, is like a patient bleeding at both arms." In the face of the foreign and interstate commercial dilemma, Congress stood helpless.

The treaty that closed the Revolution and acknowledged the independence of the new nation raised grave diplomatic troubles. When the British evacuated eastern seaports, they carried off a few hundred slaves that they claimed had been freed by military service. This action angered the states and was used to justify the passing of laws obstructing the collection of British debts, especially debts to the Loyalists. In retaliation for this claimed violation of the

treaty, England held the northwest posts and thereby ruined the fur trade of the new nation. This matter was not adjusted until the Jay treaty of 1794. Spain, angered by the treaty of 1783, urged the Indians to oppose western expansion of the new state. Furthermore, holding the mouth of the Mississippi, it prevented American settlers from using that river. Finally, the Barbary powers at that time kidnapped American citizens and held them for ransom. Congress had no money to equip vessels to protect its citizens against these depredations. The new government was constantly humiliated because of its lack of real power in foreign affairs.

The capital difference between a confederation and a federation is that the latter reaches individuals whereas the former only reaches states — a fact which makes coercion practically impossible. Congress could recommend, could requisition, could supplicate, could use moral influence, but could not coerce. The Articles placed the states under obligation to abide by the acts passed by Congress. The last article reads: "Every state shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every state." In violation of this solemn obligation most of the states failed to comply with requisitions for both money and armed men. Some of them made treaties with the Indians and alliances among themselves. They ignored treaties made by Congress and regulated the volume of money by making their own fiat money legal tender. All these violations they accomplished with impunity, for Congress could do nothing.

The spirit of anarchy and lawlessness so pervaded the states that they had great difficulty in enforcing the law and preserving order. The outstanding example of the prevailing temper was Shays' Rebellion in Massachusetts. It is doubtful whether Congress had the constitutional power to come to the assistance of Massachusetts.

The impossible amending clause of the Articles reads: "Nor shall any alteration . . . be made . . . unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state."

Attempts to Remedy the Defects. Several attempts to amend the Articles were made, but all failed. In 1781 Congress submitted to the states an amendment which would empower it to impose a five per cent duty on imports, the proceeds to be used to pay principal

and interest on the national debt. After a year's debate, twelve states ratified. Rhode Island voted "No," claiming that this additional power would endanger the liberties of the states. In 1783 another attempt was made, but the authority was limited to twenty-five years. Four states voted "No." The vote of New York was influenced by its own growing commerce. Arthur Lee, of Virginia, called Congress a "foreign power," and Richard Henry Lee said that if the amendment prevailed liberty would become an empty word. A proposition that the states raise the sum of $1,500,000 annually for twenty-five years also failed.

As early as 1781 an amendment was proposed to give Congress power "to distrain the property of a state delinquent in its assigned proportion of men and money." In 1784 an amendment to give Congress power to regulate or restrain foreign commerce won the support of only two states.

It was generally admitted that Congress had general and implied power to carry the Articles into effect against any state refusing or neglecting to abide by them. An amendment was proposed authorizing Congress to use the force of the United States to compel a state or states to fulfill their obligations. Though it had the support of Jefferson, Madison, Washington, and Hamilton, the amendment failed. On this point Washington used the following words: "I do not conceive how we can exist as a nation without having lodged somewhere a power which will pervade the whole Union in as energetic a manner as the authority of the state governments extends over the several states." In harmony with this thought John Jay, Secretary for Foreign Affairs, contended that a treaty when constitutionally made became a part of the laws of the land without the action of the state legislatures.

The amending process having failed, the attention of the thoughtful men turned to the subject of revision. In 1782 the New York legislature, at the suggestion of Hamilton, proposed a convention to revise the Articles, but Congress took no action. In 1784 Congress itself began to consider a convention to revise the Articles. In 1785 the Massachusetts legislature formally requested that a convention be called.

In the midst of this discussion, by a happy coincidence, two events paved the way for a constitutional convention. One was the Alexandria Conference, and the other the Annapolis Convention. For about ten years Maryland and Virginia had been endeavoring to

settle commercial difficulties connected with the navigation of the Potomac. Under the influence of Washington and Madison, delegates from the two states met at Alexandria and adjourned to Mount Vernon, where they smoothed out their difficulties. If two states could thus confer, why not more?

Again under the leadership of Madison, the Virginia legislature issued a call to all the states to meet at Annapolis, Maryland, in 1786 to consider how far a uniform system in their commercial regulations was necessary to their permanent harmony. Although nine states selected delegates, only five were represented. Such a start was not encouraging, but before adjournment the convention adopted a resolution, drawn by Hamilton, proposing the sending of delegates from all the states to meet at Philadelphia on the second Monday in May, 1787, to consider the whole situation in the United States and to make the government adequate. This resolution was sent to the states and to Congress. On February 21, 1787, Congress proposed the holding of a convention "for the sole and express purpose of revising the Articles, which when approved by Congress and the state legislatures will render the federal constitution adequate to the exigencies of government and the preservation of the Union."

Would the Articles of Confederation be so amended and revamped as to meet the situation, or would a new constitution be adopted — one that would provide a more perfect union, a real federation?

THE FEDERAL UNION

The Constitutional Convention of 1787. The resolution of the Annapolis Convention recommending that a constitutional convention meet in Philadelphia on the second Monday in May, 1787, asked Congress to make the call and the states to select the delegates. The resolution was submitted to the legislatures or the governors of the states, as well as to Congress. This was in September, 1786. Congress procrastinated for some time. The states took the recommendation seriously and began selecting able delegates as a rule. Seeing the ready response of several states, Congress issued the call on February 21, 1787, without mentioning the Annapolis Convention. The action of Congress made the call for a convention legal.

In most cases the state legislatures selected the delegates. Some, however, were appointed by the state governors with the consent of the legislatures. Rhode Island alone sent no delegates. Sixty-

three delegates were chosen; fifty-five attended, some intermittently. On the last day of the convention only forty-two delegates were present.

What manner of men did the states select to attend the constitutional convention? Jefferson said the convention was an assembly of demigods. Robert Morris said: "Some have boasted the Constitution to be a work from heaven; others have given it a less righteous origin. I have many reasons to believe that it is a work of plain honest men, and such I think it will appear."

Undoubtedly the men that assembled at Philadelphia in May, 1787, were the ablest body of Americans that ever considered political questions. Who were some of those notables? Washington, heading the Virginia delegation, was the leading citizen of the United States. The people were devoted to him because of his military record in the Revolution, his stainless character, his solid ability, and his judgment. He was reputed to be the wealthiest man in the United States. Virginia also sent Edmund Randolph, governor of the state, and George Wythe, professor of law in William and Mary College and teacher of John Marshall. James Madison was a profound political scholar who formulated the so-called Virginia plan and has been called the father of the Constitution.

Pennsylvania sent Benjamin Franklin, the Nestor of the convention, James Wilson, Robert and Gouverneur Morris. From New Jersey came William Paterson; from New York, Alexander Hamilton; from South Carolina, John Rutledge and the two Pinckneys; from Delaware, John Dickinson; from Massachusetts, Rufus King and Elbridge Gerry; from Connecticut, Roger Sherman and Oliver Ellsworth.

Lawyers were in the majority. Some of the delegates had seen service in the Revolution; others had helped form the Declaration of Independence and the first state constitutions. Several had served in Congress and the state legislatures. A few had been governors or state judges. Most of the delegates were successful business men with enviable records of public service. They represented the conservative interests.[1] The early Revolutionary radicals were not present.

The credentials issued to the delegates by the states conformed rather closely to the resolution of Congress. Delaware went so

[1] For the economic interests of these delegates see Beard, C. A., *Economic Interpretation of the Constitution.*

far in its instructions as to prohibit its delegates from supporting a revision that would deprive a state of equality in Congress. The delegates, however, were determined to do something constructive, even if they exceeded their instructions. Washington, in a meeting of the Virginia delegates just before the organization of the convention, said in opposition to a proposition for half-measures: "If to please the people we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which wise and honest men can repair. The event is in the hands of God." Thus, though they were instructed merely to revise the Articles of Confederation, many of the delegates were ready to draft a new constitution.

A quorum — seven states — did not assemble until May 23. Robert Morris nominated General Washington as president of the convention; he was unanimously elected. William Jackson was elected secretary. He did not record anything but formal motions and votes. James Madison made very full notes which were published about 1840. The convention sat through a long, hot summer in the state house, behind closed doors. No publicity was given to its proceedings. Each state had one vote, as in Congress.

Problems of the Convention. Among the problems that confronted the convention if a new constitution should be drafted were the following:

(1) The division of powers between the dual units of government.

(2) The most effective and acceptable means of establishing a real union among the diverse elements.

(3) The structure of Congress and the basis of representation.

(4) The adoption of a sound basis of taxation and the establishment of a stable financial system.

(5) The control of slavery, especially of the foreign slave trade.

(6) The discovery of effective means of stopping state repudiation of debts and the impairment of the obligation of contracts.

(7) The protection of property.

All these were aspects of the main problem, which was that of forming a stable central government with power to act directly on individuals, but which would not destroy the independence of the states.

The Four Plans. The state constitutions — particularly those of Massachusetts and New York — the former colonial charters and

unions, and especially the Articles of Confederation furnished precedents for the convention to consider. In addition to these documents, the delegates were familiar with the political unions of the past, especially in Greece, Switzerland, and Holland. They were also acquainted with the English common law and the writings of Aristotle and the English and French political scientists, especially John Locke and Rousseau. Out of these documents, the study of the former unions, and American experience and needs, four working plans were elaborated and presented for the consideration of the convention.

(1) The Pinckney Plan. The Pinckney plan was so like the Virginia plan that it does not need separate analysis. It was not considered by either the convention or the Committee of the Whole. The Committee of Detail used it.

(2) The Hamilton Plan. The Hamilton plan was not systematically organized, but consisted of a speech which praised the English system of government and argued for a highly centralized union with many aristocratic features, including life terms for the President, Senators, and judges. The central government was to be given power to veto state legislation, and the courts were to have authority to declare acts of Congress void for unconstitutionality.

(3) The Virginia Plan. The Virginia or large-state plan was worked out by James Madison and presented to the convention in a glowing oration by Governor Randolph. The plan provided for: (1) a national Congress of two houses, the first house to be chosen by the voters and to be given power to elect a second house from lists of names submitted by the state legislatures, both houses to be based on population; (2) powers of Congress adequate for all purposes for which the states were incompetent, and including the power to veto state laws contravening the articles of union and to coerce the states by military force to perform their constitutional obligations; (3) a national executive and judiciary to be chosen by Congress; (4) a council of revision with power to review acts of the national and state legislatures before they became operative, but with power in the legislative bodies to override a council veto; and (5) admission of new states. The United States was to guarantee to each state a republican form of government, and an oath to support the national constitution was to be required of state officers.

(4) The New Jersey Plan. The old opposition against assigning representation on the basis of population that led to the adoption

of Dickinson's plan in preference to Franklin's for the Confederation again flared up. This demand for equality of states regardless of size or population induced William Paterson, of New Jersey, to present a counterplan. The New Jersey or small-state plan contemplated: (1) revision of the Articles along federal and not national lines; (2) a Congress consisting of one house with enlarged powers; (3) a national government with coercive power over both individuals and states; (4) a plural national executive with no veto power; (5) a supreme court appointed by the executive; (6) eventual admission of new states.

Issues of the Debate. (1) Nationalism vs. Federalism. The Virginia plan was to be considered by the Committee of the Whole the day after it was introduced, but Randolph proposed instead that the convention consider the proposition that a national government be established. In the course of the debate Gouverneur Morris explained "the distinction between a federal and a national supreme government: the former being a mere compact resting on the good faith of the parties; the latter having a complete and compulsive operation."

The Virginia plan was essentially national, but it did not look toward a unitary, centralized, or consolidated government. The central government was to operate on individuals through its own laws and agencies. In other words, it was not to be dependent upon the states as under the Articles of Confederation. Governmental powers were to be divided between the central government and the states, but each agency was to have real and not phantom powers. Each was to exercise power over individuals, but in different spheres.

A few test votes showed a majority of the states favorable to the Virginia national plan. Paterson, of New Jersey, then asked for the privilege of presenting a federal plan. Defending his plan, Paterson contended that the convention's powers were limited to amending the Articles of Confederation. He said: "The idea of a national government as contradistinguished from a federal one never entered the minds of anyone. A confederacy supposes sovereignty in the members comprising it and sovereignty supposes equality." Lansing, of New York, said: "The Paterson plan sustains the sovereignty of the respective states; that of Mr. Randolph (Virginia) destroys it."

On a test vote seven states voted in favor of the Virginia plan. The following day, June 20, Ellsworth, of Connecticut, moved that the resolution should read: "The government of the United States

ought to consist of a supreme legislature, executive, and judiciary." This resolution was adopted unanimously.

The small-state plan was outvoted. Its advocates, however, were still insistent. The number of houses of Congress again came up for consideration. On June 20, Lansing of New York proposed that the powers of legislation be vested in Congress, meaning a single house. Mason replied that the mind of the people was in favor of more than one branch. Lansing's motion was defeated. On June 21, a resolution to establish a legislature of two houses was passed by a vote of seven to three.

(2) The Basis of Representation. When the matter of the representation of the states in both branches of Congress came up, Madison said that, while there might have been good reason for equality of states when the union was federal, this reason disappeared when the government became national. Delaware was willing to establish a national government but was opposed to proportional representation in both houses of Congress.

Wilson of Pennsylvania inquired: "Why should a national government be unpopular? Will not each citizen enjoy equal liberty and protection? Will a citizen of Delaware be degraded by becoming a citizen of the United States?" He pointed out the fact that the people at that moment looked to the national Congress for relief and not to the states. Continuing, Wilson observed that each citizen was under two governments, each based on the people and meant for the people, and not operating through an independent agency upon the people.

On June 29 it was voted that representation in the first branch of Congress should be proportional. Ellsworth, of Connecticut, advocated equal representation in the second house. He proposed this as a compromise, saying: "We are partly national, partly federal." The proportional representation in the first branch was conformable to the national principle and would secure the large states against the small. The equality of voices was conformable to the federal principle and was necessary to secure the small states against the large.

On July 2 the vote for equality in the second branch was a tie — five to five. This was referred to a committee of one from each state, which reported in favor of proportional representation in the first branch and equal representation in the second branch. The first branch was given sole power to originate bills for raising reve-

nue. This compromise was a victory for the large-state plan in the first branch, and for the small-state plan in the second branch.

If representation in one house was to rest on population, the question arose: Who are to be included? The North insisted that free whites only should be included. The South insisted that all the slaves should be counted also. Williamson, of North Carolina, advocated counting three-fifths of the slaves. Gouverneur Morris thought that three-fifths of the slaves should be counted not only for representation but also for levying direct taxes. His recommendation was adopted. This compromise might be phrased as follows: In apportioning representation and direct taxes, count as population (1) all free persons, including those bound out for a short term of service; (2) all taxed Indians; (3) three-fifths of all other persons (slaves).[1] This compromise gave the South an increased number of representatives but added to its direct taxes. It is a confusion of persons and property.

(3) Coercion. Under the Virginia plan the national supremacy was to be established by enabling Congress: (1) to pass laws concerning matters which the states could not handle; (2) to veto state legislation either by act of Congress or by act of a council of revision; (3) to coerce a state by military force to perform its constitutional obligations. These proposals involved great difficulties and serious consequences. Who could judge with any finality as to the matters in which the states were incompetent? The vetoing of state acts would open the door to bitter friction and contests with the states. Coercing a state by military force meant war between the central government and the state concerned.

These thorny problems met with a happy solution. It was agreed that the dual governmental agencies could operate smoothly if they had two different spheres of action. To the central government were assigned seventeen large general powers pertaining to the country as a whole. All other powers were understood to be retained and exercised by the states. Certain powers were prohibited to the states; some of these might be relaxed with the consent of Congress. The Constitution imposed a few positive duties upon the states, of such nature as to arouse little state opposition. One of them was the conduct of elections. Self-interest of the states made

[1] A proposed amendment to the Articles of Confederation contained a provision for counting three-fifths of the slaves in apportioning contributions among the states.

compliance easy. Thus the central government operates on states as well as individuals.

The difficulties involved in the veto of state legislation and the military coercion of states were solved at one stroke. On July 17, Luther Martin proposed that acts of Congress passed in pursuance of the Constitution and all treaties made under the authority of the United States be "the supreme law of the respective states," and that their judiciaries be bound thereby in their decisions, "anything in the respective laws of the individual states to the contrary notwithstanding."

This is the basis of the "supreme law of the land" clause of the Constitution, which A. C. McLaughlin calls the arch of the federal system. It established national supremacy. Upon it is based the doctrine of judicial review by the Supreme Court. The vetoing of state legislation by Congress or by a council of revision and military coercion of the states fell by the wayside. The Supreme Court of the United States became the non-political vetoing and coercing agency in deciding cases involving the constitutionality of state laws.

(4) Sectional Commercial Interests. One of the main difficulties under the Articles of Confederation had been the lack of power in the central government to regulate commerce. It was admitted that the central government should have the power of general regulation of commerce. This was the question in dispute between the English government and the colonies. In the convention Mason, of Virginia, said: "The southern states are in the minority in both houses. Is it to be expected that they will deliver themselves bound hand and foot to the eastern states and enable them to exclaim in the words of Cromwell on a certain occasion, 'The Lord hath delivered them into our hands'?" Gorham, of Massachusetts, asserted that the northern states had no motive for union but a commercial one.

Concerning the foreign slave trade there was much difference of opinion. The New Englanders, as well as the delegates from Virginia, Maryland, and Delaware, opposed the traffic. The southern states insisted on their right to import slaves. Charles Pinckney asserted that the southern states, if uncoerced, would probably stop the importation of slaves themselves, but the right to hold slaves must not be taken away. Rutledge said the southern states would never be such fools as to give up so important an interest. Luther Martin stated that slaves weakened one part of the Union which the others were bound to protect. Madison wrote: "It was wrong to

admit into the Constitution the idea that there could be property in men." Mason asked the convention to give the general government the power to prevent the increase of slavery. He said: "Slavery discourages arts and manufactures. The poor despise labor when performed by slaves. They produce a most pernicious effect. Every master of slaves is bound to be a petty tyrant. They bring the judgment of heaven on a country." Randolph pointed out that if Congress were forbidden to prohibit the importation of slaves, the Quakers, the Methodists, and many others in the northern states would be affronted.

The southern delegates insisted that if Congress were given the power over commerce it could prohibit the foreign slave trade, which was part of commerce. Furthermore, if Congress were given the power to tax, it might put these two powers together and use them in such a way as to oppress certain sections of the country. For example, a protective tariff system could be built up favoring manufacturing as against the sections that produced raw materials, such as the South; and if taxes were levied on both imports and exports the southern slave states would be caught both coming and going.

The northern and southern sections seemed to have come to a deadlock. The favorite method in such circumstances was to refer the matter to a grand committee. This was done and the committee reported a compromise by which Congress was given power over commerce (1) with foreign nations, (2) between the states, and (3) with the Indian tribes. It could not interfere with the foreign slave trade before 1808, but might levy a tax of ten dollars a head on each slave imported. Congress was prohibited from levying a tax on exports.

The most important aspect of the compromise — though its significance could not be foreseen at the time it was made — was the delegation of control over interstate commerce to Congress. Congress never levied the ten-dollar tax on slaves imported. The reason 1808 was fixed as the date when Congress might interfere with the foreign slave trade was that many persons, both in the North and in the South, confidently expected that slavery would gradually become extinct because it was uneconomic.

On the last day of the convention, September 17, Franklin made a plea for unanimity of action, and proposed a pleasing formula for the signing of the document: "Done in convention by the unanimous

consent of the states present." Three members – Randolph, Gerry, and Mason – could not bring themselves to sign.

RATIFICATION OF THE CONSTITUTION

Ratifying Agencies. The signed document was only a proposed constitution. It had still to be ratified. The legal machinery for amending the Articles consisted of the existing Congress and the legislatures of all the states. To recognize the existing machinery and also to give the document a popular character, Washington sent it to Congress with the suggestion that Congress submit it to the state legislatures, and that they in turn pass it on to conventions selected by the voters for the express purpose of approving or disapproving the work of the convention. Congress and the state legislatures complied with these suggestions.

Objections to the Constitution. In the state conventions the leading objections to the proposed Constitution included the following:

(1) The convention used revolutionary methods by exceeding instructions and ignoring the amending agencies, Congress and the state legislatures.

(2) The Constitution contains no bill of rights – Jefferson's chief complaint.

(3) The Constitution says "We the people" instead of "We the states."

(4) The conventions of nine states superseded a unanimous vote of the state legislatures for amending the Articles.

(5) The power to issue paper money has been given to the central government and denied to the states.

(6) The Constitution is sacrilegious since it contains no mention of God.

(7) The Constitution does not settle the slavery question.

(8) The Senate will be an aristocratic and perhaps an oligarchic body of wealthy men.

(9) Too much power is given to the central government, the states are thereby robbed of essential powers.

(10) The President's military power may make him a second Cromwell.

(11) The national officers are paid by the central government and not by the states.

(12) Congress has complete authority over a federal district.

Action of the State Conventions. In no case did the legislatures submit the Constitution to a direct vote of the people. Since the small states were the chief objectors to the Madison large-state plan, it is a little surprising that the first state to ratify the new Constitution was Delaware, a small state; the second state to ratify was a large one, Pennsylvania. These two states and New Jersey ratified in December, 1787; Georgia and Connecticut in January, 1788; Massachusetts in February; Maryland in April; South Carolina in May; New Hampshire, the ninth state, on June 21, 1788; Virginia on June 25; and New York on July 26. North Carolina ratified in 1789, and Rhode Island in 1790, after the new government was inaugurated.

(1) In North Carolina. There were no serious contests except in Pennsylvania, Massachusetts, North Carolina, Virginia, and New York. In North Carolina the convention was completely dominated by the Antifederalists.[1] It adjourned without ratifying, but intimated that it might ratify later if a bill of rights were added by amendment. This was done early in Washington's administration. North Carolina's convention reassembled and promptly ratified.

(2) In Pennsylvania. The first real contest was in Pennsylvania. The zeal of the Federalists for immediate action on September 28 led them to order the sergeant-at-arms to arrest two opposition members of the legislature to make a quorum, and to hold them in their chairs until the legislature should authorize a state convention to consider the Constitution. The Antifederalist opposition, especially from the western counties, mustered all the chief objections to the new Constitution. They were assisted by a series of letters written by Richard Henry Lee, who inveighed against the Constitution because it set up a government at once aristocratic and centralized. Its crowning offense was that it had no bill of rights. Wilson pointed out the fact that a constitution of delegated and enumerated powers really needed no bill of rights. He said: "I consider the people of the United States as forming one great community, and I consider the people of the different states as forming communities again, on a lesser scale." He denied that the states would be obliterated.

The opponents of the Constitution demanded a bill of rights before ratification. This was defeated by a vote of forty-six to twenty-three, and the Constitution was ratified by the same vote. Nine

[1] The defenders of the Constitution were called Federalists, the opponents Antifederalists.

months after the convention adjourned, an unofficial gathering at Harrisburg proposed a series of amendments and a revision by a second general convention. The suggestions were not made in a spirit of obstruction or bad sportsmanship.

(3) In Massachusetts. The contest in Massachusetts, a critical state, was eagerly watched by the other states. The convention consisted of 350 delegates drawn from all classes – a real representative body. The opposition ran the gamut of objections. The followers of Daniel Shays in the western part of the state vigorously opposed the ratification. The farmers objected to the section that denied to the states the power to impair the obligation of contracts. A large part of the delegates from the district of Maine feared that entrance into a strong union might defeat their designs for separation from Massachusetts. The people as a whole were staunch friends of the local town governments and hesitated to give powers to a distant government which might establish a centralized tyranny. The provision for a standing army came in for strong condemnation. It was also feared that Congress, with power over elections, might destroy freedom of elections. Furthermore the payment of salaries out of the national treasury would make national officers independent of their local constituents.

The contest in Massachusetts turned on the attitude of a few leading men. Gorham, Strong, and King, who had been members of the federal convention, sat in the state convention. Samuel Adams, also, was a member. Governor Hancock, who had been president of the Second Continental Congress, and was the first signer of the Declaration of Independence, was the president of the convention. Adams and Hancock were noncommittal at first. The Federalists dangled political preferment before the eyes of Hancock. Adams was much influenced by some popular meetings of the town meeting type in Boston. As the time for final decision approached, both Adams and Hancock swung into line for the Constitution.

Two Virginians played important roles in the Massachusetts convention. Richard Henry Lee wrote to Gerry urging that Massachusetts insist upon amendments and another federal convention. Washington wrote a letter stating: "If another federal convention is attempted, its members will be more discordant and will agree upon no general plan. The Constitution is the best that can be obtained at this time. If the Constitution is our choice, a constitutional door is open for amendments." This concluded the matter.

Massachusetts ratified by a vote of 187 to 168, but suggested a lengthy list of amendments.

(4) In Virginia. When the Virginia convention was called, eight states had already ratified. If Virginia should defeat the Constitution, this would ruin the prospects of a real union, as Virginia was the largest state. The proponents, headed by Madison, included Randolph, Nicholas, and the brilliant young lawyer, John Marshall.[1] The opponents included Mason, Lee, Grayson, Harrison, Tyler, and Patrick Henry.

There had been a quiet movement for a southern confederacy, with Virginia leading it. South Carolina's ratification of the Constitution defeated this proposition. The delegates from the Kentucky district opposed ratification because they feared that a treaty against their interests might be made with Spain by the central government.

Henry brought into play all his oratorical ability – and craft – to defeat ratification. He pointed out that the Philadelphia convention had authority to amend the Articles of Confederation, and yet it had drawn up plans for a consolidated government. "What right had they to say 'We the people'? Who authorized them to speak the language of 'We the people' instead of 'We the states'? If the states be not the agents of this compact, it must be one great, consolidated, national government." Madison pointed out that the powers of the federal government are enumerated; it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction. Henry saw the handwriting of defeat and finally insisted that Virginia demand a series of amendments. Here the victory went to the Federalists. Virginia ratified with eleven votes to spare. It was the tenth state to ratify. New Hampshire had the honor of being the ninth, leading Virginia by the narrow margin of four days.

(5) In New York. Legally one more state than was necessary had ratified. The Union was assured. Could it be a success without New York? This state was a dividing line between New England and the South. It reached from the Great Lakes to the Atlantic. It occupied a preferred military and commercial position. The state convention met on June 17 with more than two-thirds of the delegates opposed to the Constitution. Governor George Clinton, bitter

[1] General Washington was not a member, but gave a quiet and effective support to the new Constitution.

opponent of the Constitution, was ably assisted by Yates and Lansing, who had left the Philadelphia convention, and an able debater, Melanchthon Smith. The Constitution had such able supporters as Livingston, Jay, and the brilliant debater and writer, Alexander Hamilton.

The burden of winning New York fell upon the shoulders of Hamilton. Under the leadership of Yates and Lansing the state was deluged with broadsides and pamphlets. Hamilton quickly decided to prepare a series of untechnical explanations of the Constitution to be published in the press of the state. He enlisted the coöperation of Madison and Jay. Together they produced eighty-five essays, of which Hamilton wrote fifty-one, Madison twenty-nine, and Jay five. The essays were dispassionate and written in language that the average man could understand. They deserve to rank with the later decisions of the Supreme Court. In book form they are known as *The Federalist* – the best popular commentary on the Constitution. They were written not as a profound dissertation on constitutional law and the science of government, but to convince and persuade the people of New York that the Constitution was a good document and should be ratified.

Hamilton did not depend solely on these essays. Day after day in debate he met the assaults of the opponents of the Constitution. Finally, in sheer exhaustion the convention adjourned, but intimated that it might ratify conditionally. Hamilton asked the opinion of Madison on a conditional ratification. Madison replied that in his opinion there could be no such thing as a conditional ratification. Hamilton, armed with Madison's report, waged such a forensic battle that his chief adversary, Melanchthon Smith, capitulated, saying he was convinced that New York should ratify. This shattered the opposition and New York ratified on July 26, by a vote of thirty to twenty-seven.

The victory in New York insured the launching of a "more perfect union." After a brief interval North Carolina and Rhode Island came under the New Roof, as the Constitution was called. The Congress arranged for elections, and George Washington was inaugurated President on April 30, 1789.

QUESTIONS

1. How did the Articles of Confederation compare with previous attempts at union?

2. What was Maryland's influence on the formation of the union?
3. Why were the attempts to remedy the defects of the Articles ineffective?
4. In what sense is the Ordinance of 1787 the foundation of our colonial or territorial policy?
5. What were the immediate forerunners of the Convention of 1787?
6. Characterize the personnel of the Convention.
7. How did the various plans of union differ? What were the chief lines of agreement in the plans?
8. What do you regard as the best sources of the Constitution?
9. Discuss the merits of the leading objections to the proposed Constitution.
10. Did the states or the people ratify the Constitution?
11. Describe the struggle for ratification in a particular state.

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CHAPTER IV

The American Constitutional System

THE NATIONAL CONSTITUTION

THE new Constitution was not an imitation of any foreign pattern, nor was it a fiat document spun out of the imagination and theories of the framers. The constitutional convention, using past experience, held fast to what had been tested by the chartered companies, the colonial and state governments, and the first union government under the Articles of Confederation.

Contents of the Original Constitution. A preamble precedes the body of the Constitution. It has no legal effect. It concisely states the object for which the Constitution was proposed. The phrase, "We the people," indicates the popular character of the Union. Articles I–III set up the structure of the three separate, independent departments of government – the system of checks and balances – together with their powers and limitations. Article IV comprises nationalizing features carried over from the Articles of Confederation and includes sections dealing with the admission of states, the territory and property of the United States, and the protection of states. Article V contains the methods of amending the Constitution. Article VI is concerned with the Confederation debts; in it is found also the "supreme law of the land" clause, which has been called the key to our federal system. Article VII deals with the method of ratifying the Constitution.

Contents of the Amendments. The first ten of the twenty-one amendments to the Constitution were added in 1791. The first eight of these deal with the individual, property, and judicial rights of persons. They are limitations on the powers of the national government but not of the state governments. Amendments IX and X are explanatory and concern the powers reserved to the states. Amendments XI and XII correct certain defects in the original Constitution touching the judiciary and the election of the President and Vice-President. The War Amendments deal with the rights of Negroes

chiefly; the Thirteenth frees the slaves, the Fourteenth makes them citizens, and the Fifteenth undertakes to protect them in the right to vote. The "due process of law" clause of the Fourteenth Amendment, however, which has been interpreted to include corporations as juristic persons, has become the basis of the Supreme Court's power to review much social legislation. The Sixteenth Amendment gives Congress power to levy an income tax without apportioning it among the states according to population. The Seventeenth Amendment provides for the popular election of United States Senators. The Eighteenth Amendment prohibits the manufacture, sale, and transportation of intoxicating liquors within the United States. The Nineteenth Amendment protects women in the right to vote. The Twentieth Amendment changes the date for the beginning of the presidential term and the convening of the regular or annual sessions of Congress; it also clarifies some uncertainties of the Constitution concerning presidential election and succession to the presidency. The Twenty-first Amendment repeals the Eighteenth Amendment. This is the only case of repeal of an amendment.

DEVELOPMENT OF THE CONSTITUTION

The Constitution is not static, rigid, or frozen. It is a living, changing, fundamental law. It includes the seven articles of the original document, the twenty-one amendments, and much more. In a sense a constitution is not made, it grows by several different processes.

Growth by Amendment. Article V of the Constitution provides the formal method of amending it. High majorities for both proposing and ratifying amendments were substituted for the unanimity required by the Articles of Confederation. Every clause of the Constitution is subject to amendment but a state cannot be deprived of equal representation in the Senate without its consent.

An amendment may be proposed in either of two ways: (1) by a two-thirds vote of both houses of Congress, or (2) by a national convention called by Congress at the request of two-thirds of the state legislatures. A proposed amendment may be ratified (as Congress may direct) either (1) by the legislatures of three-fourths of the states, or (2) by conventions in three-fourths of the states. All twenty-one of the amendments already adopted have been proposed by Congress. Twenty of the amendments have been ratified by state

legislatures. Congress required the Twenty-first Amendment to be ratified by state conventions elected by the voters.

Some questions have arisen concerning certain phases of the amending process. What does "two-thirds of both houses of Congress" mean? The Supreme Court decided in 1920 that it means two-thirds of a quorum.[1] Can the President veto an act of Congress proposing an amendment, and can the governor veto the act of a state legislature in ratifying an amendment? The answer is "No" in both cases. Amending the Constitution is a constituent and not a legislative power.[2] How long can a congressional proposal be kept alive? Can a state legislature reject a proposal and later ratify it? Can a state legislature ratify an amendment and later recall it if three-fourths of the states have not ratified? The Secretary of State has decided that a state can reconsider a rejection but not a ratification. The ratification is complete when the state that makes up the three-fourths ratifies.

One criticism of the amending process is that the geographical districts called states have too great weight. Thirteen states with small populations can defeat an amendment, and three-fourths of the states, with a minority of the total population, can force their will upon twelve states containing over half the total.

Another criticism is that the agencies that act for states — the state legislatures — are not the best agencies for ratifying amendments. Legislatures are elected to enact state legislation and not to ratify constitutional amendments. The members may have been chosen before the amendment was submitted; it was not before the public at the time of their election. A very small number of legislators may actually participate in the ratification. Members of state legislatures do not compare favorably in ability with members of state constitutional conventions.

Another criticism of both Congress and the state legislatures is their slowness of action and their lack of responsiveness to public opinion. In support of this criticism it is pointed out that the income tax amendment was before Congress twenty years and required forty-two introductions before it mustered the necessary two-thirds vote. The amendment for the popular election of Senators was before Congress seventy-five years and required two hundred introductions before it was submitted to the state legislatures. The proposed

[1] *National Prohibition Cases*, 253 U. S. 350 (1920).
[2] *Hollingworth v. Virginia*, 3 Dallas 378 (1798).

child labor amendment has been before the state legislatures since 1924, and only thirty state legislatures have ratified it (1939). The charge that amendments have been adopted too slowly has lost much force, however, in view of the fact that six amendments have been added within a twenty-year period, 1913–1933.

Two main objects are held in view in the attempts to improve the amending process: (1) to make the process easier and speedier; (2) to make it more democratic. In 1918 Ohio changed its constitution to give the voters a referendum on the action of the state legislature ratifying a proposed amendment to the federal Constitution. The Supreme Court of the United States declared this unconstitutional, but said there was no constitutional objection to giving the voters of a state "an advisory referendum" before the legislature acts.[1] Tennessee attempted to give a popular aspect to ratification by prohibiting the legislature from voting on a proposed amendment unless it was submitted before they were elected. The Supreme Court of the United States declared this action unconstitutional.[2] In 1912 Senator La Follette of Wisconsin proposed to amend Article V to allow amendments to be submitted (1) by a majority of Congress, and (2) by the voters or the legislatures in ten states. The proposed amendment could be ratified "if in a majority of the states a majority of the electors voting also approve the proposed amendments." His proposal was not adopted. The demand for a revision of Article V has almost ceased.

Two recent requirements of Congress may become permanent features of the amending process: (1) the requirement that three-fourths of the states must ratify within seven years;[3] (2) the substitution of a state convention for a state legislature.[4]

Growth by Legislation. There are many gaps and omissions in the Constitution. For example, no mention is made of power to provide internal improvements or to create corporations such as banks. No definition of citizenship is given, and there is no provision for territorial expansion. Congress has passed legislation to supply some of these deficiencies. In 1789 it passed a judiciary act which completed the organization of the Supreme Court and regulated its appellate jurisdiction and provided for the lower national

[1] *Hawke v. Smith*, 252 U. S. 221 (1920).
[2] *Leser v. Garnett*, 258 U. S. 130 (1922).
[3] This was used for the Twentieth and Twenty-first Amendments.
[4] This was used for the Twenty-first Amendment.

courts; it has created ten executive departments; it has indicated the succession to the presidency and the procedure for counting the electoral votes for President, especially in case of dispute as to the validity of certain votes; it has set up such important agencies as the Interstate Commerce Commission, the Reconstruction Finance Corporation, the Federal Trade Commission, and the Tariff Commission; it has passed a civil service law.

The states have widened the suffrage until it is practically universal for adults, and have devolved the choice of presidential electors upon the voters. This makes the choice of a President a popular affair.

Growth by Treaties. The Constitution has been developed by treaties. The purchase of Louisiana by treaty established a precedent that has become a fixed principle of the Constitution. The national government has regulated by treaties the migration of birds from Canada; this cannot be done by congressional statute because such a statute was declared unconstitutional by the court. The national government by treaty has conflicted with the reserved powers of the states in regard to an alien's right to own and inherit land, conduct business, and attend public schools on the same basis as citizens.

Growth by the Activities of Political Parties. The adoption of the Constitution developed the first real political party divisions in this country. The great Washington warned his countrymen against the excessive activities of political parties. Parties are extraconstitutional or voluntary associations. They have not changed the letter of the Constitution, but they have transformed its meaning and effect. The political party has changed the electoral college into a party agency and popularized the presidency and the cabinet. It has made the President a legislative leader and an appointing agent in the party's interest. In fact, he is a political party leader. It has changed the Senate from a states' rights council for the President into a real legislative body. The House of Representatives is dominated by the party caucus; the Speaker is the majority party leader, and the membership of committees reflects party strength. The political party has practically eliminated the system of checks and balances — at least it has reduced its dangers. The party organization has been called the connective tissue that enfolds the separate organs of government and tends to establish the unity of popular control.

Growth by Usage and Custom. The Constitution fixes no limit to the number of terms for which a President may be elected, but

Washington declined to serve more than two, and this action established a precedent that was not broken until 1941. The President makes appointments to certain offices with the advice and consent of the Senate. Senatorial courtesy has established a custom that when the President appoints to a local office he must have the consent of the Senators from the state if they belong to the same party as the President. The Constitution requires Representatives in Congress to be inhabitants of the state from which they are elected. Custom requires a Representative to be a resident of the particular district that elects him. By custom the Senate sometimes introduces reservations into treaties, thus extending the original power of the Senate.

Growth by Interpretation and Construction. The framers of the Constitution could not forecast the future and make the Constitution provide specifically for new conditions and developments in social and economic affairs. The necessary adjustments have been effected in the first instance by the political branches of the government, Congress and the President, with final determination of constitutionality by the Supreme Court if a test case is brought before it for interpretation and application. The doctrine of implied powers involved such things as commerce, money, postal affairs, and the taxing power, which rest on construction and interpretation. The government would be much restricted were it not for this flexible method of expanding the Constitution.

LEADING PRINCIPLES OF THE AMERICAN SYSTEM

The Constitution as adopted and developed exhibits certain characteristics which are not mere abstract principles, but vital governmental concepts. These will now be briefly set forth.

Popular Political Basis. Most political scientists agree that the American system rests upon the solid basis of popular sovereignty. The Declaration of Independence announces that this solemn act was taken " in the name and by the authority of the good people of these colonies." It further declares: " Governments derive their just powers from the consent of the governed." The first state constitutions were enacted in the name of the " good people." The Massachusetts declaration of rights says: " All power residing originally in the people and being derived from them . . . all officers . . . vested with authority are their substitutes and agents . . . and are at all times accountable to them." The principle of popular sover-

eignty was stated in the Massachusetts constitution in the following words: "The people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign and independent state." The enacting clause in the preamble of the Constitution of the United States says: "We the people of the United States . . . do ordain and establish this Constitution." Lincoln gave the idea of popular sovereignty its classic expression, calling our system "a government of the people, by the people, and for the people."

Under popular sovereignty, what is meant by "the people"? "The people" does not comprise all the people living within the territorial boundaries of the United States; idiots, the insane, felons, minors, aliens – and formerly slaves and women – are not included. Positively stated, the "We the people" of the constitutions includes the voters only. They are the sole possessors of political sovereignty.[1]

Republicanism. Under popular sovereignty the popular will may be expressed either directly or by means of representatives. The first method would be a pure democracy. The state and the government would be identical. This method could not be used in a country of great extent and large population. The alternative method mediates the will of the voters through representatives. This is indirect democracy or republicanism.

Madison in *The Federalist* (No. 39) emphasized the following as the constituent elements of a republic: (1) a scheme of representation with political power delegated to a small number of elected or appointed officers, whose power comes from the people and whose term of office is limited; (2) adaptability to a large population and wide extent of territory; (3) a reasonably wide suffrage.[2]

Representation applies with full force only to the political branches of the government, especially the legislative. Its application to the executive branch emerges as the chief executive increases his leadership in legislation and as the head of a political party. The judiciary, in general, is not held responsible to political representation. It dwells apart for the performance of a specialized function

[1] Another kind of political power is called legal sovereignty. This means the power exercised by the agents who enact the will of the people or make the laws for the state. They exercise a derivative power which comes from the political sovereign. Pluralists assert that political power should not be exercised exclusively by the legal sovereign, but by several groups such as churches, lodges, corporations and clubs, employer associations and workers' unions.

[2] See *Minor v. Happersett*, 21 Wallace 162 (1875).

that requires professional training and experience. The chief ways in which political representation applies to the judiciary are in the selection of the judges and in the method of their removal. Both acts may be partisan, but the prospects are slight because of the restraining influence of public opinion.

The steady tendency in western popular government is to have equal populations within specified districts the basis of representation. In the United States one Representative is elected from each district and two Senators are elected from each state. In our early history territorial representation amounted also to occupational representation. The rural district was agricultural and the municipal district was commercial and industrial. With the extension of the suffrage these distinct interests have tended to disappear. There is no legal basis for the representation of occupational or economic interests in the United States. The lobby is the unofficial extralegal method of informing legislative and administrative commissions of the desires of special groups and of influencing legislative action. Numerous organizations maintain lobbies in Washington. Some have elaborate headquarters and highly paid experts. Some lobbies furnish valuable information and seek the highest public welfare; others seek only selfish, anti-public ends. Some attempts at the legal regulation of lobbying have been made, but they have not been very successful.[1]

The Constitution guarantees a republican form of government to the member states. The question of what constitutes republican government for the states has arisen several times in our political history. In 1842 it came to a test in Rhode Island. The state had been operating under a transformed colonial charter in which the qualifications for voting were restricted to property owners. A number of malcontents under the leadership of Thomas Dorr adopted a People's Constitution, and Dorr was elected governor. This gave Rhode Island two rival governments. The President, under his power to suppress rebellion, recognized the charter government and was ready to put down the rebels by military force. An appeal was

[1] The territorial-population system of representation does not entirely meet modern social and economic demands. Russia has adopted representation of the occupational interests of the proletarian groups. The Italian corporative state now rests upon all economic interests, not the proletarian alone. The Weimar Constitution of Germany for the Second Reich provided for an economic council to advise the Reichstag. France and several of the new states of Europe provide for economic councils.

made to the Supreme Court, which decided that the question was political and not judicial, and should be settled by the political branches of the government. In this instance the President, acting under the military act of Congress, decided the controversy.[1]

After the Civil War the congressional plan for the reconstruction of the southern states prevailed as the elected southern Congressmen were not admitted and seated until Congress approved. When Oregon adopted the initiative and referendum for supplementing the legislation passed by the state legislature, the enactment was contested on the ground that it substituted the direct for the representative method of passing laws. Congress continued to admit Congressmen, since Oregon's laws might still be enacted by the representative legislature.[2] When Senator Huey Long became a dictator in Louisiana it was charged that Louisiana ceased to have a republican form of government. So long as Louisiana had the *form* of republican government, Congress did not expel its Congressmen, although the spirit of republicanism was in abeyance.

From the foregoing examples it is clear that the decision as to whether a state has a republican form of government rests with Congress, since it has the power to admit and expel Congressmen elected from the state in question. Congress has unmistakable evidence of what is "republican in form" within the meaning of the term as employed by the Constitution, since all the states had republican forms of government when the Constitution was adopted.

The Presidential System. The American government, central and state, is presidential. Unlike the situation under the cabinet or parliamentary system, in which the executive department is under control of the popular house of the parliament for both power and tenure, the chief executive is independent of the legislature, and the legislature is independent of the executive. The chief features of presidential government are: (1) fixed tenure of office; (2) separation and not fusion of the two political departments.

The chief executive appoints a cabinet to perform administrative duties, but these ministers are not members of the legislative body. They do not assume responsibility for the acts of the executive nor prepare, introduce, or defend bills before the legislature. They are not subject to interpellations and the usual votes of censure. Their responsibility is to the chief executive. They are executive min-

[1] *Luther v. Borden*, 7 Howard 1 (1849).
[2] See *Pacific States Tel. & Tel. Co. v. Oregon*, 233 U. S. 118 (1912).

isters and not parliamentary leaders. Frequently they and their chief do not belong to the political party that controls the legislature. Neither the chief executive nor the cabinet has any power to dissolve the legislature and order new elections.[1] Harmony between the political branches of the government is secured through the political party, especially if the chief executive belongs to the party that controls the legislature.

The system concentrates executive power in one person, which has the advantage that when a course of action is decided upon there can be and usually is an energetic and powerful administration of the law. On the other hand, the system affords opportunity for friction and even deadlocks between the President and Congress. To overcome this weakness it has been suggested that members of the President's cabinet be assigned seats in each house of Congress, with the privilege of speaking and the duty of answering questions, but with no power to vote. This could be done by a mere change in congressional rules. The plan has not been favorably received by Congress although it was warmly supported by Justice Story and President Taft. The opponents of the plan point out that the President's leadership of the political party and the frequent personal contacts between the congressional committees and the members of the cabinet achieve most if not all the benefits that are claimed for the plan.

Walter Lippmann has pointed out that the President has two big jobs. This is true. What are these jobs? In addition to being the chief executive and military chief and having a modicum of constitutional legislative and judicial power, the President is the leader of the majority political party, which plays a decisive part in national government.

The President as head of the state personifies the whole nation, its independence and unity within our constitutional system. He stands above all regions, factions, and special interests. But all democratic governments must and do develop political parties. Our system has developed no prime minister. The nearest approach to one was the Speaker of the House of Representatives before 1910. The President perforce must act as his own prime minister. A large part of his success is due to his skill as a party leader.

It takes a strong character to be the head of the nation and act as

[1] The negative powers of the American cabinet are the positive powers of the cabinet in a parliamentary system.

a party leader at the same time. Washington was strong enough to keep Jefferson and Hamilton, rival party leaders, in his confidence while he was breaking the new ground for a more perfect union. Lincoln was strong enough to preside over a cabinet of his own party rivals, and glorified the high office of head of the state by placing the preservation of the Union above partisan interests. In great emergencies, when party feeling runs high, the presidency calls for a character that can properly appraise the dual role he must play, and put first things first.[1]

Functional Separation of Powers.[2] The functions of government are sometimes classified as the formation or enactment of the public will and the enforcement of this will – the so-called twofold division of governmental functions. The dual division is readily applicable to the cabinet form of government, in which there is a union of the executive and legislative departments of government. The triple division into legislative, executive, and judicial functions is better adapted to states that have the presidential system of government, which promotes the independence of the executive department. The specialization and differentiation of the powers of government have now made it necessary to add to the standard triple division two more separate functions – electoral and administrative.

All our governments, national, state, and local, are called into existence by the voters, who also determine the powers of governments and fix their limitations. The Declaration of Independence says: "All governments derive their just powers from the consent of the governed." All our constitutions say: "We the people do ordain and establish." Elective officers are chosen by the voters, who take part directly or indirectly in making and amending the national and state constitutions. In about a dozen states and many cities the voters participate directly in the making of law through the initiative and referendum. In about the same number of states and cities they not only elect officers but have the power to recall them before the end of their term. The voters exercise judicial power by serving on juries. Their electoral functions are performed chiefly through the activities of political parties. The voters stand in the very center of political services, exercising not only constructive but also restraining power in all directions.

[1] What is here written about the President can be applied to most state governors.

[2] See Dealey, J. Q., *The State and Government;* also Willoughby, W. F., *The Government of Modern States.*

The executive function has usually included what is now differentiating into the administrative function. The executive function is being restricted to the political or policy side of enforcing the law. The chief executive "takes care that" the laws are faithfully executed. The administrative function is the actual detailed carrying out of what has been determined by the legislative department, if it is not declared unconstitutional by the courts. The early state legislatures performed large administrative functions. The reaction from this led to the creation of a number of constitutional, elective executive officers who performed administrative duties mainly and were independent of the governors. Following the example of Congress, the state legislatures have created numerous administrative boards and commissions. The cities have tried various plans of government but seem to favor the council-manager plan, which leaves legislative power to the council and centralizes administration in the hands of the manager. In this they are following the plan of the central government.

Modern government is highly complex and technical. It demands trained administrative agents. When partisan politics can be eliminated from the selection and removal of administrative officers, when choice and tenure rest upon merit, then administration will have a chance to show that it is an efficient function of government.

Many of the first state constitutions had provisions for the separation of the departments of government. The first Maryland constitution adopted the principle of separation of powers in the following words: "The legislative, executive and judicial powers of government ought to be forever separate and distinct from each other." The Massachusetts constitution contains the most exhaustive provision. In the Constitution of the United States all legislative power is vested in Congress, all executive power in a President, all judicial power in one Supreme Court and such inferior courts as Congress should establish.

The idea of coördinate or separate governmental powers had been advocated by Aristotle, Cicero, Locke, and Blackstone. The framers of our first constitutions were largely influenced by the work of the French political philosopher, Montesquieu, entitled *The Spirit of the Laws.* Montesquieu strongly advocated separation of powers. The founders of the Republic produced a coördinated system of independent departments with separate powers and a resulting method of checks and balances among these departments. Two reasons have

been assigned for this procedure: (1) this division would furnish the best protection for individual liberty by preventing any one agency from becoming all-powerful, arbitrary, and dictatorial; (2) it would produce efficiency by giving opportunity for specialization in a single phase of governmental activity.

There have been violations of the theory in practice, however. The President, in addition to having the executive power, exercises legislative power when he delivers messages to Congress recommending legislation, signs or vetoes a bill, or issues ordinances. The Senate exercises executive power when it shares the appointing power with the President. Congress exercises judicial power when the House impeaches and the Senate tries an impeached officer. The judiciary exercises executive power when it appoints federal officers, as it may do if authorized by law, and legislative power when it declares what is law when a proper case comes before it for interpretation and application. Furthermore, various commissions such as the Interstate Commerce Commission, while exercising executive functions primarily, are rapidly developing *quasi* legislative and judicial powers. The principle of the separation of powers in the national government is still vital, however. The Supreme Court used it in declaring a New Deal act unconstitutional.[1]

The separation of powers in the national government was supposed to result in a wholesome set of checks and balances. In operation, the checks have been more effective than the balances. Indeed, they have almost locked the wheels of the national government a few times, notably during the period of reconstruction after the Civil War when the Republican party was dominant in Congress. The checks are most evident when the presidency is in the hands of one party and one or both houses of Congress are controlled by the opposition party. Best results are secured when all three departments are in harmony and no one department of government insists on the exercise of its full power. Then the spirit of compromise makes it possible for the different departments to coöperate for the general welfare. This condition is achieved when the executive and both houses of Congress belong to the same political party. In fact the political party, which is outside the government, furnishes the balance which the separation of powers was intended to provide.

Limitations on Government. A characteristic feature of American government is limitation of powers. This is true whether the

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

government is national, state, or local. No officer is above the law, whether he is President, governor, legislator, constable, or justice of the peace. There are certain things no government, national, state, or local, can do. The method of doing certain things is stated in the Constitution, and must be followed. We have no legislative agency that is theoretically as omnipotent as the English House of Commons or the French Chamber of Deputies. We have no dictatorship resting on Sovietism, Fascism, or Nazism. The limitations on our government are found in the constitutions – chiefly, but not exclusively, in the bills of rights. They relate to freedom of religion, the press, and speech; immunity from arbitrary arrest, trial, and punishment; the protection of private property against the unjust action of all governments. The governments must proceed according to due process of law. These constitutional limitations are under the protection of the courts.[1]

Supremacy of the Judiciary. Certain judicial writs are employed for controlling the executive department. The writ of *habeas corpus* is used if an individual's personal liberty is threatened by an administrative officer; *quo warranto* to test the right of an officer to a public office; *mandamus* to compel an administrative officer to perform a ministerial duty or an act which the law commands him to perform; *injunction* to restrain an officer from performing acts which he has no legal authority to perform; *certiorari* to test the jurisdiction of an administrative officer.

The practice of the American courts of holding the acts of the other two departments null and void because of unconstitutionality is a distinguishing feature of our governmental system. Administrative agents could be called to account in England by the common law courts. The judicial committee of the Privy Council could advise the king to set aside colonial acts because they were not in harmony with the laws of England or the colonial charters. Here are found the beginnings of the ripened doctrine of American judicial supremacy. Some critics have called ours a government by "lawsuit." Still others have said that in last analysis ours is "government by the robe."[2]

The complexity of our governmental system has given rise to

[1] For further treatment of limitations, see Chapter V. See also *Ex parte Milligan*, 4 Wallace 2 (1866), and *Yick Wo v. Hopkins*, 118 U. S. 356 (1866). These are reprinted in Ewing and Dangerfield's *Source Book in Government and Politics*, pp. 58–63.

[2] Supreme Court justices wear black silk robes.

numerous problems such as (1) keeping a proper balance between two sets of agencies in our federal system so that neither will encroach on the constitutional powers of the other; (2) keeping the different functional departments within their proper constitutional spheres; (3) protecting the individual's constitutional rights and immunities against infringement by either national or state action. The courts are regarded as the best agency for performing this important service.

Some of the state supreme courts had declared state statutes unconstitutional before the adoption of the national Constitution.[1] In some cases this aroused a storm of opposition. In 1803, in the case of *Marbury v. Madison,* Chief Justice John Marshall clearly established the right of the federal judiciary to declare a congressional act null and void for unconstitutionality. He declared that the congressional statute and the Constitution were not in agreement; that in deciding a definite case the Supreme Court had to choose which law it would apply; and since the Constitution is the supreme law of the land and the judges were sworn to support it, the inferior law or a congressional statute was declared void or no law, because of unconstitutionality. This is regarded as final; and the power of judicial review is inherent in all courts, national and state.[2]

FEDERALISM — TERRITORIAL DIVISION OF POWERS

Basis and Operation of Federalism. The United States is a federation. The Constitution which formed the Union distributes political powers between the central government and the states, the central government having delegated and enumerated powers, all other powers being reserved to the states or to the people.[3] W. F. Willoughby[4] suggests that the local governments should have the delegated, enumerated powers and the central government the unenumerated, reserved powers. The reason for this proposal is that the development of social and economic integration demands the exercise of general and not local powers. The government that can exercise the residual powers in this situation can adjust itself quickly to the facts of national life without resorting to frequent constitutional amendment or invoking the implied powers of the Constitution by legislative action and judicial interpretation.

The leading problem of federalism is how to keep our federal sys-

[1] See page 21.
[2] See pages 424–428, 450.
[3] U. S. Constitution, Amendment X.
[4] *The Government of Modern States.*

tem an "indestructible union of indestructible states." A brief preliminary examination of the practical operations, trends, and reasonable prospects of the different units of our government should throw some light on this problem.[1]

In a federation the units of the dual governments are deemed to be coördinate or equal. Each government – central and local – is supposed to exercise the powers assigned to it in the constitution. In the forty-eight states, however, the central government exercises a kind of overlordship over the local units. Similarly, the federal Constitution states that the supreme law of the land shall consist of the Constitution, statutes, and treaties of the United States, anything in the state constitution or laws to the contrary notwithstanding. The central government also has the power to see that the states maintain a republican form of government.[2] Furthermore, an agency of the central government, the Supreme Court, has the power to interpret the relations of the central and local governments. Additional evidence of the supremacy of the central government is the rather comprehensive list of constitutional limitations imposed upon the states.[3]

Expansion of National Power. The causes of the expansion of national power are numerous. Only one or two will be noted. Because of modern inventions and the triumphs of science, business transcends state lines and organizes on a regional or national scale. Great industries concentrate in certain localities. Labor is highly specialized and organized on a national basis. Mass production is possible in this machine age. Regulation of the situation created by all these factors calls for a central government that can cope with existing facts and needs. The states are not equal to the task.

(1) Legislative. One method of expanding national power is by formal amendment of the Constitution. A second method is through broad construction of the powers of Congress. Statutes approved by the courts on the basis of implied powers have increased the power of the national government to a much greater degree than have formal amendments. Examples are: (1) the establishment of the two Banks of the United States, the national banks, and the Federal Reserve banks – implied from the specific power to tax and borrow money; (2) the establishment of postal savings banks and the parcel post, and grants of land and money for making roads, rail-

[1] For full discussion see Part VI.

[2] See pages 54–55.

[3] See Chapter XXII.

roads, and canals – implied from the power to establish post offices and post roads; (3) the establishment of quarantine stations, the inspection of slaughterhouses, the pure food and drug laws, the requirement of safety appliances, the provision of workmen's compensation in the railroad service, the creation of the Interstate Commerce Commission, the regulation of airships and broadcasting, various tariff laws, the wages and hours control law – implied from the commerce power; (4) the enforcement of wheatless and meatless days during the World War, government operation of railroads and telegraph lines during the war, the conscription law for the enlistment of men for the army, and the nationalization of the militia – implied from the war power. In short, legislation of Congress upheld by the Supreme Court has virtually nationalized control over commerce,[1] money,[2] and banking,[3] and has given the central government large control of business and increasing subjects for taxation.[4]

A third method of expanding national power is through the establishment of a national police power. Recent legislation has virtually established such power by hanging legislation on such constitutional pegs as the powers over commerce,[5] postal affairs,[6] and taxation.[7] The states are supposed to use the police power for the protection and promotion of safety, order, and morals under the Tenth Amendment. Congress has accomplished the same purpose not by superseding the state police power but by supplementing it. A fourth method of increasing national power is by means of national sub-

[1] See *Gibbons v. Ogden*, 9 Wheaton 1 (1824); *Gennessee Chief v. Fitshugh*, 13 Howard 443 (1851); *R. R. Commission of Wisconsin v. C. B. & Q. R. R.*, 257 U. S. 563 (1922); *Houston E. & W. Texas R. R. Co. v. United States* (Shreveport Case), 234 U. S. 342 (1914); *Minnesota Rate Cases*, 230 U. S. 352 (1913).

[2] *Veazie Bank v. Fenno*, 8 Wallace 533 (1869); *Knox v. Lee, Parker v. Davis*, 12 Wallace 457 (1871); *Julliard v. Greenman*, 110 U. S. 421 (1884); *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240 (1935).

[3] See *McCulloch v. Maryland*, 4 Wheaton 316 (1819); *Veazie Bank v. Fenno*, 8 Wallace 533 (1869); *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180 (1921); *Westfall v. United States*, 274 U. S. 256 (1927).

[4] See *McCulloch v. Maryland*, 4 Wheaton 316 (1819); *Pollock v. Farmers' Loan and Trust Co.*, 158 U. S. 601 (1895); *Mississippi v. Panhandle Oil Co.*, 277 U. S. 218 (1928); *Smyth v. Ames*, 169 U. S. 466 (1898); *Munn v. Illinois*, 94 U. S. 113 (1877); Stuart Chase, *Government in Business*.

[5] *Champion v. Ames*, 1884 U. S. 321 (1903); *Hippolite Egg Co. v. United States*, 220 U. S. 45 (1911).

[6] *Ibid.*

[7] *McCray v. United States*, 195 U. S. 27 (1904); *United States v. Doremus*, 249 U. S. 86 (1919).

sidies.[1] A fifth and final legislative method is by passing laws and making their violation punishable as a crime. Violations of such laws are called statutory crimes. Examples of statutory crimes are violations of the Mann or White Slave Act, kidnapping, and use of the mails to defraud.

(2) Executive. The President under his authority "to take care that the laws be faithfully executed" has expanded the powers of the national government. President Washington gave an early example of the power of the United States to execute its own laws when he called the state militia of Pennsylvania into the service of the United States to suppress the Whiskey Insurrection. President Jefferson followed this precedent when he used state militia to enforce the Embargo Act. President Lincoln waged the Civil War on the theory that he was enforcing the laws against disobedient individuals and groups of individuals. He established an effective blockade of the southern states, suspended the writ of *habeas corpus*, closed newspaper offices, established military courts outside the theater of the war, and issued the Emancipation Proclamation as war measures in enforcing the laws. The President can protect the officers of the United States in the performance of their official duties.[2] President Cleveland sent federal troops to Chicago in the strike of 1894 to protect interstate commerce and the mails. He did this on his own initiative and over the protest of Governor Altgeld of Illinois.[3]

(3) Judicial. Not to be outdone by the legislative and executive departments, the judicial department has made its contribution to the expansion of national powers. It not only tries cases but it interprets the Constitution, statutes, and treaties of the United States and the constitutions and statutes of the states. In a contest between the central and state governments the decision rests with the federal courts. One member of the dispute passes on its own powers. The Supreme Court has the power to decide on the constitutionality of the acts of the legislative and executive branches of the government. Chief Justice Hughes has said: "We are under a Constitution, but the Constitution is what the judges say it is." The late Justice Holmes declared that the courts virtually legislate. Furthermore, the federal courts control business administration when they supervise the work of a receiver of an insolvent railroad.

[1] See pages 485–486.

[2] See *Tennessee v. Davis*, 100 U. S. 257 (1880); *In re Neagle*, 135 U. S. 1 (1890); *Johnson v. Maryland*, 254 U. S. 51 (1920).

[3] See *In re Debs*, 158 U. S. 564 (1895).

It has been said that Chief Justice John Marshall did more to nationalize our government during his term of thirty-four years than the whole Federalist party during its lifetime. In the exercise of the power of judicial review the Supreme Court only declared two federal statutes unconstitutional before the Civil War. In the recent period it has consistently been liberal and has upheld acts of Congress sometimes using strained construction in doing so. A changed attitude is evident in the court's decisions declaring an income tax to be a direct tax; [1] in invalidating a minimum wage law for women; [2] two child labor acts,[3] and various New Deal cases.[4] The Supreme Court has dealt more leniently with New Deal legislation in some recently decided cases.[5]

Relation of the National Government to Local Governments. National courts may come in contact with cities in such matters as impairment of the obligation of contracts, the taking of property without due process of law or in violation of ordinances, or the denial of equal protection of the law. The appropriation of money for grants immediately touches cities in matters concerning education, roads, local waterways, and health. The national government interests itself in city planning, zoning, housing, and local employment agencies. It comes in contact with counties through grants in aid for education, health, and highways.

Relation of the States to Each Other.[6] Interstate jealousies and friction were common before the adoption of the Constitution. The new Constitution undertook to place in workable relation not only the nation and the states but the states among themselves. Under the Articles of Confederation the states, like foreign nations, were practically independent of each other. They were highly competitive, having protective tariffs against each other and collecting customs at their frontiers. With the establishment of "a more perfect union" it was expected that the utmost freedom of migration be-

[1] *Pollock v. Farmers' Loan and Trust Co.*, 158 U. S. 601 (1895).

[2] *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

[3] *Hammer v. Dagenhart*, 227 U. S. 257 (1918); *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

[4] *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *Schechter v. United States* (N. R. A.), 295 U. S. 495 (1935); *United States v. Butler* (A. A. A.), 297 U. S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

[5] *National Labor Relations Board v. Jones & Laughlin Steel Co.*, 301 U. S. 1 (1937); *Carmichael et al. v. Southern Coal & Coke Co.*, 310 U. S. 495 (1937); *Stewart Machine Co. v. Davis*, 301 U. S. 648 (1937); *Helvering et al. v. Davis*, 301 U. S. 619 (1937).

[6] This subject is discussed more fully in Chapter XXIII.

tween states would result and that interstate free trade would furnish the people a great unrestricted market at home. In a large measure these hopes have been realized.

In recent years we have seen a reversion to some of the practices that prevailed in the period of the Confederation. During the first century under the Constitution the American tradition of mobility of population became fixed. The American people moved West to establish homes and build a civilization. Today they still undertake to go West to escape a creeping destitution. They are fleeing from dust bowl areas and submarginal land or closed factories, or they are seasonal workers traveling from South to North as the harvest periods approach. But they do not have the free mobility of old. They meet "ports of entry" at state boundaries. Oftentimes they are inspected for sanitary reasons, are quarantined, denied admission, neglected, or refused aid by relief societies. They are the depression pioneers, moving to get jobs and make homes; but gone are the days of unrestricted interstate migration.

Closely connected with various restrictions on this mobility of population is the pronounced tendency for individual states to erect economic barriers against other states of the Union in an attempt to promote local interests. A few examples will suffice. Modern transportation and refrigeration make it possible for Wisconsin and Minnesota to sell milk in Boston and New York lower than the local dairy farmer can sell it. The local milkmen ask for protection against the dumping of foreign milk into their local markets. No state can impose a direct tariff against milk coming from other states. The protection of the local interests is accomplished by requiring local inspection of milk for sanitary reasons. Local milk sheds are constructed and the inspectors do not go beyond the sheds that contain the local milk. This subterfuge virtually establishes a prohibitive tariff. In 1933 Pennsylvania passed a law forbidding the sale of milk not approved by Pennsylvania inspectors. The governor of Wisconsin retaliated by threatening to prevent the sale of Pennsylvania products in Wisconsin. In essence, anti-chain-store legislation is based on the theory of protecting the local business man against outside competition.

Many states now encourage local industries by requiring that public buildings be constructed from material produced or fabricated within the state. Some states help local insurance concerns by imposing discriminating taxes against outside companies. "Ports

of entry" have been used to prevent outside competition with local labor interests. They are also used to prevent the importation of bootleg gasoline and petroleum. Several states impose discriminating taxes against out-of-state liquor. When a state imposes sales taxes consumers undertake to evade them by buying from states that do not use this form of tax. This is checkmated by a "use" tax upon all goods brought from outside. All of these attempts at making the individual states self-sufficient interfere with the free flow of interstate commerce and the maintenance of a free American market.[1]

The states are kept in fairly friendly relations by the requirements of five constitutional provisions concerning interstate relations [2] and by a few coöperative activities of the states themselves. As a result of the constitutional provisions the Supreme Court has settled two hundred fifty-nine disputes between the states [3] and Congress has agreed to fifty-three interstate compacts.[4] The states on their own initiative have promoted their mutual welfare by uniform laws,[5] conferences of administrative officers,[6] and the passage of reciprocal legislation.[7]

Relation of the States to the Local Governments.[8] The local governments within the members of our federation are legally subject to the state and not the nation. Cities were once sovereign states. After the American Revolution the state legislature claimed to inherit the power of the king and Parliament over cities. They now exercise almost complete authority over them. State domination was especially conspicuous in such matters as state imposition of financial burdens on cities, state selection of certain local officers, and the granting of special franchises to individuals. Eventually, provisions prohibiting the legislature from passing local and special laws began to appear in state constitutions. Finally, home rule provisions appeared, granting the cities and counties authority in local or municipal affairs but retaining general powers that pertain to the state or to all the cities as parts of the state at large.

[1] For a detailed description of these recent state activities see Public Policy Pamphlet No. 27, *Death by Tariff*, by Raymond Leslie Buell, University of Chicago Press.

[2] See pages 471–476.

[3] See Crawford, F. G., *State Government*, ch. 3.

[4] *Ibid.*

[5] See pages 476–477.

[6] See pages 477–478.

[7] See pages 479–480.

[8] This subject is discussed more fully in Chapter XXIV.

Cities and counties act as agents of the states for administering many state-wide laws, such as those relating to preservation of the peace, health, education, and highways. To clear up the confusion of state and local functions there is a strong demand that all county officials who perform strictly state functions, such as prosecuting attorneys, sheriffs, constables, county judges, and their several staffs, be made state officers appointed by higher state officials and responsible to the appointing agent.

Relation of Local Units of Government to Each Other.[1] Sometimes the county has a supervisory relation to the other units of local government in such matters as education, health, and taxation; sometimes a municipal or town justice of the peace has a county-wide jurisdiction. A large city and special districts create a troublesome county problem. The city-county problems could be partially solved by granting home rule to each. Special districts such as irrigation, drainage, or public utilities districts add to the complexity and confusion of local government, and should be abolished. The centralizing tendencies in administration are gradually transferring many township functions to the county and the state. The towns seem destined to be eliminated as units of government.

Trends and Prospects of American Federalism. What are some of the achievements and weaknesses of American federalism as revealed by experience? The achievements of American federalism are numerous. (1) Small states and large, with diverse populations, through a spirit of mutual accommodation and compromise founded and developed our Union. Federalism has preserved the government of each local unit according to its peculiar racial elements, antecedents, local customs, and resources. In other words, it has secured local autonomy and external unity, thus maintaining a fine poise between the centripetal and centrifugal tendencies in political affairs. (2) Federalism has simplified the problem of governing territory that is continent-wide. (3) It has encouraged local experiment which would be so expensive and sometimes so dangerous that it would not be tried in a state with a unitary government. (4) Its spirit is opposed to bureaucracy. (5) Finally, federal government is the only form that would have a prospect of success if a real world-state should be established. It would provide local autonomy in the present national states and world unity in the new central government.

The flaws in American federalism have been accentuated by the

[1] This subject is discussed more fully in Chapter XXIV.

workings of profound economic forces. These have revealed weakness in its structure, in the distribution of power under it, and in its political and administrative aspects. (1) Foreign affairs have been complicated by state legislation concerning the person and property of aliens. (2) Internal difficulties have arisen through the diversity of state legislation on such subjects as marriage and divorce, insurance, labor, transportation, communication, private business corporations, and commercial instruments, where uniform legislation is desirable. Some legislation on these subjects has called forth the appellation of "traitor state" from the states injuriously affected socially and economically. It has been charged that some of the states have such poor corporation laws as to establish a "twilight zone" in which there is no effective legislation or control. (3) Political weakness has been revealed in conflicts between the central government and the states, such as the Whiskey Insurrection, suits of states by individuals of another state as in the case of *Chisholm v. Georgia,* the Virginia and Kentucky Resolutions, the Jefferson Embargo Act and the federal use of the state militia, the Hartford Convention, the nullification acts of Georgia and South Carolina and the Civil War, and the concurrent jurisdiction provided in the Eighteenth Amendment and the Volstead Act. (4) The state boundary lines limit the enforcement of law, the keeping of order, and judicial proceedings. (5) The diversity of state laws and judicial decisions on the same subjects amounts to uncertainty, not to say chaos. (6) Our federalism provides double plants, legislation, administration, and adjudication. (7) Our federal form of government is complex and expensive. (8) Finally, the states have been ineffective in meeting the social and economic demands made upon a service state. To meet the situation, the central government has intruded into the reserved sphere of state government and in doing so has undertaken impossible burdens: for example, the N. R. A., the A. A. A., and the wages and hours law.

Many of the recent attempts to increase the powers of the central government have been thwarted because the Supreme Court has declared them unconstitutional, holding that they violate the Tenth Amendment and attempt to delegate legislative power to the President. The action of the central government in going over the heads of the states during the depression and dealing directly with cities and counties has met with considerable opposition. All recent suggestions to amend the Constitution by adding large areas of power to the central government have been coldly received. There

is a general feeling that the central government has attempted things for which it is poorly equipped. Moreover, these additions, it is said, would place an impossible burden upon the central government and would develop a bureaucracy. In sum, there is a strong feeling that the central government should relax its grip on the state and local governments and restrict activity to its own proper sphere.

Despite the fact that the colonial and not the English government occupied the chief attention of the early settlers and that the successor states have been highly important within the pattern of the federal system, there are numerous and able groups that believe the states should be drastically modified or practically eliminated. Two outstanding proposals have been advanced: (1) to establish independent city-states within the present limits of the states; and (2) to expand the territorial limits of the state to include large regions that have economic or geographical unity.

The chief obstacles standing in the way of the adoption of new city or regional states are (1) tradition and sentiment, which favor the states as now organized; (2) almost insuperable financial difficulties; (3) the political parties, which are now organized on national and state lines; (4) the complexity resulting from interposing another layer of government between those now in existence; (5) the Constitution itself.[1] The new units cannot be adopted unless the states concerned and Congress consent. The consent of Congress might be secured; the consent of the states is not probable.

Trends are emerging which promise well for the future. The reorganization of the different units of government looking towards the elimination of Chinese Walls of separation is one of these. Furthermore, programs for the reorganization of the functional departments in every unit of government either have been adopted or are in progress. The underlying concepts of all these plans look towards the centralization of power, the fixing of responsibility, and the attainment of efficiency and economy. When every unit of our federal system, each within its own sphere, performs its functions intelligently we shall continuously be making progress toward a "more perfect Union."

QUESTIONS

1. How has the supremacy of the central government been established?

[1] See U. S. Constitution, Art. IV, Sec. 3, and Art. V.

2. Describe any one method of changing the Constitution other than by formal amendment.
3. Has the power to amend the Constitution been used wisely? Discuss.
4. Should the method of making treaties be modified?
5. Should all amendments be ratified by state conventions?
6. What is the present status of the system of checks and balances?
7. Is the presidential form superior to the cabinet form of government? Why?
8. What is judicial supremacy?
9. How has the power of the national government been expanded?
10. Describe the operation, trends, and prospects of federalism.

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PART II

Popular Rights, Agencies, and Processes

CHAPTER V

Protection of Rights and Privileges

CLASSES OF PERSONS ENTITLED TO PROTECTION

RIGHTS and privileges are not the same for all persons in the United States, because there are various kinds of persons. Two classes of persons are entitled to protection: (1) natural persons; (2) legal persons. The different classes of persons sustain different relations to the state and consequently have different rights and privileges.

Natural persons may be grouped as follows: (1) citizens; (2) aliens; (3) wards or nationals; (4) stateless persons.

Citizens are men, women, and children who are members of the political body called the state. They owe allegiance to the state and enjoy all the rights and privileges conferred by the constitutions and laws of both nation and state.

Aliens are individuals who reside in this country but are citizens of another. There are about 5,000,000 such persons in the United States at present. They have limited rights.

Wards or nationals are neither citizens of the United States nor aliens. They are subjects of this country and are protected by it, but they do not have all the constitutional rights of citizens. The Filipinos are wards of the United States. Indians before 1924 were wards; but now that they have been made citizens, they are in the anomalous position of being citizens and wards at the same time.

Stateless persons are not citizens of the United States or of any other country. They have lost their citizenship. Many Russians in this country were citizens of Russia, but after the Revolution of 1917 they lost their citizenship by act of the Soviet government; hence they are now without a country or political allegiance. An alien who has taken out his first papers renounces or gives up his allegiance to the country from which he emigrated, but does not take on his new allegiance until he completes his naturalization by taking out his second papers. In the interim he is essentially a stateless person.

Legal persons are creatures of the law and are called corporations. They are artificial persons and have limited rights.

DUAL CITIZENSHIP

The most important class of persons are the citizens. They enjoy the largest number of rights and have the most complete protection. There are two classes of citizens – United States citizens and state citizens. The original Constitution speaks of citizens of the United States and citizens of states. These seemed to be on a parity; by reciprocity, a citizen of one was a citizen of the other. However, the Supreme Court in 1857 decided that a state might confer all the rights and privileges of its own citizenship on a colored person, but this did not make him a citizen of the United States.[1] The Fourteenth Amendment adopted in 1868 gave a partial definition of citizenship in the following words: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This statement definitely established dual citizenship. The two citizenships are distinct and each has its own rights and privileges.[2]

ACQUISITION OF CITIZENSHIP

According to the Fourteenth Amendment, citizenship may be acquired in two ways: (1) by birth; (2) by naturalization.

Citizenship by Birth. The Fourteenth Amendment adopts the common law principle of *jus soli:* that citizenship is based on the soil or place of birth if the person is subject to the jurisdiction of the United States. Persons may be born on the soil of the United States and not be citizens of the United States if their parents are diplomatic representatives of another country, or if their parents are on a public vessel from another country, or if their parents are alien enemies invading the United States, as was the case in the War of 1812. Such persons are not under the jurisdiction of the United States by the principle of exterritoriality in international law. A person born in the United States may be a citizen even if his parents, though under the jurisdiction of the United States, cannot become citizens.[3]

Citizenship by blood, or the Roman law principle of *jus sanguinis,* was established by a congressional law providing that a child born

[1] *Scott v. Sandford,* 19 Howard 393 (1857).
[2] See *Slaughterhouse Cases,* 16 Wallace 36 (1872).
[3] See *United States v. Wong Kim Ark,* 169 U. S. 649 (1898).

abroad may become a citizen if his father at the time was a citizen and if the foreign-born person at the age of eighteen files with an American consul a statement of his intention to become a resident of the United States and at the age of twenty-one takes an oath of allegiance to the United States.

Citizenship by Naturalization. Naturalization may be collective or individual.[1] If naturalization is collective it may be (1) by treaty; (2) by special act of Congress. If naturalization is individual it must be by a federal or state court of record according to a law passed by Congress under its constitutional power to enact uniform laws on naturalization.

Until 1898 the people living within the territories annexed by treaty were made citizens of the United States by special provision in the treaty. The people of Texas, Hawaii, Puerto Rico, and the Virgin Islands were made citizens of the United States by law. All non-citizen Indians were made citizens by act of Congress in 1924. The Filipinos were made citizens of the Philippine Islands by act of Congress.

Individual naturalization is a judicial process before a national or state court of record, a territorial court, or the courts of the District of Columbia. The naturalization act of 1906 prescribes the detailed steps. The courts are assisted by officers from the immigration and naturalization service in the Department of Labor. The process of judicial naturalization consists of three steps: (1) declaration of intention; (2) filing of a petition and proof of qualifications; (3) final examination and issuance of a certificate of citizenship. If an alien is at least eighteen years of age he goes before the court and under oath declares his intention to become a citizen, renounces his allegiance to the country of which he is a citizen, promises to reside in this country, and swears allegiance to the United States.

In not less than two years nor more than seven years after declaring his intention the applicant files with the court in his own handwriting a petition with a statement that he has resided in the United States at least five years, is at least eighteen years of age, entered the country legally, and is not an anarchist or a polygamist. Again he renounces allegiance to his mother country and swears that he will support the Constitution of the United States.[2] He must have the

[1] Naturalization is the exclusive function of the national government. See *Chirac v. Chirac*, 2 Wheaton 259 (1817).

[2] In connection with the oath to support the Constitution, some pacifists have

testimony of two citizens stating that he has been a resident for five years and is a person of good moral character.[1]

Not less than ninety days later, the applicant appears before the court and the naturalization examiner of the Department of Labor for an examination in American government. If this is successfully passed, the court has a certificate of citizenship issued. The cost for naturalization is twenty dollars. Certificates secured by fraud may be annulled by the courts.[2]

Only aliens who are "free whites" or of African nativity or descent are eligible for citizenship. The Chinese are specifically excluded; Japanese, Koreans, Burmese, and Hindus are not eligible.

Formerly the citizenship of a wife followed that of her husband. Now naturalization is an individual act on the part of the wife. By congressional act of 1934 nationality rights are the same for both sexes. Naturalization of parents naturalizes the minor children.

In 1868 Congress recognized the right of a citizen, either native or naturalized, to expatriate himself and become a citizen of another country. If a naturalized citizen takes up residence in his mother country for two years, or residence in another country for five years, the court may annul his citizenship.

PROTECTION OF CIVIL LIBERTY

There is a broad constitutional guarantee of the civil rights of all persons in the United States. There is also a guarantee of certain additional rights of citizens only.

Civil Liberty. The constitutional protection of civil liberty extends to personal rights and property rights. The protection of personal rights in the ordinary civil affairs of everyday life is perhaps the most precious boon guaranteed by the Constitution.

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been denied citizenship and the Supreme Court has upheld the action. Rosa Schwimmer, a Hungarian, would not promise to take up arms in defense of this country. The Supreme Court decided against her petition by a six to three vote. *United States v. Schwimmer*, 279 U. S. 644 (1929). A short time after, the Supreme Court by a five to four vote withheld naturalization from Dr. D. C. McIntosh, a Canadian by birth and a professor in Yale Divinity School, because he would not promise to bear arms in a war which he might think immoral. *United States v. McIntosh*, 283 U. S. 605 (1931). There were vigorous dissents in both cases.

[1] Alien veterans of the World War are exempt from the five-year residence requirement. Evidence of honorable discharge is taken as sufficient evidence of good moral character.

[2] See *Luria v. United States*, 231 U. S. 9 (1913).

The personal freedom of the individual is protected by the Thirteenth Amendment adopted in 1865, which reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." There have been some curious applications of this amendment. In 1897 the Supreme Court held that a seaman who broke his contract and deserted his ship could be punished by imprisonment.[1] The La Follette Seamen's Act of 1915 declared that the breaking of a seaman's contract is not desertion. The Supreme Court held that a state statute requiring a labor debtor to pay the debt or work out the debt or be committed to jail is a violation of the Thirteenth Amendment because this would establish peonage which amounts to involuntary servitude.[2] A baseball player who has contracted to play ball for a definite period for one organization, and for no other, can be prevented from playing for another but cannot be compelled to play for the organization with which he contracted, as this would violate the Thirteenth Amendment.[3] The civil rights of Negroes found no protection in an act passed by Congress to prevent discrimination against them in hotels, theaters, and other public places, as discrimination on account of race or color does not constitute slavery.[4]

The First Amendment says: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The language shows that it applies to the central government only. It was the culmination of an age-long fight to establish freedom of religious faith and the separation of state and church. Congress is prohibited from establishing a state church or taxing for the support of a church. Religious faith is guaranteed. A person may believe in God or be an atheist. He may have any religion or no religion. Worship or practice of a religious faith may not extend to overt acts that violate criminal laws. Worship or practice of religious faith is free only when it does not conflict with the usual standards of good morals or the law of the land.[5]

Some atheists condemn the President's Thanksgiving proclamation as violating the First Amendment. The Supreme Court upholds

[1] *Robertson v. Baldwin*, 165 U. S. 275 (1897).
[2] *Bailey v. Alabama*, 219 U. S. 219 (1911).
[3] See Burdick, C. K., *The Law of the American Constitution*, p. 499.
[4] *Civil Rights Cases*, 109 U. S. 3 (1883).
[5] The classical statement of freedom of religion is found in *Reynolds v. United States*, 98 U. S. 145 (1878).

state police power laws requiring Sabbath observance in the interest of safety, order, and morals. Some states prohibit the reading of the Bible or the offering of prayer in the public schools. The supreme court of Tennessee has held that a statute prohibiting the teaching of evolution in the public schools did not violate the state constitution requirement "that no preference shall ever be given by law to any religious establishment or mode of worship," because the religious sects are not agreed on the subject of evolution.[1]

Every liberal or democratic state claims that culture and progress depend upon freedom of speech and of the press. The First Amendment prohibits Congress from "abridging the freedom of speech or the press."[2] This does not protect libelous or treasonable speeches or writings that lead to insurrection or disobedience to law. Twice Congress has gone to the extreme under this amendment. In 1798 it passed a sedition act directed against inciting insurrection and disorder and publishing false and malicious writings against the government, or inciting any foreign power to make war on this country. There were several convictions followed by imprisonment and fines. The act was passed to check the Republican attacks on the Federalist administration. The Republicans charged that the act was unconstitutional, adopted the Virginia and Kentucky Resolutions, and defeated the Federalists in the election of 1800. President Jefferson pardoned the prisoners, and Congress indemnified them for the money paid in fines.

In the Civil War, President Lincoln interpreted his war powers to authorize him to arrest and imprison editors and to punish speakers for supporting rebellion and opposing the draft or weakening the cause of the Union. The Supreme Court threw considerable doubt upon President Lincoln's exercise of these drastic powers.[3]

During the World War, Congress passed an espionage act in 1917 and a sedition act in 1918. These acts provided heavy penalties for persons who opposed the war or who "wrote, printed or published any disloyal, scurrilous, or offensive matters about the constitution or form of government of the United States." These acts were upheld by the Supreme Court.[4] Justice Holmes pointed out that

[1] *Scopes v. State*, 154 Tenn. 105 (1927).

[2] The leading book on this subject is Chafee, Z., *Freedom of Speech* (1921).

[3] See *Ex parte Milligan*, 4 Wallace 2 (1866).

[4] See *Schenck v. United States*, 249 U. S. 47 (1919), and *Debs v. United States*, 249 U. S. 211 (1919).

freedom of the press allows the publication of certain things in time of peace that could not be allowed in time of war.[1]

An eminent authority says the guarantee of assembly and petition is an outgrowth or logical result of freedom of speech and the press.[2] The concluding provision of the First Amendment restrains Congress from "abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances." The Supreme Court has said the right of assembly and petition is an attribute of national citizenship and is guaranteed by the Constitution.[3] The right of petition has been for a long time and still is an important part of the English constitution and practice. One of the great English constitutional documents is the Petition of Right, 1628. One of the indictments of George III in the Declaration of Independence is that he spurned colonial petitions. Robert E. Cushman says the right of assembly and petition presupposes compliance with three requirements: (1) the assembly must be peaceable; (2) the petition must concern a lawful object; (3) the petition does not require that it must be considered. The "gag resolution" ordered that the anti-slavery petitions be laid on the table without consideration, despite the strenuous opposition of J. Q. Adams, who claimed that the right of petition carried with it the right to have the petitions considered. The gag rule has been rescinded; but hundreds of petitions receive little or no consideration unless the petitioners are persons of political importance.

The Second Amendment protects the people in the right to bear arms. This does not mean the carrying of concealed weapons, but such as can be used by the state militia which was supposed to take the place of a standing army.[4]

The Third Amendment prohibits the quartering of soldiers in a private house in time of peace against a private owner's wishes, and in time of war except in a manner provided by law. This amendment strikes at an abuse of the English government in the colonies just before the Revolutionary War. The amendment has never been violated, so general has been its acceptance.

The Seventh Amendment provides that in suits at common law,

[1] See *Gitlow v. New York*, 268 U. S. 652 (1925).

[2] Cooley, T. M., *Constitutional Limitations* (Eighth edition), vol. 1, p. 728.

[3] *United States v. Cruikshank*, 92 U. S. 542 (1876).

[4] See *Miller v. Texas*, 153 U. S. 535 (1894), and *Presser v. Illinois*, 116 U. S. 252 (1886).

when the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved. Of course this applies only to matters coming under federal jurisdiction.

A crime is an offense against the state itself. The state is both plaintiff and prosecutor. There are many opportunities for interfering with personal liberty; hence constitutional restrictions.

Treason is one of the oldest as well as the newest crimes and strikes at the very foundation of the state. It may be used by autocratic rulers unjustly to remove personal enemies. The crime of treason had become varied and subject to constructive definition; consequently the framers of our Constitution dealt with three phases of it: definition, method of proof, and limitation on punishment. The Constitution says: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." The use of the word *only* prevents Congress from defining treason to suit itself. Treason cannot be proved except by the testimony of two witnesses to the same overt act or by confession in open court.[1] Furthermore, the Constitution empowers Congress to provide for the punishment of treason with the limitation that the punishment may not extend beyond the life of the traitor to include his descendants.[2]

The writ of *habeas corpus* stems from the English statute passed during the reign of Charles II to correct abuses such as arresting persons illegally and holding them in prison for long periods without trial. The writ is issued by a court and orders the person holding another to produce the body before the judge that he may decide whether the person is legally under arrest. If he is not, he is set free immediately; if he is, he is detained to stand trial as to his guilt. Only one question is asked on a writ of *habeas corpus:* legality of imprisonment.

The Constitution provides: "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." The Supreme Court has declared that Congress alone has the power to suspend the writ.[3] At the beginning of the Civil War, President Lincoln had the writ of

[1] The act must be open and notorious. Aaron Burr went free because there was no proof of overt acts of war. A treasonable intent is not sufficient for a conviction of treason.

[2] *Bigelow v. Forrest,* 9 Wallace 339 (1869), and *United States v. The Insurgents,* 2 Dallas 335 (1795).

[3] *Ex parte Milligan,* 4 Wallace 2 (1866).

habeas corpus suspended. Merryman, a southern sympathizer and agitator, was arrested and imprisoned in Fort McHenry. He petitioned Chief Justice Taney, sitting as a circuit judge, for a writ of *habeas corpus*. Taney issued the writ but the commander did not obey it. Taney then issued a writ of contempt but the marshal could not serve it. Taney protested to President Lincoln, who did not reply but later released Merryman, who was turned over to the civil authorities. (The action of President Lincoln in suspending the writ of *habeas corpus* was later approved by Congress. The agency for suspending the writ is left in some doubt.

A bill of attainder is a legislative conviction of crime without a judicial trial. The Constitution prohibits both the United States and the states from passing bills of attainder.

In 1865 Congress passed the Test Oath Act, which provided that no one should be admitted to practice before federal courts who could not take the oath that he had never voluntarily borne arms against the United States. The Supreme Court held that this was a bill of attainder as it imposed a penalty without a judicial trial.[1]

Ex post facto laws are prohibited to the United States and the states. They apply to criminal matters only. Such a law makes an act a crime which was not a crime at the time committed or changes the law of evidence, or the method of trial,[2] or changes the penalty to the prejudice of the person on trial.

To supplement the protection in criminal matters found in the original Constitution the first eight amendments — a bill of rights — were quickly added. These give more detailed protections than are found in the original Constitution. It should be remembered that they apply to the central government and not to the states.[3]

Amendments IV–VII afford complete protection for persons accused of crime. They cover the ground from search and arrest through the trial to final punishment. Due process is fully met for judicial trials in criminal cases.

An ancient maxim of the common law is: "Every man's house is his castle." It was the entrance of the king's officers to search for evidence of sedition, and the issuance of writs of assistance in Massachusetts to search for smuggled goods, that made the colonists blaze

[1] *Ex parte Garland*, 4 Wallace 2 (1866).

[2] *Thompson v. Utah*, 170 U. S. 343 (1898), and *Calder v. Bull*, 3 Dallas 386 (1798).

[3] *Barron v. Baltimore*, 7 Peters 243 (1833).

with indignation against acts that violated the sanctity of the home. This feeling bore fruit in the Fourth Amendment, which prohibits unreasonable searches and seizures. Reasonable search and seizure may be made. No warrant can be issued 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. A warrant is necessary for a legal search and seizure, except that a house may be entered to make a legal arrest or to see that the terms of a license are being observed. Boats and automobiles can be searched without a warrant.[1] The court said it was not unreasonable to search a vehicle of transportation for liquor, as it can easily escape while a warrant is being issued. If evidence is obtained by illegal search it may not be used against an accused person if he objects before the trial.[2]

Two important protections to persons accused of crime were incorporated into the Constitution from the English common law: (1) indictment by a grand jury – a body of twelve to twenty-three persons; (2) trial by a petit jury – a body of twelve persons. Usually three-fourths of the grand jury may indict, but it takes a unanimous vote of the trial jury to convict. The grand and petit jury must be used in the federal courts in capital and otherwise infamous crimes. Most states follow the same practice. Some state constitutions have abolished the grand jury as slow and cumbersome and allow a prosecuting attorney to file an information which is sufficient to bring a person to trial. The Supreme Court has decided that this is due process.[3] Some states by constitutional amendment have reduced the petit jury to eight. The Supreme Court has held that jury trial is to safeguard the interests of an accused person; therefore he may waive his rights if he wishes.[4]

Formerly in England an accused person was frequently tortured to cause him to testify even though the testimony incriminated him. The nearest approach in this country at present is for a peace officer to use the " third degree " to induce the accused to confess, and then produce the confession at the trial. The Fifth Amendment protects the accused against being a witness against himself. This is to prevent self-incrimination. The accused may waive his right to take

[1] *Carroll v. United States*, 267 U. S. 132 (1925).
[2] *Weeks v. United States*, 232 U. S. 383 (1914).
[3] *Hurtado v. California*, 110 U. S. 516 (1884).
[4] *Patton v. United States*, 281 U. S. 276 (1930).

the witness stand in his own behalf. Most juries expect the accused to testify, and hold it against him if he does not.

A person may be induced to testify before a grand jury if the prosecuting attorney will promise not to use the evidence against him in a trial. Books, papers, and documents cannot be used as testimony against an accused person against his will. Unreasonable searches and seizures may produce evidence that is self-incriminating. The Supreme Court has held that evidence procured by private theft may be used in a federal case as it was not secured by the agents of the federal government directly.[1] The Supreme Court in the case of *Olmstead v. United States*[2] held that evidence secured by federal prohibition agents' tapping telephone wires did not violate the constitutional provision against self-incrimination or unreasonable searches and seizures. By direction of the Department of Justice the practice of wire-tapping to obtain evidence has been discontinued.

The Constitution requires that criminal trials shall be impartial, speedy, and public. The accused has the right to counsel and must be informed of the nature and cause of his arraignment. He has the right to confront the witnesses against him and to compel witnesses who know anything in his favor to attend the trial and testify. He cannot twice be tried for the same offense if the jury has agreed. He must be tried in the state or district where the crime has been committed. Finally, the government cannot require excessive bail or impose excessive fines or inflict cruel or unusual punishments.

Economic Rights.[3] An individual is protected in his property rights. Private property may extend to anything except human beings. The central government might exercise its powers in such a way as to oppress the individual in regard to his property; therefore numerous constitutional restrictions are imposed on the government. The government cannot levy taxes on exports; direct taxes must be levied according to population, except income taxes; indirect taxes must be uniform. The taxpayer is further protected in that all revenue bills must originate in the House of Representatives, and no money can be drawn from the public treasury except by an appropriation made by law. The government may take the individual's

[1] *Boyd v. United States*, 116 U. S. 616 (1886).

[2] 277 U. S. 438 (1928).

[3] These paragraphs are based on Young and Wright, *Unified American Government* (Revised edition), p. 379, with permission of McGraw-Hill Book Company.

private property under the right of eminent domain, but private property cannot be taken except for a public purpose, and then only after just compensation has been made; and just compensation is a judicial question.

The individual may call on the central government as against the state government for protection to his private property. The states cannot levy any imposts on foreign commerce except for inspection, impose any tonnage duties, tax the lawful agencies or instrumentalities of the central government, emit bills of credit, take property without due process of law, make anything but gold and silver coin of the United States legal tender, or pass a law impairing the obligation of contracts.[1]

President Arthur T. Hadley has made a classical statement on the relation of the Constitution to private property as follows: "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." [2]

Political Liberty. Practically all persons within the state enjoy civil liberty. Even aliens are protected in large measure; but public or political expediency has restricted political liberty to a smaller number of persons. In the beginnings of statehood in the Old World, the individual counted for little. In those times there was little self-government and autonomy, and no representation. Political power was imposed from above and did not originate with the governed. During the rise of the absolute monarchs in Europe the rights of the people were still neglected; but the great political revolutions of the seventeenth and eighteenth centuries established representation and popular participation in political affairs. Distinct interests had their representatives; the right of petition was developed into a legislative power; the courts were brought under popular control; legislative bodies could be dissolved and an appeal made to the electorate; frequent elections were established; representatives were given legal instruction; there was a separation of the departments of government, each acting as a check upon the other; there was a sphere of

[1] See *Dartmouth College v. Woodward*, 4 Wheaton 518 (1819); *Stone v. Mississippi*, 101 U. S. 814 (1880); *Home Building and Loan Assn. v. Blaisdell*, 290 U. S. 398 (1934).

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

constitutional limitations and safeguards; finally came minority representation, direct popular legislation through the initiative and referendum, the power to recall officers, and popular participation in judicial affairs through jury service. These devices have tended to harmonize authority and personal liberty.

Political liberty is not so extensive as civil liberty. Political liberty means popular participation in political affairs, and civil liberty means protection against the government and other individuals. Only the capable should participate in governmental affairs; but all should enjoy civil liberty.

PROTECTION UNDER THE DUE PROCESS CLAUSES

There are two "due process" clauses in the Constitution. One is in the Fifth Amendment and is applied against the central government; the other is in the Fourteenth Amendment and is applied against the states. In neither amendment is the phrase defined directly or by any implication in the context. The courts have never attempted a precise definition of it. The Supreme Court has declared that "the full meaning of the term should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise." [1] Starting with "law of the land," as found in Magna Carta, the courts have gradually developed the meaning of the phrase as they have applied it to many different cases adjudicated. The phrase has been applied to both procedural and substantive rights.

Procedural Rights. The violation of any of the personal rights already discussed, by any court in either a civil or a criminal trial, would be against due process of law.[2] Fair trial according to established laws and methods that maintain essential rights is the essence of due process of law in both civil and criminal trials.[3] Administrative officers responsible for the assessment and collection of taxes, health officers, certificating experts, and appraisers of property for the exercise of eminent domain are required to give notice and a fair hearing to all persons whose rights are involved. Such boards tend to act arbitrarily. In the interest of due process of law there is usually the right of appeal to a regular court.

[1] *Twining v. New Jersey*, 211 U. S. 78 (1908).

[2] See *Cooke v. United States*, 267 U. S. 517 (1925). *Hurtado v. California*, 110 U. S. 516 (1884).

[3] *Powell v. State of Alabama*, 287 U. S. 45 (Scottsboro Case, 1932).

Substantive Rights. The courts have had to interpret due process in substantive as well as procedural rights. These cases have examined chiefly the powers of legislative bodies to pass laws on police powers that would conform to judicial standards. The early attitude of the Supreme Court was to hold legislative bodies within strict limits. This attitude with reference to the police power in the states is well illustrated in a few cases. New York passed a law prohibiting bakers from working more than sixty hours a week. The Supreme Court declared this unconstitutional as interfering with liberty of contract.[1] The Supreme Court also declared void a Kansas law making it a misdemeanor for an employer to threaten to discharge an employee because he was a member of a labor union [2] and an Arizona statute which undertook to prevent the use of an injunction in a labor dispute.[3] The Supreme Court was called upon to rule on the meaning of liberty in two important cases touching liberty in education. A Nebraska law undertook to restrict the teaching of German in private schools. The Supreme Court declared that this statute violated the Fourteenth Amendment guarantee of liberty.[4] An Oregon law providing that all children who had not finished the eighth grade must attend the public schools, thus abolishing private schools, met the same fate as the Nebraska law.[5]

The Supreme Court, adhering to a rigid construction of the due process clause and the police power as exercised by Congress for the District of Columbia, declared a minimum wage law for women unconstitutional as an interference with the liberty of contract.[6] A more liberal construction of due process was revealed when the Supreme Court upheld an Oregon law that restricted the hours of labor for both sexes in manufacturing establishments [7] and a Utah statute limiting the hours of men to eight in smelters and underground mines.[8] The latest example of the more liberal attitude of the court in this field is its reversal of the *Adkins v. Children's Hospi-*

[1] *Lochner v. New York*, 198 U. S. 45 (1905).
[2] *Coppage v. Kansas*, 236 U. S. 1 (1915).
[3] *Truax v. Corrigan*, 257 U. S. 312 (1921).
[4] *Myers v. Nebraska*, 262 U. S. 390 (1923).
[5] *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U. S. 510 (1925).
[6] *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).
[7] *Bunting v. Oregon*, 243 U. S. 426 (1917).
[8] *Holden v. Hardy*, 169 U. S. 366 (1898).

tal minimum wage case for women.[1] The Supreme Court has recently upheld advanced social legislation in several cases.[2]

The due process clause of the Fourteenth Amendment has been broadened by the Supreme Court recently. Justice Sandford, speaking for the court, used the following words: "For the present purpose we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress [3] – are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states." [4]

Due process applies to all persons, including corporations.

GUARANTEE OF EQUAL PROTECTION OF THE LAWS

The Fifth and Fourteenth Amendments use the same language for due process. The Fourteenth Amendment adds that "no state shall deny to any person within its jurisdiction the equal protection of the laws." This is found in most of the state constitutions and is regarded as the greatest single protection enjoyed by all persons. It was added to the due process clause of the Fourteenth Amendment to protect the freedmen against invidious state legislation in the southern states. Justice Miller, who wrote the opinion in the first case [5] that interpreted the Fourteenth Amendment, stated that he doubted whether the "equal protection" clause would ever be invoked except to protect Negroes. He proved to be a poor prophet as it is now applied to all persons and all kinds of rights. The phrase is intended to prevent discriminatory classification as a basis for legislation or administration.

A Negro cannot be denied the right to serve on a jury or vote at a primary election.[6] Negroes may be segregated from white persons on railway trains and hotels. They may not be excluded from the public schools, but may be required to attend separate schools. The trains and schools must be equal to the facilities for the whites.[7]

[1] *West Coast Hotel Co. v. Parish*, 300 U. S. 379 (1936).

[2] See *Nebbia v. New York*, 291 U. S. 502 (1934); *National Labor Relations Board v. Jones & Laughlin*, No. 419, Oct. term, 1936; *Steward Machine Co. v. Davis*, No. 837, Oct. term, 1936; *Helvering v. Davis*, No. 918, Oct. term, 1936.

[3] *Barron v. Baltimore*, 7 Peters 243 (1833).

[4] *Gitlow v. New York*, 268 U. S. 652 (1925); also *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931).

[5] *Slaughterhouse Cases*, 16 Wallace 36 (1872).

[6] *Nixon v. Herndon*, 273 U. S. 536 (1927).

[7] *Civil Rights Cases*, 109 U. S. 3 (1883); *Plessy v. Ferguson*, 163 U. S. 537 (1896).

Classification may be used provided it is reasonable and applies equally to all persons in the same class. In 1929 Indiana passed a law which provided a graduated tax on chain stores. An owner of 225 chain stores was taxed $5,443 when the same stores owned by individuals would only be taxed $675. He attacked the law on the ground that it denied him equal treatment. The Supreme Court in upholding the law said the discrimination was based on a reasonable distinction. The statute treats all chain store owners alike. The court said this is all the Constitution requires.[1] The administration of a law may deny equal protection of the law. San Francisco passed an ordinance prohibiting laundries in frame buildings without a permit from the inspector. The inspector granted permits to natives to operate laundries in frame buildings and denied permits to Chinese. The Supreme Court declared this unconstitutional as it denied equal protection.[2]

PROTECTION OF RIGHTS AND PRIVILEGES OF CITIZENS

Privileges and Immunities of National Citizens. There are some rights a person enjoys not because he lives within the United States but because he is a citizen. They inhere in his American citizenship. The rights of a naturalized citizen are not so complete as those of a native-born citizen. He is not eligible for the presidency. Our country will not guarantee a naturalized citizen protection against the claims of his native country for military service upon his return. Our government presumes that citizenship in this country lapses by residence abroad.

The Fourteenth Amendment enumerates who are citizens and then adds: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It does not enumerate the privileges and immunities of national citizens. This has been done from time to time by the Supreme Court.[3] The rights of national citizens have been well stated as follows: (1) the right of expatriation – that is, the right to give up American citizenship and become naturalized in another country; (2) the protection of our government when upon the high seas or in foreign

[1] *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S. 527 (1931).

[2] *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

[3] See Lien, A. J., *The Privileges and Immunities of Citizens of the United States.*

countries, although the precise amount and character of this protection are nowhere specified and rest in the discretion of the President or Congress or other federal officers; (3) the right to become a citizen of a state by the simple process of going and residing in it; (4) access to all parts of the United States for the transaction of legitimate business and free passage from place to place; (5) the right to take advantage of the homestead and other public land laws of the government; (6) the right to enter the country and, if questioned, to prove citizenship; (7) the right peaceably to assemble and petition Congress; (8) the right to vote for members of Congress if one has the necessary qualifications for voting for the most numerous branch of the state legislature (9); the right to use the navigable waters of the United States; (10) the right to engage in interstate and foreign commerce; (11) the right to the privileges extended under the postal laws; (12) all rights secured to citizens by treaties with foreign nations.[1]

Interstate Privileges or Comity. Not only are the states restricted against interference with the citizens of the United States but they cannot discriminate against the citizens of sister states when they change residence to other states. The so-called comity clause reads: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[2] The Supreme Court in explaining this clause said: "It was undoubtedly the object of the clause in question to place the citizen of each state upon the same footing with citizens of other states. . . . It relieves them from the disabilities of alienage in other states . . . ; it gives them the right of free ingress into other states and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and the pursuit of happiness; it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."[3] This comity clause does not mean that a citizen of Kansas moving to Minnesota can claim all the privileges he had in Kansas, but only all the privileges Minnesota grants to its own citizens. Of course he does not have the privilege of

[1] Orth, S. P., and Cushman, R. E., *American Government*, p. 159. By permission of F. S. Crofts and Company.

[2] United States Constitution, Art. IV, Sec. 2.

[3] *Paul v. Virginia*, 8 Wallace 168 (1868).

voting and holding office in Minnesota. The courts have held that Minnesota can require certain qualifications before extending the privilege. A state may reserve for its own citizens the enjoyment of local resources such as game or fish.

A corporation is not a citizen within the meaning of the comity clause. It suffers certain disabilities but it is a legal person and is entitled to protection against impairment of contract, to equal protection before the law, and to due process of law.

INDIVIDUAL DUTIES AND OBLIGATIONS

The citizen has duties and obligations as well as rights and privileges. Rights and duties are correlative. Citizens who constantly insist on their rights and neglect their duties may eventually find themselves without rights. Rights, both personal and property, are relative and not absolute.

The relations between government and individuals within a state are reciprocal. The right of free speech carries the obligation to observe and not abuse it; freedom of religion and worship implies the obligation of refraining from breaking the criminal law under the cloak of religious freedom; the right of protection by the government implies the duty of supporting the government by paying taxes and obeying its law officers and judicial decisions; the privilege of voting carries the obligation of voting regularly after study of the Constitution, our history and government, and current public questions, and of helping to form a sound public opinion by informing oneself of the comparative merits of candidates and issues; the right to sue in the courts carries the obligation to serve on juries; the right to be protected against domestic insurrection and foreign invasion imposes the duty of serving in a *posse comitatus* and the army and navy; the right to good government involves the duty of being willing to serve in public office for the general welfare and not for spoils; the rights of citizenship impose the obligation of cherishing their benefits by keeping civic ideals high, for

> To live for common ends is to be common.
> The highest faith makes still the highest man;
> For we grow like things our souls believe,
> And rise or sink as we aim high or low.

QUESTIONS

1. Name the different classes of persons that are entitled to protection in the United States.
2. What is the basis for dual citizenship in the United States?
3. How is citizenship acquired or lost?
4. Define civil liberty; economic liberty; political liberty.
5. Distinguish *jus soli* and *jus sanguinis*.
6. What do you understand by "due process of law"?
7. To which government does "due process" in the Fifth Amendment apply? "Due process" in the Fourteenth Amendment?
8. Discuss the relation of individual rights to obligations.

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CHAPTER VI

Voters and Political Parties

POPULAR CONTROL IN GOVERNMENT

THE American people boast that their government is a democracy – that is, a government in which the people rule. The Constitution presumably is based upon the social contract theory, under which the people enter into a contract to establish a government, endow it with powers, place upon it certain limitations, set up the administrative structure, and provide the means of control over it.

The American government is in truth a theoretical democracy; yet its popular character should not be exaggerated. In numerous instances the people do not control, but merely assent to control by a small group.[1] This does not mean, however, that American democracy is beyond popular control. It merely signifies that the people are not sufficiently interested or aroused to exert positive control over their government. The fact remains that the people, or a majority of them, may control if they see fit. In other words, democracy in America means that the people have the power to determine their policies and conduct their government, but do not do so unless they exercise their prerogatives as citizens and actively participate in government. In America, democracy may be looked upon as a "gun behind the door" system of government.

Voting as a Means of Control. Popular control is exercised normally through the ballot. As long as citizens possess the power to vote for their officers and express their opinions on public questions, it may be assumed that they have the power to control the government. The issues before the people often are not of sufficient importance to cause a majority of the potential electorate to take the trouble or the time to go to the polls and express an opinion. Seldom do more than fifty per cent of the electorate vote, and frequently the proportion is much smaller. This situation has been interpreted

[1] See Beard, C. A., "The Fiction of Majority Rule," *Atlantic Monthly*, vol. 140 (Dec., 1927), pp. 831–836.

by some as a failure of democracy. Since elections are determined by pluralities more often than by majorities a minority of the electorate may actually control the government. It is well known that political machines and bosses with their organized minorities can outvote unorganized majorities. This does not mean, however, that the people are deprived of the power of expressing an opinion in government. As long as the suffrage is extended to all adult citizens, and as long as citizenship is defined according to the Fourteenth Amendment, we have a system of government in which the people either control the government or acquiesce in control by minorities. Acquiescence simply means that the people are not sufficiently interested to express an opinion, and are to some extent satisfied with the government that the machine or the organized minority is giving them. A majority of voters have it within their power to change the government at any election. This means that the electorate is the final authority in the American system of government.

COMPOSITION, CHARACTER, AND PRIVILEGES OF THE ELECTORATE

No treatment of the American system of government is complete without some discussion of the means of popular control. In this chapter we shall concern ourselves chiefly with the composition and character of the electorate and the organization of the electorate in political parties. In the next chapter we shall consider the activities of the voters in their choice of public officers.

Definition of the Electorate. By the word *electorate* we mean all citizens who are entitled to vote. In most continental European countries the determination of the electorate is a relatively simple matter. In France, for example, the electorate is determined by a single national law, uniformly applied over the entire country. In the United States, determination of the electorate is much more complicated. In the first place, the national government does not determine who shall or shall not vote. The Constitution merely provides that anyone may vote for national officers who is allowed to vote for the members of the most numerous branch of the state legislature. This means that the states determine qualifications for suffrage. The Constitution imposes but two restrictions on this state power. These restrictions are found in the Fifteenth and Nineteenth Amendments. The Fifteenth Amendment prohibits the states from denying suffrage on account of race, color, or previous condition of servitude. The Nineteenth Amendment provides that the states

shall not deny suffrage because of sex. Other than this the states are free to impose whatever qualifications they desire.

Suffrage – A Right or a Privilege. Before these qualifications are discussed, the question may be raised whether suffrage in the United States is a right or a privilege. In answering the question, we must decide what is meant by a right. If a right is defined as an inherent possession of the citizens, then suffrage must be called a privilege, for not all citizens possess the suffrage. The Fourteenth Amendment states that anyone born or naturalized in the United States is a citizen thereof. This means that persons under twenty-one years of age are citizens; they are not allowed to vote, however. Thus, suffrage is not inherent in the citizens. Again, if suffrage were a right, it would not have been necessary to add the Fifteenth Amendment to the Constitution. The Fourteenth Amendment made the Negro a citizen, but it did not protect him in his suffrage. It took the Fifteenth Amendment to prevent the states from denying him the privilege of participating in the determination of public policy. The courts generally uphold this view and have repeatedly stated that citizens possess no right of suffrage.[1]

Development of the Suffrage. The history of suffrage in the United States has been one of progressive extension of the voting privilege. Prior to 1815 many states imposed restrictions on the voting privilege, basing it on property holding or the payment of taxes. At the time of the adoption of the Constitution suffrage was restricted generally to property holders, and a few states even imposed religious qualifications. This meant that only a minority of the adult male population was allowed to vote. Soon after the adoption of the Constitution the states, and especially those that were admitted after that document had been ratified by the original thirteen, began to extend suffrage to all male white adults. Vermont in its first constitution provided that every freeman might vote "who has a sufficient interest in the community." Kentucky in 1792 adopted manhood suffrage. In the same year New Hampshire gave up its property-holding qualifications. Other states, however, tended to hold to various property or tax qualifications. In Tennessee, Ohio, and Louisiana these qualifications were included in the first constitutions. Thus, prior to 1815, there was no decided trend in suffrage.

During the period from 1815 to the Civil War, suffrage require-

[1] *United States v. Anthony*, Fed. Cases 14459 (1873); *Minor v. Happersett*, 21 Wallace 162 (1874).

ments were relaxed and democratic principles triumphed. Qualifications for officeholding were liberalized and the suffrage was broadened. This was the inevitable result of Jacksonian Democracy. In the new states of the West, political democracy was an accepted fact, and the older states gradually abandoned property and tax-paying qualifications and accepted manhood suffrage as a result of the influence of the frontier democracy of the West, the restless condition of the urban population, and the hostility of small businessmen and manufacturers who could not meet the property-holding qualifications found in some of the early state constitutions.

The Fifteenth Amendment. Since the Civil War, suffrage has been extended in two general directions – to the Negro and to women. As stated before, the Fifteenth Amendment did not give the Negro suffrage, but merely provided that the states should not deny him suffrage because of his race, color, or previous condition of servitude. Prior to the adoption of the amendment certain northern states permitted Negroes to vote, but it was not until after the adoption of the amendment that Negro suffrage was accepted in all the states. The methods devised by the southern states to circumvent the amendment and prevent the Negro from exercising the suffrage will be discussed in connection with present-day suffrage requirements.

The Nineteenth Amendment. The movement for woman's suffrage dates from the Jacksonian era. It was started long before the privilege of the suffrage was extended to the Negro. However, the agitation for woman's suffrage did not receive serious attention until after the Civil War and the enfranchisement of the Negro.

By the end of the nineteenth century the matter could no longer be passed over with ridicule or indifference. Wyoming in 1869 had extended the suffrage to women and allowed them to vote for territorial offices on the same basis as men. Upon its admission to the Union it continued its woman's suffrage arrangements. Other western states, including Idaho and Utah, upon their admission to the Union became woman's suffrage states. It was not until around 1906, however, that consistent efforts were made to extend suffrage to women generally. About that time various woman's suffrage organizations turned their attention to the nation-wide enfranchisement of women. These organizations at first confined their efforts to the states and attempted to have provisions for woman's suffrage written into the state constitutions. This method was slow and uncertain. Under

some of the more aggressive suffrage leaders the various organizations began to work for the adoption of an amendment to the Constitution of the United States which would give suffrage to women on an equal basis with men. Finally, in 1919, Congress proposed the Nineteenth Amendment, which embodied the principles of the so-called Susan B. Anthony proposal made in 1869. This proposal was ratified by the required three-fourths of the states and became part of the Constitution in 1920. It forbids any state from withholding the ballot on account of sex.

Numerous attempts have been made to determine the effect of the Nineteenth Amendment upon American political life. It may be concluded that women vote in much the same way as men. This means that some are intelligent and vigilant, while others vote blindly and are decidedly apathetic in their political interests. Some fall under the domination of political machines, while others are thoroughly independent. Woman's suffrage has enlarged the electorate, but it is difficult to show that it has changed the complexion of American democracy.[1]

Woman's suffrage has introduced some interesting changes, however, in American political life. It has been credited with some of the progressive social legislation which has been added to the statute books. In this connection the Sheppard-Towner Maternity Act of 1921, the Cable Acts, and other measures favorable to women might be mentioned. Woman's suffrage has also meant that women seek political office on the same basis as men. Not infrequently women are elected to the Congress of the United States. Many of them fill places in state legislatures and on city councils. For the first time in history a woman was named as a cabinet officer in the cabinet of President Franklin D. Roosevelt.[2]

The enfranchisement of women has had another significant effect on American democracy. All over the country, organizations of women interested in public affairs have sprung up. Among these organizations may be mentioned the National League of Women Voters, which has exerted a powerful influence in educating women, and men as well, to vote with intelligence and discrimination. These

[1] Blair, E. N., "Are Women a Failure in Politics?" *Harpers*, vol. 151 (Oct., 1925), pp. 512–522; Gilman, C. P., "Women's Achievements since the Franchise," *Current History*, vol. 27 (Oct., 1927), pp. 7–14; Thompson, M., "A Decade of Women's Suffrage," *Current History*, vol. 33 (Oct., 1930), pp. 13–17.

[2] Frances Perkins, Secretary of Labor.

organizations, nonpartisan for the most part, have become important factors in the political life of the nation.

Suffrage Requirements Today. Today only five main suffrage requirements may be noted in the various states. These refer to age, residence, citizenship, the payment of taxes, and education. It has been pointed out that between forty and forty-five per cent of the total population are now qualified to vote. This situation might be compared with that of the Revolutionary period, in which no more than six per cent could exercise the franchise.

Interestingly enough, every state in the Union has set the minimum age for electors at twenty-one. More or less elaborate provisions are made in the American system of government for uniform state laws, but this is an example of uniformity without any special agreement. Why should the voting age be fixed at twenty-one? It is true that some people under twenty-one are just as capable and just as intelligent as many others over that age, but most countries of the world have decided that a person reaches full maturity at about that age, and it has become almost universal in the United States as elsewhere that the minimum age for voters be twenty-one.

Citizenship is also a universal requirement in the United States. All state laws provide that a voter must be a citizen of the United States before he is allowed to vote. Not many years ago some states of the Union allowed aliens to vote, provided these aliens had declared their intention to become citizens. At the present time, however, no state allows an alien to vote.

Residence likewise is a requirement found in all the states. Before one may vote he must have lived in the state for at least a year and in the county and precinct for periods varying from thirty days to six months. An examination of residence requirements in various states reveals the fact that southern states for the most part have higher residence requirements than do most of the northern and western states. Presumably a residence requirement can be used as a means of preventing the Negro from voting, since many Negroes, especially in the South, are prone to move from precinct to precinct and from county to county. Thus, higher requirements tend to disfranchise considerable numbers of Negroes.

Payment of taxes was once a major prerequisite for voting in a number of states. Today, however, such qualifications are confined almost entirely to the southern states, where the payment of a poll tax of one or two dollars is used as a requirement for voters,

This requirement is not peculiar to the South. There are states outside this region which impose some sort of tax qualifications on voters in certain types of elections. For example, some states provide that only those who pay taxes shall vote in elections involving local issues. Generally, however, such qualifications are not imposed in general elections.

In the early days of the country, literacy qualifications were uncommon. There are twenty-three states now,[1] however, which use educational or literacy qualifications in some form. Thirteen of the states are south of the Mason-Dixon line and four are in New England. Some state "literacy" qualifications merely refer to the ability to read. Other states, however, go much further and require that the prospective voter be able to read and interpret the Constitution. In some of the southern states such qualifications are used to disfranchise the Negro. The most interesting educational requirement is found in New York. Under the constitutional amendment of 1921, New York has introduced and continues to use an educational test which is prepared and administered by the state department of education.[2] Such a test is designed to eliminate the least intelligent and has had the effect of cutting down somewhat the size of the electorate in that state. In the opinion of many, it has meant that the state is able to have an intelligent government.

The value of an educational test for voting has been questioned. Certainly the mere fact that a voter has the ability to read or write is no guarantee that he will vote intelligently and wisely. The educational requirement has been criticized as being undemocratic and out of harmony with American democratic principles. It is not our purpose to present argument on one side or the other, but it must be admitted that democracy rests upon some degree of political intelligence. Undoubtedly educational requirements would be undemocratic if no means were provided for educating and informing the electorate; but all the states maintain school systems operating at public expense and compel children to attend these schools. That the states should use their educational systems to improve the quality of the electorate is highly desirable. Democracy is likely to be improved rather than damaged through such an effort.

[1] Crawford, F. G., "The New York State Literacy Test," *American Political Science Review*, vol. 17 (May, 1923), pp. 260–263; vol. 19 (Nov., 1925), pp. 788–790; and vol. 25 (May, 1930), pp. 342–345.

[2] Ogg, F. A., and Ray, P. O., *Introduction to American Government* (Sixth edition), pp. 160–161.

Problems of Negro Suffrage. The problem of Negro suffrage is important enough to be considered apart from general suffrage qualifications. The Fifteenth Amendment was added to the Constitution in an attempt to guarantee that the states would not discriminate against a Negro in the matter of suffrage. The southern states, however, have been rather adroit in debarring Negroes from voting. Their attitude is explained by the situation which developed in the South after the Civil War. During the Reconstruction period, the governments of the southern states were in the hands of "carpetbag" adventurers from the North, who manipulated the newly enfranchised Negroes to their own advantage. Most of the influential whites had been disfranchised because of their participation in the Civil War. The unqualified Negroes who formed the majority of many of the state legislatures spent money foolishly and generally showed their complete lack of fitness for political power. Gradually the native white populations regained control of their states, and became convinced that their security depended upon keeping control. In the last analysis, some of the expedients adopted to prevent the Negroes from capturing control of the state and local governments were violations of the spirit of the Fifteenth Amendment. In the early days, such organizations as the Ku Klux Klan and other forms of intimidation were used. The courts condoned the most flagrant methods of corruption. Even the stealing of ballot boxes and the false counting of votes went unpunished. In the long run, however, these methods met with general public disapproval since they brought disgrace upon the South.

Nevertheless, southerners considered that the necessity for controlling the Negro vote remained. But more appropriate and legal methods had to be devised to prevent Negro domination. The Fifteenth Amendment must be circumvented, but the circumvention must be accomplished within the limits of the Constitution. The amendment merely prohibited a state from denying suffrage to a Negro because he was a Negro. Negroes for the most part, however, were illiterate and poor. Accordingly, several states imposed literacy qualifications for suffrage and provided that a prospective voter must be able to read and write, and in some cases interpret the Constitution, before he should be allowed to vote. Such tests effectively prevented many of the Negroes from exercising the suffrage.

Likewise, proceeding on the theory that most Negroes are poor, some states required the payment of a poll tax as a prerequisite to

voting. Generally the tax was collected in the spring and the elections were not held until midsummer or fall. Many Negroes were unable to pay the taxes, but even though the tax was paid the receipts were often lost before the election was held, and no one was given the ballot unless he was able to produce his tax receipt. These requirements, together with the lengthy periods of residence, barred large numbers of Negroes from voting.[1]

Other methods were used to attain the same end. Some of the southern states enacted so-called "grandfather" laws. Such laws provided that only those persons could vote whose grandfather or some direct ancestor was allowed to vote on January 1, 1867. Such laws were adopted in seven of the states having the heaviest proportion of Negroes. It will be observed that the date, January 1, 1867, operated to exclude practically all Negroes from the suffrage since the Fifteenth Amendment was not added until 1870. Suffice it to say, these "grandfather" clauses have been declared unconstitutional on the ground that they are incompatible with the Fifteenth Amendment.[2]

A further safeguard against Negro voting is seen in the attempt of several southern states to exclude Negroes from Democratic primaries. Because the Democratic party is dominant in the South, nomination in the Democratic party is equivalent to election. Thus, if the Negroes are successfully excluded in the Democratic primary, they are excluded from participation in the election of public officers. Most of the states made no attempt to go beyond the mere giving of the right to a party to determine its own membership. Some states, however, actually put into their laws a provision that Negroes be specifically excluded from Democratic primary elections. Such bold statements soon led to a challenge before the United States Supreme Court. The court had decided that the power of the federal government did not extend to primary elections,[3] but in spite of this the Supreme Court in 1927 declared that the exclusion of Negroes from Democratic primaries was in conflict with the clause of the Fourteenth Amendment which guarantees the equal protection of the laws.[4] Following this decision the legislature of Texas enacted a so-called "white primary" law, which gave the state

[1] Ogg, F. A., and Ray, P. O., *Introduction to American Government* (Sixth edition), p. 163.

[2] *Guinn v. United States*, 238 U. S. 347 (1915).

[3] *Newberry v. United States*, 256 U. S. 232 (1921).

[4] *Nixon v. Herndon*, 273 U. S. 526 (1927).

executive committee of the political party the power to prescribe the qualifications of its own members. The Democratic state committee in Texas debarred Negroes. In 1932 the Supreme Court, by a five to four decision, held the law to be discriminatory and contrary to the equal protection clause.[1] Apparently the decision of the court does not prevent parties, in the absence of legislative provisions, from debarring Negroes.[2] On the other hand, there is a decided tendency in many of the states for the Democratic party to encourage Negroes to exercise their privilege of suffrage. This is the result of the need of the Negro vote when that vote can be used to the party's advantage.

In spite of the fact that the exclusion of Negroes from the southern electorate has aroused considerable protest in the past, it is now accepted as a fact and is regarded in many quarters as necessary and inevitable.[3] As a rule the disfranchised Negroes are indifferent. Many Southern Negroes are poorly qualified for the exercise of political power and as a result manifest no interest in voting. In many cases where they are allowed to vote, the ignorant Negro is simply used by the unscrupulous white politician to swing an election through bribery. No longer does the northern Democrat or Republican protest vigorously against the exclusion of Negroes from suffrage. Until the Negroes can be brought to a condition in which they know what they are voting for, neither of the major parties urges complete enfranchisement. It has been pointed out time and again that the initial mistake was made when the Negroes were enfranchised *en masse*. Of course, there is much to be said against the injustice of preventing Negroes from voting when whites of the same intellectual level are allowed the suffrage. The laws which prevent the Negroes from voting in so many southern states are applicable alike to the whites and the Negroes.

Penalty for Denying Suffrage. As a penalty for restriction of the suffrage, the Fourteenth Amendment provides that a state which denies or abridges the right of any of its adult male inhabitants to vote,

[1] *Nixon v. Condon*, 286 U. S. 73 (1932).

[2] The Supreme Court held it within the power of the Democratic state convention to determine the party's membership, since the convention is the highest authority of the party and is a voluntary organization. See *Grovey v. Townsend*, 294 U. S. 699 (1935).

[3] The southern white viewpoint on Negro suffrage is set forth in Murphy, E. G., *Problems of the Present South*, ch. 6, and Caffey, F. G., "Suffrage Limitations at the South," *Political Science Quarterly*, vol. 20 (Mar., 1905), pp. 53–67.

except for participation in rebellion or other crime, shall have its representation reduced in Congress proportionately. Some attempts have been made to interpret this penalty as applying only to cases of denial of suffrage because of race or color. The phraseology of the amendment does not lead to such an interpretation. The New England states, with their literacy requirements, may be accused of being as guilty as the southern states with their constitutional provisions designed to affect the Negro vote. Suffice it to say, the penalty has never been imposed. Presumably it is a case of people living in glass houses not being willing to throw stones.

The Voter's Task. The American voter has an enormous and important task. It is within his power to express his opinion upon numerous matters of public policy and to determine who shall control the government. In all states he is called upon to express an opinion upon constitutional amendments. In twenty-two states [1] the voters may pass upon ordinary laws referred to them by the legislature. In twenty states the voters are allowed to initiate legislation. These tasks are often bewildering. In addition, in most states a voter has the privilege of voting for members of both houses of the state legislature, for his governor, for various state administrative and executive officers, for judges, and for a long list of county, city, town, and other local officers and boards. The voter's task in relation to the national government is relatively simple. There he votes only for members of Congress and for presidential electors. Expressed in another way, the short ballot is used in the national government, but the contrary is true of the state and local governments.

Non-Voting — Causes and Remedies. Seldom do more than fifty per cent of the potential voters in the United States take the trouble to cast their ballots in the election. Especially is this true of the states dominated by one major political party. The census of 1920 indicated that the total population of the United States was slightly in excess of 105,000,000 people. Of this group more than 54,000,000 are citizens over twenty-one. In the presidential election of 1920 only slightly more than 28,000,000 people, or slightly more than fifty-two per cent of the citizens of voting age, voted for any candidate for the presidency. Of course, it is impossible to state how

[1] Arizona, Arkansas, California, Colorado, Idaho, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, and Washington provide for the referendum but not the initiative.

many of the remaining 26,000,000 were ineligible to vote, but in any case the proportion would be small.

Over a period of thirty years until 1928 there was a declining number of citizens who took the trouble to cast their ballots. This is shown by the fact that in 1896 more than eighty per cent voted in the presidential elections, while in 1920 slightly more than fifty-two per cent voted. In 1928, as a result of a heated campaign for the presidency, the popular vote amounted to more than 36,500,000 out of a total registration of slightly more than 43,000,000. In 1932 the Roosevelt campaign brought out a vote of 39,750,000 out of a registration of 47,500,000. This situation compares unfavorably with the showing in other countries. In Great Britain, for example, parliamentary elections bring out from seventy to eighty per cent of the potential electorate.

Undoubtedly part of the explanation of non-voting in the United States is that considerable numbers of citizens are debarred because of insufficient residence requirements. Also, sickness and weather conditions are important factors. Registration requirements now found in a number of states tend to restrict the number of voters. Moreover, in many cases people become disgusted with politics and refuse to have anything to do with it. Closely akin to disgust is the chief reason for non-voting – indifference.[1] In some sections of the country people do not go to the polls because of the lack of any vital issue in the elections. It makes little difference to many persons who holds a particular office. It may be said, however, that if an election involves a vital issue little difficulty is experienced in getting out the voters. Unfortunately, many people vote because of prejudice and not because of real interest in public policy.

Undoubtedly the number of non-voters can be reduced by reducing the burden on the voters. If the voter feels that there is something to vote for, he is likely to take the trouble and time to express his opinion through his ballot. A short ballot which includes only the names of policy-determining officers could do much to eliminate the difficulty which the several states experience with non-voting.

DIRECT LEGISLATION

Initiative and Referendum. Both the initiative and the referendum as means of popular control of government came into existence

[1] See Merriam, C. E., and Gosnell, H. F., *Non-Voting; Causes and Methods of Control*, ch. 7.

as a result of loss of confidence in the legislatures. They substitute the voters for the elected legislature, or supplement the legislature. The initiative is a means whereby the voters themselves enact – or at least take the first steps in enacting – measures which the legislature will not or has not seen fit to consider. The referendum, on the other hand, is a means whereby the voters may defeat a measure which has been proposed by the legislature. Thus the initiative is positive while the referendum is negative. It was never intended that either the initiative or the referendum should supplant the legislature or the representative system of government. The use of either of these devices constitutes a popular procedure by which the people simply say to the legislature, " Unless you represent us, we will take the lawmaking process into our own hands."

The referendum has been in general use for many years as the means of having the people pass upon constitutional amendments or certain types of proposed financial legislation. The use of either the initiative or the referendum for ordinary statutes had its beginning in South Dakota in 1898. From that time until about 1912 the movement lagged. At the present time, there are about twenty states which authorize direct legislation.[1] In these states the people have been required to pass upon relatively few proposals. In a number of states the local units, especially the cities, are permitted to use the initiative and the referendum. The urban voters have shown that they are not so slow to use these procedures as are the people of the state as a whole.

While the procedure in regard to the initiative and referendum differs in the several states, there are certain general principles that are found in all systems. With the exception of Delaware every state has provided for the compulsory referendum for constitutional amendments. In a number of instances a referendum is required on bond issues. In the local units it is not unusual to require a referendum for charter amendments, indebtedness, and other matters. In such connections the referendum has come to be used in such a manner that it is seldom thought of as a means of direct legislation.

The optional as distinguished from the compulsory referendum

[1] Use of the initiative and referendum is state-wide in Arizona, Arkansas, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, and Washington. In Maryland and New Mexico use of the referendum, but not the initiative, is state-wide. See Graves, W. B., *American State Government*, p. 132.

has been used chiefly for general legislation. Suppose the legislature passes a statute which is objected to by many voters. These voters wish to have a referendum on the law. Ordinarily they will circulate a petition a certain number of days before the law becomes effective. If the required number of voters, varying from five to ten per cent of the electors, sign the petition, the law does not become effective, but must be submitted to the voters for their approval or disapproval. Some states require that it be voted upon at a regular election and some at a special election. Legislation of an emergency character is ordinarily exempted from the operations of the referendum. This exemption is often abused, since many bills are designed as emergency measures when they are not such in fact. It may be added that this situation accounts for the requirement found in some states that, before an emergency clause can be attached to a proposal, it must pass the legislature by an extraordinary majority.

The initiative may take one of two forms: direct or indirect. In the direct type, the voters draft a proposal and circulate a petition in its behalf, without referring the proposal to the legislature. If the required number of names are signed to the petition – the percentage is usually higher than that required for a referendum – the measure is placed on the ballot at the next regular election. Thus, in the direct type of initiative, the proposal goes directly to the voters; the legislature has nothing to do with it.

In the indirect initiative the proposed measure is first submitted to the legislature, and if that body passes it the matter is settled. If, however, the legislature refuses to pass it, the proposal is either submitted to the voters without formality, or additional signatures must be obtained on a petition, after which the matter is submitted to the voters.

Direct legislation has not encroached seriously upon the prerogative of the legislature, but the mere fact that direct legislation has not been used to an extreme is not an indication that it has not been effective. The consciousness on the part of the legislators of the existence of either the initiative or the referendum has had an influence on legislation which cannot be measured objectively.

An important objection which has been raised to both the initiative and the referendum is the fact that they impose an additional burden upon the ballot. In many states the ballot is now too long to permit intelligent voting. The addition of complicated and technical sub-

jects to it confuses the voter. As a result many measures placed upon the ballot receive the attention of only a small number of persons. People are inclined to vote for candidates but disinclined to vote for measures. As a result there is a tendency not to bother with voting for laws, but rather to let the legislature make the laws.

It has been charged, also, that direct legislation might bring about minority government. This charge is not to be taken seriously. In too many cases policies are determined by a minority under any system of government. In a representative system this situation is almost unavoidable. If the minority is intelligent, its action is not to be greatly feared; but if that minority is the ordinary "lunatic fringe" type, representative government suffers. As long as the people have the opportunity to make their opinions felt, yet do not take the trouble to express them forcefully, the system cannot be blamed.

Direct Legislation and Education of the Electorate. It has frequently been pointed out that a system of direct legislation tends to educate the electorate in public affairs. Unless the electorate is provided with sufficient information on the measures placed upon the ballot, the educational advantages of the initiative and referendum are rendered practically void. In some states pamphlets containing information about the measures to be voted on are mailed to each voter. The voter is not thereby educated, but he is at least provided with information that he needs in order to vote intelligently upon any proposed law.

The Recall. Closely akin to the initiative and referendum as means of popular control is the recall. Under a system of recall a public officer may be removed from office at any time by vote of the people. This device makes public officials responsible to the electorate at all times. Ordinarily recall laws provide that a minimum time must have elapsed before a newly elected official is subject to its operation. The recall has been applied primarily to elective officials, but in rare instances to appointive officials also.

The procedure in the recall is somewhat the same as that set up for the initiative and the referendum. Usually the first step in the recall process is the preparation and circulation of a petition setting forth the reasons why the official in question is no longer able to serve the public, and why he should be recalled from office. If this petition is signed by a certain percentage of the voters — usually around twenty-five per cent — the official must stand for election again.

Ordinarily a recall is a special election and the only question considered is whether the official ought to be removed from office. In most cases the recall ballot is divided into two parts, the first of which has to do with the recall of the incumbent. If a majority of the voters express themselves as desiring his recall, the next question presented is that of voting for a candidate to fill the office. This means that the official's name appears only once on the ballot, but there may be additional names and instructions to the effect that the voter is to express his preference for a candidate in the event that the incumbent is recalled. In cities the recall has proved popular. It has been written into the charters of most cities having the commission or city manager type of government. According to one estimate, about 1200 cities have made provision for its use.[1]

The arguments for the recall may be summarized as follows: (1) It enables the people to remove any official who has been negligent or unfaithful in discharging his duties without waiting for the next regular election. Theoretically, this argument is of the essence of democracy, but it must be remembered that the recall is made necessary by a mistake of the people in selecting the official in the first place; and since the mistake is to be remedied by the same process by which it was made, use of the recall is no guarantee that a better choice will be made the second time.

(2) Possibly the most effective argument for the recall is the contention that it tends to make public officials more careful in the discharge of their duties, and thus more responsive to public opinion. If the recall has this result, its effectiveness cannot be measured wholly by the number of instances in which it has been used; rather, its effectiveness is seen in the relatively few examples of its use. While it is true that public officials may be more likely to render satisfactory public service if they know their jobs can be taken from them at any time, it is also true that an official is often compelled to sacrifice an ultimately good objective to temporary expediency. The recall thus causes the official to become an opportunist. Since every move he makes will be watched, he may be prevented from carrying out a plan which in the long run may be good but may not appear so if each part of it is subjected to public scrutiny without a consideration of the whole.

(3) Another alleged advantage of the recall is reflected in the

[1] MacDonald, A. F., *American City Government and Administration*, p. 326.

influence it has had on the willingness of the citizens to allow public officials longer terms of office. There can be little objection to granting powers over a long period if the official charged with the powers may be subjected to public control at any time.

Some of the objections to the recall have been suggested in the course of our discussion of its advantages. What is possibly the major objection to recall appears when it is used for the removal of appointive officers. In many cases it becomes absurd to apply this device to appointive officials. Many of these appointive officials are technical experts whose qualifications cannot be determined by the electorate. If the people are not capable of passing upon the qualifications of an appointive official in his appointment, there is little reason to believe that they are capable of passing on the same qualifications or lack of them in his dismissal.

In many cases recall of an official is attempted during a political campaign. Such attempts have the effect of misleading the public. In too many cases personal hatreds and jealousies, as well as political ambitions, play a part in these campaigns, but these matters are never mentioned in the recall petition. There have been many instances of libel suits following a recall election.

Undoubtedly the recall, as is true with the initiative and the referendum, has its function as a weapon of last resort to be used only in an emergency; and in spite of the fact that there have been some abuses of the recall in the United States, generally it has been considered as a "gun behind the door." Seldom is it used more than four or five times within one year in any one jurisdiction of the United States, and many of these attempts are not successful.

Proportional Representation. In recent years considerable attention has been given to systems of proportional representation. This improved method of selecting legislative officials may be looked upon as a means of popular control over legislation. While legislative bodies may be reasonably representative of social and economic groups, it cannot be said that they are representative of the various currents of political opinion. In the United States, as well as in the states and local subdivisions, we elect public officials by either majority or plurality elections. This means that the majority or the plurality controls to the exclusion of the minority. While genuinely democratic government may mean majority control, it does not exclude minority participation. In a true democracy the

minority must be recognized. This is the objective of proportional representation. Under such a system all political groups will be represented in proportion to their voting strength.

While there are various types of proportional representation, the only kind that has been used in the United States is the Hare system. This is now in operation in several cities, and has been suggested for the states. Proportional representation is useful only where there is a group of officers to be elected. It cannot be used for single officials. An explanation of the Hare system will indicate how its objectives are attained.

Under the Hare system the ballot contains the names of all candidates for the legislative body printed in a single vertical column. The voter indicates his choices of these candidates by placing the figures, 1, 2, 3, 4, etc., opposite the candidates' names. Ordinarily he has as many choices as there are places to fill. His vote will count for but one candidate, but in case his first choice does not need the vote, it is shifted to his second choice, and so on. In the counting of the ballots, they are arranged according to the first choices indicated on the ballots. If it is clear that a voter cannot help his first choice, either because the candidate has already received the required number of votes or because he is hopelessly defeated, the ballot is shifted to the second choice; and if the second choice has been eliminated, to the third choice. This transferring process is continued until a candiate is found for whom the vote will count in building up the quota necessary for election.

It is essential to state at this point that an electoral quota is determined in advance, which indicates the figure necessary for any candidate to receive in order to be elected. This quota is determined by dividing the total number of valid ballots by the number of places to fill, plus one. This is done in order to guarantee that a choice will be made and that the ballots theoretically cannot be divided equally among all the candidates. The Hare system has been called proportional representation with a single transferable vote.[1]

The Hare plan has the advantage of preventing any single group from monopolizing all seats in the legislature and excluding the representatives of other groups; every group of any size in the governmental unit will have representation in the legislature in proportion to its strength. Proportional representation also insures that no

[1] See MacDonald, A. F., *American City Government and Administration*, pp. 195–206.

political machine can gerrymander districts so that large blocks of voters are made politically impotent. It has the additional merit of making primary elections unnecessary; thus the system saves the voter time and tends to reduce election cost materially. Under it, also, the voice of independent voters is felt to a greater degree than in typical majority and plurality elections. If an independent voter's first choice is not used, his ballot is transferred to a second or third choice and thus is not wasted. This means that the independent voter's strength is more equally measured against the strength of organized political machines.

That there are many objections to proportional representation is illustrated by the fact that relatively few jurisdictions have adopted it. Among the objections is the argument that it tends to destroy party responsibility. If by this it is meant that proportional representation makes it impossible for any single party to capture all the seats in the legislature, the argument is correct. But again it is well to raise the question as to what is meant by democratic government; democracy does not mean domination by a majority exclusive of the wishes of a minority. Possibly the most practical objection to proportional representation is the contention that it is too complicated for the average voter to understand. Some years ago a Michigan court in commenting on this situation made the following statement: "An actuary, mathematically skilled in the application of the doctrines of chance to financial and other affairs, might work with confidence upon the possibilities of this system, but to the non-expert . . . it appears 'too intricate and tedious to be adopted for popular elections by the people.'" [1]

To the average elector the destiny of his vote is a mystery, however easy it might be for him to follow instructions in marking his ballot. Undoubtedly the method of counting votes under the Hare system is much more complicated than under the traditional plan, and many voters will not understand the procedure. But is it important for the average voter to understand all the details of the procedure? The voters are, or should be, interested in policies, and not in the technical details of the electoral process. The only major difficulty in this regard is found in the experience of some voters in marking ballots. The method is simple, but the placing of 1, 2, 3, 4, etc., after candidates' names is a little more complicated than simply

[1] *Wattles ex rel. Johnson v. Upjohn*, 211 Mich. 514 (1920). Quoted in MacDonald, A. F., *American City Government and Administration*, pp. 203–204.

marking an X in a square or a circle. No one would deny, however, that the marking of proportional representation ballots demands only slightly more intelligence on the part of the voter than voting a straight ticket. The delay in counting proportional representation ballots has been cited as an objection to the system. Obviously this is not a major difficulty provided the will of the people is expressed, as is done under such a system. In any event, proportional representation is a matter worthy of consideration in the selection of legislators. There appears to be a gradual increase of interest in it.

POLITICAL PARTIES

A political party has been defined as "a voluntary organization of individuals or groups of individuals advocating certain principles and policies as superior to all others for the general conduct of government, and which, as the most efficient method of securing their adoption, designates and supports certain of its leaders as candidates for public office." [1] In addition it may be said that a political party consists of a group of persons organized for the purpose of running the government. In any event, voters must have some type of organization, political in nature, through which their desires concerning the government are transmitted and transformed into political action. The party then, whether its purpose is that of securing the adoption of certain policies or simply of electing certain persons to office, becomes the instrument through which the voting public makes political action possible. There must be some rallying point around which voters can organize and secure such action — hence the political party.

Parties Essential to Democracy. In spite of the fact that the activities of political parties have not always been commendable, the party is an essential instrument of democracy. Besides furnishing a center about which voters may rally, the party tends to educate and organize public opinion regarding important public problems. In the United States and other democracies, the party has become indispensable in the conduct of government. It is the chief instrument through which the ordinary citizen exerts influence in the formulation of public policy, as well as on the execution of that policy. The party is the only contact the large body of citizens has with the government.

It has been pointed out that the party also furnishes a harmoniz-

[1] Brooks, R. C., *Political Parties and Electoral Problems*, p. 14.

ing factor in democracy. For example, if the legislature and the executive happen to be of different political faiths, the party tends to cut down and decrease possibilities of friction and even deadlocks in the enactment of law. If there is any unity in such a government, that unity comes through political action. Also, the party is often the agent through which responsibility of the executive and legislative branches is guaranteed. If these branches are of the same party, the influence of the party tends to eliminate the discord and lack of a unified purpose which might exist without such an association to bind these theoretically separate and distinct branches of government into one unit.

The framers of the Constitution apparently anticipated no such organization as a party. The Constitution of the United States — and the constitutions of most of the states as well — is silent concerning party life. Political parties have grown up parallelling the regular governmental machinery. The party has taken its place as an organization that is fully as important as the machinery of government itself. Certainly no one can be fully informed on American government without taking both the formal governmental machinery and party activities into consideration. The party in a very real sense furnishes the motivating power for the formal machinery. If the party functions smoothly, the chances are that governmental machinery will likewise operate with some degree of smoothness.

The Two-Party System. In the United States a two-party system exists. Such a system appears to be confined largely to the two great democracies of the world, the United States and Great Britain. Elsewhere there is a multitude of small groups organized strictly along economic and social lines, no one of which is able of its own accord to control the government. In the United States, however, voters have generally supported one of two major parties. Of course there have been minor parties, but for one reason or another these parties, organized largely along unifunctional lines, have not been able to draw to themselves any considerable number of voters. The United States is so large geographically, and embraces areas so widely different economically and socially, that no party system is able to translate into action principles and policies with only a local or distinctly narrow application. It may be assumed that major issues in the United States are viewed from only two angles: that of the conservatives, and that of the liberals. Even though the major parties have not maintained consistent liberal and conservative atti-

tudes, it may be pointed out at any one time that one tends to be liberal and the other conservative. Apparently these are the only two attitudes that Americans have been able to adhere to in regard to any national problem. The two-party system, even though it may be accused of causing the parties to advocate very general policies and take no definite stand on many important issues, has the merit of introducing into American democracy an element of stability which could not exist under a multi-party system.

Party History. Before the adoption of the Constitution of the United States there were no political parties as such.[1] They appeared, however, in the latter part of Washington's administration, when the Jeffersonian Republicans and Hamiltonian Federalists contended for power. The history of parties in the United States may be divided into six more or less distinct periods, namely: Federalist supremacy, 1789 to 1800; Jeffersonian-Republican supremacy, 1801 to 1816; the Era of Good Feeling, 1816 to 1832; Democratic and Whig rivalry, 1832 to 1860; Republican supremacy, 1861 to 1884; Democratic and Republican rivalry, 1884 to the present. There is a thread of continuity from the present Democratic party back to the Jeffersonian Republicans, and from the present Republican party to the Federalists.

The political issues and principles advocated by the major parties of each period show the course of development and the possible future of political party organization in the United States. We shall now examine the characteristics of each period.

The Federalists and the Jeffersonian Republicans who contended for supremacy in American political life in the first period differed fundamentally on the following points: (1) their attitudes toward government and individual liberty – the Federalists favored a strong national government, and the Jeffersonian Republicans emphasized individual liberty; (2) matters of foreign policy – the Federalists tended toward a pro-English attitude, and the Jeffersonian Republicans expressed sympathy with the struggle for liberty, equality, and fraternity in France; (3) social and economic problems – the Jeffersonian Republicans represented the small tradesman and the people of the more sparsely settled frontier communities, while the Federalist party got its support primarily from the centers of trade and com-

[1] Immediately before and during the Revolution, the colonists aligned themselves as Tories and Whigs, according to the English pattern. The Whigs favored the colonial cause and independence.

merce in the East, and from the large landowners in the South.[1] Thus the Federalist party generally represented the wealthier classes while the Jeffersonian Republicans, like their present-day Democratic counterpart, were looked upon as the poor man's party.

The fourth point of difference concerned questions of constitutional construction. On this matter the Federalists, in their advocacy of a strong national government, tended to a broad and loose interpretation of the Constitution, while the Jeffersonian Republicans, in their emphasis on personal liberty and states' rights, adopted the strict construction attitude. The first group believed that the national government should do anything which might be implied in the constitutional delegations of power, while the latter interpreted the powers of the national government strictly and narrowly, and claimed that the national government can do only those things specifically delegated to it. These general attitudes have dominated party life, with exceptions of course, from the beginning. One group has largely represented the Federalist attitude while the other has adhered with exceptions to the Jeffersonian view of the Constitution. If there be any difference of principle between the two major parties, the matter of constitutional interpretation is that difference. It should be said, however, that generally the party of the "ins" believes in more powers in the hands of the national government, while the party of the "outs," desiring to get in, is forced to adopt an opposition point of view.

The Federalists, largely because men still remembered the weaknesses of the national government under the Articles of Confederation, remained in power throughout the administrations of Washington and John Adams. But during the latter part of Adams's administration Federalist power steadily declined. This decadence of the Federalist party was brought about chiefly through factional differences, especially differences of opinion over the Alien and Sedition Acts and the heavy anticipated taxation which did not materialize. These factors, plus the alleged aristocratic tendencies of the party, enabled the Jeffersonian Republicans to gain control of both the legislative and executive branches of the government in 1800.[2]

Except for two brief intervals the party of Jefferson remained in

[1] See Beard, C. A., *Economic Origins of Jeffersonian Democracy*, chs. 1, 6, 7, 14.

[2] Morse, A. D., "Causes and Consequences of the Party Revolution of 1800," *American Historical Association Report* (1894), pp. 531–539.

power from 1800 until 1860. From 1800 to 1816 the Federalist group afforded some opposition to the Republicans, but by the latter date the party had been completely discredited and ceased to be a force in national affairs.

The third period of party development in the United States has been called the "Era of Good Feeling" or "the Period of Personal Politics." From 1816 to 1832, national elections were fought on the basis of personalities. This meant bitter factionalism. All factions claimed to be the true followers of Jefferson, and each fought to convince the voters that it best represented Jeffersonian ideals. The personalities who furnished leadership for the groups during this period included John Quincy Adams, Henry Clay, Andrew Jackson, William W. Crawford, John C. Calhoun, and De Witt Clinton.

In a very real sense this period was one of transition. The political factions were known as National Republicans and Democratic Republicans. The groups following the leadership of John Quincy Adams and Henry Clay found themselves in agreement on certain major policies. In 1824 they emerged and assumed the name of National Republicans. This group advocated the establishment of the Second Bank of the United States. It favored high protective tariffs and an elaborate system of internal improvements. The merger of the two smaller groups led to the election of Adams to the presidency in 1824. This caused mergers of the other groups. Andrew Jackson was the most colorful opponent of Adams and Clay; accordingly, he furnished the rallying point for an opposition group which came to be known as Democratic Republicans. Soon after Jackson's election to the presidency the name was abbreviated to Democrats, and his party became the immediate and direct ancestor of the present Democratic party. After 1832 the National Republicans, critical of the autocratic and domineering tendencies of "King Andrew," assumed the appropriate name of Whig, which was imported from England and borrowed from a party which had long been the champion of parliamentary privilege against the undue exercise of the royal prerogative.[1]

The fourth period of party history dates from 1832 to 1860. It was actually a period of Democratic supremacy, but because of the two brief interruptions in the Democratic program it has been called an era of Democratic and Whig rivalry. The Democratic party advocated the expansion of territory and strict interpretation of the

[1] See Carroll, E. M., *Origins of the Whig Party.*

Constitution, and opposed the national bank, the protective tariff, and the system of internal improvements which had been supported by the Whigs. The Whig party of this period was composed of a conglomerate group. While the Democratic party was able to muster some unity of opinion in the slavery controversy, the Whig party was hopelessly divided. Some of the dominant groups of the Whig party joined with the new third party which was organized during this period – the "Native American" or "Know Nothing" party. From time to time this new group, composed of Whigs and others, became the center of an antislavery group which in 1860 was successful in electing its candidate to the presidency, and afterward assumed the role of a major party on the American political scene.[1]

The present Republican party, which came into power in 1860, is the only third party ever to play a major role in American politics.[2] Because of their vigorous opposition to the extension of slavery the groups which fused into the Republican party were able to gain the support of numerous small farmers and wage earners of the North who were opposed to the slave labor of the South. The new group adopted the protective tariff plank of the old Whig platform and thereby won over the northern commercial interests.

During the Civil War, party lines tended to disappear. Loyal Democrats as well as Republicans supported the war measures of Lincoln. Many of them joined the newly organized Republican party. Party interests were subordinated to the task of saving the Union. For the time being, the name Republican was replaced by the name Union party. By 1872, however, so many of the former Democrats had dropped out of the Union party that the name Republican was restored.

In the late sixties and early seventies the currency problem made its appearance. During the Civil War many "greenbacks" had been issued to increase the amount of money in circulation. A considerable group of people advocated the redemption of greenbacks as legal tender and found a political party to effectuate their demands. The Greenback party failed to materialize as a national political organization, however.

From 1860 to 1884 other minor groups challenged the supremacy of the Republican party. It was during this period that the Liberal Republican and Prohibition parties made their appearance. The

[1] Smith, T. C., *Parties and Slavery, 1850–1859*, ch. 10.
[2] Kleeburg, G. S. P., *The Formation of the Republican Party.*

Liberal Republican party arose out of opposition to the reëlection of U. S. Grant to the presidency, and as a result of a strong demand for lower tariffs and a policy of general amnesty to the South, which was still in the hands of the armies of reconstruction. Once these demands were met, the Liberal Republican party disappeared.[1] The Prohibition party, which advocated but one principle, has been the longest-lived of the minor parties in the United States. It puts a presidential candidate in every election and has been the uncompromising opponent of the liquor interest. It has never won a national election, but it had considerable influence in the adoption of the Eighteenth Amendment.

During the period of Republican supremacy Republican national issues changed considerably and the general policies of the party became more definitely crystallized. Though probably the most radical of all national political organizations in its origins, the party soon became the advocate of vested interests. It had opposed slavery and advocated the freeing of the slaves, which meant the destruction of private property, but its experiences in office had a settling effect. It developed new issues primarily of an economic nature, and became identified with the advocacy of a high protective tariff and the interests of big business and concentrated industry, adhering for the most part to the general principles of constitutional interpretation originally formulated by the Federalists.

The period from 1884 to the present has been called a period of Democratic and Republican rivalry. While the Democratic party has been able to elect but three candidates to the presidency during the period, it must be admitted that the two parties have continued more nearly on equal terms than in the previous period. Frequently the Democratic party has been able to dominate one or both Houses of Congress in spite of the fact that it has been in control of the presidency but six terms. With the exception of Grover Cleveland's two terms as President, the Republican party was in the ascendancy and maintained itself in almost undisputed control until 1912. At that time there was at least a temporary disruption of the party. Out of it grew the National Progressive party, which has existed as a factor in American political life ever since. The factional differences in the Republican ranks which led to the nomination of Theodore Roosevelt in 1912 for the presidency on the Progressive ticket brought together certain elements in the Republican party which

[1] Ross, E. D., *The Liberal Republican Movement.*

adopted a forward-looking program of political, social, and economic action. That party took the field again in 1916 and since then has been a power in the sectional elections and in Congress.

Major Party Issues. The major issues between the Democratic and Republican parties from 1884 to the present have reflected the disappearance of the old Civil War and Reconstruction problems and the emergence of newer social and economic questions. Among these are the following: the currency question; control of monopolies; imperialism; the regulation of interstate commerce; the reorganization of the banking system; the conservation of natural resources; the modification and repeal of the Eighteenth Amendment; labor legislation; and the promotion of agriculture. On many of the questions the parties have not maintained a consistent attitude. In any event the questions have not brought about a cleavage in the two parties. While all of them have received some attention in national party platforms, it has become increasingly difficult to point to any definite principles that distinguish the attitudes of the two major parties on these questions. While the tariff has ceased to be a national issue, the Republican party has generally been looked upon as a party of high protection while the Democratic party has been pointed to as a party favoring tariff for revenue only. But neither the Democratic nor the Republican party has been consistent on this score.

As a result of the economic depression there appeared in 1932 certain issues which point to the development of fundamental party differences. Time must tell whether or not the Roosevelt New Deal is to replace the Democratic party or go forward under the Democratic banner. In any event, until the coming of the New Deal, major party platforms presented few clear-cut and sharply defined issues. Now, however, there is considerable speculation as to the future of the two major parties. Undoubtedly if they are to continue to exist, they must be based upon certain fundamental social and economic differences. There is a chance, of course, that one party may develop into a conservative group while the other may become a definite liberal party.

Minor Parties. With the exception of the Republican party, no minor party has ever succeeded in electing a President; and when the Republican party succeeded in placing its candidate in the White House, it ceased to be a minor party. For the most part the minor parties have not attempted to elect candidates to office. Rather they

have devoted themselves to forcing the adoption of certain policies. The minor parties have been of substantial service to both the major parties and to the country as a whole. They have been the guide and the balance wheel to American political life. Many of them have succeeded in having their policies written into the Constitution and the laws.

One of the most important of the minor parties which have existed in the United States was the Populist or People's party, which flourished in the nineties.[1] This party developed out of the Farmers' Alliances in protest against existing economic and political conditions. The Populists advocated government ownership and operation of railroads, telephones, and telegraphs; the establishment of postal savings banks; a graduated income tax; the substitution of national paper money for bank notes; and the free and unlimited coinage of silver at a ratio of sixteen to one. Also the party advocated the popular election of Senators, the adoption of the initiative and referendum, and the enfranchisement of women. Some of these policies have found their place in the Constitution of the United States itself.

One of the most important recent minor parties is the Socialist, which was organized about 1897.[2] This party adopted much of the program of the Populist party, especially its features relating to public ownership and democratic control. Measured in terms of actual votes the Socialist party has exerted little influence on American political life since it has never won a single electoral vote in a presidential election. Its policies, however, in some respects have been taken over by major parties, and much of the social and economic legislation that has been added to the statute books is due to some extent to the Socialist party. Locally the Socialist party has succeeded in electing a few of its candidates to Congress, to state legislatures, and to municipal offices. Its national influence, however, has been in its advocacy of social legislation.

Among the other progressive groups which have been organized as minor parties are the Farmer-Labor party and the La Follette Progressive party. The Farmer-Labor party, which made its appearance

[1] McVey, F. L., "The Populist Movement," *American Economic Association Studies*, vol. 1, no. 3 (1896).

[2] See Watkins, G. S., "The Present Status of Socialism in the United States," *Atlantic Monthly*, vol. 124 (Dec., 1919), pp. 821–830; Ghent, W. J., "Collapse of Socialism in the United States," *Current History*, vol. 24 (May, 1926), pp. 242–246.

in 1920, grew out of dissatisfaction with the programs and policies of the major parties. It was hoped that it would be able to unite liberal groups consisting of the radical leaders of both farmer organizations and labor interests through the adoption of its name. Suffice it to say, however, it has made little impression upon party life in the United States.

The La Follette Progressive party has tended to be more or less local. It was organized as a fusion of Socialist and various other groups dissatisfied with what they termed the inaction of the major parties. Soon after its organization in 1924 it adopted, under the leadership of the late Senator Robert M. La Follette of Wisconsin, a program of public service. It attacked monopolies and called for public ownership of water power and railroads. It has gained particular notice because of its advocacy of an amendment to the Constitution empowering Congress to veto judicial decisions. In the presidential election of 1924 it elected its candidates for the electoral college in the state of Wisconsin.

Political Parties in the States. Local officers are elected in many states because they are members of one or the other national party. This means that we have carried national party allegiance down to the local units, when the issues that divide the national groups have no application. The question might be raised: What is the difference between a Democratic secretary of state and a Republican secretary of state? Or to make the question even more ridiculous: What is the difference between a Democratic county clerk and a Republican county clerk? An answer to the question must go back to the political importance of the national government in American party life.

While divisions according to national party alliances are not only illogical but unjustified in state and local governments, the American people are apparently unable to dissociate local politics from national politics. To be sure, it is to the interest of the national party organization to keep alive its local connections. By so doing it fosters a permanent attachment and abiding loyalty to the party. It also seems sensible to use the local organizations of the national groups in filling local offices even though there are no Democratic or Republican local policies.

Another reason for the persistence of national party lines in the local governments is the fact that certain local policies, including unemployment, the high cost of living, interstate commerce, slum

clearance, water supply, utility control, the regulation of business, and others, cannot be solved by the local units alone. The local government must coöperate with the state and national governments. Thus national parties adopt certain policies regarding these questions and tend to carry them down to the local units.

Movements toward Nonpartisan Elections. While there is a tendency to take the line of least resistance and cling to the national parties in local affairs, notable advances have been made toward the substitution of nonpartisan local elections for partisan elections.[1] Especially is this true in cities, where mayors, city councils, and other officers are frequently elected at nonpartisan elections. The people vote on these candidates because of their stand on certain local issues rather than because of their affiliation with a particular national party. This is indeed an encouraging development in American politics. Two states in the Union at the present time – Nebraska and Minnesota – elect their legislators at nonpartisan elections. Other states presumably elect state officers at nonpartisan elections, but even though the elections may be called nonpartisan, the party as a factor in politics has not been eliminated. While the party name does not appear on the ballot, each party maintains its organization and promotes certain candidates for office. The party affiliations of these candidates are known by the voters, and the candidates are elected as members of a certain party.

Party Organization. To maintain its existence and carry on a program, whether it be national or local, a party must be well organized. In general, party organization consists of a set of party committees, each having control over a certain area. Thus parties are organized on a territorial basis, but the various units are so coördinated that the party works as a whole.

The National Committee. Party organization is headed by the national committee, which in either party is concerned primarily with the election of a President. Its membership is recruited from various sections of the country. Its members are generally the old-line politicians of the party who have had experience in political life and are keen observers of political trends. At the present time both the Democratic and the Republican national committee are composed of one man and one woman from each state or other unit represented

[1] See Hull, M. D., "The Non-Partisan Ballot in Municipal Elections," *National Municipal Review*, vol. 6 (Mar., 1917), pp. 219–223; Munro, W. B., *Government of American Cities* (Third edition), ch. 14.

in the national convention. These members in both parties are nominated by the state delegations and are formally elected by the convention itself. The chief functions of the national committee are to make the arrangements for holding the national convention and to conduct the presidential campaign. Between presidential elections the national committee remains in a more or less dormant stage; but even in this dormant period it maintains a national headquarters and a permanent staff.

The directing head of the national committee is the national chairman, who is nominally elected by the committee but in reality is the personal choice of the party's nominee for the presidency. The committee delegates to him almost complete responsibility for the campaign. He is assisted by several vice-chairmen, a secretary, and a treasurer. An executive committee is ordinarily named by the chairman to assist in the campaign. Under the chairman's direction there is usually a group of bureaus or divisions such as the speakers bureau, the publicity department, the advisory committee, the congressional committees, the foreign language division, research divisions, farm divisions, and others.

Congressional and Senatorial Committees. The congressional and senatorial campaign committees of the national parties are composed of members of Congress. They are active in connection with congressional and senatorial elections. During presidential campaigns these committees place themselves at the disposal of the national committee. Thus national party organization operates as a unit.

State Central Committees. In the state, party organization consists of a series of committees headed by the state central committee of each party.[1] These committees vary considerably in the several states and are regulated by law in most. Usually membership on the state central committee is based upon counties or districts of the state. In these districts members are elected directly by the party voters or by delegate conventions. The activity of the state central committee consists in the conduct of state elections. It assists the national committee in national elections.

Local Committees. Below the state central committee are similarly constituted committees of congressional, senatorial, or legislative districts in the state. There is also a county committee. Likewise such committees are found in cities. It will be observed that

[1] Merriam, C. E., "State Central Committee," *Political Science Quarterly*, vol. 19 (June, 1904), pp. 224–233.

each committee has its own task but is also considered a part of the general party machinery.

Functions of Party Machinery. The first purpose of the somewhat elaborate party machinery which has been set up in the national government and in the states and local units is to instruct the voters concerning campaign issues, inform them as to the candidates of the parties, get out the vote on election day, raise the money to finance the campaigns, and generally to quicken and stimulate interest in party affairs. Undoubtedly these committees do important work. Of course they are prejudiced and present only the merits of their candidates and issues. It must be remembered that they are party agents and the purpose of the party is fundamentally to secure and maintain control of the government.

Party Finance. Since political parties in the United States have grown to be complex organs of popular government, the management and conduct of a party demands the collection and disbursement of large sums of money. In order to be placed in control, the party must influence the voters, and in so doing it must conduct extensive political campaigns. These campaigns cost money – in some cases large sums. Thus, an adequate campaign fund is a vital necessity if the party is to survive and perform the service for which it is organized.

The collection of party revenues usually falls to the treasurers of the various party committees. In the case of a national party organization there may be a director of finance or a committee on ways and means charged with this important duty. Various methods are used by the party manager in raising funds for the campaign. There appears to be a tendency in recent years for the party to appeal to a large number of voters who will contribute relatively small sums to the party, rather than to seek large contributions from a few wealthy individuals or corporations. Before 1912 these wealthy individuals and corporations contributed the greater portion of the national party's campaign fund. Since that date, however, the appeal has been made to the rank and file. Undoubtedly this procedure tends to make the individual contributor feel that he has a stake in the success of the party.

High Cost of Campaigns. To conduct any political campaign, whether it be local, state, or national, considerable sums of money are needed. It is necessary only to mention the sum required for the party to circularize each registered voter to indicate the extent of

campaign costs. It is reasonable to assume that each letter sent out by a party organization costs at least five cents and possibly ten cents. Thus the cost of this one item, when a considerable number of voters is concerned, demonstrates that the legitimate expenditures incurred in a campaign are necessarily large. Presidential campaigns in recent years have cost millions of dollars. Prior to 1920, national campaign funds were relatively small. It has been estimated that the most expensive campaign prior to that date was the "Free Silver" campaign of 1896. Since no official records of national campaign expenditures were kept until 1908, the cost of these earlier campaigns cannot be stated definitely. However, it has been estimated that the Republican party in the campaign of 1896 spent over $3,000,000. Apparently the expenditures of the campaign of 1928 exceeded all previous records. The Republican party raised over $10,000,000, while the Democratic campaign fund amounted to nearly $7,500,000.[1] Owing to the severe depression the campaign fund of 1932 fell far below the record of 1928.[2] In 1940 the costs of the presidential campaign to national, independent, and state committees reached the amazing figure of $22,716,893.65. The Democrats spent $6,095,357.79 while the Republicans expended $16,621,535.86 in an unsuccessful effort to elect their candidate.[3]

These large outlays in presidential campaigns have been looked upon with suspicion. Many voters are not persuaded that a party could spend so much money legitimately. The disbursements are regarded as evidence that the parties attempt to buy the election. Such expenditures have been denounced as slush funds. Rival organizations, of course, play upon this popular prejudice. It should be noted, however, that the expenses, especially of campaigns on a national scale, are necessarily large. The cost of advertising and publicity and of maintaining a party organization is enormous. As the size of the electorate increases, party expenditures must be expected to increase. If all the legitimate expenditures in a party in a presidential campaign were totaled, the amount would astound many voters. Of course, some of the money raised in political cam-

[1] Pollock, J. K., *Party Campaign Funds*, ch. 3.

[2] See Overacker, L., "Campaign Funds in a Depression Year," *American Political Science Review*, vol. 27 (Oct., 1933), pp. 769–783.

[3] *Report*, Special Committee to Investigate Presidential, Vice-presidential, and Senatorial Campaign Expenditures, 77th Congress, 1st Session, Report No. 47, Feb. 15, 1941.

paigns is used for illegal purposes, and sometimes for wholesale corruption.

Corrupt Practices Acts. In recent years both the national government and the states have endeavored to regulate party finance in detail. The state acts apply to both primaries and elections. The federal corrupt practices act regulates only national elections. One group of so-called corrupt practices acts is designed to restrict the sources of party revenue. These acts especially prohibit corporations from contributing large sums to the party campaign. Also in many cases they forbid the assessment of public employees and officeholders for party purposes. The second group of acts is designed to restrict the objects of party expenditures. They may fix the maximum expenditure of a party organization and the maximum that any individual can spend in his own campaign. Usually these acts set forth a maximum expenditure for each office. The amount varies with the assumed importance of the office; usually the candidate can spend but a certain percentage of the salary he would receive if elected. The Hatch Acts, the more recent and stricter of the federal statutes on the subject, are combinations of these types. These acts place a limit of $5,000 on the amount contributed by any person during any calendar year or for use in any one campaign or election, and restrict to $3,000,000 the amount which may be received as contributions or expended by any political committee during any calendar year. Also employees of the federal executive departments are prohibited from using their official authority to affect or influence elections, and from taking an active part in political campaigns. These acts were widened in 1940 to cover state employees paid in whole or in part from federal loans or federal sources. This means that national law has been made to regulate, perhaps indirectly, state elections and nominations.[1] A third type of corrupt practices act attempts to limit the aggregate expenditure of political organizations to a certain amount per vote cast in the last preceding election. Other acts limit or prohibit expenditures for certain specified items, leaving other expenditures unlimited. Still other corrupt practices acts require the publication at certain periods before and after an election of the names of all contributors to the campaign, with the amounts that each contributed, and the filing of statements with the proper officials showing the character and amounts of expenditures.

[1] Public Law No. 252, 76th Congress, 3rd Session.

In operation the national and state corrupt practices acts, despite their somewhat elaborate character, have not always produced the results they were expected to achieve. They have not had the effect of reducing the amounts spent in campaigns, nor have they eliminated illegal disbursements. After all, it is exceedingly difficult to separate legitimate and illegitimate expenditures. Undoubtedly candidates and parties spend large sums of money which are never reported as campaign expenses. The laws in many cases are so lax either in their terms or in their enforcement that they make liars out of many candidates.[1] In one state, recently, candidates unconsciously spent more money for a certain election than was allowed under the law. After the fact was brought to their attention, they simply amended the statements which they had filed with the proper state officer, reducing the alleged amount of expenditure to conform with the law. The reduction was on paper only, and the amazing factor in the whole situation was that the law permitted the statements to be changed. Candidates and parties have in some instances been convicted of violating corrupt practices acts, but such convictions are rare. Both continue to collect large sums and to spend them as they please in spite of the limitations set up in the corrupt practices acts.

QUESTIONS

1. Discuss popular control in government, and voting as a means of control.
2. Trace the development of suffrage in the United States. Is suffrage a right or a privilege?
3. What requirements for voting are found today?
4. Discuss the problem of Negro suffrage. What methods have been used to deny suffrage to the Negro?
5. What are the reasons for non-voting? Are there any remedies?
6. Are political parties necessary in the American form of government?
7. Outline the history of political parties in the United States.
8. Discuss the influence of national parties in local elections and movements toward nonpartisan local elections.
9. Outline party organization.
10. Is money important to political parties? Why? Discuss corrupt practices acts and their effectiveness.

[1] See Brooks, R. C., *Political Parties and Electoral Problems*, p. 350.

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CHAPTER VII

Voters and the Choice of Public Officers

THE VOTER'S BURDEN

THE public policies advocated by a party are translated into action through the election of the party's nominees to office. The voters selecting officials must participate directly or indirectly in nominations and elections. The process of nomination is a party matter while the electoral process is strictly public. With the development of the direct primary the voter participates in both nomination and election in practically all the states. This wide participation in the election of public officers has placed an undue burden on the electorate. Both for nominations and for elections a long ballot is used extensively. The voter is called upon to express his opinion relative to the merits of numerous officers, both policy-determining and non-policy-determining. It is difficult to vote intelligently for a long list of officers in any unit of government. The long ballot confuses many voters and causes the subordinate elective offices to become mere pawns of politics. It encourages manipulation by political bosses and machines. The result of its use has been blind voting, boss rule, and minority control of government.

The Short Ballot. To remedy this situation the National Short Ballot Organization was formed some years ago.[1] This reform group formulated so-called short ballot principles and has attempted to secure their adoption. These principles are: (1) Only those officers whose functions are important enough to deserve and demand public attention should be elected; all others should be appointed. (2) Only a few offices should be filled by election at one time.[2] This permits adequate and unconfused public examination of the candidates. Briefly, these principles mean that only policy-determining officers should be elected, and ministerial officers should be appointed; and that national, state, and local elections should be held

[1] Brooks, R. C., *Political Parties and Electoral Problems*, p. 425.
[2] National Short Ballot Organization, *The Short Ballot*, p. 2.

on separate days so as not to confuse the voter and mix national, state, and local political issues.

The short ballot principle is used in the national government, since the voters are called upon to select only presidential electors and members of Congress. In the states and local units, however, the long ballot prevails. In many states the voters are called upon to elect a list of officers consisting of the governor, legislators, judges, and minor administrative officials. In the local units the executive, administrative, legislative, and judicial officials find a place on the ballot. In the selection of policy-determining officials the voters should participate, but in the selection of purely ministerial officers no public policy is at stake. Party policy in this matter means nothing; efficiency is the element to be considered. If short ballot principles were applied to the state, the voter would be called upon to elect only the governor and members of the legislature. Applied to the local units, the voters would elect only the chief executive and the members of the legislative body. Also, these elections would fall on different days; hence national, state, and local issues would not be confused by the voter.

Any discussion of the selection of public officers naturally falls into two parts: namely, nominations and elections. They will be considered separately.

NOMINATIONS

In the electoral process the matter of nominations is highly important. Nominations are the preliminary phase of the process of realizing the party's chief purpose: to gain control of the government; but they have a broader significance as well. In many instances the election proper is a choice between two equally good or equally bad candidates, nominated and placed upon the ticket by the political parties. The selection of these candidates, if the voters are allowed to participate in it, is even more important than the election. In the nominating process the voters have an opportunity to select candidates from a much larger group than in the election. Thus the quality of persons to fill public offices is determined in the nomination rather than in the election.

State Control of Nominating Process. In early American history, as in European countries today, the nominating process was simple. Parties were looked upon as private organizations, and the selection of candidates to represent the party was regarded as a matter that

concerned only the party. The public, it was argued, had no interest in the selection of the party's nominees. This meant that nominations were almost totally unregulated by law. The realization that the nominating process is of equal importance with the electing process has brought about more or less stringent regulation of it in the several states. Parties are no longer looked upon as private organizations; rather, they are viewed as public institutions which must operate within the pale of the law. The Constitution of the United States makes no mention of nominations; hence, the regulation of the nominating process falls to the states. State laws now determine the methods a party shall follow in this first phase of selecting public officers.

Methods of Nomination. Political parties in the United States have used three different methods of nominating public officers: the legislative caucus, the delegate convention, and the direct primary.

The Caucus. The earliest systematic method followed by political parties in the United States was the legislative caucus. Under this method party members of the legislature named the respective party choices for office. The people's only recourse in the case of bad choices by the legislators was to select different legislators to represent them. This was not an effective means of redress, however, for under the caucus system legislators nominated their successors. Thus the legislative caucus practically excluded the voter from the nominating process. This method was probably justified in the early days when means of travel and communication were limited, and the voters would have experienced considerable difficulty in holding conventions or primaries in the several states.

The caucus method was used in nominating candidates for local as well as state and national offices. Local caucuses were informal meetings of party leaders. Usually these groups selected the party's candidates for local office. Frequently they appointed some of their nominees to confer with representatives of similar caucuses concerning nominations for offices in larger districts. It was an easy transition from the local caucuses to the county nominating convention. In time, state nominating conventions modeled after county meetings supplanted the legislative caucuses. Before 1840 the convention was used almost universally in the selection of the candidates for office above those of the township and other local subdivisions. The delegate convention was adopted for nominations to national offices shortly after 1830.

The Convention. The convention system was a marked advance over the nominating caucuses in that it made use of the principle of representation. It meant that the people, at least theoretically, through their delegates to the convention, had a means of expressing their opinions in the party's choice for office. The convention system has existed until the present day, and is looked upon by party leaders as probably the best method of nominating candidates for office. The convention affords the party the opportunity to perfect party organization, arouse party enthusiasm, and placate various groups in the interest of party harmony. The most serious disadvantage of the convention is the fact that it is usually subject to the political machine, over which the people have little control. When this is the case, the nominating convention becomes a party device and not a public institution. In many states the convention became the "market place of politics." There trades were made and promises of mutual support were consummated. The wishes of the voters came to be disregarded in the nominating process. As a result of the demands of the voter for a greater degree of participation in the nominating process, the delegate convention has declined in importance.

The Direct Primary. Since the beginning of the twentieth century the great majority of the states have abolished the convention system. In its place, nominations are made by means of a direct primary. Today the direct primary is used in some form in all but three states of the Union.[1] The candidates of the parties are chosen directly by the people rather than by selected representatives in a convention. Primary elections of the several parties are usually held in the same manner as regular elections. Candidates secure places on the primary ballot by filing petitions signed by a certain number of voters. Roughly the number of signatures to a petition is in proportion to the importance of the office. The required number varies from one-half of one per cent of the qualified voters to ten per cent. Usually a plurality of the votes cast is sufficient for nomination; some states, however, require that the successful nominee obtain a majority of the total vote.[2] If no candidate receives this majority in the first primary, a so-called run-off primary is held, at which the two highest candidates are voted upon.

[1] Connecticut, Rhode Island, and New Mexico.

[2] For example, ten southern states require a majority vote for nomination: North Carolina, South Carolina, Georgia, Florida, Mississippi, Alabama, Louisiana, Arkansas, Texas, and Oklahoma.

Primary elections are of two general types: open and closed. In the open primary no attempt is made to prevent Democrats from voting for Republicans or Republicans from voting for Democrats. The candidates of the two parties appear on the same ballot, and the voter picks out the candidates of his choice. The open primary is generally disapproved by political parties. It has made possible a system called raiding, which is best explained by an illustration. Suppose a Republican believes that the best man on his ticket will win with little difficulty. Obviously, it will be to the advantage of the Republican party in the general election to have the weakest candidate on the Democratic ticket nominated. Accordingly, the Republican voter does not vote for a candidate on the Republican ticket, but casts his ballot for the weakest candidate on the Democratic ticket to oppose his strong Republican candidate in the regular election. In this way Republican voters raid the Democratic ticket. Because of this practice the states for the most part have adopted closed primaries, at which only registered voters participate in the party's primary. Republicans are prevented from voting in Democratic primaries, and Democrats are prevented from voting in Republican primaries. The enforcement of a system of closed primaries makes necessary a formal registration and enrollment of voters prior to the holding of the primary election.

In some instances nonpartisan elections are held for filling certain local offices. These nonpartisan elections are usually preceded by nonpartisan primaries. Such primaries are conducted like an ordinary primary with the exception that the ballot carries no indication of the party affiliations of the candidates. The nonpartisan primary is simply a process whereby all candidates except the two highest are eliminated; these two are voted upon in the regular election. It will be observed that the nonpartisan primary tends to guarantee a majority vote for the successful candidate in the regular election.

Since the direct primary has gained such wide support in the various states, the question of its merits should be raised. Undoubtedly the primary gives the voter an opportunity to participate in the nominating process which he would not enjoy under either the legislative caucus or the delegate convention system; and it has been claimed that the direct primary has actually brought about a greater participation of the electorate in public affairs. More voters go to the polls, and perform this duty with a great deal more interest,

it is said, than was possible when the voters were allowed to select only delegates to a convention. Moreover, the primary has weakened to some extent machine control of nominations. To control the primary a political machine must have the support of at least a plurality of the voters of the party; under the convention system a small minority may control. It has been argued also that the direct primary has made it possible to bring better candidates to the attention of the people. Under the convention system political parties were often accused of selecting incapable candidates for office. The primary system is no guarantee that the best candidates will be selected, but at least it affords an opportunity to defeat the most unsatisfactory. The primary has been pointed to as a means of eliminating much of the corruption which existed under the convention system. It is much more difficult to make political trades in a primary than in a convention. Here the people who are not parties to the trade hold the balance of power.

The opponents of the primary system deny many of its alleged advantages. It is claimed that the excessive cost of the primary and the expense to candidates favor the wealthy aspirants to office, and the wealthy may not be the best. It is pointed out also that party life is essential in a democracy, and the primary has the effect of weakening party organization and destroying party responsibility. Arguments for and against the primary are matters of opinion, and little evidence has been produced on which to base an objective judgment on the relative merits of the primary and convention. Suffice it to say, the convention has been almost completely discredited.

The results of the primary have not been all that could be expected. If the primary is to succeed, the fact that democracy needs leadership must be taken into consideration. The primary does not supply leadership to the same degree as a convention. Even in the primary, however, such leadership must be present, either in the person of the candidates or from an organized political group — often a minority group. This means that even primaries are subject to control by the party.

Nominations in the National Government. No discussion of nominations would be complete without giving special attention to the national nominating convention. While the primary has almost completely displaced the convention in states and local units, the delegate convention is still the method of nominating candidates for

the presidency. Some states have experimented with the so-called presidential primary, but it has not been universally accepted.[1] Under a presidential primary the delegates to a convention are selected by the voters, and these delegates pledge themselves to be guided by the preferences expressed. President Wilson, in his first annual message to Congress, recommended that the presidential primary be extended to enable voters to nominate directly candidates for the presidency. Numerous bills looking toward this objective have been introduced in Congress, but no such measure has been approved by that body. Undoubtedly the enormous cost of such a system militates against its use. Likewise constitutional obstacles to such proposals have been raised, and it is generally admitted that no such presidential primaries could be adopted without a constitutional amendment. Thus the movement for a presidential primary, even though its beginning was auspicious, has lost force. By 1916 more than half the delegates of both leading parties were chosen by primaries. Gradually since that date state after state has abandoned the method.

The National Convention. As a result of the demand for popularization of party machinery the delegate convention came into use in national elections in 1831, replacing the legislative caucus as a nominating process. In that year both the National Republican and the Anti-Masonic party held a national convention. These conventions nominated candidates and adopted party platforms. By the year 1840 the national convention had become an established practice, and even today parties follow the same general procedure that was developed in the earlier days.

The national conventions of both major parties, as well as of the minor parties, have become essential features of party activity. These conventions are called by the national party committees which decide upon the place and date of the convention and authorize the parties in the several states to name delegates to the conventions. Ordinarily the major parties hold their conventions in June or July of the presidential year. The selection of the place for the convention has become an important political maneuver. The choice is determined not only by railroad or hotel facilities but by the dictates of political strategy as well. If certain sections of the country are doubtful, it is considered wise political strategy to hold the convention in such a section, on the theory that the interests

[1] Overacker, L., *The Presidential Primary.*

of the party will thereby be promoted. Chicago more than any other city, because of its central location, draws to it many national conventions. The Middle West is usually a battleground for both political parties.

National conventions are not regulated by federal law; rather, each party decides when and where its convention will be held, and determines its membership. In the early days both parties allowed a state to send a quota of delegates equal to the state's representation in Congress. From 1852 to 1872 the Democratic convention consisted of twice this number of delegates, but each delegate had only half a vote. After 1872 each delegate was given a whole vote. The Republican party allowed representation from the various states on the same principle until 1912. At that time it adopted a system of selecting delegates in accordance with Republican strength over the country. While Democratic strength was distributed relatively evenly through the various sections of the country, Republican strength was more highly concentrated. Representation in the Republican convention on the basis of congressional delegations led to a disproportionate influence of the South, which constantly voted Democratic in national elections. In fact, before 1912 some of the southern states which cast but a small Republican vote in the general election had more delegates in the convention than states which cast large Republican votes. To prevent this situation, the Republican party has used the following formula since 1923: Each state has four delegates-at-large, two for each Senator; two delegates-at-large for each Congressman-at-large; a delegate for each congressional district; an additional delegate for each such district which cast as many as ten thousand votes for the Republican candidate in the last national election; and an additional three delegates-at-large if the state went Republican in the last presidential election.

Except where the presidential primary is used, delegates to national conventions are chosen by mass meetings, caucuses, and district and state conventions. Thus the naming of delegates to the national convention remains a party matter and the voters in general have little to say about it.

Usually the convention is made up of conglomerate groups of local politicians, businessmen, governors, legislators, state political bosses and leaders, and others. It meets in a large hall decorated with bunting and adorned with placards, and capable of seating thousands of people. Usually the delegates occupy seats on the

main floor, where sections are assigned to delegations from each state and territory represented in the convention. The alternates sit in the rear of the delegates, and the galleries are occupied by spectators, who are admitted generally by tickets. Always a special place is reserved for the press.

The convention has become probably the most spectacular feature of American political life. Theoretically it is for the purpose of considering grave questions of policy and nominating candidates for the highest office in the land. The surroundings, however, are anything but conducive to deliberation. In the convention hall there is a constant buzz of conversation. Numerous demonstrations and all sorts of noise-making contraptions add to the general commotion. If the hall in which the convention is held is not equipped with a large and powerful organ, numerous bands supply popular music. In recent years the convention hall has resounded with the theme songs of the leading candidates.

It need scarcely be said that the setting for a national nominating convention is only the outward trappings of the actual nominating process. Most of the real work of the convention is done behind closed doors and in hotel rooms. The convention simply confirms decisions made in advance. A body consisting of more than 1100 delegates is incapable of performing deliberative functions in an atmosphere charged with emotion. The convention as such can only give vent to these emotions. Thus national nominations remain in the hands of the party machine.

Procedure in the Convention. National conventions last ordinarily for four or five days. The actual work of nominating could be done in a much shorter time, but the convention does much more than nominate; it generates political enthusiasm and gets the campaign off to a flying start. Usually on the first day of the convention the order of business runs somewhat as follows: call to order by the chairman of the national committee; prayer; the reading of the official call of the convention; announcement of the list of temporary officers agreed upon by the national committee; the keynote speech by the temporary chairman; the adoption of rules and the selection of members of the four important committees on credentials, permanent organization, rules and order of business, resolutions or platform.

The temporary chairmanship is decided upon by the national committee before the convention meets. Nominations for this party

post may be made from the floor, but usually the party leaders are able to avoid any contest in the open. The chairman has his keynote speech written out before he is elected. In this speech, which is usually of a flowery nature, he eulogizes his party and condemns the opposition. The selection of a chairman always indicates "the way the wind is blowing" politically. In many respects the keynote speech is the first effort made in the convention to bring about party harmony and at the same time generate enthusiasm.

Membership on the four principal committees is a matter of considerable importance. Ordinarily the role is called by states and territories, and each delegation announces through its chairman the name of one member from that state or territory to serve on each of the committees. These committees meet and prepare reports before the next day's session. At the second session reports are submitted usually in the following order: (1) rules and order; (2) credentials; (3) permanent organization; and (4) resolutions and platform. The rules of the convention are usually those used in a previous convention and follow closely the rules of the House of Representatives. Such rules are accepted with little or no discussion.

The committee on credentials has the task of deciding contests between rival delegations from a state, and of seating the delegation which, on the basis of evidence filed, it believes is entitled to a place in the convention. The seating of contested delegations is an important matter, since the decisions may turn the convention for or against a certain candidate. Obviously it is important for a leading candidate to gain control of the temporary organization of the convention and the delegations from each state.

After the rules are adopted and the contested delegations are seated, the next important business before the organization is that of effecting the permanent organization. The committee dealing with this subject nominates a list of permanent officials who are usually elected without debate. The permanent chairman presides over the convention. He has to settle many difficult questions, and needs for his work considerable energy as well as an expert knowledge of parliamentary law.

The task of the committee on resolutions and platform is to set forth the principles and policies of the party relative to great national issues. The Republican party usually decides upon its platform before it nominates its candidates for the presidency. The Demo-

cratic party ordinarily reverses this order, naming its candidate first and then building its platform.

The framing of a platform is a delicate matter. Often individual delegates or groups of delegates carry to the convention certain trial resolutions to be included in the platform. Outside interests such as labor, war veterans, and others make numerous and often conflicting suggestions to the platform committee. Because it is an instrument designed to attract all the voters possible, the platform must not be too definite on any one subject. In too many cases it becomes a "glittering generality." There have been instances in which planks in a platform have had no bearing on actual national issues. For years the Democratic party included a plank in its platform demanding Irish independence. The purpose of this plank was simply to attract the Irish voters. The harmonizing of the demands of the various elements in the convention with respect to the platform is ordinarily accomplished within the committee. Once the platform is agreed upon by the committee it is "rubber stamped" by the convention. When a platform is designed to attract votes rather than to state policies, there is little discussion of it on the floor. It may be argued that the platform, once the election is won, has served its purpose. This explains to some extent why candidates and parties so easily forget alleged platform promises after the election. In many cases, the platform will be remembered only by opposition politicians who seek to use it against the faction or the party in power.

The spectacular part of the national convention is the actual nominating process. This usually takes place after the third day. The secretary calls the roll of states alphabetically. Each state through some member of its delegation has the opportunity of placing in nomination an individual of its own choice, or it can yield to a delegation from some other state which, under the alphabetical order, would not be called until later. Such a procedure is thought to give a favorite candidate a decided advantage in that it gets his name before the convention early and sets off a demonstration in his behalf. Following each nomination there are numerous seconding speeches, all of which are designed to create enthusiasm for the candidate. After both the initial nominating speech and the seconding speeches there are demonstrations lasting for as long as an hour. These demonstrations may be spontaneous or may be staged

according to prearranged plans. In any event the purpose is to whip up enthusiasm.

After the roll of states is called and all states have had an opportunity to place some candidate in nomination, the convention proceeds to vote on the candidates. Again the roll of states is called and the delegations through their chairman announce their votes. Before 1936 the Democratic convention used the so-called unit and two-thirds rules. Under the unit rule a majority of the state delegation determines a vote of the entire state.[1] Under the two-thirds rule a two-thirds vote of the entire membership was necessary to nomination. These rules were challenged repeatedly and attempts were made from time to time to abolish them. In 1936 the Democratic convention, meeting in Philadelphia, by a voice vote abrogated the traditional rule. In the opinion of many observers the two-thirds rule is necessary as long as the unit rule is enforced. It is urged as a safeguard against control of nominations by a few states.

After the states have voted, the results are announced by the clerk. Sometimes a single ballot will elect, and the nomination is then made unanimous. In other cases the votes are so divided that no candidate receives the required majority. In this event additional ballots are taken. During the interval between ballots adherents of various candidates are at work attempting to gain strength for their choices. In some cases, even after all-night sessions, no candidate emerges victorious. The balloting continues, and if the deadlock between two leading candidates is not broken immediately the convention may swing to a "dark horse." An extreme case of balloting was observed in 1924 when it required 103 ballots in the national Democratic convention to nominate John W. Davis for the presidency after a deadlock lasting nine days.

After the nomination for President has been made, the convention is usually weary and hastens to conclude its work. The next business is that of nominating a candidate for the vice-presidency. The same procedure is followed – roll call, nominating and seconding, speeches and ballots. The nominating of Vice-Presidents is generally monotonous. The trades made in the balloting for President usually determine who will be the vice-presidential nominee. A nomination to the vice-presidency may be made on several

[1] See Becker, C., "The Unit Rule in National Nominating Conventions," *American Historical Review*, vol. 5 (Oct., 1899), pp. 64–82.

grounds. It may be necessary to nominate a particular individual to placate a disgruntled element of the party. The nomination may be made in recognition of a switch of votes for a presidential candidate. It may be made to give representation to a different section of the country from that represented by the presidential nominee.

After the party has nominated its candidates for President and Vice-President two final tasks remain. One is the selection of a national committee and the other the selection of committees to notify the presidential and vice-presidential candidates of their selection. The national committee consists of two members from each state and territory. In theory they are chosen by the convention, but the convention makes its selections from the nominations of the states. The chairman is the appointee of the presidential candidate and is usually the man who managed the pre-convention campaign for the successful candidate. The notification committees have become an anachronism. Every aspirant for the nomination stays close to his radio during the convention, and he knows immediately that he has been selected. In 1932 Franklin D. Roosevelt broke the precedents in this matter by flying from Albany, New York, to Chicago and announcing his acceptance in person before the convention adjourned. After the appointment of these committees the convention adjourns *sine die.*

ELECTIONS

Electorate Determined by State. The determination of the electorate in the United States is a matter of state law. The Constitution of the United States provides that anyone may vote in national elections who is permitted to vote for the members of the most numerous branch of the state legislature. Under state law, then, who may vote? Each state is free to prescribe whatever requirements it sees fit, provided it does not violate the Fifteenth and Nineteenth Amendments to the Constitution.

Generally, states have imposed three major requirements for the privilege of voting: Age, residence, citizenship. These, together with other requirements as found in several states, have been explained elsewhere.[1]

Registration of Voters. For many years numerous states have required that citizens who possess the qualifications for voting must appear before designated agencies prior to the election and be

[1] See page 100.

registered as members of a party or as independent voters. In recent years there has been a considerable movement toward the wide adoption of registration laws.[1] Persons who are not registered are denied the privilege of voting. These registration systems are designed to purify elections and guarantee that only qualified voters will be permitted to exercise the suffrage. Some states employ the system of permanent registration; in others voters are required to re-register at certain stated periods, usually annually or biennially.

Under a registration system a person appears before the registration board or some designated official in his precinct or county, during a certain period prior to the primary or general election, and affirms his qualifications for voting. An accurate description of the voter is filed, together with his party affiliation. During the interval between the close of registration and the election, the list of voters is examined and persons whose qualifications do not appear to meet the requirements of law are removed from it. When a name is removed from the registration list the person concerned is given an opportunity to be heard. Only those persons whose names remain on the registration lists are allowed to vote in the election. Such persons compose the active electorate. Usually provisions are made for periodic purging of the registration lists.

Registration has become almost an absolute necessity in thickly populated urban sections where the voters are not known personally to the election officers. Without such a system there would undoubtedly be a great deal more illegal voting than under a carefully organized and honestly administered registration plan. State-wide registration systems have been adopted in many states.

Election Laws. The conduct of elections is minutely regulated by state law. Election laws are often so complicated and so voluminous that few persons have either the inclination or the courage to study and become acquainted with them. Yet electoral matters constitute the very essence of popular government. Hence, every intelligent citizen should make an effort to know something of the election laws under which he exercises his control over government. These laws regulate the form of the ballot, the choice, qualifications, and duties of election officers, the counting of ballots, the canvassing of returns, and also the routine conduct of the voting process itself.

Election Officials. Many of the chief points covered by election

[1] See Harris, J. P., *Registration of Voters in the United States.*

laws may be explained in connection with a description of the work of election officials. Ordinarily there are three classes of election officers: those in charge of the preliminaries of an election; those in charge of the polling places in the precincts; and those in charge of the counting and canvassing of election returns.

The first group includes the officers who administer the registration of voters prior to the elections as well as those who determine the polling places and election precincts, and who appoint the polling officers and provide them with ballots and other necessary equipment. In a large city the mere designation of polling places and the task of making the arrangements for the distribution of voting equipment are gigantic undertakings. It is almost miraculous that this work is done as honestly and efficiently as it is. The preliminary arrangements for an election usually are made by the county. These matters are in charge of boards of supervisors or election commissions. In some cases the boards are appointed by county officials; in others they are wholly or partially under state control. Generally they are bipartisan in character. In many states they are composed of a Republican, a Democrat, and some *ex officio* officers such as the sheriff or the county judge.

The second group of election officers consists of those in charge of the voting. Their numbers and titles vary in the several states. In most states they are appointed by the county election board or commission. A few examples of the practice in several states will suffice to show the situation. In New York every election precinct has four inspectors of election, two poll clerks, and two ballot clerks divided equally between the two major parties. In North Carolina each precinct has one inspector, two judges, and three clerks. In Kentucky each polling place is manned by two judges, a clerk, and a sheriff of election. The duties incumbent upon these officers consist in maintaining order at the polls, seeing that qualified voters are permitted to cast their ballots and prohibiting unqualified voters from doing so, and safeguarding the ballot boxes or the voting machines so that a qualified voter may cast his vote and those not qualified shall not participate. In addition to the regular officers of election the political parties appoint party workers known as challengers and watchers. These party adherents are watchdogs not only of the electoral process but of the interests of a particular group. They are entitled to see everything done by the election officers and to question the right of a voter to cast his ballot.

The appointment of the polling officers in most states is in the hands of the local politicians. Such appointments are frequently made as political favors. In very few cases is any attention paid to the qualifications of persons to perform the duties of a political officer. Some years ago one state required persons who held these positions to pass an examination conducted by the state civil service commission.[1] It is reasonable to expect that such a plan would insure better administration of the electoral process.

The last group of election officers comprises those concerned with counting or canvassing the ballots. This may take place either at the polling place after the close of the election or at some central location in the county – usually the county courthouse – and may be done publicly or in the presence of only the polling officers. The count is usually made on tally sheets furnished by the county authorities, and complete returns from each voting precinct must be submitted to the proper local officials. The canvassing or returning officials are also required to account for all ballots, used and unused, and to preserve them until they are delivered into the hands of some designated official or officially destroyed.

When the counting of ballots is done at some central location in the city or county, the canvassing officers have nothing to do with the casting of the ballots; they assume charge of the ballots and other equipment after the polling officers have finished their work. When ballots are counted at the polling places, it is not unusual to require that the polling officers also act as canvassing officers.

Upon the completion of the counting, whether it be done at the polling places or at some central location, "return blanks," often in duplicate, are made out showing the exact number of votes received in the precincts by each candidate. These returns are transmitted by the canvassing officers to some higher authority such as the board of election commissioners or the county board of supervisors; then later to some state official, often the secretary of state, who consolidates and transmits the returns from the precincts and counties to the state canvassing or election board.

State Boards of Elections. The state board of elections or a board performing the general duties of supervision of election stands at the head of the election machinery of the state. In some states such a board is composed of *ex officio* members; in others it is

[1] Such a law was enacted in New Jersey in 1911, but it is no longer in operation.

strictly a bipartisan agency. In Illinois, for example, the board is composed of the governor, the secretary of state, the auditor, the treasurer, and the attorney general. In Kentucky the state board of election commissioners consists of one Democrat and one Republican, named by the respective party organizations, with the clerk of the court of appeals as the *ex officio* chairman. Regardless of the composition of such a board, it has the duty of receiving election returns from the various counties and local districts. Upon examination of these returns, the board issues a certificate of election which is *prima facie* evidence of the right of the person designated to hold the office he seeks. These certificates of election do not preclude the possibility of contested elections. Frequently, defeated candidates allege that they have been illegally denied a certificate of election. Controversies of this nature may be determined by the courts, but if the election concerns a seat in the state legislature, or even in the city council, the legislative branch of government in many states has the power of decision.

Ballots. Voting in the United States is commonly done by means of a ballot, though there is a decided movement at present to substitute the voting machine for the ballot. The history of the ballot reflects the evolution of American political life. In early times, voting was done by having the voters announce their choice orally. This method did not provide secrecy in elections.

Nowadays every state in the Union except South Carolina uses a form of the so-called Australian ballot.[1] Before the adoption of this improved type of ballot the candidates of the party organizations printed their own ballots on different-sized and different-colored paper, and proceeded to distribute them at the polls. This did not provide secrecy in elections. Secrecy has been obtained through the adoption of the Australian ballot.

The Australian ballot has several outstanding characteristics. In the first place it is an official ballot, printed on uniform paper of uniform size and color and distributed and controlled wholly by the government. It is secret, it is official, and it is uniform.

The arrangement of names on the ballot usually conforms to one of two plans. Some states use the so-called party column type of ballot, in which the candidates of different parties are printed in separate columns at the head of which appears the party name

[1] For the history of its development, see Evans, E. C., *A History of the Australian Ballot System in the United States.*

and in some cases the party emblem. Under the party name or emblem there is usually a large circle. If a voter desires to vote for all nominees of a party, he simply places his mark in the circle. Opposite each name down the column is a small square. If the voter desires to vote for individual nominees of the party, he puts a mark in the square, or he may write in, in the space provided, the name of some other person. The party column ballot facilitates "straight ticket" voting. It has accordingly found favor with party leaders and it is used in a majority of states.

The other type of ballot is known as the office group ballot. In this type the names of the candidates of the various parties are grouped together under the titles of the offices they seek. The designation of the party to which an individual candidate belongs appears alongside his name. The party group type does not provide a means of voting a straight ticket with a single cross or mark as does the party column ballot. This latter type finds favor with independent voters and tends to encourage "split ticket" voting. Some states have developed the office group ballot by omitting any mention of political parties. Under each office, only the names of the candidates appear. A person desiring to vote a straight ticket must know who the candidates of his party are, and put his mark opposite the name of each party nominee.

Voting Machines. In recent years there has been a decided movement toward the adoption of voting machines to replace the ballot in elections.[1] Voting machines are practically foolproof, and record and count the vote automatically. They have the merit not only of secrecy but also of speed. More people can vote in the same length of time than is possible when printed ballots are used. The machines have the merit also of tending to eliminate some of the corruption associated with elections. There is no way of stuffing the ballot box when a voting machine is used. The effectiveness of the voting machine is demonstrated by its use in New York City. In presidential elections the largest city in the land is ordinarily the first to complete its count.

QUESTIONS

1. Discuss the ballot generally used in elections. What are the advantages of the short ballot?
2. What methods of making nominations have been used? What

[1] See Zuckerman, T. D., *The Voting Machine — Its History, Use, and Advantages.*

methods are in use today? How are candidates nominated in your state?

3. Discuss the merits and defects of the primary. Discuss the open versus the closed primary.
4. Trace the procedure followed by the major parties in nominating a candidate for President.
5. What is the unit rule? The two-thirds rule?
6. Discuss state primaries in presidential nominations.
7. Who determines what persons may vote?
8. What types of officials conduct elections and what are their duties?
9. Name the various types of ballots in use today and discuss the merits of each. What are the advantages of voting machines? What type of ballot is used in your state?
10. Discuss registration of voters. Are voters registered in your state?

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PART III

Legislation: Unified Agencies and Processes

CHAPTER VIII

The Structure of Congress

THE BICAMERAL SYSTEM

UNDER the Constitution of the United States the national lawmaking power is vested in Congress. This body is divided into two chambers – the Senate and the House of Representatives. The Senate is composed of two members from each state, and House membership is apportioned among the states according to population, including resident aliens and excluding Indians not taxed.

Historical and practical considerations are responsible for this bicameral system in the United States. Since medieval times the English parliament had been composed of two houses. Naturally the English colonies in America followed the English model when they set up their legislative bodies. The practical reason for the adoption of the bicameral system in our national government is to be found in the diversity of social, economic, and political interests in the constitutional convention. The constitution of the Confederation provided for only one chamber. Under the Articles of Confederation each state, regardless of size, had but one vote in Congress. The larger states objected strenuously to this arrangement, while the smaller states desired to have it continued. Suffice it to say, the adoption of a bicameral system made possible an important compromise on representation in the legislative body. This compromise tended to soothe the feelings of both the large and the small states by giving the states representation in proportion to population in one house and equal representation in the other. Thus the adoption of the bicameral plan did much to save the convention from disaster and made the Constitution acceptable to the country.

Undoubtedly there were other practical reasons which entered into the adoption of the bicameral system in the national government. Many people at the time of the adoption of the Constitution entertained a fear of majority rule. These fears were mitigated by the thought that the Senate as set up in the Constitution would serve as

a conservative check on the excesses of democracy, which were likely to appear in the more popular branch. Then too, the idea that under the bicameral system one house acts as an effective check upon the other may have entered into the minds of many members of the convention. Under such a system any bill, before it becomes law, must run a double gauntlet.[1]

As to the theoretical justification of the bicameral system in the national government, Woodrow Wilson in his *Congressional Government* probably provides the most logical argument. A legislative body in a democracy must be representative. This means that it must represent not only blocks of people but different areas and sections of the country. In the bicameral system which was adopted under the Constitution, complete representation is attempted in that the House, as the more popular branch of government, represents certain numbers of population, while the Senate – assuming, of course, that state lines mean something – represents distinct areas which supposedly possess distinct economic, social, and political ideas. Thus, under the bicameral system true representation is attempted.

THE HOUSE OF REPRESENTATIVES

The House of Representatives is the popular branch of Congress. While an American may look with reverence upon the Supreme Court and listen to the debates in the Senate with a considerable degree of respect, he enters the House of Representatives under the assumption that there he finds his representatives expressing his own views. The House has been looked upon as the champion of the people's cause. In a very real sense it expresses the country's mood of exalted patriotism, political generosity, or narrow economy, changing suddenly from one mood to another. The House is a chamber of extremes. Accordingly, it has come to personify more of the American qualities than has the Senate. The average member of the House is no better or worse than the average business or professional man. In other words, the House is made up of average Americans and represents average Americans.

Election of Members. Article I, Section 2, of the Constitution requires that every member of the House of Representatives be at least twenty-five years of age, seven years a citizen of the United States, and an inhabitant of the state from which he is chosen. This

[1] *The Federalist*, No. 62.

provision says nothing about residence within a particular congressional district. In practice, however, members of the House, with the exception of the few members-at-large from a limited number of states, are elected from districts by the people thereof. For the election of members of the House of Representatives no uniform national suffrage system has been set up either by the Constitution or by law. The Constitution merely requires that "the electors in each state have the qualifications requisite for electors of the most numerous branch of the state legislature."[1] This means that anyone who is permitted to vote for state representatives may vote for Senators and Representatives. The conditions of voting for state representatives are determined by the states, not by the national government. The only restrictions imposed on the states in this regard by the Constitution are found in the Fifteenth and Nineteenth Amendments. Under the Fifteenth Amendment a state may not withhold the privilege of suffrage on account of race, color, or previous condition of servitude, and under the Nineteenth Amendment suffrage shall not be denied because of sex. Since each state has wide powers of determining suffrage, these regulations vary greatly from state to state.

Apportionment. The Fourteenth Amendment provides that "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." Originally the provision of the Constitution relative to apportionment stated that the slave population should be counted at only three-fifths of its actual number. This became inoperative with the abolition of slavery, and in terms of the Constitution the Negro became a whole man. The Fourteenth Amendment also provides for a reduction of the representation of any state which denies the privilege of suffrage to adult citizens of the United States, except for participation in rebellion or other crimes. Many states allegedly are and have been guilty of violating this provision, but for various reasons no serious attempt at enforcement has ever been made.[2]

Originally the membership of the House of Representatives was fixed at 65. From time to time, however, this figure has been increased until it now stands at 435. This means that the average number of inhabitants for each congressional district has risen from about 33,000 in 1793 to more than 280,000 in 1930. Apparently Congress has been persuaded that a halt should be called, and in the last

[1] Art. I, Sec. 2.

[2] See pages 111–112.

two decades there have been no serious attempts to add members to an already unwieldy body.

Shifts in population will inevitably occur in various states. Thus it is necessary to reapportion membership periodically if the states are to be represented fairly in the House. The Constitution calls for a reapportionment after each decennial census. It should be stated that Congress has not always been eager to carry out this constitutional mandate. For example, in 1920 Congress made no apportionment of membership in the lower house. Failure to do so undoubtedly constituted a theoretical violation of the Constitution, but nothing could be done about it since there is no legal action possible against Congress.

The problem of reapportionment seems to have been solved by an act of 1929 limiting the membership of the lower house to its present number, 435, and providing for automatic reapportionment after each census. The limitation of membership makes it necessary to reduce the number of Representatives of the slow-growing states and to increase the number of Congressmen from states with increasing populations. Future apportionments of membership will be determined according to the following formula: the total population of the United States will be divided by 435 and the quotient will be the representation for each Representative; the total population of the state will then be divided by the representation for each member of the lower house, and the result will be the quota of Representatives for each state.[1] As a result of the reapportionment of 1932, twenty-one states lost and eleven gained seats.

Congressional Districts. The Constitution does not lay down any rule regarding congressional districts. It provides only that the time, place, and manner of holding elections in the states shall be prescribed by the state legislatures; but Congress may at any time make or alter such regulations. For about fifty years Congress allowed the states to determine how Representatives should be chosen. Some states established districts with a Representative elected from each. Others employed the general ticket system, by which the Representatives were elected by the voters of the entire state. The general ticket system injured the representative system considerably, since it meant that a small plurality of voters elected all Representatives in the state. Congress in 1843 corrected this evil by estab-

[1] Chafee, Z., "Congressional Reapportionment," *Harvard Law Review*, vol. 42 (June, 1929), pp. 1015–1047, and U. S. *Daily*, Aug. 2, 1930, p. 1739 ff.

lishing the district plan. Under this legislation the states were authorized to elect members from districts determined by the state legislature. By later legislation any additional members which states won by reapportionment could be elected from the state-at-large. These members are called Congressmen-at-large. Several states follow this practice.

The determination of congressional districts within the state is a matter reserved for the state legislatures. It has been assumed that in the laying out of these districts the states will so draw the boundary lines that the districts will be composed of contiguous and compact territory and will contain, as nearly as is practical, equal numbers of inhabitants. This was specified in an act of Congress in 1911. In 1929, however, Congress eliminated this requirement and gave almost free hand to state legislatures in laying out congressional districts.[1] Thus the political party which happens to be in power in the state at the time of reapportionment often yields to the temptation to draw boundary lines so that it secures an unfair advantage over the opposing party. In establishing congressional districts many state legislatures have devised geographical peculiarities, some of which represent shoestrings, saddlebags, and dumbbells.[2] The objective in the minds of the legislatures, of course, is to group all members of the opposing party in as few districts as possible, so that a minimum number of Representatives can be elected by that party, while the party in power is provided an easy means of electing the maximum number possible. In recent years this practice of gerrymandering has been stayed somewhat by public opinion. Possibly another deterrent is the realization that party domination may change at the next apportionment, and thus the actions of a party which gerrymanders may become a boomerang. It has been suggested by many students of government that some plan of proportional representation could be adopted which would eliminate the objectionable features of the district system. These possibilities are described in Chapter VI.

Term of Office. Members of the House of Representatives serve for two years. At the time the Constitution was framed, short terms of office were in vogue.[3] In many cases, even a term of two years was

[1] *Wood v. Broom*, 287 N. J. 1 (1932).

[2] Maps showing congressional districts as existing in 1930 will be found in the *Congressional Directory*, 71st Congress, 3rd Session.

[3] Under the Revolutionary state constitutions, members of the state legislatures were elected annually in all states except South Carolina.

looked upon as endangering the people's liberties. Suffice it to say that a two-year term is now regarded as too short. The disadvantages of this short term are not so serious when we consider the fact that many Representatives are reëlected and serve several terms. In 1929 the average term of service of members of the House of Representatives was 8.45 years.[1] This being the situation, the biennial election of Representatives may be looked upon with some favor, since it is possible for the people to hold these legislators responsible for their actions every two years.

Qualifications. The Constitution specifies that any person who has attained the age of twenty-five years, who has been a citizen of the United States for seven years, and who is an inhabitant of the state from which he is elected is eligible to sit in the House of Representatives.[2] The only restriction placed upon this generous requirement is that members of Congress shall not hold any other public office under the United States. This means that members of the army and navy are excluded from membership.

To the constitutional limitations on membership in the House, public opinion has added a residence qualification. Even though the Constitution is silent on the matter, public opinion has practically forced Representatives to live within the district which they represent. Of course, a few exceptions to this practice are permitted in metropolitan sections, where the Representatives live close to their constituents, although in a different area. This practice differs from that prevailing in England, where a district may send to the House of Commons a man who resides in an entirely different section of the country. Undoubtedly the American attitude on the matter of district representation accounts for the somewhat narrow local view that many of our Representatives take on national and international questions.[3] Our Representatives, whether they like it or not, are often compelled to put aside these broader questions and deal with the immediate desires of their constituents if these constituents are not to forget them at the next election.

The Constitution gives Congress the power to judge the qualifications of its members.[4] In exercising this power both the House and the Senate have imposed certain qualifications for membership

[1] New York *Times*, May 26, 1929.

[2] Art. I, Sec. 2, Cl. 2.

[3] See comments by Bryce, James, *The American Commonwealth* (Fourth edition), vol. 1, pp. 191–195.

[4] Art. I, Sec. 5, Cl. 1.

which are not to be found in the Constitution or laws. Presumably any person elected to the House who meets the constitutional qualifications of age, residence, and citizenship, and who holds no office under the United States and has not engaged in rebellion against the government, is entitled to membership. But exercising its prerogatives of judging the election of its members, the House has on several occasions added qualifications of its own and thus, in the minds of many, has exceeded the powers given it under the Constitution.[1] In 1900 the House refused to seat B. H. Roberts, a polygamist elected from Utah. In 1918 Victor L. Berger, a Socialist, was elected to the House from the Milwaukee, Wisconsin, district. He was refused a seat on the grounds of his conviction on charges of sedition and because of his socialistic activities during the World War. Of course, the Constitution does not state that a member of the House must have only one wife or that he must share the same political sentiments of the majority of the people of the United States, but Congress in effect read these requirements into its general power to be the judge of the qualifications of its own members.

THE SENATE

Equal Representation. In establishing the bicameral system of legislation the Constitutional Convention of 1787 clearly intended that the Senate represent a union of states and that the House represent a union of the people.[2] As has been stated before, the practical reason for the establishment of a two-house legislature in the national government was the controversy which existed between the smaller states and the larger states. The Senate, then, may be pointed to as the house set up in direct response to the demands of the smaller states, since states have equal representation in the upper house, regardless of their size. The Constitution gives each state two Senators. This means that the least populous state has as much representation as New York with its millions.

Undoubtedly, equal representation in the Senate results in gross violation of the democratic principle that people in geographical areas should be the basis of representation in a representative body. Conceivably the Senators from states having only a small proportion of the entire population of the country might unite to form a majority that could block the will of the minority of Senators represent-

[1] Rogers, L., *The American Senate*, chs. 2, 4.
[2] *The Federalist*, No. 62.

ing the great bulk of the population. In practice this has seldom occurred, because the great issues in Congress have been between the industrial and the agricultural states, and not between the large and the small states. While it is true that the agricultural states have had the advantage in the Senate, since they are more numerous and usually less populous, the industrial states have had a similar advantage in the House of Representatives. In many respects the equal representation in the Senate has been counterbalanced by proportional representation in the House.

Numerous suggestions have been made that the system of representation in the Senate should be modified and large states given representation more in accord with their population. For example, it has been suggested that each state be allowed an additional Senator for each million of population above a certain figure. A constitutional amendment would be required to make this change. Such an amendment would be most difficult to secure, since the Constitution provides that "no state without its consent can be deprived of its equal suffrage in the Senate." This provision might well be called the unamendable clause of the Constitution. No state wishes to give up its equal representation in the Senate. Hence, all suggestions to that effect, however plausible or interesting, are likely to receive scant attention.

Election of Senators. From the adoption of the Constitution until 1913, Senators were chosen by the state legislatures. This method was changed only with the adoption of the Seventeenth Amendment to the Constitution in 1913. Under the original method of selection the state legislatures made their choice in whatever manner suited their convenience. At least this was the situation until 1866, when Congress laid down the rule for legislatures to follow in such elections. In so doing Congress was exercising its constitutional power to regulate the time and manner of holding senatorial elections. Under the provisions of the act of 1866 the two houses of the state legislature were required to meet separately and ballot for Senators on the second Tuesday after they convened. A majority vote was necessary to selection. If, however, no candidate received a majority in each house, the two houses met in joint session the next day for the purpose of selecting a Senator. If no candidate received a majority vote in the joint session, they continued to take at least one vote every day thereafter until some candidate received a majority vote of the two houses.

For a long time before the change was made, there was considerable dissatisfaction with the system of legislative selection of Senators. It was said that the corrupt influence of political machines and private corporations too often dominated the election of United States Senators. In some cases men of wealth bought their way into the Senate. Also, the election of Senators by the legislature had its effects upon state issues. Many state representatives were elected to the state legislature because they were pledged to vote for a certain man for Senator and not because of their attitude on particular state issues. Also, the selection of Senators by state legislatures consumed much valuable time which should have been devoted to state legislation. It was urged that the selection of Senators by state legislatures was thoroughly undemocratic.[1] While many of the charges against the system of legislative selection may have been true, students of the subject today are convinced that some of them were exaggerated.

The movement for the popular election of Senators had its beginning prior to the Civil War and became insistent before the end of the century. To a considerable extent the Populist party deserves the credit for bringing the issue squarely before the people, since that party incorporated the proposal in its platform in 1892. In 1893 the House of Representatives approved a resolution calling for a constitutional amendment. In several western states a plan was adopted by which voters expressed their choice for Senators at the time state legislators were elected, and the state legislators, in much the same way as presidential electors, legally elected the candidate who received the largest number of popular votes in the state. As a result of this movement the Seventeenth Amendment was ratified and proclaimed in force in 1913.

By the Seventeenth Amendment, Senators are elected by the people of the state in the same way as are members of the lower House, except that all the people of the state vote on candidates for the Senate, and not merely the people of a particular district. The question may be raised whether the popular election of Senators has removed the evils of the old system and whether or not popular election has meant the selection of abler men to the Senate. Undoubtedly great interest has been shown in the popular election of Senators, and the state legislatures have been relieved of the burden of selection and allowed to devote their time to state issues. It may

[1] See Haynes, G. H., *The Election of Senators*, chs. 1, 5, 6.

be stated without fear of successful contradiction, however, that popular election has not removed the influence of political bosses or machines, although they may find it more difficult to guarantee the selection of their candidates. Undoubtedly money still plays a considerable part in many senatorial elections; in fact, more money must be spent now than in 1913, since more is required to reach several hundred thousand voters than would normally be needed to conduct a campaign before a relatively small legislature. Senatorial campaigns frequently cost as much as forty to sixty thousand dollars.[1] Much larger sums have been expended in many instances. Some persons are of the opinion that a rich man or one with considerable financial support still occupies an advantageous position when he seeks election to the United States Senate.

Has the popular election of Senators produced a better type of Senator? Undoubtedly demagogues are still elected and sent to the United States Senate. This would be expected under a system of popular election. It would appear that we have traded some of the old boss type of individual for the demagogue variety. Good men are still elected to the Senate as before. As a matter of fact, the Senate is about what it was before the adoption of the Seventeenth Amendment. It is still a responsible body reflecting the opinions of the people, and its reflections have not been changed by the mode of selecting its members.[2]

Term and Continuity. A United States Senator serves for a term of six years. In the constitutional convention some sentiment was expressed for a longer period; a few members advocated election for life. To most persons, however, six years has been deemed sufficient to give the required stability and continuity to the Senate. This term is long enough to allow the Senator to acquire much valuable legislative experience and attain a degree of leadership

[1] The use of large sums of money in senatorial nominations is evidenced by the Newberry controversy of 1918–1922 and the cases of Wm. S. Vare of Pennsylvania and Frank L. Smith of Illinois in 1926–1928. By a narrow margin the Senate decided in 1922 not to arrest T. H. Newberry, Senator from Michigan, for spending $195,000 in his primary campaign. The Senate passed a resolution declaring the spending of such a large sum in the primary as contrary to sound policy and dangerous to good government. As a result Senator Newberry resigned. By votes of 53 to 28 and 56 to 30, in December, 1927, the Senate refused to seat Vare and Smith, respectively, because of the improper receipt and use of large sums of money in both the nomination and election.

[2] See Johnson, C. O., *Government in the United States* (Second edition), p. 312.

without being harassed by the nightmare of constant elections. This fact in itself has set the Senate apart from the House of Representatives as a more stable, conservative, and in many respects a more workable body. Many Senators serve for more than one term. In fact, periods of service running to twenty years are not uncommon. From 1790 to 1924 the average turnover of personnel in the Senate was 27.2 per cent. In the same period the House turnover was 44 per cent.[1] Continuity of personnel is further secured by the provision that only one-third of the Senate seats are filled in each congressional election. The remaining two-thirds thus are always holdovers. While the House of Representatives must be reorganized after each election, the Senate has been in organized existence from the beginning. A single political revolution may completely alter the political complexion of the House, whereas not less than three such successive turnovers could bring about a complete change in the Senate.

Qualifications. While members of the House of Representatives are required to be twenty-five years of age and citizens of the United States for seven years, Senators must be at least thirty years of age and citizens for at least nine years. In other respects the constitutional qualifications of members of the two branches of the Congress are identical. Like the House, the Senate is endowed with power to judge the election returns and the qualifications of its members. Also, like the House, it has from time to time imposed qualifications in excess of those prescribed by the Constitution. Unlike the House, however, the Senate in many cases has allowed Senators-elect to be seated and then subsequently expelled them. Expulsion may be for any cause, provided a two-thirds vote can be mustered in favor of such action. During the Civil War many Senators were expelled from the Senate on charges of disloyalty. In a more recent instance, the Senate broke the precedent and refused to seat elected Senators from Pennsylvania and Illinois on charges of irregular election involving the improper use and receipt of campaign funds.

COMPENSATION AND PRIVILEGES OF MEMBERS OF CONGRESS

Compensation. Members of Congress are entitled to compensation at a rate fixed by act of Congress and paid out of the public

[1] Fletcher, R. M., "The Labor Turnover of the United States Congress," *Social Forces*, vol. 7 (Sept., 1928), pp. 129–132.

treasury. From the organization of the government until 1855, members were paid on a per diem basis. In 1855, however, a salary of $3000 a year was allowed. This salary was subsequently increased in 1865 to $5000, in 1907 to $7500, and in 1925 to $10,000. The Speaker of the House and the Vice-President, as presiding officer of the Senate, receive an annual compensation of $15,000. In addition to their regular salary, Congressmen receive an allowance of fifteen cents per mile for travel to and from the sessions of Congress and an allowance for salary and clerical assistance, together with the privilege of the frank. In their choice of secretaries, many members indulge in the practice of nepotism and appoint members of their families to these positions. In some cases the number of persons so employed has exceeded one hundred. It should be said, however, that some of these appointees have done valuable work and have earned every dollar paid them. Some have learned valuable lessons in politics which have made them useful public servants. It will be remembered that Senator Robert M. La Follette, Jr., for example, served an apprenticeship under his father, who was a member of the Senate for some time.

Congressmen possess the valuable privilege of using the mails without cost for the purpose of distributing official documents and for official correspondence. Frequently the frank is used for purposes not wholly official in character. A Congressman may use it for his own political purposes or to further the interest of his party. Speeches delivered on the floor of Congress and so-called unspoken speeches are printed and distributed by the thousand among the voters. The franking privilege is not only advantageous politically to Congressmen in that it gives the incumbent what often amounts to unfair advantage over other aspirants, but it also may be looked upon as actually adding to the regular compensation paid to members of Congress.

Privileges and Immunities. Members of Congress by virtue of their office enjoy certain privileges and immunities not extended to ordinary citizens. Among them are freedom from arrest, freedom of speech, and freedom of action.

Congressmen at all times are subject to arrest for treason, felony, and breach of the peace, but if they are attending sessions or are on their way to or from such sessions, they cannot be arrested for civil causes. This privilege is derived from the practice which prevailed in England at the time of the adoption of the Constitution, and is

based upon the theory that lawmakers should be free and independent, so that their actions will not be hampered by worries and interferences due to arrest or attempted arrest.

Members of Congress are likewise given the right to speak freely without fear of interference from persons who might hold views differing from theirs. This privilege is a part of our English governmental inheritance, since members of Parliament have enjoyed such freedom for centuries. Under this special privilege a Congressman may attack private individuals and feel personally secure against libel suits. In time of war, Congressmen may deliver bitter speeches against the action of the government – speeches which in many cases, if delivered outside the walls of Congress, would be sufficient cause to send a private citizen to prison. There have been instances in which the privilege of free speech has been abused, but without it members of Congress would be subject to an effective gag rule likely to result in ultimate injury to the general public. Practically the only limitation placed upon this privilege is the action of Congress itself. Either house may discipline a member for overstepping the bounds of propriety and may even expel him. Also, it should be stated that public opinion may act as a check upon unrestrained freedom of speech on the part of members of Congress. For his activities in Congress the electorate may retire a member at the end of his term, and anything that he may say after such action, even though it relates to his activities in Congress, becomes a matter for which he is responsible.

SPECIAL FEATURES OF THE TWO HOUSES

Though the House and Senate are presumed to be complementary and equal parts of the legislative branch of government, and though their concurrent action is necessary in the ordinary process of lawmaking, the two houses exercise certain separate and distinct functions.

Special Functions of the House. The Constitution gives to the House of Representatives the sole privilege of originating revenue measures.[1] Custom has likewise decreed that appropriation measures, too, must begin in the lower house. In effect, however, these special prerogatives of the House are little more than technicalities and contribute practically nothing to the prestige of the lower branch of Congress. Even though a revenue or appropriation measure

[1] Art. I, Sec. 7.

originates in the House, the Senate through its power of amendment can so change it that it is scarcely recognizable as a House measure. Thus for all intents and purposes the House and Senate share equally in this regard.

An exclusive prerogative of the House is the bringing of impeachment proceedings against civil officers. The Constitution invests the House with the sole power of impeachment. In many respects this special power of the House has been a "mere scarecrow." As predicted by Thomas Jefferson, there have been not more than a dozen cases in which the House has seen fit to exercise its exclusive power. When exercised, this power consists in presenting charges upon complaint of any member against a civil officer for an alleged violation of the Constitution or the laws. With the bringing of formal charges the House must turn the matter of impeachment proper over to the Senate, which acts as a jury in the hearing of such cases. Suffice it to say that, with the bringing of charges against a public official, the official must have an opportunity to defend himself and give answer to the charges brought by the House. When charges are brought, however, the Senate has no other alternative than to try the accused under the indictment made by the lower House.[1]

Special Functions of the Senate. In addition to its usual legislative powers, the Senate exercises certain quasi-judicial and quasi-executive functions. The exercise of these functions by the Senate is undoubtedly a carry-over from the practice of the upper house of colonial assemblies, whose duty it was to share the power of the governor. The quasi-executive functions of the Senate are of two types: the confirmation of presidential appointments and the approval of treaties. Before most major presidential appointments can be made, the Senate under the Constitution and laws must approve them. Since it is impossible for the President to initiate all presidential appointments, in view of their number, many of his nominations originate in recommendations made to him by Senators. In making and approving such recommendations the Senate follows the principle of "senatorial courtesy." This means that the Senate is inclined to confirm appointments proposed by the President when

[1] For additional information on impeachment see extracts from the *Journal of the United States Senate in All Cases of Impeachment, 1798–1905*, 62nd Congress, 2nd Session, Sen. Doc. No. 876 (1912); Simpson, A., *A Treatise of Federal Impeachment;* Thomas, D. Y., "The Law of Impeachment in the United States," *American Political Science Review*, vol. 2 (May, 1908), pp. 378–395.

such appointments have the approval of the Senators of the states in which the appointees reside, and is inclined to disapprove appointments proposed by the President contrary to the wishes of the Senators. Undoubtedly, "senatorial courtesy" has resulted in something resembling political logrolling or trading. The idea prevails that if you will approve my recommendations, I will not question yours.

Before a treaty becomes effective the Senate must approve it by a two-thirds vote. The President must assume initial responsibility for agreements with foreign governments, but they do not become effective until the Senate has placed its stamp of approval upon them. Considerable controversy has been raised even from the beginning over this division of responsibility between the President and the Senate.[1] In many European countries today the legislative body possesses no authority to interfere with the prerogatives of the executive in carrying on foreign relations. Again, convincing argument can be advanced showing that deliberative bodies are not adapted to the performance of such functions. On the other hand, treaties are said to be a part of the supreme law of the land. As such, it is logical that they be framed, or at least approved, by the legislative branch of the government.

The question has arisen as to the extent to which the Senate should be consulted in the process of negotiating treaties.[2] George Washington experienced bitter disappointment in his attempt to secure the assistance of the Senate in this regard. It will be remembered that a few months after the inauguration he appeared before the Senate to ask its advice upon certain treaties. After he had presented his point a Senator made a motion that the matter be referred to a committee. Washington is said to have remarked: "This defeats every purpose of my coming here." Also, it is said that he departed with an oath, stating emphatically that that appearance would be his last. From that time until this, no President has consulted the Senate in the negotiation of treaties. The Senate may know nothing of the treaty until it is presented in its final form. The matter of treaties will be discussed more in detail in Chapters XV and XXVI.

[1] Fleming, D. F., *The Treaty Veto of the American Senate.*

[2] See Willoughby, W. W., *Constitutional Law of the United States* (Second edition), vol. 1, chs. 33–36.

QUESTIONS

1. Is there any justification for the use of the bicameral system of legislation in the national government?
2. What is the method of determining the number of representatives to be elected from a state?
3. What is the purpose of gerrymandering? To what extent is it practiced in your state?
4. What changes have been made in the selection and caliber of Senators by the Seventeenth Amendment?
5. Discuss freedom of speech in Congress. To what extent are Congressmen immune from arrest?
6. Are the rural or the urban interests overrepresented in Congress? Which of the two houses tends to give more representation to the rural element? What are the advantages and disadvantages of functional or occupational representation?
7. Contrast the residence requirements for a Congressman with the residence requirements for a member of the British Parliament. Should there be a residence requirement?
8. Why is the prestige of the Senate greater than that of the House?

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CHAPTER IX

The Working Organization of Congress

SESSIONS OF CONGRESS

ORIGINALLY, under the terms of the Constitution, Congress met each year on the first Monday in December.[1] This arrangement gave each Congress two regular sessions, in addition to such extraordinary sessions as might be called by the President. Terms of Congress have been numbered consecutively since the first one met in 1789, and it has been customary to refer to the sessions of each Congress as the first and second sessions of that Congress. Extraordinary sessions have been numbered consecutively whether they were called before the meeting of the regular session or afterward. The first regular session, which convened in December of the odd-numbered years following congressional elections, was called the long session since it usually lasted well into the summer of the following year. The second regular session, opening in December of the even-numbered years, was called the short session since its duration was limited by the term of its members, which expired on March 4 following its opening.

The Short Session Eliminated. Since there were always many members of Congress who had been defeated in the November elections prior to the opening of the session, but whose terms did not expire until March of the following year – members popularly known as "lame ducks" – the short session came to be known as the "lame duck session." With the adoption of the Twentieth Amendment in 1933 the short or lame duck session of Congress was abolished. At present, Congress assembles at least once every year. Meetings begin on the third day of January, unless Congress by its own action changes the date. Thus members of Congress elected in November begin their term of office the following January. This may be contrasted with the situation prior to the adoption of the

[1] Art. I, Sec. 4, Cl. 2.

Twentieth Amendment, when Congressmen in many cases did not assume office until thirteen months after their election.

Prior to the adoption of the Twentieth Amendment there was considerable concern over what might happen if ever the electoral college failed to choose a President. Under constitutional provisions the elections would fall to the House of Representatives. But the House might be composed of many "lame duck" Congressmen. This would mean that defeated Congressmen, who would usually be members of the party defeated at the November elections, would elect the President. Under the terms of the Twentieth Amendment, such a situation is impossible. The members of the House which convenes in January are elected at the same time that presidential electors are chosen, and the chances are that these Congressmen, or a majority of them, will be members of the party which cast the majority of votes at the November election. Thus the Twentieth Amendment avoids a possible unfortunate situation.

The adoption of the Twentieth Amendment is likely to have another important effect. Before 1933 the short session of Congress witnessed more filibustering than the long sessions. This phenomenon was to be expected, since the "lame ducks," who for the most part were out of harmony with the voters' desires, could do much damage by preventing the passage of legislation which their opponents favored. In numerous cases these Congressmen adopted a defeatist point of view and attempted to block as much legislation as possible. With the adoption of the Twentieth Amendment, both the short session of Congress and the lame ducks were eliminated, and the cause for extensive filibustering ceased to exist.

INTERNAL ORGANIZATION OF THE HOUSE

Complicated Organization of Congress. Neither the House nor the Senate is a simple working organization operating in a political vacuum; rather, both houses are complicated governmental agencies, deriving much of their power and momentum from sources wholly outside themselves. To use a commonplace illustration, the organization of either house may be compared to a gasoline engine with all of its intricate parts, each performing its special function and at the same time being propelled by forces having an existence separate and apart from the operating mechanism. The congressional officers and committees are the congressional motor; the gasoline

which propels the motor is party leadership and the various pressure groups necessary to its effective operation.

OFFICERS OF THE HOUSE

Speaker of the House. The Constitution specifies that "the House of Representatives shall choose their Speaker and other officers" [1] but leaves the details of the organization to be determined by the members themselves. In addition to the Speaker, the House has provided for the following officers: clerk, sergeant-at-arms, chaplain, doorkeeper, and postmaster. Each of these, of course, has his own staff of subordinates.

The Speaker occupies a place of extreme importance in the organization and operation of the House. In many respects he is the most powerful official of the national government, next to the President.[2] The speakership is an office of medieval origin and has been used in all countries possessing anything resembling representative government. Ironically enough, this important officer of the House does very little speaking except in the discharge of his duties as presiding officer. The title "Mr. Speaker" may be explained by reference to the English House of Commons. It originated in the practice of this legislative body in sending one of its number to "speak for them to the king" whenever it was felt that the lawmakers must ask for changes in the law. In the United States Congress the Speaker is invariably a member of the House, although there is no constitutional requirement in this regard. He is chosen by the House membership after nominations have been made by the majority and minority caucuses. The candidate of the majority caucus is always elected by the House. Even though the members of Congress know that it is but a formality for the minority to present a candidate, the election is carried out with all the dignity and solemnity of a hard-fought campaign. When the predetermined result is officially announced the defeated candidate for the speakership escorts the victor to the rostrum and officially presents him to the House.

It is logical to reason that the American speakership developed in order to give leadership to the party. In the early days of American

[1] Art. I, Sec. 2, Cl. 5.

[2] Lord Bryce called the Speaker "the second political figure in the United States." See *The American Commonwealth* (Fourth edition), vol. 1, p. 142.

governmental development it was assumed that the President would furnish political leadership. This assumption, however, proved to be erroneous almost from the beginning. The American President simply could not be used as a party leader in Congress, particularly because the President and the majority of Congressmen are frequently of different parties. The party was therefore compelled to search for leadership in Congress itself. Almost from the beginning this situation has existed, and as long as the United States government continues to be of the presidential type, the Speaker of the House must furnish the necessary leadership to his party in Congress.

The English and American Speaker fail of close comparison in spite of the fact that the speakership in American legislative bodies has its origin in English governmental practice. The Speaker of the House of Commons, like the Speaker of the American House of Representatives, is chosen by the majority party, but upon his election the English Speaker lays aside partisanism and presides over the House with the impartiality of a judge.[1] On the other hand, the American Speaker never forgets the party which elects him, and serves as a partisan presiding officer. In England the Speaker often serves term after term in spite of the fact that the party which elected him may not have retained a majority in the House of Commons. The American Speaker frankly uses his office in the party's interest, and the speakership changes hands with a change of majority strength in the House. The late Speaker Nicholas Longworth stated what appears to be the typical American attitude of the speakership when he said: "I believe it to be the duty of the Speaker, standing squarely on the platform of his party, to assist in so far as he properly can the enactment of legislation in accordance with the declared principles and policies of his party, and, by the same token, to resist the enactment of legislation in violation thereof."[2]

Powers and Duties of the Speaker.[3] It is the duty of the Speaker to preserve order on the floor of the House, even to the extent of having the galleries and the lobby cleared in case of any disturbances. As presiding officer of the House he puts all questions and

[1] The English speakership is explained in Ogg., F. A., *English Government and Politics*, pp. 381–386.

[2] Quoted in Ogg, F. A., and Ray, P. O., *Introduction to American Government* (Fourth edition), p. 436.

[3] The standard work on the Speaker, before the reduction of his powers, is Follett, M. P., *The Speaker of the House of Representatives* (1896).

announces the decisions of the House. The Speaker signs all accounts, addresses, resolutions, writs and subpoenas which may be ordered by the House. The Speaker's right to vote on ordinary legislation is not denied. Rules, however, provide that he is not required to vote except in case of ties, or when the House is voting by ballot. As a member of the House, however, he has the privilege of voting on any measure.[1]

Until 1911 the Speaker enjoyed wide power in the appointment of committees. At present, however, he appoints only members of special and conference committees. This power of appointment made the Speaker definitely the master of the House. In many respects it gave him more influence in government than was exercised by any other individual except the President. His power of appointment not only affected legislation but enabled him to elevate his favorites to positions of power and influence or break any member he so desired. Often Speakers were referred to as "czars." Speaker Reed was generally known by that name. From time to time bitter fights were made against this particular prerogative of the Speaker,[2] and in 1910 there occurred what is known as the Revolution of 1910–1911. As a result of this movement on the part of the younger members of the House, the right to appoint committees was wrested from the Speaker, as well as his chairmanship of the important committees of the House.

The fact that the Speaker no longer appoints committees, except the special and conference committees, does not mean that his position has been reduced to insignificance. He retains two general classes of duties. The late Speaker Longworth divided his time into parliamentary and political duties. The parliamentary duties are derived from the office itself and consist largely in dispensing the rules of procedure. They are merely the duties of a presiding officer, plus the modification of contemporary rules of procedure which the Speaker reports.

The second class of duties, the political, grows out of his leadership of the majority party of the House. In the exercise of these duties the Speaker shares his prerogatives with other party leaders, who may not be regularly elected officers of the House. These lead-

[1] The functions of the Speaker are set forth in House Rule, I, 1–7.

[2] For an interesting article in defense of the Speaker, see Cannon, J. G., "The Power of the Speaker; Is He an Autocrat or a Servant?" *Century Magazine* vol. 78 (June, 1909), pp. 306–312.

ers include the floor leader and the whip. The floor leader is chosen in caucus and is the field marshal of his party on the floor. In the performance of his duty he gets his forces together, maps out his plans of action, holds frequent conferences with his lieutenants, and in general attempts to hold the party members together in the support of major legislation promoted by the particular group in power. The duty of the whip is to keep in contact with the party members and see to it that they vote as the party has pledged itself. In 1933 the Democratic organization of the House provided the whip with fifteen assistants chosen from different sections of the country. Another important associate of the Speaker in the exercise of his political duties is the Steering Committee. Even though its composition is subject to frequent change it usually includes those members of the majority party who hold important positions in the House. The duty of this committee is to meet at regular intervals, discuss pending legislation, and report its recommendations to the party caucus.

The Speaker shares his political duties with the chairman of the Committee on Rules as well as with other important committee chairmen. More will be said about the Committee on Rules in another section. Suffice it to say that the Speaker, the majority floor leader, the whip, and the chairman of the Committee on Rules must coöperate if the party is to enact its legislative program. It will be seen that the Speaker at present is not the autocrat he was prior to 1910.[1] While he may be looked upon as the most powerful official in the House, he must share his power with party leaders. Probably this situation is responsible, to some degree at least, for the confusion, delay, and uncertainty that often attend the work of the House.

A highly important power that the Speaker possesses at present is his right to recognize members of the House seeking the privilege of the floor. In general there is no appeal from the Speaker's decision as to who shall be recognized on the floor of the House. In the exercise of this right, however, he must follow the practice of the House, and it is correct to say that he does not possess the absolute and arbitrary power of recognition. For instance, when a particular bill is before the House the Speaker must give first recognition to some member who represents the committee reporting the bill. Suffice it to say, the Speaker is a partisan and he has the power to recognize those members who in his opinion will promote the

[1] See Hasbrouck, P. D., *Party Government in the House of Representatives*, ch. 1.

party's legislative program, and refuse recognition to those who would block that program.

In addition to his wide power of recognition the Speaker has the right to refuse to entertain dilatory motions. The purpose of such a motion is to prevent the majority from legislating by introducing motions to lay a bill on the table, to reconsider, to postpone, or to take some other action. In the regime of Speaker Reed in 1890, the House adopted a rule that no dilatory motions were to be entertained by the Speaker.[1] Ordinarily the Speaker does not exercise this authority until it becomes clear that a motion is dilatory, and then he seldom invokes the rule unless some member raises the point of order.

Importance of the Speaker. Although there is nothing in the Constitution to indicate the importance of the position of Speaker of the House, it is apparent that he wields power second to none among legislative officers; and in spite of his loss of the power of committee appointment, he is still the fountainhead of authority in the House. He must be a man who knows the intricate mass of parliamentary procedure and possesses resourcefulness, decisiveness, tact, humor, and firmness. In the past many of the outstanding statesmen of their times held this important position. The speakership has not been a means of political promotion, however, since only one Speaker, James K. Polk, has been advanced to the presidency. Other Speakers have been candidates for this high office; some of them – for example, Henry Clay and James G. Blaine – missed election by narrow margins. Probably this situation is the result of the fact that the Speaker's views on national problems become so well known to the country that he necessarily offends many who have views differing from his, and in many cases those who are offended are able to exert much influence in determining presidential nominations.

In a very real sense the Speaker prior to 1911 approached the position of a premier such as the premier in the French Parliament, or the British prime minister. As a result of the so-called Revolution of 1910–1911 the premiership of the United States passed from the Speaker to the President. If the President could be sure that he would have a majority of the members of Congress supporting his plans at all times, he would indeed be the American premier. The fact is, however, that the "American premier" often has no congressional majority to support him.

Other Officers of the House. In addition to the Speaker, the House

[1] Rule XVI, Sec. 10.

selects the following officers: the clerk, the sergeant-at-arms, the doorkeeper, the postmaster, and the chaplain. Each of these has a group of employees working under his direction. In all, the employees of the House number approximately four hundred. While the Speaker is usually a member of the House, the other officers are never members. Of this entire group of House officers, the clerk is the most important. Among his duties are those of presiding at the opening of the first session of each Congress prior to the election of the Speaker; of furnishing to each member a list of the reports which it is the duty of various officers and departments to make to Congress; of seeing that the Journal is printed and distributed to members; of affixing the seal of the House to its orders, subpoenas, and warrants; of certifying to the passage of bills and resolutions; of approving contracts for materials and labor for the House; and of keeping and paying stationery accounts of members. The clerk is assisted by some six or eight subordinates appointed by himself.

The sergeant-at-arms, under the direction of the Speaker or a committee chairman, assists in the maintenance of order and carries out the demands of the House in serving subpoenas and compelling the attendance of absent members. It is his task also to pay the salaries and mileage allowances of members of the House, and to control the Capitol police. Like the clerk, he too employs the assistants necessary to the performance of his duties. The doorkeeper's chief function is that of enforcing House rules relative to the privileges of the floor to outsiders. Also, he assists the sergeant-at-arms in maintaining order, introduces to the House the bearers of messages, and acts as custodian of House properties. The numerous messengers work under his direction. Likewise he supervises the janitorial force. Because of the large volume of mail received by House members the position of postmaster has become a practical necessity. The chaplain performs the duty of opening the House each day with prayer.

Party Leadership in the House. In addition to the regularly appointed members of the House, selected theoretically by the entire membership, the majority and the minority party each maintain an organization which is indispensable to the American legislative process. The work of both Houses of Congress is under the control of the two political parties, and the majority party regards itself as responsible for the entire legislative output. The minority or opposi-

tion party thus is necessarily compelled, if party life is to be sustained, to criticize and vote against the principal proposals of the majority and to act as a governor on the excesses of majority rule. While this potent factor did not receive recognition in the Constitution of the United States, it nevertheless exists, and legislation apparently is not possible except through the party organization. Of course it should be understood that votes in Congress are not always cast according to party divisions, but the principal work of Congress is generally the achievement of the majority party.[1]

The Caucus. Party control in the House is part and parcel of the party caucus as the directing machinery of the party. There is a caucus composed of party members in both the majority and the minority party. All House members who are "reasonably regular" party adherents belong to their party's caucus. The ordinary procedure and powers of this extralegal body are informal and irregular. Before any action is taken by the House, however, it may be assumed that the majority party caucus has taken its action. It selects the slate of House officers, makes provision for the selection of committees, and arrives at decisions relative to House rules. The minority caucus selects its candidates and generally agrees upon the procedure it will follow in opposing and criticizing the work of the majority. Little can be said definitely of the powers of the caucus, since these powers vary from time to time. In many instances the caucus has served as a rubber stamp for approving decisions already reached by a few leaders such as the Speaker and the chairman of the Rules Committee. This was certainly true of the Democratic caucus prior to 1911. Since then, however, the individual members of the caucus have enjoyed a larger share in the formulation of party policies.

Not only is the caucus a potent factor in the legislative process, but as a part of its control over legislation it is a severe disciplinary agent. No ordinary member can afford to disregard the decisions of his party caucus. Party action is determined by a majority vote of the caucus, and any member who does not agree with the decision of the majority of his party caucus is compelled to yield or suffer the consequences of being read out of the party counsels. Members who will not be bound by the caucus are discriminated against in committee assignments, their opportunity for advancement in the House is jeopardized, their social life is restricted, and their pet

[1] Hasbrouck, P. D., *Party Government in the House of Representatives.*

measures are ignored, with the result that the people of their districts are encouraged to select other Representatives. Party insurgency is considered party disloyalty and a legislative high crime and misdemeanor. The only hope the average member has of accomplishing anything for himself or his constituents is to yield to the dictates of his caucus, whether he likes it or not. Not only does the caucus exact unswerving loyalty on the part of its members, but its power often means that the House is controlled by a minority of the entire membership. To be sure, a majority of the caucus is necessary for control, but a majority of the caucus is often a minority of the membership of the House.

INTERNAL ORGANIZATION OF THE SENATE

General Features of the Senate. The outstanding characteristic of the Senate of the United States is the fact that it is a continuous body with a relatively small membership as contrasted with the House, which is a temporary body with a large membership. In the beginning the Senate was looked upon as a body representing the states, and the House as the popular branch of Congress. Apparently the makers of the Constitution conceived that the Senate would be sufficiently conservative to withstand the frequent storms of public opinion. This attitude is expressed in Article I, Section 3, of the Constitution, which sets higher age and citizenship qualifications for Senators than for Representatives, and also provides a longer term of office for the members of the upper house. The same general attitude is expressed in the provision that only one-third of the members of the Senate retire each two years. Because of these requirements it is logical to expect that Senators for the most part will be older and more experienced than members of the House.

Not only was the Senate to be the conservative branch of the national legislative body, but it was to be the more aristocratic of the two houses. It must be remembered that the Constitution makers of 1787 were aristocratic in their political views. Many of them distrusted the uninformed masses of people and succeeded in writing into the Constitution several provisions designed to protect the government from the excesses of democracy. Among these provisions are the mode of electing the President, the appointment of the judiciary, and the establishment of the Senate. In many respects the Constitution makers desired to place the control of government at least partially in the hands of the "best of the people." This is

illustrated by the fact that the original mode of selection of Senators was by state legislatures and not by popular vote.

The Senate has lost much of its original aristocracy and conservatism. In many respects and on frequent occasions it has more nearly represented the country as a whole than has the House. Often the members of the Senate are as young as members of the House. Likewise Senators have as little experience in business or politics as do members of the House. In brief, some students of the subject criticize the Senate as simply a duplicate House, save for its particular powers of a quasi-executive and quasi-judicial nature.

Officers of the Senate. The Vice-President of the United States acts as the presiding officer of the Senate. In several respects he differs from the Speaker of the House as a presiding officer. He has no powers except those of a moderator, and he has no vote except in case of a tie. He is not a partisan leader like his counterpart in the House, and his influence over the Senate is in no way comparable to that of the Speaker over the House. It is the proper thing for the Vice-President to "know his place" in the Senate. If he should not possess sufficient tact to sense this, there is little doubt that the Senators would soon inform him in this regard.

In addition to the Vice-President there is a president pro tem. who presides in the absence of the Vice-President. The other officers of the Senate correspond to those of the House and are chosen in like manner. Probably the most important of these, although he is outside the official organization of the Senate, is the majority floor leader, who is chosen by the caucus of the majority party. Upon his shoulders falls the chief responsibility as the party's spokesman. He is the guiding hand in the party's program. Ordinarily the caucus, in selecting this important officer, takes into consideration not only the matter of seniority but faithful adherence to party discipline and party life.

Senate Committees. As in the House, the Senate maintains a series of standing committees, as well as special committees organized along functional lines and performing the same general types of work as the committees of the House. The membership of the committees is determined in each party by the Committee on Committees. This selecting committee is chosen by the caucus of the two parties and makes assignments to the various standing committees, subject to the approval of the caucus. Officially, Senate committees are elected by the entire membership of the Senate in the same way that House

committees are selected. Prior to 1921 there were seventy-four committees in the Senate. Since that time, however, the number has been reduced to well under thirty-five.[1] Interestingly enough, the size of Senate committees differs very little from the size of House committees, which means that Senators serve on numerous committees. In some cases one Senator may be a member of at least five different committees. As in the House, the chairmanship of the committees is determined on the basis of seniority.

Senate Rules. Since the Senate is a permanent body and has a membership less than one-fourth that of the House, it is not as necessary that an elaborate system of rules be adhered to in the upper as in the lower house. The Senate, however, has its own rules and precedents. The rules are based on Jefferson's *Manual of Parliamentary Practice,* possibly to a greater extent than are the rules of the House.

The Committee on Rules and the Steering Committee. The Senate maintains a Committee on Rules as does the House, but this committee has no such power as does the House Committee on Rules. Also, there is a Steering Committee in the Senate corresponding in work and organization to the like committee in the House. This committee, like that of the House, consists of the principal leaders of the majority party; but, unlike the House committee, it does not dominate the proceedings of the Senate. Its chief function is to select measures to which the party is pledged and attempt to secure support for their passage. In pressing for the passage of these measures the committee employs a technique that differs somewhat from that of the House. Seldom is any attempt made to force the Senators into line; rather, the loyalty of the Senators to the interests of their party is expected to achieve the passage of the measures desired.

In brief, the Senate organization bears some resemblance to that of the House, but it is not nearly so complex. The size of the Senate, as well as its continuous character, tends to make it a deliberative body to a greater degree than is the House.

THE COMMITTEES

Necessity of Committees. To a very considerable extent the work of Congress is the work of a group of congressional committees. Before the work of these committees is discussed, some consideration

[1] The number of Senate committees in the Second Session of the Seventy-fourth Congress was thirty-three.

should be given the necessity and the justification for the dual committee system of Congress. The enormous mass of legislation poured into the legislative mill is the compelling excuse for and explanation of the committee system as it exists in both national and state legislative bodies. In the course of two years the House of Representatives is called upon to consider some twenty to thirty thousand bills. It is obviously impossible for the House acting as a whole to give even the slightest attention to all of this proposed legislation. The work of selecting the bills to receive attention and of recommending them to the House is done by the committees. The House then either acts upon the committee reports or uses the committee recommendations as the basis of action.

Types of Committees. Congressional committees are of four kinds: special, standing, procedural, and party committees. In the mind of the average person, a congressional committee means a standing committee. Undoubtedly these bodies are the most important in the routine work of Congress, but the special, procedural, and party committees will be treated here before the regular permanent committee system is discussed. The special committees are of three types: the select committee, the conference committee, and the joint standing committee. The procedural committees include the Committee of the Whole House, the Committee of the Whole House on the State of the Union, and the Rules Committee. The Rules Committee, however, is constituted as a standing committee and will be considered as such. The party committees include the Steering Committee and others. Only the select committees will be discussed at this point, since the work of the procedural and party committees is considered in connection with the organization and procedure in Congress.[1]

Frequently the House authorizes the Speaker to appoint select committees to consider questions which cannot be handled properly by the standing committees. Thus these committees are temporary in nature and cease to exist when the particular question under discussion is disposed of and the House has taken action to discharge the committee. The various investigational committees which have become so familiar in recent years are of this type.

The Conference Committee, a highly important factor in the legislative process, is a joint committee but at the same time a select committee. A committee of this type is appointed by the Speaker to

[1] See pages 173, 179, 183, 184, 185, 190, 191.

confer with a similar committee of the Senate when the two houses fail to agree upon a piece of legislation. Its purpose is to smooth out all matters of disagreement and effect a compromise which will meet with approval in both houses of Congress. Thus, the Conference Committee does more legislating than is often suspected. Since a Conference Committee report is seldom questioned by the two houses of Congress, such committees may be considered the most important special committees in the national legislature.

In addition to the Conference Committee, Congress uses joint standing committees. These committees are established by concurrent resolutions of the two houses. Members are selected in the same manner as the members of regular standing committees. These committees deal with routine matters which concern both houses of Congress, such as printing, the library, and the enrollment of bills.

The standing committees – appointed for the duration of a Congress – are the unit cells in the working organization of both houses. They are organized functionally and are bipartisan in character. Some years ago there were more than sixty standing committees in the House, but recently the number was reduced to about forty-five or fifty.[1] The representation of the two major parties on these committees is determined by their comparative strength in the House. The membership of the committees is decided by the Committee on Committees, which is named by the caucus of each party. In the Democratic party, the Committee on Committees consists of the Democratic members of the House Ways and Means Committee. This selecting committee determines the assignment of its members to the several committees and makes its report to the party caucus. This body makes its nominations to the House, and the House in regular session elects the various members of the committees. Prior to 1910 the Speaker possessed full power and authority to assign members to committees according to his personal or political whims. The chairmanships of the committees are awarded according to the principle of seniority, but always to members of the majority party.

The fact that the party in power always has a majority on the standing committees of Congress, and that the chairmanship of all committees is always given to members of the majority party, strikingly demonstrates the existence of majority tyranny in Congress. The committee system thus shows that legislation in the United

[1] In the Second Session of the Seventy-fourth Congress, there were forty-seven standing committees in the House.

States is usually the work of the majority party in Congress, which gives little regard or consideration to the minority. This fact is all the more significant when it is recalled that practically all the important bills presented to Congress are government or administration proposals. The minority has little opportunity to consider measures when they come before the House for debate. The legislative process in Congress, unlike the practice in the British Parliament, is a party matter, in which the tyranny of the majority is the predominating factor.

Only about one-fourth of the total number of committees in the House are of any great importance. A list of the more powerful standing committees of the House would include those on Rules, Ways and Means, Appropriations, Banking and Currency, Interstate and Foreign Commerce, Agriculture, the Judiciary, Military Affairs, Naval Affairs, and Post Offices and Post Roads. It must be remembered, however, that the importance of these committees fluctuates with the changing emphasis on problems of the times. With the important committees reduced to such a comparatively small list, it is obvious that there are a great number of relatively unimportant committees. This number is continued from Congress to Congress as the line of least resistance. Once a committee is created, it is difficult to abolish it. Then, too, members take pride in having a large number of committee assignments appear on their letterheads, for the greater the number of assignments appearing on the letterhead, the more important the member becomes in the eyes of his constituents, who have little appreciation of the relative importance of committees.

Seniority and the Committee System. The principle of seniority plays a major role in the committee system in Congress. When a new man is elected to Congress he is assigned to the lowest place on a committee, and in the event of his reëlection he is usually reassigned to the same committee and moved up to a higher place. This process continues so long as the member is reëlected. Eventually he reaches the position of ranking member or possibly chairman of the committee. The chairmanship, of course, is dependent upon his party being in power, since the senior member of the majority party's representation on the committee will be the chairman. This rule of seniority has been the subject of bitter criticism. Ability, except such as is gained through long years of service in Congress, plays no part in the selection of committee chairmen. Young and

ambitious Congressmen have chafed under the rule, but it persists in spite of all protestations. The criticism has been made that seniority actually means senility. In favor of the rule is the fact that it has the merit of administrative convenience. Undoubtedly it saves congressional leaders much embarrassment and prevents many general scrambles for desired chairmanships. The attendant intrigues for such preferment might cause more unfortunate situations than those prevailing under the seniority rule.

At this point certain questions may be raised concerning the committee system generally as it operates in Congress. In view of the enormous mass of legislation coming before every session, it is necessary that some means be provided to separate desirable measures from undesirable, and to put them in such shape that they will pass both houses. Nevertheless the question may be asked: Is it not possible to improve upon the committee system that prevails in the American Congress?

It has been stated that our American legislative committees work more or less independently of one another, and that the resulting chaos is noticeable in all fields of legislation, especially finance. Under the present committee system it is impossible to prepare and work out unified plans of legislation for an entire session of Congress. Frequently the laws passed by a session of Congress bear little or no relation to one another, and this in spite of the efforts of the Steering Committee to carry through what is supposed to be a more or less comprehensive program of legislation. Of course, the whole reason for this situation does not lie with the committee system as such, since in most important pieces of legislation there are always powerful interests to placate, such as the farmer, organized labor, the manufacturer, those who believe in more governmental control and those who believe in less control, and others. In Great Britain the measures passed by the House of Commons embody a program that gives evidence of careful legislative planning. The work of planning the program is entrusted to the cabinet, whose members are members of the House of Commons. Under the American scheme of separation of powers, this work must be undertaken by legislative committees separate from the executive branch of government. This fact, together with the necessity of recognizing various sections of the country and different economic interests, means that it is both legally and politically impossible to attain the high degree of legislative planning that prevails in Great Britain.

Under the present committee system in Congress, there appears to be too little deliberation on legislation. Many European states have set up procedures that insure adequate consideration of measures, and have established methods by which each member may participate freely in shaping a bill – a situation almost impossible under the American system. Simpler, more direct, and less time-consuming methods than are customary in America have been employed. In general, the methods are similar to the following:

> At the beginning of each annual session and sometimes oftener the members are divided by lot into six or even more "sections" or "bureaus" with about fifty to seventy members each. Each bill which is acted upon by a House must first come before all of the sections, meeting separately. Amendments are freely offered by everyone interested and quickly acted on. At the close of the consideration each section chooses a reporter to represent it on one measure. He is often the man who has shown himself in the debate to be most familiar with the subject. A meeting of all the reporters of the sections is then held and the various forms of the measure as amended by the sections are then consolidated into a new compromise bill which is reported to the House. Here again the man who has shown himself to be the best informed may be chosen by the reporters' section to be the final reporter to the House, or, as we would call it, the floor leader in charge of the bill. By this method every representative is given a chance to debate every bill and is a member of one section.[1]

Some similar plan would have the effect of restoring the Congress of the United States to the rank of a deliberative assembly.

The Committee on Rules. Outside the official list of standing committees is the exceedingly important Committee on Rules. While the work of most committees usually is limited to a particular subject, the Rules Committee is concerned with the whole matter of procedure in the House, and possesses powers peculiar to itself. Until 1880 this committee was an unimportant select committee whose duty it was to report on rules at the beginning of each session. From 1880 to 1910, under the chairmanship of the Speaker, it dominated the House. After 1910, when the Speaker lost his powers, the Committee on Rules practically came to control the proceedings of the House. At present the committee is composed of fourteen men,

[1] Young, J. T., *The New American Government and Its Work* (Third edition), p. 45.

all veterans in legislative experience; a majority of them, of course, represent the majority party in the House.[1]

Established rules facilitate the orderly functioning of any legislative body. In the beginning the House used simple rules of procedure based on English practices. When Jefferson was Vice-President he prepared his famous *Manual* for the guidance of the Senate, and this *Manual* came to be used in the House, with the necessary changes to meet existing practices in the lower branch of Congress. Since that time, the rules have been added to until the present rules of the House constitute an extremely lengthy, complicated, and allegedly arbitrary code. Few Congressmen, including the Speaker, fully understand the rules.

Occasionally changes are made in the rules at the organization of a new House, but after organization no new rule is adopted except upon the recommendation of the powerful Rules Committee. The veteran legislators who control the committee are not likely to recommend any change in the rules which will weaken their control over the House.

Not only does the Rules Committee pass upon proposed changes in the rules, but it also plays a major role in directing the proceedings of the House. Since both the majority of the members of the Rules Committee and the majority floor leader represent the party in power, these two agencies of the House, together with the Steering Committee ordinarily act as one. Actually the Rules Committee, with the coöperation of its powerful allies, the Steering Committee and the majority floor leader, controls, or may control, the activities of the House in a most minute fashion. Under existing practice, the committee has the power to issue special orders, and these orders, if approved by a majority of the House, may give precedence to certain measures, limit debate, and specify the number and nature of amendments which may be offered. Thus the Rules Committee may issue an order at any time to meet any exigency. For example, a special order of the Rules Committee may block all moves to delay the passage of a measure, regardless of the objections which may be raised by the opposition.

[1] In the First Session of the Seventy-seventh Congress, ten of the fourteen members of the Rules Committee were members of the majority party.

QUESTIONS

1. What effects have the Twentieth Amendment had on the working organization and sessions of Congress?
2. Compare and contrast the position and the powers of the Speaker of the House with those of the president of the Senate.
3. Show how the regular organization of Congress and the party organization in Congress work together in the process of legislation. Why is the latter necessary?
4. Why is the committee system necessary in Congress? How are committee memberships determined? How are committee chairmen selected? Show how it is possible for the committees in Congress to defeat the program of a President.
5. Why is the Committee on Rules so important in the two houses of Congress? In which house does this committee wield the greater power?

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CHAPTER X

Congressional Procedure

NECESSITY FOR SYSTEMATIC PROCEDURE

THE government of the United States is intended to be a government of laws and not of men. Probably this accounts, at least to some extent, for the mass of legislation coming before every session of Congress. Much of this legislation is designed to protect citizens against arbitrary and despotic officials. In recent years the amount of legislation has grown enormously, owing to the growing paternalism in government and to the demand of citizens for more services from the government. The number of bills presented to Congress varies with changing conditions and with different sessions. Ordinarily, from twenty to fifty thousand bills of every description are presented to a Congress. In order to wend its way through this maze of legislative proposals, Congress has been compelled to adopt a definite mode of procedure and strict party discipline. Necessarily there is much legislating behind the scene. The average spectator who sits in the galleries and watches either house in action sees only the bombastic phase of congressional procedure and work. Unable to find its collective way through the mass of legislative proposals, Congress has resorted to the committee system, which has been described in the preceding chapter. There, real legislation is being carried out, while the floor of either house simply presents the side intended for what is often a gullible public.

THE LEGISLATIVE PROCESS

Preliminaries. The legislative process as such has its beginning on the glamorous first day of a congressional session. In accordance with the Twentieth Amendment the regular session of Congress begins on the third day of January of each year unless Congress shall select a different day.[1] The opening session is a unique occasion.

[1] Before the adoption of the Twentieth Amendment the regular sessions of Congress opened on the first Monday in December of each year.

Ordinarily the floor of the House is crowded with Congressmen milling around, indulging in much handshaking and backslapping. The galleries are crowded with curious spectators. Broadcasting facilities have been set up in both houses, by means of which people throughout the United States and the world are enabled to obtain a mental picture of the opening of Congress.

If the session is the first session of a Congress, the House is called to order by the clerk. If it is a second or even a third session, this duty falls to the lot of the Speaker. In the Senate the call to order is made by the Vice-President of the United States. After the gavel has sounded, the first item on the program is the invocation offered by the chaplain, and after that the roll call of members. All newly elected members are required to take the oath of office. If there are contested elections, the persons involved are normally not allowed to take the oath until the contest has been decided.

One of the first items of business before the House, especially in the first session of a Congress, is the election of officers. This procedure must be followed every two years. The Senate, since it is a more continuous body, is not so vitally concerned with the selection of its officers. In the House, however, this is an important event. The actual selection consumes very few minutes, since it consists of a simple approval of the report of the majority caucus. This is true in both houses. After the election of officers and the completion of its organization, each house usually appoints a committee to notify the President of the United States that that house is ready to receive his regular message. Also a committee is appointed to notify the other house of its initial action. Ordinarily this constitutes the entire business of the first day, except that of adjourning out of respect to the memory of deceased colleagues.

The President's message to Congress may be given on the second day or it may be delayed several days. This matter rests largely with the President himself. In any event, as explained in Chapter XV, he is under obligation to give information to Congress on the state of the Union.[1]

Introduction of Bills. Bills designed for action in the Congress may originate from several different sources. Usually the more important bills before any Congress are the so-called administration or government measures. These are usually drawn by some executive agency and are sent to Congress to be introduced by an impor-

[1] See pages 312–313.

tant committee chairman as a proposal of the administration. Individual Congressmen, of course, have the legal right to submit any bill any time. Generally these individual Congressmen with their local and hobby bills are the most prolific of all the sources of legislation. Also, organized interests constitute sources of legislation which should not be overlooked.

The actual process of passing the bill involves first of all the introduction of that measure by an individual member or chairman of an appropriate committee. All bills for raising revenue, however, must originate in the House.

Consideration by a Committee. A bill is introduced by simply placing it in the basket on the Speaker's desk. The next step is the reference of that bill to the proper committee and the assignment of a number which it carries throughout its course. The assignment to the committee is made by the Speaker, and the number is attached by the clerk. If the committee in charge thinks that the bill is of sufficient importance to deserve further attention that committee or a subcommittee may hold a hearing on the measure, to which all interested persons may be invited. After this hearing the committee may follow one of four courses of action. It may report the bill favorably to the House; it may report it unfavorably; it may report it with amendments; or it may refuse to take action. Assuming that the report is favorable, the next step is the consideration of the committee's report on the floor of the House. This consideration involves the placing of the bill on the proper calendar and more or less thorough debate on the measure.

The Calendars. The calendars in Congress constitute an interesting phase of legislative procedure. Obviously the vast number of proposals emanating from committees cannot be considered without some sort of systematic classification. Normally Congress attempts to treat bills in the order in which they come from committees. A series of congressional calendars has been devised to care for particular classes of measures. Bills are recorded on these calendars as they come from committees. Separate days are set aside for certain subjects, and thus for the consideration of measures placed on the several calendars. Probably the most important calendar used in the House is the Union Calendar. This calendar is used when the House acts as the Committee of the Whole House on the State of the Union. Revenue bills, general appropriation bills, and public bills directly or indirectly appropriating money or property are placed

on this calendar. If a bill is a public bill but is not concerned with an appropriation of money, it goes on the House Calendar. If it is a private or special bill it is placed on the calendar of the Committee of the Whole House or the Private Calendar. Theoretically bills come up in the order in which they appear on these calendars, but with the allowance of privileged motions there is no guarantee that bills will receive this systematic treatment.[1]

The Committee of the Whole. For the consideration of more important measures the House resolves itself into the Committee of the Whole House or the Committee of the Whole House on the State of the Union. In brief, this means that the entire House, sitting under different rules and presided over by a special chairman designated by the Speaker, supplements the regular committee in charge. In most cases the Speaker designates as special chairman the chairman of the committee to which the bill was assigned. Theoretically, when the House is organized as the Committee of the Whole House, it considers private bills. When it is organized as the more important Committee of the Whole House on the State of the Union, it is considering public bills for raising revenue or making appropriations. A spectator in the gallery, even though he may not know the Speaker or the special chairman, is able to observe at all times the status of the House. If the mace, which is the symbol of power of the House, is removed from its place on the Speaker's stand, the House is organized as the Committee of the Whole. When so organized one hundred members constitute a quorum. It must be remembered that this group cannot transact regular congressional business but is limited to making reports of its findings back to the House proper.

The procedure facilitates action since speeches are limited to five minutes. Also no record is kept of the remarks made by various members while the House is organized as the Committee of the Whole. In spite of the fact that speeches are so limited, the most important oratory has been heard when the House has been organized as the Committee of the Whole. Speeches on the bill under consideration necessarily are condensed and all arguments are to the point. In the Committee of the Whole, bills are given what is known as the second reading. The first reading took place when the bill was introduced and read by title only. At the second reading bills

[1] Alexander, D. S., *History and Procedure of the House of Representatives*, p. 222.

are probably scrutinized more carefully than at any other time. These bills are often amended and thoroughly revised. When this has been done the Committee of the Whole is dissolved and the House is called to order by the Speaker. At this time the special chairman in charge goes through the routine of reporting the committee's finding to the entire House. At this stage the House is ready for final action. As a rule the question is raised after the House formally reassembles: Shall the bill be engrossed and read a third time? If this motion carries, the third reading takes place, which is by title only, unless a member desires to delay the passage of the bill and demands a full reading.

Closure in the House. During the debate on the motion to read the bill the third time, members are permitted to speak at length, but the rule prevails that no member shall speak for more than one hour. After the debate and the passage of the motion to read the bill the third time the measure is voted on, and if the result is favorable, it is signed by the Speaker and sent to the Senate for consideration by that body.

Obviously, without rules to bring debates to a close and to expedite the passage of bills, the House would be unable to perform its proper functions. Many members may desire in good faith to speak on a bill, but the House does not have time to hear all of them; much less can it afford to give time to those who desire to place all possible obstacles in the way of the bill. The "previous question" and the suspension of the regular rules by a two-thirds majority, constitute the chief methods employed by the House to hasten action on bills and prevent the extended use of obstructionist techniques.[1] The "previous question" is a time-saving device borrowed from the British Parliament. After the floor leader and the chairman of the committee responsible for the bill decide that there has been sufficient debate, they simply demand the previous question and the motion must be put by the Speaker immediately. If this motion is carried, a vote on the bill is taken at once. The use of such a rule definitely minimizes filibustering as it is practiced in the Senate.

The Legislative Process in the Senate. Since the procedure in the Senate is similar to that followed in the House, it is unnecessary to go into this subject in detail. Rather, we shall consider only the major differences between the Senate and House procedures. These chief differences concern the matter of freedom of debate, filibuster-

[1] Rogers, Lindsey, *The American Senate*, pp. 117–161.

ing, and closure. While debate on a bill in the House may be limited and to some extent suppressed, the Senate enjoys a considerable degree of freedom in this regard. Many years ago the Senate rules included "the previous question," but with a revision of this rule in 1806 this technique was quietly dropped. Since then few Senators have had cause to worry that speeches which they prepare on various phases of legislation would not be heard on the floor of the Senate. Considering this almost unlimited freedom of speech it is no wonder that the fervent orators of the time have sought seats in the upper house of the national legislature. This freedom has often been abused, and its abuse has allowed minorities to block the work of majorities through useless speeches; likewise it has permitted insurgents and independent members of the Senate to prevent action by their more disciplined party colleagues.

Filibustering. Because of the laxity of Senate rules and the degree of freedom allowed Senators to speak their mind on legislative matters, the practice of oratorical obstruction, or filibustering, or, as it is called in Australia, "stone-walling," has developed to an extreme degree in the upper house. In some cases filibusters have lasted for two months. In many cases these tactics are employed to obstruct legislation which individual Senators or minority groups desire to block. This is usually done by a group of Senators working in cooperation and delivering speeches and holding the floor indefinitely against the desires of other groups. In many respects filibustering becomes simply an endurance contest. Some of the better known filibusters have been carried on by some of the outstanding men who have occupied seats in the Senate. In 1908 Senator La Follette held the floor for more than eighteen hours and prevented the enactment of certain currency legislation. One of the more recent long distance filibusters was carried through by the late Huey Long, who blocked the appropriation of funds for certain social security measures and compelled reconsideration of these matters in another session of Congress. To take up time, the filibustering Senator may talk upon any subject, read books or newspapers, or recite poetry. Filibustering speeches are ordinarily of poor grade, since the sole object of the Senator is not to speak to the point but simply to kill time and wear down the patience of other Senators.

Closure. The attention of the public was called to the use of the filibuster in the debate over the Armed Merchant Marine bill in 1917. President Wilson had called upon Congress to enact such

legislation. It met with very little opposition in the House and was favored by a majority of Senators. However, the small group that opposed it, by holding the floor of the Senate until Congress adjourned, prevented the enactment of the measure. In response to a strong note written by the President, criticizing the tactics of the minority, the Senate adopted the closure rule of 1917. This rule, even though it is not so effective as the method used in the House, is a mild form of closure.[1] According to the rule a motion to close debate must be signed by sixteen Senators and presented to the Senate. After two days the following question is voted upon in the Senate: "Is it the sense of the Senate that the debate shall be brought to a close?" This question is decided without further debate, and if two-thirds of those voting approve the passage of the motion, the measure before the Senate becomes unfinished business and must be disposed of before other measures can be considered. After this the time for individual speeches is limited to one hour and no dilatory motions can be made. This rule does not prevent filibustering, but it makes it possible to cut down on the obstructionist practice employed in filibustering. Various proposals that a more drastic rule of closure be adopted by the Senate have been made. The efforts of Vice-President Dawes in this regard are familiar. Senator Norris has long been an advocate of a more drastic rule. The so-called "Lame Duck" Amendment, which was sponsored by Norris, has had the effect of decreasing filibustering since the amendment removes the time limit on the sessions of Congress.

On the other hand many persons defend the extreme freedom of debate in the Senate and look upon it as a safe balance to what might appear as autocratic party control in the House. Professor Lindsey Rogers justifies senatorial freedom of discussion on this ground and points out that many bills defeated by filibusters deserved such a fate.[2] In any event any proposed reformation of the Senate in this regard ought to be approached with caution, for the Senate as a public forum should not disappear.

THE CONFERENCE COMMITTEE

Its Work. All measures before they become law must be passed in identical form by the two houses of Congress. Frequently there are slight differences in the form in which measures pass the House

[1] *Senate Manual*, Rule XXII. [2] *The American Senate*, ch. 5.

and the Senate. In other cases the two houses are far apart in their opinions of proposed legislation. The Conference Committee is the method which has been devised for ironing out differences between the two houses. This is a special committee composed of the important members of standing committees having charge of the measures in question in the two houses. Thus it is a joint committee composed of both Senators and Representatives and appointed by the presiding officers of the two houses. In the event that a proposal in the Senate differs slightly from a similar proposal in the House, this committee is charged with the task of bringing the two houses to some agreement on the measure. The members of the committee meet and consider all points of the measure and ordinarily find some common basis of agreement which is reported back to the houses. In rare instances are the proposals of the Conference Committee turned down in either house. Thus the Conference Committee becomes a vital factor in legislation. There have been instances in which bills have been almost rewritten in the Conference Committee. In a very real sense, then, the Conference Committee is the legislature.[1]

Criticisms. There have been numerous criticisms of the powers of the Conference Committee. In 1884 John Sherman objected to its power when he said: "I feel that both houses ought to make a stand on the attempt to transfer the entire legislative power of Congress to a committee of three of each body selected not according to any fixed rule but selected probably according to the favor of the presiding officer or the chairman of the committee that framed the bill, so that in fact a committee selected by two men, one in each house, may frame and pass the more important legislation of Congress."[2] Even though this criticism may be just in many instances, the chief defect in the use of the Conference Committees lies in the fact that the houses have come to accept their reports without question and have adopted them in most cases without change. Of course, either house might question the decisions of the Conference Committee, but the rank and file of members feel that they are unable to do better than the committee, and as a result acquiesce in its findings.

Difficulties arising out of the use of the Conference Committee

[1] See Rogers, Lindsey, "Conference Committee Legislation," *North American Review*, vol. 215 (1922), pp. 300–307.

[2] Quoted in Luce, Robert, *Legislative Procedure*, pp. 403–404.

could easily be avoided, as has been suggested by Robert Luce, by the adoption of a system of joint standing committees in Congress as contrasted with the present dual system of standing committees. After all, the Conference Committee is a joint committee. If there could be one system of committees composed of members of both the House and the Senate, it is probable that greater unanimity of opinion would prevail and there would be less likelihood of major differences between the bills as passed by the two houses.

THE LOBBY AND PRESSURE GROUPS

Reasons for Such Legislative Agencies. Congress does not work in a political vacuum, nor can its work be understood apart from the social and economic forces of modern society. Congress is a vital part of the living organism of American society. Each Congressman is a distinct personality and is associated necessarily with various economic and social groups. He is dependent upon these groups for his election. As a candidate for office, he makes certain commitments to organized groups. In many cases these commitments constitute unbreakable ties that bind him to these groups as elements in his constituency. In the discharge of his duty in Washington a Congressman is under pressure not only from his constituents at home but from various national associations. Many home associations which he may have conceived of as local have national organizations with offices in the national capital; for example, the farmers' group.

These organizations interested in favorable legislation present an array of forces foreign to the language of the Constitution and the apparent will of the framers of that document. Originally representation in Congress was intended to be upon a geographical basis. For many years this was the case. Geographical sections fought one another, and often there was bitterness between states. Strict geographical differences, however, have tended to disappear. At present geographical differences between Congressmen are not nearly so important as functional differences which cut across geographical boundary lines, ignoring such influences as sectionalism and states' rights. Differences within Congress today are between certain economic groups, rather than between groups of states. Such groups consist of grain growers, steel manufacturers, oil interests, labor, the veterans, the miners, the shippers, and others. As a matter of fact, the change in the situation from a geographical

emphasis to functional differences of opinion has been so marked that many citizens have proposed the complete abandonment of the geographical plan of representation and the adoption of a functional plan or what might be called "an interest plan." European states, including France, Russia, and Germany under the Weimar Constitution provide for the representation of economic groups in their legislative bodies.

These functional groups, since they have no direct representation in Congress and are armed with superior knowledge of conditions, often attempt to bend Congressmen to their way of thinking. Of course, one group tends to bend a Congressman in one direction and another group attempts to reverse the process. These special interest groups, known as the lobby, maintain agencies in Washington whose business it is to secure favorable action upon measures sponsored by them and to oppose measures which in their opinion are detrimental to their interests. Taken collectively, they have been called the Third House of Congress.

Classes of Lobbies.[1] All lobbies fall into four more or less clearly defined types: economic groups, professional bodies, reform groups, and religious organizations.[2] The economic groups are the best known of all lobbies in the nation's capital. This group consists of trade and industrial organizations, farm groups, organized labor, and especially the railroad and utility interests. Among the more important lobbies of this group is the Joint Committee of National Utility Associations, which is said to be one of the best financed of all the lobbies before Congress; [3] the American Farm Bureau Association, which has been responsible for the very effective work of the farm bloc and much of the legislation favorable to agriculture,[4] and the American Federation of Labor and the Committee for Industrial Organization. Some observers are inclined to include the American Legion as an economic group before Congress, on the theory that the chief motivating influence of this body's activities is economic rather than patriotic.

The reform groups consist of such agencies as the League of Women Voters and the National Popular Government League. Both

[1] For the organization and activities of lobbies see Herring, E. P., *Group Representation before Congress.*

[2] This is the classification made by Johnson, C. O., *Government in the United States*, ch. 15.

[3] Walsh, T. C., "Lobbies and Lobbyists," New York *Times*, Oct. 13, 1929.

[4] Kent, F. R., *The Great Game of Politics*, chs. 42 and 45.

of these organizations are interested in promoting better government on all fronts. The League of Women Voters in the last few years has been especially active in urging legislation designed to bring about better personnel in the public service. Included in the reform group are organizations which may be classed as reform agencies but which, nevertheless, are inclined to be slightly more selfish in their outlook than the two just mentioned. There are patriotic organizations such as the Daughters of the American Revolution, the Navy League, the Reserve Officers Association, and the American Legion, all of which are constantly urging larger appropriations for defense. On the other hand there are various peace societies interested in promoting world peace in every way possible. Some of these societies have been branded by their opponents as socialistic, anarchistic, and bolshevistic. Of course, it is impossible to be all of these at the same time, but the charge is made.

The professional bodies also have representatives in Washington sponsoring legislation favorable to the several professions. These groups include organizations of lawyers, architects, and others. These groups play a greater part in state legislatures than in Congress, however, since most of the objectives for which they strive concern the state's police power. However, such agencies as the American Association of Engineers and other professional groups are constantly watching the activities of Congress.

Contrary to belief in some quarters, the religious organizations are of considerable importance as lobbyists. Some of the most significant social legislation has been sponsored by these organizations. This group is represented by such organizations as the Board of Temperance, Prohibition, and Public Morals, the National Catholic Welfare Council, and the Federated Council of the Churches of Christ of America. Some of these organizations are among the most active and best organized pressure groups before Congress. In order to know the weak spots in a Congressman's armor they maintain a complete card index of every member of Congress, showing his attitude on all major legislation previous to his coming to Congress as well as his entire record while there.

A successful lobby is thoroughly organized, well informed, and adequately staffed and equipped. It has been estimated that there are not less than two thousand lobbyists, or "legislative agents," at every session of Congress. These legislative agents are usually

intelligent and tactful. They have a wide circle of acquaintances in Washington and usually attract new friends easily. They satisfy the ego of many newly elected Congressmen and thus gain their enduring friendship. These agents know the subjects about which they desire Congressmen to be well informed, and are also versed in the social practices and customs of the national capital. They know the exact technique of persuasion and are thoroughly familiar with the methods of either frontal or flank attack. They know when to withdraw as well as when to attack. To use a common phrase, lobbyists know all the tricks of the game. Ex-Congressmen are among the more successful lobbyists in the nation's capital. As Phillips has said, "Washington is a sanctuary for lame ducks" who, upon their retirement, become agents for special interests and urge their former colleagues to accept their newly adopted points of view.

The fees paid these expert strategists compare favorably with those paid in some of the highest federal offices. Indeed, many lobbyists receive salaries as high as that of the President of the United States.[1] Certainly such salaries would not continue unless the interests concerned were convinced that it is money well spent. Lobbying is apparently a paying proposition from the viewpoint both of the agent and the principal.

Lobbying Methods. The basic method used in lobbying is that of obtaining complete information on members of Congress. Lobby groups maintain more or less elaborate card indexes of members showing among other things their peculiarities, susceptibilities, and the weak points in their political armor. With this as a basis, lobbyists use every known method of persuasion, including logic, reason, entreaty, detention, elaborate entertainment, and in some cases bribery. Some of them have adopted the theory that, if the end is legitimate from their own point of view, any means may be used to attain it.

What Is Wrong with the Lobby. The question has been raised: Is the lobby good or bad? Many lobbies might be classed as selfish, while others might be called good. The good lobby as distinguished from the selfish lobby is one which employs methods which are open and above board, while the selfish lobby is inclined to resort to underhanded tactics. Some critics have declared that the lobby is the "most insidious and dangerous of all influences on the govern-

[1] See Kent, F. R., *The Great Game of Politics*, p. 271.

ment." On the other hand, some of the lobby groups are interested in legislation from which they will derive no direct profit. Since the activities of the lobby have been directed at both legislators and administrative officers, and its scope has become so widened, there have been many suggestions for reform. Little of a tangible nature has been accomplished, however. Undoubtedly the lobby is necessary as long as Congress does not provide for functional representation. Therefore, the only hope of making a bad lobby good is an improvement of method.

Regulation of the Lobby. A lobby certainly has a legal right to present its point of view in a free country; indeed, the Supreme Court has put its stamp of approval on lobbying as "one of the attributes of citizenship."[1] It is not the lobby we object to, but the methods employed by some lobbyists. The lobby may supply much needed information to Congress, and without it the Congress may grope for guidance. If the lobbies are here to stay — and some of them appear to be economically and socially necessary — regulation to drive them out may simply result in driving them under cover. The only sensible method of regulation is to bring the activities of the lobby into the open. William Jennings Bryan adopted an extreme point of view when he suggested that lobbyists ought to wear uniforms in order to distinguish them from members of Congress and bystanders, but this same suggestion was recently made in a state legislature. The more practical means of regulation, however, is to force the lobby to show its expenditures and methods of operation. This is done by having lobbyists register and give frequent reports on their activities. More has been done in this direction in state legislatures than in Congress. In Congress the plan of regulation has been to allow the lobby to operate but to subject it to frequent investigations when the situation warrants such action. The American principle of representation makes complete regulation impossible. The only adequate remedy against the evils of the lobby is to send men to Congress who cannot be corrupted.

QUESTIONS

1. What changes were brought about in the sessions of Congress by the Twentieth Amendment?

[1] See Phillips, R., *American Government and Its Problems*, p. 203.

2. Discuss in general the internal organization of both Houses of Congress. What are the powers and duties of the Speaker?
3. Describe the process of passing a bill through Congress.
4. Name the more important committees of the House and the Senate. Why is there such an elaborate system of committees?
5. Why does the lobby exist? How is it regulated? How could such regulation be strengthened?
6. Which is the more important in the control of legislation in Congress — the regularly elected officers and committees or the party organization?
7. Why has the Conference Committee been criticized? What could be done about it?
8. Compare and contrast the American Speaker with the English Speaker. Should the Speaker be selected from the membership of Congress or from without?

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CHAPTER XI

Powers of Congress

GENERAL NATURE OF CONGRESSIONAL POWERS

Powers of Congress Limited. In the American federal system governmental power is divided between the national government and the states. The Tenth Amendment to the United States Constitution states: "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." In other words, the government of the United States is a government of limited or enumerated powers. This means that Congress as a policy-determining agency of the national government can do only those things specifically delegated to it or necessarily implied from its delegated powers. In many respects the Constitution may be construed as a limiting agent giving to Congress and the other agencies of the national government certain powers and denying others. The effect of these limitations has been to set up a relatively weak central government compared with those of other countries. This situation is inherent, however, in a federal system of government.

In recent decades the United States has been knit together by economic and social ties. Improvements in transportation and commerce have eliminated great distances. Consciously or unconsciously the people of the United States have demanded that the central government assume more and more powers. In the struggle to bring about some symbols of political unity where economic unity already exists, the question of the power of Congress has been the cause, almost from the beginning, of numerous court battles as well as many political issues. This situation has been more pronounced since 1930 than at any other time in the history of the country. While few questions of this character arise out of the specific delegation of powers to Congress, there have been many controversies over the question of implied powers.

The Elastic Clause. The delegations of power to Congress in

the Constitution are couched in general terms. One may read the Constitution thoroughly and yet not be able to answer questions as to the meaning of the regulation of commerce or the limit of the taxing power, for example. In practice, Congress has assumed considerable discretion in exercising its powers under the Constitution, and the courts have been inclined more and more to construe liberally the powers of Congress and to approve congressional action.

The doctrine of implied powers is derived from Article I, Section 8, Clause 18 – the "Elastic Clause" – of the Constitution. This clause states that "Congress may 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." Does this mean that Congress must pass only the laws absolutely necessary to the enactment of its enumerated powers? Important legal battles have been fought over this question. There have been two schools of opinion in the matter: the broad constructionists, holding that Congress has constitutional authority to exercise powers that may reasonably be implied from its enumerated powers, and the strict constructionists, holding that Congress does not possess such freedom.

The Triumph of Implied Powers. Suffice it to say, the doctrine of implied power was established by the United States Supreme Court in the case of *McCulloch vs. Maryland*[1] in 1819. Generally it has been assumed since, from this case, that if the end is legitimate, any means not definitely prohibited may be used to obtain that end. Broad interpretation of the powers of Congress has been the chief vehicle of the centralization of power in the federal government. While there are still ardent proponents of states' rights, there may be observed a continued increase in the powers of the national government. Congress is doing more today than ever before, and with the continued improvements of industry and commerce the national government will become more important in the daily life of the average individual. Either by interpretation or by constitutional amendment the powers of Congress, in all probability, will continue to be enlarged.

[1] 4 Wheaton 316.

TYPES OF CONGRESSIONAL POWERS

While the Constitution embodies the doctrine of the separation of powers, the attainment of this ideal is impossible in practice. All three branches of government to some degree are endowed with the three major types of power.[1] Congress is looked upon primarily as a legislative body, but it exercises both executive and judicial powers in addition to its legislative functions. These powers will be discussed in order.

Legislative Powers. The Constitution states that "all legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[2] Thus, according to this constitutional provision, Congress is the sole national lawmaking authority, and cannot delegate its legislative powers to any administrative or judicial organ of the government. The exact meaning of this delegation of all legislative powers to Congress has led to many important and interesting questions of constitutional and administrative law. Is it possible in any case for Congress to delegate its legislative powers to an administrative body? With few exceptions, judicial decisions on this matter have indicated that Congress may establish some general rule or principle and then authorize some administrative agency to apply the rule to specific cases.[3] It is obvious that there are many technical problems so complicated that Congress has long since ceased to solve them by exact and detailed legislation. The matter of fixing freight and passenger rates on interstate railroads is a case in point. Congress has merely provided that such rates shall be reasonable and has set up an expert body, the Interstate Commerce Commission, whose duty it is to determine the reasonableness of rates. The delegation of power to the President to fix tariff schedules is another case of this type. Some of the important New Deal measures, among them the N. R. A. and the A. A. A., the Wagner Labor Relations Act, and the Guffey Coal Act, involved a similar

[1] Under the American constitutional system it has been assumed that all powers are of three kinds: legislative, executive, and judicial. W. F. Willoughby, in his book *Principles of Public Administration*, suggests a fourth power: administrative. Harvey Walker, in his *Public Administration*, argues that a more logical classification would be simply politics and administration.

[2] Art. I, Sec. 1, Cl. 1.

[3] See *State v. Whitman*, 196 Wis. 472; 220 N. W. 929 (1928); *Field v. Clark*, 143 U. S. 649 (1892).

delegation of specific powers to administrative bodies.[1] Some of these have been declared constitutional by the court while others have met with judicial veto. Hence the question of just where the line is to be drawn between the establishment of a general legislative principle and the delegation to an administrative body of the power to see that the general principle is followed, has not been settled with any degree of finality.

It will be observed that Congress possesses only "all legislative powers herein granted." This means that every exercise of legislative power must be based upon a definite authorization in the Constitution. When any legislation is proposed in Congress, the members making the proposal must point to some clause of the Constitution which expressly or by implication gives Congress the necessary authority. Also, if the opponents of the measure can show that there is no constitutional sanction, it becomes useless for Congress to pass the measure, since such a measure is likely to meet with an adverse decision before the Supreme Court.

What, then, are the legislative powers of Congress? Article I, Section 8, enumerates a list of powers conferred upon Congress in unmistakable terms. These refer to taxation, borrowing, commerce, naturalization, bankruptcy, coinage, the establishment of post offices and post roads, patents and copyrights, the establishment of inferior courts, maritime law, national defense, control of territories. The elastic clause is also included in this group. For convenience these powers will be discussed under the following heads: finance, commerce, postal powers, bankruptcy, patents and copyrights, weights and measures, national defense, and criminal law. Some attention will be given the non-legislative powers of Congress – executive, judicial, constitutional, and electoral. Of these legislative powers, those relating to finance and commerce assume major importance, and many of the others might well be made parts of these general powers.[2]

Financial Powers – Taxation. One of the chief weaknesses of the Articles of Confederation was the fact that the national government did not possess the power of taxation.[3] Today it would be absurd to suggest that any government, however small, could exist without this

[1] See Chapter XXVIII; also Burdick, C. K., *The Law of the American Constitution*, pp. 149–154.

[2] A more detailed discussion of the commerce and taxing power of Congress will be found in Chapters XXVIII and XXXIV.

[3] Fiske, John, *The Critical Period.*

important power. Very appropriately, in the list of powers given Congress in Section 8 of Article I of the Constitution, the power "to lay and collect taxes, duties, imposts and excises" is given first place. This power, considered alone, appears to be quite comprehensive. But a further examination of the powers and limitations of Congress discloses the fact that several important restrictions have been placed upon the taxing power. Among these restrictions are the following: (1) taxes can be levied only to pay the debts and provide for the common defense and general welfare; (2) direct taxes must be apportioned among the states according to population; (3) all duties, imposts, and excises must be uniform throughout the United States; (4) no duties shall be levied on exports; (5) Congress shall not tax the property or instrumentalities of the states; [1] and (6) Congress cannot use its taxing power merely to regulate matters which have been reserved to the states.[2] While the restrictions are described more fully in Chapter XXXIV, it is well, as a further explanation of the general nature of the taxing power of Congress, to discuss certain aspects of items (5) and (6) at this point.

Except for the limitations on the taxing power listed above, Congress is free to tax any and all objects likely to produce revenue, and is absolutely unrestricted in determining the rate of taxation and the amount of revenue to be raised from any of its legal sources. Thus, the remedy for excessive and inequitable taxation does not rest with the courts, but rather with the electorate.

The question of the power of Congress to tax the property or instrumentalities of the state, including the salaries of state officials, appears to be a matter which brought forth little controversy from 1819 to 1939. In 1819 the Supreme Court in *McCulloch v. Maryland* (4 Wheaton 316) laid down the doctrine of immunity from intergovernmental taxation. In so far as the salaries of officials are concerned this doctrine of immunity was soon strengthened by the court in the case of *Collector v. Day* (11 Wallace 113) in 1870. For years many persons have been unable to see the justice in collecting income taxes from private citizens and exempting the employees of a governmental unit. This problem has not gone

[1] *Collector v. Day*, 11 Wallace 113 (1870). An opposite point of view was expressed in a decision of the Supreme Court in 1939. See *Graves v. O'Keefe*, 306 U. S. 466 (1939). This case is reported in the New York *Times*, Mar. 28, 1939.

[2] *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

unchallenged even by the government itself. On January 19, 1939, President Franklin D. Roosevelt sent a special tax message to Congress in which he said:

> In my message of April 15, 1938, I urged that the time had come when the Congress should exercise its constitutional power to tax incomes from whatever source derived. I urged that the time has come when private income should not be exempt either from federal or state income tax simply because such private income is derived as interest from federal, state, or municipal obligations or because it is received as compensation for services rendered to the federal, state, or municipal governments.[1]

The decision in the O'Keefe case of 1939 plus the recent acts of Congress and state legislatures means that the doctrine of tax immunity has been virtually abandoned. It is reasonable then to assume that Congress has the power to tax instrumentalities of the state, and that the state in turn may exercise the same power. Undoubtedly more definite legislation will be enacted in the future removing completely this time-honored limitation on the taxing power of Congress.

Possibly the most important problem concerning the power of Congress to tax involves those measures which, although tax laws in form, aim only incidentally to produce revenue, being designed to regulate business. In the passage of such measures, Congress has at times gone so far as to destroy or prohibit certain types of business operation. Thus, in 1866, Congress imposed a tax of ten per cent on the notes of state banks, in order to give the national banks a monoply of the business of issuing bank notes. Congress has a right to levy a tax as a means of making effective a definite delegation of power — in this case the power of coinage — [2] but by so doing, state bank notes were taxed out of existence.

Further, it may be asked: Is a tax constitutional when it is not clearly a revenue measure or a means of making effective some definite delegation of power? This question was raised in 1902 in connection with the taxation of oleomargarine, in 1912 by the tax upon the manufacture of poisonous matches, in 1914 by the narcotic drug laws, and in 1919 by the law proposing to lay a special income tax on persons or corporations employing children under

[1] New York *Times*, Jan. 19, 1939.
[2] *Veazie Bank v. Fenno*, 3 Wallace 533 (1869).

sixteen years of age. The Supreme Court upheld the oleomargarine and narcotic laws as revenue measures,[1] refusing to question the motives of the legislative body, but in the case of child labor it made the legislative motive the test of the constitutionality of the law. The court refused to consider the law a revenue measure, seeing in it an attempt to regulate by means of taxation a subject normally falling to the states. Accordingly, the measure was held not to be a valid exercise of the taxing power of Congress.[2]

Financial Powers — Appropriations. The Constitution grants to Congress exclusive control over the authorization of expenditures. No money can be drawn from the Treasury except with the approval of Congress. The Constitution states that Congress may collect revenue to "pay the debts and provide for the defense and general welfare of the United States," and that "no money shall be drawn from the Treasury but in consequence of appropriations made by law."[3] One of the most important tasks before Congress is that of making the huge appropriations necessary for the various governmental agencies and services. Ordinarily appropriations are made in one of three different forms: (1) the annual appropriations; (2) the permanent appropriations, which are made for definite needs and remain available until the entire amount is expended; (3) the permanent annual appropriations, which do not require an annual vote of Congress but rest upon laws relating to certain fundamental functions of government which might be classed as fixed, such as payment of debts and of the salaries of certain officials.

The power of Congress over appropriations is complete except for the constitutional limitation that no appropriation for the army shall be made for a longer term than two years. Other than this, the obligation for providing for the common defense and general welfare has led Congress to appropriate money for almost every conceivable purpose. In the performance of this duty Congress has not developed any particular appropriation policy or financial plan. Rather, it makes appropriations according to the needs of the moment, the amount in each case being determined by popular interest and public necessity. This is shown by the fact that Congress appropriates money for relief in times of floods or other major

[1] *McCray v. United States*, 195 U. S. 27 (1904); *United States v. Doremus*, 249 U. S. 86 (1919); *Negie v. United States*, 276 U. S. 332 (1928).

[2] *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

[3] Art. I, Sec. 8, Cl. 1, and Sec. 9, Cl. 7.

economic emergencies. When it is desirable to add to the merchant marine, Congress provides the funds. In times of unemployment Congress has made huge appropriations for public works. In addition to these purposes which are apparently national in scope, Congress has adopted the practice of giving subsidies to the states for public health activities, the building and upkeep of roads, the advancement of education, and social welfare projects. From this it appears that Congress may appropriate money for a particular function whether or not it has authority to legislate on the matter. An example of this is the action of Congress in appropriating money for the welfare and hygiene of mothers and infants according to the terms of the Sheppard-Towner Act. The Supreme Court sustained the act, but later, when Congress appropriated money for the purpose of regulating agricultural production, under the terms of the Agricultural Adjustment Act, the same court ruled that Congress does not have this power, since such regulation is an encroachment upon the reserved powers of the states.[1]

In spite of this adverse ruling of the Supreme Court there has been a tendency in recent years for Congress to expand its power of appropriation and give more and more money to the states for certain designated purposes. Apparently the grant-in-aid principle has become an accepted practice and a legal power of Congress. It is not likely that the government of the United States will take a backward step in this regard.

For many years appropriation bills in Congress were framed and reported on the basis of estimates submitted by the Secretary of the Treasury to the House committee which prepared revenue measures. Little by little, however, appropriations came to be provided for in separate bills presented by the committees set up for the purpose of considering legislation on new subjects as they developed. This resulted in a most unsatisfactory system of handling appropriations and meant that there was no possible way of making appropriations balance revenue. The result was simply an increased national debt. Also this haphazard method of preparing and enacting appropriation bills led to the practice of "logrolling" and "pork barrel" legislation. The Treasury came to be looked upon as a pork barrel, and each Congressman had no alternative than to get all he could for his constituents. To accomplish this purpose, it was necessary for Congressmen to join forces in order to get as

[1] *United States v. Butler*, 297 U. S. 1 (1936).

much pork as possible – "You help me get mine and I will help you get yours." In very few cases did either the Congressmen or their constituents think of the pork with any sense of shame. One member from a southern state made the remark: "Every time one of these Yankees gets a ham, I'm going to do my best to get a hog." [1] While modern budgeting has somewhat improved the situation, the odor of pork is still evident in Congress, and logrolling is looked upon as "honest" legislative trading.[2]

In 1921, after several years of agitation, Congress enacted the first national budget law. There had been considerable pressure prior to that date for such a reform. The demand undoubtedly was promoted by the tremendous increase in national expenditures as a result of the World War, the studies of such agencies as President Taft's Economy and Efficiency Commission, and the efforts of the Wilson administration. It is interesting to observe that the United States fought the World War without a budget, but that it is impossible to pay the bill without some attention to budgetary procedure. The Budget and Accounting Act of 1921 and its subsequent amendments are discussed in Chapter XXXIV.

The Payment of Debts. As was observed previously, the Constitution gives Congress the power to borrow money on the credit of the United States.[3] This power is unhampered by any constitutional limitations; Congress may borrow money in any amount that it pleases and dictate the terms upon which the debt incurred is to be repaid. Some years ago, Congress set a limit of $45,000,000,000 beyond which the debt should not go. More recently, when that figure was practically reached, Congress raised the statutory limit. With increased expenditures for national defense, including aid to the democracies at war in 1941, it is impossible to predict the ultimate size of the national debt. This debt consists largely of interest-bearing bonds, treasury notes, certificates of indebtedness, war-savings certificates, and postal certificates.

Coinage. The Constitution gives to Congress the power "to coin money and regulate the value thereof." During the Civil War, Congress issued large amounts of paper money and later made such paper legal tender in payment of all debts. The Supreme Court in

[1] Milburn, George, "The Statesmanship of Mr. Garner," *Harpers*, vol. 165 (Nov., 1932), p. 675.

[2] See Beard, C. A. and Wm., *The American Leviathan*, pp. 178–179, for an excellent discussion of logrolling and pork barrel legislation.

[3] Art. I, Sec. 8, Cl. 5.

the case of *Hepburn v. Griswold* [1] in 1870 held that this was beyond the authority of Congress. In later cases the court reversed itself and ruled that Congress could issue paper money under its powers to coin money, and could make such money legal tender.[2] In the latter decision the court appeared to consider the printing of paper money one of the usual forms of borrowing as practiced by modern government. At the present time the power of coinage includes the issuing of gold, silver, and paper currency as may be authorized by Congress. For a more extensive discussion of the issuance of paper money see Chapter XXX.

Regulation of Commerce. Probably the most discussed power of Congress relates to the regulation of commerce under the commerce clause of the Constitution. It will be remembered that a lack of this power was the main defect of the Articles of Confederation, and that the necessity for some form of national control over commerce was the main factor leading to the Constitutional Convention of 1787. It was recognized then that the development of commerce, both foreign and domestic, was one of the prime requisites of national stability. Thus it is not surprising that the new Constitution gave Congress broad power to regulate commerce with foreign nations, among the several states, and with the Indian tribes.

The Constitution in delegating this authority to Congress imposed four limitations on the activities of the national legislative body. In the first place the foreign slave trade was not to be prohibited prior to 1808. In the second place no tax or duty was to be imposed by Congress on articles exported from any state. In the third place no preference was to be given by any regulation of commerce or revenue to the ports of one state over those of another. Lastly, vessels bound to or from one state were not to be obliged to clear or pay duties in another state. The first of these restrictions was temporary. The second was a concession to southern exporters of agricultural products and has proved a definite limitation on congressional authority. The third and fourth limitations have operated to prevent discrimination against any state or group of states.

In recent years the people of the United States have witnessed an enormous expansion of the national government. Much of this

[1] 8 Wallace 603.

[2] *Legal Tender Cases*, 12 Wallace 457 (1871); *Julliard v. Greenman*, 110 U. S. 421 (1884).

expansion has come through the commerce clause of the Constitution and the acts of Congress enacted thereunder. The commerce clause, more than any other part of the Constitution, has been the means of establishing the close relation which exists between business and the government. There is little likelihood that this trend will be reversed; rather, the relations of government and business are destined to grow more intimate as commercial enterprise is enlarged and transcends state boundary lines.[1]

It is noteworthy that the Constitution of the United States, which was drawn up to meet simple economic conditions, is capable of being expanded so that Congress may deal with the complex activities of a mechanized twentieth century, and that this expansion of the commerce clause has been achieved without changing a single word of the original phraseology. The explanation of this phenomenon is found in the liberal interpretation given the clause by the United States Supreme Court. Beginning in 1824 with the famous case of *Gibbons v. Ogden*,[2] the court has liberalized the meaning of the words *regulate* and *commerce* to synchronize with the advances made in commerce and industry. The exercise of the commerce power is discussed further in Chapter XXVIII.

Congressional authority over commerce extends to the regulation of commerce (1) with the Indian tribes, (2) with foreign nations, and (3) among the several states. Of course the regulation of commerce with the Indian tribes, which was of considerable importance in the early history of the country, has now become almost a dead letter. Foreign and interstate commerce are the all-important phases of congressional action in modern times.

The Postal Power. Closely related to the commerce power is the power the Constitution grants to Congress to establish and control post offices and post roads.[3] In many respects the postal power might have been implied from the commerce clause. The transportation of the mail, since the crossing of state lines is involved, is a matter of interstate commerce as truly as it is an exercise of the postal power.

Even though the Constitution does not make the matter explicit, Congress has assumed exclusive jurisdiction over the establishment

[1] Crecraft, E. W., *Government and Business*; Flynn, J. T., "Business and the Government," *Harpers*, vol. 156 (Mar., 1928), pp. 409–415.

[2] 9 Wheaton 1.

[3] Art. I, Sec. 8, Cl. 7.

and maintenance of post offices and post roads. The primary functions of the postal system, including the collection, transportation, and distribution of letters, cards, newspapers, periodicals, and other mailable matter, was an activity in which the states participated originally, but which, upon the adoption of the Constitution, passed exclusively to the national government. In many respects the development of the postal power as we understand it today was a relatively slow growth. In the beginning there were serious doubts as to whether Congress possessed the constitutional power to create the elaborate postal system which is in operation today, or whether it must confine the exercise of this power to the designation of existing buildings and routes to be used as post offices and post roads. Suffice it to say, under both the postal power and the commerce power, Congress has passed law after law extending and enlarging the postal system and postal power until it includes today the operation of the postal savings system, the postal money order system, the parcel post system – which incidentally tended to put the United States government in the express business – and the exclusion from the mails of matters such as lottery tickets, fraudulent offers, and writing of any kind tending to encourage crime and immorality.

The postal power of Congress has also been used as the constitutional basis for the so-called Good Roads Act of 1916, by which large sums of money have been spent throughout the country for the construction of a system of federal highways. The money appropriated for this purpose is given the states on a matching basis. Thus the postal power has become a potent factor in the extension of national control over matters once reserved to the states.[1] The title of the act of 1916 makes it clear that that act was based upon the postal power: "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes." More recent acts covering the same subject have omitted any mention of the postal clause.[2]

In addition to its major powers over finance, commerce, postal affairs, and the control of foreign affairs, Congress exercises numerous miscellaneous functions. These have to do with bankruptcy, patents, copyrights, trademarks, weights and measures, national defense, and criminal law.

[1] For a complete discussion of grants-in-aid, see MacDonald, A. F., *Federal Aid.*

[2] *Code of Laws of the United States* (1926), pp. 665–670.

Bankruptcy. Since business concerns often fail and such failures affect more than one state, the Constitution authorizes Congress to pass uniform laws on the subject of bankruptcy throughout the United States. The act of 1898, which was amended in 1926, provides a uniform rule. It gives jurisdiction over bankruptcy to the federal courts, and provides that a petition may be filed by either the creditor or the debtor himself, asking that the debtor be declared bankrupt. In such a case the court summons him and invites his creditors to present and prove their claims. The court in all such cases appoints a temporary receiver or a permanent trustee to assume charge of all the assets of the debtor and hold them for further action. The administrative agent of the court at bankruptcy proceedings is the referee, who hears all cases and acts for the court. This federal act has been supplemented by various state laws on business and solvency.[1]

The federal law for bankruptcy is intended to be a humane provision by which insolvent debtors distribute all of their effects and thereafter become free of further claims. It is natural that such a benevolent device should be exploited by persons seeking to defraud. The federal government has by no means solved all problems in bankruptcy. In recent years organized fraud has developed and experts have been employed to use the federal law on bankruptcy for the specific purpose of fraud. This practice assumes several different forms, but one illustration will suffice. There have been occasions in which the so-called expert goes to a merchant in financial difficulty and suggests that his inevitable failure be made a source of profit. The merchant is persuaded to send as much of his stock as possible to the expert without the public knowing it and then presents his petition in bankruptcy. The expert's lawyer then applies for the status of receiver and the goods are sold in a distant city. In due course the bankrupt is discharged and the proceeds from the sale of the goods are distributed between the expert and the bankrupt. Such fraud may assume many modifications of this practice, but in any event the intent of the law is not accomplished. The federal laws on bankruptcy carry with them most lenient penalties. For a violation of such laws the penalty is five years' imprisonment, but the full penalty is seldom applied. Conspiring under the federal bankruptcy laws carries with it a

[1] Federal bankruptcy laws supersede state bankruptcy laws, which are in abeyance until the federal law is repealed or lapses.

maximum of two years' imprisonment. Some years ago a survey of five hundred bankruptcy cases showed an average sentence of only seven months and twenty-nine days.[1]

Experience has demonstrated that the present bankruptcy system is almost a complete failure from the creditor's point of view. Recent statistics indicate that creditors' losses amount to $750,000,000 annually, and that creditors receive an average of only 7½ cents on the dollar.[2] Because of the unsatisfactory character of bankruptcy laws, bar associations and associations of credit men and merchants have recommended various changes in the law. In New York a few years ago it was recommended that a federal commissioner in bankruptcy should supervise the enforcement of such laws through use of the court, and direct the appointment of trustees and receivers. This would strengthen government control of the entire procedure and would relieve the federal courts of much detail in the matter of appointment and supervision.[3]

Patents and Copyrights. The Constitution authorizes Congress "to promote the progress of science and the useful arts" by guaranteeing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. In the application of this constitutional power Congress has passed laws providing for both patents and copyrights. The patent law grants to the inventor for seventeen years the exclusive right to make use of and market his invention or lease his rights in the invention. In securing a patent right the applicant files papers with the Patent Office describing his invention and pays a nominal fee for the privilege of showing that his alleged patent departs from previous devices or processes. He may be required to deposit with the Patent Office a model of his device. An examiner then makes a recommendation upon which final action may be taken and the patent granted or denied.

In practice, once a patent is granted, the federal government ceases to take further interest in the matter. If someone later infringes on the patent, the patentee must defend his monopoly in court. It may be seen that a small inventor is virtually without defense when a large concern with almost unlimited resources is the other party to the controversy. Various proposals have been made to strengthen the patent laws so that the small inventor will be more adequately protected. It has been suggested that the chief remedy for the situ-

[1] Young, J. T., *The New American Government and Its Work* (1933), p. 386.
[2] Quoted in Young, *op. cit.*, p. 386. [3] *Ibid.*, p. 388.

ation might be the requirement that all articles and processes on which patents are granted must be placed on the commercial market within a period of five years or the patent will lapse.

Under Article I, Section 8, of the Constitution, Congress has enacted laws which grant to authors the exclusive right to reproduce their writings for a period of twenty-eight years, with the privilege of extending this monopoly for a like period. A copyright may include books, musical compositions, works of art, photographs, and other publications. The copyright law, like the patent law, provides that such monopolies be extended to every applicant who conforms to general requirements. The copyright law, however, is not so easily evaded as the patent law. The chief objection to the present law is that it does not cover violations of the monopoly privilege except in the United States. It has been suggested on numerous occasions that the United States should become a party to international agreements for the protection of such copyrights.

In 1925 Congress enacted a law under which trademarks may be registered, and any person who originates and uses them may be protected against competition from others engaged in similar business. The law for trademarks is not enacted under the patent and copyright provisions of the Constitution, but rather as an exercise of the power of Congress over interstate commerce. Thus, the federal law does not cover infringements of trademarks unless the trademarked goods enter the channels of interstate commerce.

Weights and Measures. The Constitution definitely gives Congress the power to fix the standards of weights and measures.[1] In the beginning this power included the establishment of standard measures of weights, length, and cubic dimension. From time to time Congress has enacted additional laws fixing the content of certain standard containers. It has further provided that for each unit of weights and measures there should be deposited at the Bureau of Standards an original standard unit to be used in the enforcement of laws relative to weights and measures.

The establishment of weights and measures in modern civilization includes much more than the ordinary tangible measures. The measurement of electric current, the ductility of wire, the determination of candle power, the standardization of the tensile strength of materials, and other matters were not anticipated when Congress was given its control over weights and measures. Because of the scien-

[1] Art. I, Sec. 8, Cl. 8.

tific character of this work, Congress has created the Bureau of Standards and authorized it to take over the establishment of the numerous and complex standards of measurement made necessary by the advance of science and the practical application of its findings to everyday life. The Bureau of Standards has been made an integral part of the Department of Commerce. It employs a staff of experts and technicians and operates extensive chemical and physical laboratories.

WAR POWER AND NATIONAL DEFENSE

The Declaration of War. The Constitution gives Congress broad authority in all matters of national defense.[1] It has the power to declare war and make rules concerning its conduct. This includes the power to raise and support an army and navy, to establish a state militia or a national guard to enforce laws of the United States, and to suppress insurrections and repel invasions. Theoretically, the power of declaring war rests solely with Congress. It must be remembered, however, that the President plays an important role in this matter. While he does not possess the power actually to declare war, he does have the authority, as commander-in-chief of the armed forces in the United States, to engage in national defense until Congress takes action. Usually in such instances the President advises Congress that a state of war exists. Whenever such advice has been given to Congress, that body has never failed to declare war officially. Practically, then, Congress is an approving body which confirms and makes official actions already taken by the President.[2]

The Termination of War. While the power to declare war rests exclusively with Congress, the power to terminate war appears to be an executive function. Theoretically and logically, if Congress declares war it should say when that war is ended, but since the termination of war is usually brought about by means of a treaty and becomes a matter which involves at least two countries, the President's treaty-making power becomes more important than any action of Congress. To be sure, a treaty cannot be made without the concurrence of the Senate. It may be assumed, then, that war is not completely terminated except by the authority of the upper house of Congress. The situation after the World War illustrates the role

[1] Art. I, Sec. 8, Cls. 11–16.

[2] See Corwin, E. S., "The Power of Congress to Declare War," *Michigan Law Review*, vol. 18 (May, 1920), pp. 669–675.

played by both the President and Congress in the termination of war. Since the termination of the World War was a multilateral affair, President Wilson as chief executive authorized the coöperation of the United States in the Armistice and had much to do with the making of the Treaty of Versailles. A long fight developed in the Senate, however, over this treaty, and it was not until President Harding assumed office that the World War was officially terminated by a joint resolution of Congress, and not by a treaty. This means, then, that the actual termination of war is an executive action, while official action must be delayed until the Senate confirms whatever treaty the President has formulated.

Maintenance of Military Establishments. In carrying on war it is necessary that Congress have the power to maintain military and naval establishments. Congress has authorized and established the United States Military Academy at West Point, the Naval Academy at Annapolis, the Marine Establishment at Quantico, Virginia, and various training schools for coast guard and merchant marine purposes. It should be remembered that, in addition to the regular army and navy, Congress long ago provided a system of military training in the land grant colleges, various service schools for the military forces, and a War College in Washington. Even though the United States tends to be a peaceful nation, the sum total of its military establishments means that Congress has provided generous support for national defense.

Military and Naval Rules. Since Congress has the power to declare war, plays an important part in the determination of war, and provides for the maintenance of military and naval establishments, it is logical that it also have the power to pass upon military and naval rules. All such rules for the regulation of the land and naval forces must have the approval of Congress before they become effective. Of course no Congressman is in a position to know all of the complexities of such rules. In practice they are drawn by the General Staff, but their effectiveness is conditioned upon congressional approval. The rules which have been approved by Congress for the management of the army are called the "Articles of War," [1] and the rules for the navy are called the "Articles for the Government of the Navy." [2]

[1] *United States Compiled Statutes* (1918), pp. 315–328; *ibid.* (1923), pp. 112–128; *Code of Laws of the United States* (1926), pp. 227–241.

[2] *United States Compiled Statutes* (1918), pp. 288–396; *Code of Laws of the United States* (1926), pp. 1154–1163.

These rules and regulations cover such subjects as the powers and duties of officers and men in the military and naval service of the United States and the regulations governing the procedure of courts martial in both armed forces of the country.

Suspension of the Writ of Habeas Corpus. Under the Constitution, Congress is authorized to suspend the privilege of the writ of *habeas corpus* "when in case of rebellion the public safety requires it." [1] The wording of this clause of the Constitution has led to considerable controversy as to the branch of government which may suspend the writ. Since it is included in the article dealing with the organization and powers of Congress, many legal authorities have argued that Congress has the exclusive right to suspend the writ of *habeas corpus.* This view was supported by Chief Justice Taney at the opening of the Civil War when he held that it was the prerogative of Congress rather than of the executive to take such action. President Lincoln held a contrary view of the situation and acted in accordance with that view. In his message to Congress, he vigorously defended his action.[2] The writ of *habeas corpus* is issued by a court upon petition of a person who deems himself illegally held in confinement, or upon petition of someone else in his behalf. Undoubtedly those who argue that Congress has the sole privilege of suspension have the better of the argument until an emergency arises, at which time any President may be expected to take the course of action followed by Lincoln during the Civil War.

The Army of the United States. Congress possesses the authority to provide for an army of whatever description or size it desires. Generally the policy of the United States has been such as to demand but a relatively small standing army in time of peace. The standing army, however, is supplemented by the national guard. The national guardsmen, who were known prior to the passage of the National Defense Act of 1916 as state militiamen, are volunteers who may be called into action when a national emergency or domestic insurrection makes it necessary. The Constitution grants extensive powers "to provide for organizing, arming, and disciplining the militia." It also provides that Congress may call out the militia for three distinct purposes: to repel invasions, to suppress insurrections, and to execute national law. Also Congress has the power to provide for the gov-

[1] Art. I, Sec. 8, Cl. 12.

[2] Richardson, J. D., *A Compilation of the Messages and Papers of the Presidents,* vol. 6, p. 25.

ernment of such parts of the militia as may be employed in the service of the United States. The only important limitation on the power is seen in the fact that the appointment of militia officers and the authority to train the militia in accordance with national regulations are expressly reserved to the states.[1] The National Defense Act of 1916 made the militia into a national guard and provided for its organization, training, and equipment as one of the three integral parts of the Army of the United States.[2]

As a part of its war powers, Congress is also authorized to purchase and acquire sites within the states for the erection of forts, arsenals, dockyards, and other needful military buildings. These sites are acquired with the consent of the state legislatures, but once acquired Congress may exercise exclusive jurisdiction over them.[3]

CRIMINAL POWERS

Counterfeiting. The Constitution does not delegate to Congress broad powers to define crime and provide punishment. It does, however, delegate rather definite powers in the matter of counterfeiting. Thus, Congress has the power "to provide for the punishment of counterfeiting the securities and current coin of the United States."[4] In view of this provision of the Constitution and of the fact that the federal government has the exclusive power of coinage the states perform no functions whatsoever in this regard.

Piracies, Felonies, and Offenses against the Law of Nations. Another criminal power given Congress by the Constitution is that of defining and punishing piracies and felonies committed on the high seas, and offenses against the law of nations. In the early history of the United States this congressional power was extremely important, but with the improvement of transoceanic travel and the increase in trade between nations piracy has been practically outlawed; hence this delegation of power to Congress has become virtually a dead letter. Occasionally, however, felonies over which the United States must assume jurisdiction are committed on the high seas. As the result of a national agreement, the states usually assume such jurisdiction if such offenses are committed within three miles

[1] Art. I, Sec. 8, Cls. 15–16.

[2] The Army of the United States is composed of the regular army, the national guard, and the organized reserves.

[3] *United States Compiled Statutes* (1918), pp. 396–417; *ibid.* (1923), pp. 151–159; *Code of Laws of the United States* (1926), pp. 1033–1046.

[4] Art. I, Sec. 8, Cl. 6.

of the coast line. Beyond this three-mile line the United States government still has theoretical jurisdiction, providing the offenses in question are committed on a vessel flying the American flag. In other words, the term *high seas* may be construed as any portion of the seas beyond the three-mile limit.

Treason. Congress has the constitutional 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." Treason has been defined by the Constitution in rather narrow terms, in that it consists only of levying war against the United States or in giving aid and comfort to its enemies.

Other Criminal Powers. The Constitution limits the criminal powers of Congress to counterfeiting; piracies, felonies, and offenses against the law of nations; and treason. Through its implied or resulting powers, Congress has extended its constitutional jurisdiction over crimes to include punishment for those who have robbed the mails, violated the interstate commerce laws, sold narcotic drugs illegally, and violated other federal statutes which carry with them certain punishments. The authority of Congress to provide punishment in these cases follows logically from the powers expressly granted the national legislature. For example, the power of Congress to establish post offices carries with it the power to prescribe punishment for those who interfere with the mails. In other words, Congress exercises certain criminal powers resulting from specific delegations of power under various clauses of the Constitution. If this were not true, many of the delegated powers of Congress would mean little. Congress must have the power to punish criminals or its delegated powers become unenforceable.

In recent years Congress has passed a series of laws under its commerce power aimed at particular types of criminals. Thus the so-called Lindbergh Kidnapping Act of 1932 and 1934 makes it a crime to transport kidnapped persons across state lines. The National Stolen Property Act of 1934 provides penalties for those who transport stolen properties across state boundaries. Other acts of the same character include the Federal Fugitive Felon Act and the Federal Extortion Law. The former was passed in 1934 and the latter in 1932. The passage of these acts indicates that the criminal powers of Congress had been extended beyond the specification delegated in the Constitution. Theoretically, such laws are not enacted under any criminal power delegated to Congress, but rather under the commerce and taxing power of that body.

QUESTIONS

1. Discuss the nature of the powers of Congress.
2. How are the powers of Congress modified or expanded? What is the present trend and what reasons may be given for it?
3. Discuss the "elastic" clause and the attitudes which have been assumed toward the powers of Congress.
4. What are the taxing powers of Congress? What are the limitations on these powers?
5. Discuss the powers of Congress in making appropriations. How do you account for logrolling and pork barrel legislation?
6. What are the military powers of Congress? Compare the declaration of war with the termination of war.
7. What is the extent of the criminal powers of Congress? What recent acts of Congress indicate the extension of these powers?
8. What powers, denied by the Articles of Confederation, have been granted to Congress under the Constitution? What has been the effect?

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CHAPTER XII

Non-Legislative Powers of Congress

IN addition to its regular legislative powers, Congress is authorized by the Constitution to exercise certain functions which may be classed as executive, judicial, and constituent.

NON-LEGISLATIVE POWERS

Judicial Powers. The judicial powers of Congress have to do with impeachment, the conduct of congressional investigations, and the organization of the federal court system. The Constitution gives the House of Representatives the exclusive power of impeachment. The power of impeachment, strictly speaking, refers simply to the authority to vote a charge against a civil officer; the bringing of such charges is no indication that the officer in question is guilty. Once charges are made by the House of Representatives against a civil officer for treason, bribery, or other high crimes or misdemeanors, the person so charged is tried by the Senate. The House, then, acts in the capacity of a grand jury and brings the indictment, while the Senate is constituted as a trial jury to determine the guilt or innocence of the person on trial.

Impeachment proceedings have never been brought against a military officer, and the consensus of opinion is that Congress has no authority to impeach such officers. Congress, by its own action, has imposed other restrictions on its power of impeachment. In 1798 it refused to impeach one of its own members [1] and in so doing set up a precedent which since that time has made it impossible for Congress to impeach a member of either house. Yet the President and all other civil officers, including judges, may be impeached for "treason, bribery, and other high crimes and misdemeanors." [2] While the meaning of "treason" and of "bribery" is reasonably certain, "high crimes and misdemeanors" has been given a broad interpretation in practice. Apparently it is within the discretion of Con-

[1] Senator Blount of Tennessee.

[2] United States Constitution, Art. II, Sec. 4.

gress to determine what constitutes high crimes and misdemeanors. There have been occasions upon which judges have been impeached for personal habits. One of the charges against President Johnson was that his public addresses were "intemperate, inflammatory, and scandalous." In the recent controversy over the appointment of a member of the Supreme Court who, it is alleged, belonged to the Ku Klux Klan, impeachment was suggested. Presumably any high crime or misdemeanor committed by a civil officer must have been committed during his term of office to subject him to impeachment; he cannot be impeached for an act prior to his appointment.

An impeached person if convicted is removed from office and is disqualified for holding any other office under the United States. After removal, any officer may be tried in the regular courts for the crime for which he was impeached. If found guilty he is subject to the action of the courts as if he were an ordinary criminal.

Impeachment has been used sparingly by Congress. There have been thirteen impeachments and only four convictions in the history of our government. Several cases of attempted impeachment have resulted in resignations, which accomplished practically the same result as conviction. The four officers removed by impeachment have been judges. Apparently impeachment is considered by Congress a remedy of last resort. With the exception of the impeachment of President Johnson, and of Justice Chase in 1804, it has not been used by Congress as a political means of controlling either the executive office or the courts.

The Inquisitorial Power of Congress. Congress, as well as state and local legislatures, has assumed the power to investigate the activities of the executive and judicial branches of government, and to conduct inquiries into general economic, social, and political conditions at any time it deems such action is necessary. While there is no specific delegation of this power in the Constitution, its exercise is looked upon as an inherent function of a legislative body. From one point of view, it may be considered a method by which the legislative branch exerts its power as a check upon the other branches of government. The prerogative of Congress to conduct such investigations was upheld by the Supreme Court in 1927 when the court said: "We are of the opinion that the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function." [1]

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

It appears that Congress may investigate any problem which relates to a subject within its legislative competence. It has conducted investigations on the election of its members, on the procedure and methods followed in Congress, on the work of the executive and judicial departments, and on broad questions of general policy. It has been estimated that about 330 congressional investigations were conducted between 1789 and 1928. Of these, 190 were inquiries initiated by the House, 125 were held by the Senate, and 15 were joint investigations.[1] Since 1928 the number of such investigations has increased. From 1933 to 1937 Congress authorized 165 investigations. Of these, 85 were conducted by congressional committees and 80 by other agencies at the request of one or both houses of Congress.[2]

The chief and most general reason for congressional investigations is the desire of Congress, perhaps induced by the force of public opinion, to see that the laws are being properly executed. Investigations of congressional elections, when need arises, must be conducted by Congress itself, since the Constitution makes it the judge of its own elections. Investigations of the executive or judicial branches are conducted for the purpose of seeking information on the manner in which laws are being administered by these branches of the government. Investigations bearing on questions of broad general policy are used to supply Congress with needed information on these problems; thus, such investigations become the basis for legislative action.

The most successful exercise of the inquisitorial power of Congress is seen in Senate investigations. In recent years the Senate has investigated practically every important problem of our national life, including such topics as oil scandals, the munitions industry, aviation, monopolies, the stock market, agriculture, Muscle Shoals, and administrative reorganization. Wide publicity has been given these committee hearings. Through such investigations, and the publicity which has attended them, public opinion has been educated and the constitutional principle of checks and balances has taken on a new meaning in the United States. Undoubtedly the reason the Senate, instead of the House, has assumed this important

[1] Anderson, William, *American Government*, p. 576.

[2] McGeary, M. N., "Congressional Investigations during Franklin D. Roosevelt's First Term," *American Political Science Review*, vol. 31 (Aug. 1937), pp. 680–690.

role is to be found in the longer terms of Senators, and in the continuity of the Senate as a legislative body, together with the freedom of debate in the Senate and the popular prestige that body enjoys.

The procedure in legislative inquiries has been reduced to a rather simple formula. The House or the Senate decides that some question is of sufficient importance to justify an investigation. Then, by either a separate, a concurrent, or a joint resolution, a committee is appointed and the subject is named. The committee is usually given power to appoint experts and clerks, hold hearings, and summon witnesses. These witnesses are placed under oath and questioned as if they were before a regular court of law. With the exception of this practice, however, the procedure followed by a congressional investigating committee is much more informal than that of a court.

The power of investigational committees to summon witnesses and compel them to testify strikes at the very heart of the separation of powers principle of the Constitution and has given rise to a number of serious questions. Can Congress compel the President or any executive officer to deliver to an investigating committee any document or information desired by the committee? On a number of occasions the President has refused to comply with the demand of Congress that certain documents be transmitted, on the ground that making such information public would be incompatible with public interest. In such cases the courts have consistently refused to order the executive to comply with congressional demands. Thus the President appears to have as much freedom in his sphere as the legislature has in its. Another question is: Can Congress compel private individuals to testify before investigating committees? If the investigation is within the competence of the legislature, it appears that individuals enjoy no such immunity as the President. Apparently their only safeguard is the safeguard found in regular courts, which allows the individual to refuse to testify on the ground that he would incriminate himself, and self-incrimination cannot be compelled by either a congressional investigating committee or a court. With this limitation, individuals can be brought before congressional committees and forced to give testimony. If they refuse, they may be punished for contempt. The committee itself cannot punish the individual, but it can report to the house it is serving, and

the house may order the sergeant-at-arms to arrest the individual, bring him before the house, and proceed to impose punishment.

Undoubtedly the wide use of the inquisitorial power of Congress, especially in senatorial investigations, has led to numerous abuses. In some cases these investigations have been used for political purposes. Investigating Senators have ridiculed and bulldozed witnesses, and in some cases have gone far beyond the scope of the investigation and brought into the proceedings private telegrams, files, and correspondence which had no bearing on the problem. In spite of these abuses, it appears that the legislative investigation is here to stay. It is looked upon as a safeguard against growing executive control, and as a means of compelling the executive and judicial arms of government to be more careful of their actions. Many persons view legislative investigation in much the same light that they view the investigational work of the grand jury: it is the people's resort against arbitrary government.

Control over National Courts. The Constitution provides that "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." [1] This provision means that the organization of the courts is entirely within the power of Congress and that the establishment of courts, with the exception of the Supreme Court, is permissive and not mandatory. Not even the Supreme Court is completely established by the Constitution. Thus the number of courts – both circuit courts of appeal and district courts – and the number of judges thereof are matters determined by Congress. Apparently the only restriction placed on the power of Congress in setting up the federal court system is the requirement that judges shall hold their office during good behavior and shall receive for their services a compensation which shall not be diminished during their continuance in office. More will be said of the federal court system and its operation in Chapter XX.

EXECUTIVE POWERS OF CONGRESS

In addition to the special powers of the Senate in sharing with the President the power of appointment and the control over treaties, Congress exercises certain other powers of supervision over the executive which may determine in large measure not only the organ-

[1] Art. III, Sec. 1.

ization but the authority of the executive and the administrative branches of government. The powers and duties of the President and the administration are suggested in general by the Constitution, but the exact nature of the work performed by these agents is determined and often minutely regulated by Congress. A few examples of the power of Congress to prescribe executive and administrative duties will suffice. The Civil Service Act of 1883 placed a relatively small number of federal employees under the merit system, but gave the President the power of extending the merit system to additional employees. The Budget Act of 1921 defined the duties of the executive in reference to the annual budget. Commissions, such as the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, and many of the newer agencies of government are set up by act of Congress and their duties are defined in considerable detail. In brief, Congress has an important voice in determining executive spheres of action and an even wider power with respect to the executive department and independent agencies of the government. To quote an interesting article which appeared some years ago: "Congress hurries tirelessly from one administrative problem to another; from technical details of reforestation to costs of the hoof and mouth disease; from the right way to protect the fish in the Alaskan waters to the regulation of the left hand turn in the District of Columbia; from the proper temperature for a botanical garden to the loan of the Marine Corps Band for a centennial in Florida. It is a common practice nowadays for Congress to spend days debating such administrative questions as which guns shoot best, how long paint lasts, how mail tubes are operated, how somebody ought to be made a captain of the navy." [1]

Undoubtedly a certain amount of administrative supervision by Congress is necessary, but when a legislative body concerns itself with such minute administrative details it is likely to do more harm than good, as well as consume valuable time which should be spent on the determination of general policies. With the assumption by the national government of functions which were once localized, there has been a tendency on the part of Congress to allow more discretion to administrative officials. The stock example of such discretion is found in the tariff law, which allows the President to raise or lower tariff schedules as much as fifty percent. Some of the re-

[1] Merz, C., "Congress Invades the White House," *Harpers*, vol. 85 (May, 1926), p. 643.

cent New Deal laws, a few of which met with judicial veto, involved this principle. Undoubtedly, as the functions of the national government grow, Congress will be compelled more and more to give administrative agencies a wider degree of discretion.

CONSTITUENT AND ELECTORAL POWERS

Among the non-legislative powers of Congress are those which might be classed as constituent and electoral. These are concerned with the participation of Congress in the amending process and electoral procedure.

No alteration can be made in the Constitution without congressional action, but neither has Congress of itself the power to make any fundamental change in the Constitution. The discussion of methods of amending the Constitution in Chapter IV has indicated the function of Congress in proposing amendments to the states for ratification and in calling a national convention to formulate proposed amendments. This is another way of saying that the initiative rests with Congress. In proposing amendments Congress apparently may include procedural restrictions on the process and set time limits within which amendments must be ratified or else fail of confirmation. In the case of the Eighteenth, Twentieth, and Twenty-First Amendments, the resolutions which submitted the proposal to the states specified that the amendments must be ratified by the several states within seven years from the date of submission. It appears, then, that Congress may impose what might amount to vital restrictions on the amending process.

In the exercise of its electoral power Congress acts as the board of elections in counting the electoral vote for President and Vice-President and in declaring the results. Likewise Congress elects in case the electoral college is not able to muster majority support for any one candidate. The Twentieth Amendment and other sections of the Constitution specify the manner in which Congress shall perform this function. Under Section 4 of the Twentieth Amendment, Congress "may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose the President whenever the right of choice shall be 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."

LIMITATIONS ON POWERS OF CONGRESS

Restricted Scope of Powers. The Constitution states that Congress shall exercise "all legislative power herein granted." This means that Congress may exercise only those legislative powers which are based upon direct authorizations in the Constitution. Any proposed piece of legislation is assumed to be based upon some clause of the Constitution which either expressly or by implication grants the necessary authority to Congress. Unless authority for the legislation can be shown, it is useless for Congress to enact the measure. The Supreme Court is the final judge of congressional powers. If in the opinion of the court Congress has exceeded its congressional power in enacting a law, the law will be declared null and void. On the other hand, if the court thinks that the law is based upon some grant in the Constitution, the measure will be upheld. This restriction on the scope of congressional powers to some extent explains why there are often such long debates on the constitutionality of proposed laws. Arguments on this point consume much of the time of both houses.

Express Grants of Power. Briefly, the scope of congressional action is delineated by such powers as are expressly granted to the national legislature in the Constitution. It is defined negatively by almost as many express prohibitions. Between these two extremes is a broad disputed field of implied and resulting powers. Article I of the Constitution contains further a lengthy list of subjects upon which Congress *may* take action, including: currency, patents, copyrights, bankruptcy, taxation, naturalization, interstate and foreign commerce, the declaration of war, and the maintenance of the army and navy.

Permissive and Mandatory Powers. Most of the powers expressly delegated to Congress are permissive and the two houses are allowed to exercise their discretion in acting upon the various subjects. In other words, the Constitution states that Congress *may* do certain things and seldom says that it *must* take certain actions. It should not be understood that all the powers granted Congress are permissive. Some of them are mandatory. Examples of mandatory congressional powers include the calling of conventions to revise the Constitution if two-thirds of the states so request, the taking of the regular decennial census, and the making of regulations for the taking of appeals from the lower federal courts to the Supreme Court.

In regard to mandatory powers, the question may be raised: What compels Congress to take action upon these matters? If Congress fails to act, nothing can be done. The remedy for such dereliction of duty lies not in Congress itself, but with the electorate. If an individual member, or Congress as a whole, fails to abide by the mandatory constitutional powers, the people have no other recourse than to see that they elect to the national legislative body men who will observe constitutional mandates.

Express Prohibitions. Most of the express limitations on the powers of Congress are set forth in Section 9 of Article I. Among them are the following prohibitions. The privilege of the writ of *habeas corpus* may be suspended only in cases of emergency where the public safety requires it; no preference may be given to the ports of one state over those of another in regard to commercial or revenue laws; vessels bound to or from one state are not required to secure clearance papers or pay duties in another; money may be drawn from the public Treasury only after appropriations have been made according to law; and Congress may grant no titles of nobility.

In addition to this list of express prohibitions, further limitations are found elsewhere in the Constitution. These include the requirement that Congress may alter the laws of the states respecting the times, places, and manner of holding elections for Senators and Representatives except as to the place of choosing Senators. Also, the extensive power of taxation given Congress is subject to the limitation that direct taxation must be uniform and that export duties are not to be imposed on goods leaving the country. In providing that Congress support an army and a navy the Constitution imposes the limitation that no appropriation for this purpose shall be made from the public Treasury for a period of longer than two years. The framers of the Constitution inserted a clause defining the crime of treason and thus prevented Congress from extending the offenses which may be prosecuted under the name of treason. In punishing treason, Congress may not impose a punishment that will work corruption of blood or forfeiture except during the life of the person convicted.

In addition to the express prohibitions found in the Constitution, there have grown up certain other limitations on congressional power as a result of our adoption of the federal system of government and the establishment of a presidential form in the federal system. Directly and indirectly, congressional acts are modified by the activi-

ties of the executive and judicial departments. Enough has been said relative to the activities and powers of the courts to indicate the extent of the check that the courts make on legislative action. It is likewise true that the executive department imposes certain direct and indirct limitations on congressional power. This is shown by the fact that the President may veto any measure passed by Congress.

Implied Powers. Much of the actual power exercised by Congress is derived by implication from some express grant. The fact that the Constitution confers upon Congress authority to "make all laws which shall be necessary and proper in carrying into execution" the powers expressly granted gives the national legislative body considerable leeway. Further authority is found in four of the last seven amendments, which state that Congress shall have power to enforce these amendments by appropriate legislation.

The "necessary and proper" clause of the Constitution has been the basis of a large body of implied powers. While the exercise of many of these powers derived by implication may cause considerable controversy and ultimately lead to many court battles, Congress continues to exercise them. Early in our history the Supreme Court under the guidance of John Marshall developed a liberal attitude on the subject of implied powers, and that attitude has been followed more or less consistently through the years. Marshall's attitude is reflected in the phrase: "If the end is legitimate, any means not prohibited may be used to attain that end." Thus, if it can be shown that Congress has been given the authority to deal with any subject, it is free to choose its own methods to make its power effective, so long as those methods are not in direct conflict with the Constitution. A famous example of the use of implied powers was the establishment of the Bank of the United States in 1791 and in 1816. While the Constitution does not give Congress the express power of establishing and maintaining such an institution, it does say that Congress shall exercise the power of coinage and control of foreign and interstate commerce. Thus, if Congress possesses the power of coinage it possesses the power to establish instrumentalities necessary to its exercise.[1] There are many other examples of the exercise of congressional powers which cannot be found in the Constitution itself. Among them are the establishment of the Federal Reserve system, the system of postal savings, and the parcel post; the fixing of rates to be charged by interstate utilities; the regulation of conditions of

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

labor; and the passage and enforcement of the Pure Food and Drug Act. The limits of the implied powers of Congress are unknown. Apparently it is able to do anything provided the act can be classed, even though remotely, under the power of taxation, the power to regulate commerce, or any other expressed power in the Constitution.

Resulting Powers. In addition to its implied powers Congress exercises what have been called resulting powers. It is not necessary, according to the Supreme Court, for Congress to trace back every power it exercises to a single express grant of authority; its authority for enacting a certain law may be deduced from more than one grant or from a combination of such grants. Probably the best illustrations of this type of power are the criminal powers of Congress. The Constitution defines certain crimes, and as a result of such definitions Congress possesses the power of fixing punishments for the crimes. Unquestionably Congress has the power to fix the punishment for the violation of any national law even though that power is not expressly granted by, or cannot be inferred from, any single part of the Constitution.

Federal Police Power. Under the federal system of government powers are divided between the national government and the states, in accordance with the formula set forth in the Tenth Amendment. This means that Congress exercises only delegated powers while the states possess reserved powers. Theoretically and legally, the states and not Congress exercise what is called police power – that is, the power to legislate in the interest of public health, public morals, public safety, and the general welfare. Congress theoretically does not possess such power since there is no delegation of it to Congress in the Constitution. As a matter of practice, however, in recent years there has grown up what has been called federal police power, and Congress under guise of some specific delegation has regulated activities of individuals in the interest of public health, public morals, public safety, and the general welfare. The national health is safeguarded, morals are maintained, and safety is promoted under congressional power to lay taxes, to establish post offices and post roads, and to regulate interstate commerce. This is another way of saying that federal police power springs from specific delegations or implications of other powers. Examples of this are the regulation and prohibition of the sale of narcotic drugs under the taxing power, and the requirement of safety appliances, the fixing of hours of labor, meat inspection, and pure food and drug regulation under the com-

merce power. In the last analysis any of these powers has the effect of protecting and promoting public health, public morals, and public safety whether or not they are enacted as such. Undoubtedly, as the country becomes more of a national economic unit through improved methods of transportation and communication, it will be necessary for Congress to extend its so-called police powers. It is altogether possible that such extensions can be brought about by a reliance upon existing constitutional grants. This implies, of course, that the country will recognize the fact that such matters have grown beyond the possibility of effective local control and have become national problems affecting commerce, taxation, and other matters.

QUESTIONS

1. What is the scope of the judicial powers of Congress?
2. Enumerate the limitations on the power of impeachment by Congress. Has this power been used extensively?
3. What is the basis for the congressional power of investigation? What is its extent? What is the procedure followed?
4. What control does Congress exercise over national courts?
5. Does Congress exercise much or little control over the executive? Discuss and give illustrations.
6. What is meant by constituent and electoral powers and what form do they take?
7. What are the constitutional restrictions on the powers of Congress?
8. How are the powers of Congress defined both positively and negatively?
9. What is the "necessary and proper" clause? What are implied powers? Resulting powers? Is there a federal police power? Explain what may be said at this point about the separation of powers in the federal government.

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See also references at end of Chapter XI.

CHAPTER XIII

State Legislatures

ROLE OF THE LEGISLATURE IN STATE GOVERNMENT

THE legislative branch of the state government has been called "the central power house" of the state. In structure, organization, and procedure state legislative bodies are similar to Congress, but in powers they are quite unlike the national legislative body. While Congress possesses only those powers specifically delegated to it, or necessarily implied, state legislatures possess all powers not specifically denied them or delegated to other agencies of the state by the constitution. The similarities between the state legislatures and Congress need not be discussed at length. It is necessary, however, to give considerable attention to the main points of difference between the national and the state legislative bodies.

FORMS OF STATE LEGISLATURES

Regardless of what it is called, every state in the Union possesses a legislative body. In some states this branch of government is known as the General Court; in others, following the colonial practice, it is called a General Assembly, but in the majority it is simply designated as the State Legislature.

As in Congress, the bicameral system of legislation is used in all but one state of the Union,[1] and this state — Nebraska — adopted the one-house plan only in 1937. From the beginning the states have been committed to the bicameral system, since only four states, until the adoption of the unicameral system in Nebraska, have used a legislature composed of one house. Delaware had a unicameral legislature until 1776. The Pennsylvania legislature consisted of one house from 1776 to 1790; Georgia used such a legislature from 1777 to 1789; and Vermont continued to employ the unicameral plan until 1836.[2] Until recent years few outside the ranks of students of poli-

[1] See Moran, T. F., "Rise and Development of the Bicameral System in America," *Johns Hopkins University Studies in History and Political Science*, vol. 13 (1895). [2] See Carroll, D. B., *The Unicameral Legislature of Vermont.*

tics would question the use of bicameral legislature in the states,[1] and in the mind of the average citizen today the bicameral plan is still the natural scheme of government even though there has been an almost complete abandonment of the principle in local governments.

Adoption of the Bicameral System. Why did we adopt the bicameral system? The colonies used the bicameral system rather generally. By the close of the Revolution it had been adopted in all states except Pennsylvania and Georgia. The colonial assemblies were composed of two houses – one elected by the people and one usually appointed by the Crown. Undoubtedly the bicameral legislative system of the colonies was patterned after the two houses of the British Parliament. In both Parliament and the colonial assemblies, there was a distinction between the two houses, in that the same group did not select the members of the upper and lower houses. In some of the early state legislatures the upper house was elected by the propertied classes while the lower house was elected by the rank and file of the people. In most of the states, however, this distinction was never made, and the states which adopted it soon gave it up and allowed the same electors to choose the members of both houses. Also, almost from the beginning, population came to be accepted as the basis of representation in both houses. This means that there was no essential difference between the upper and the lower house, and the chief excuse for the existence of the two, aside from historical reasons, was the belief that one house would act as a check upon the other. While this may be the explanation of the adoption and continued existence of the bicameral system in the states, it does not explain the adoption of the two-house system for the national legislature. It will be remembered that the Connecticut Compromise in the Convention of 1787 was in large measure responsible for the adoption of a bicameral national legislature.

Admitting, for sake of argument, that there was a real reason for the adoption of the bicameral system in early state governments, the question may be raised whether that system is suitable to twentieth century state governments. It has been assumed that the existence of the two-house plan in the states affords a system of checks, and guarantees more careful consideration of bills than is possible in one house. Do the two houses actually check one another? The few

[1] A notable exception is Senator George W. Norris of Nebraska, who has been called the father of the unicameral plan in modern times.

studies which have been made of the working of the bicameral system indicate that it is difficult to show that one house is an effective check upon the other. While it is true that a number of bills passed by one house are killed in the other, the bills are killed without much discrimination.[1]

Use of the Unicameral System. For the past few years there have been many suggestions that state legislative bodies be made unicameral.[2] Probably the motivating force behind such movements toward unicameralism has been the almost universal adoption of this principle in municipal governments and its subsequent success. If a one-house legislature operates successfully in a city, many observers are of the opinion that such a plan would function satisfactorily in a state. Also, the Canadian provinces as well as numerous other units of government abroad have had successful experience with one-house legislative bodies.[3] In spite of all the movements toward unicameralism and the many arguments students of legislation have advanced, only the state of Nebraska has been willing to experiment. Before the Nebraska plan is described, the various arguments for a simplified legislative structure should be summarized.

Essentials of a Good Legislature. The essentials of a good legislative body have been summarized as follows: (1) it should not be unduly hampered by constitutional restrictions; (2) it should possess an external structure and an internal organization that will render it an effective and responsible agency of the public will; (3) it should not be so big as to be unwieldy; (4) its form should not

[1] See Colvin, D. L., *The Bicameral Principle in the New York Legislature;* Schaffter, Dorothy, *The Bicameral System in Practice;* Simons, M. D., "Operation of the Bicameral System in Illinois and Wisconsin," *Illinois Law Review*, vol. 20 (Mar., 1926), pp. 674–686; Hall, J. E., "The Bicameral Principle in the New Mexico Legislature," *National Municipal Review*, vol. 16 (Mar.-Apr., 1927), pp. 185–190, 255–260; Boots, R. S., "Our Legislative Mills; Nebraska," *ibid.*, vol. 13 (Feb., 1924), p. 118.

[2] The Model State Constitution, proposed by the National Municipal League, provides for a unicameral legislature, with members elected under a system of proportional representation.

[3] Of the sixty-two major systems of government in the world today, only fifteen have one-house legislatures. They are Albania, Bulgaria, Costa Rica, Esthonia, Finland, Guatemala, Honduras, Latvia, Lithuania, Norway, Panama, Persia, El Salvador, Spain, and Turkey. See *Political Handbook of the World*, Council of Foreign Relations; *The Statesman's Yearbook;* James, H. F., and Martin, C. A., *The Republics of Latin America;* McBain, H. L., and Rogers, L., *The New Constitutions of Europe.*

complicate the process of lawmaking needlessly and facilitate the evasion of responsibility; (5) it should be reasonably representative of the principal geographical sections and of the main social and economic groups in the state.

Just what form of legislative organization will best meet these requirements? One conclusion is certain: our present legislative organization does little to promote these ideals. No one of the forty-seven bicameral state legislatures fulfills all of the requirements. While many reasons might be given for this situation, the fact that state constitutions generally provided that the legislature shall consist of two houses has aided materially in frustrating the attainment of the ideals here proposed. In the matter both of legislative organization and of legislative powers, the assumption of constitution makers has been that legislatures are a necessary evil whose actions are to be guarded against at every opportunity. Too little thought has been given to making the legislature a workable and responsible lawmaking body which will promote the general welfare rather than hinder it.

Argument for Unicameralism. The advocates of unicameral legislation should feel that the burden of proof is upon them. Why should we change from the established plan of bicameralism to an untried scheme of unicameralism? Many proponents of the one-house legislature would say immediately that the plan is not untried; it has worked satisfactorily in almost all the cities of the country as well as in foreign countries. They could also point out that the two-house legislature is not as representative a body as might be set up. In Congress, the two houses at least tend to represent different groups and interests, but in the average state this situation does not hold. Instead of supplementing each other and making the legislature more representative, the two houses duplicate each other. Furthermore, since a bicameral legislature must necessarily be a rather large body, it tends to become cumbersome and ineffective. Ordinarily the real work of any state legislature is done by a comparatively small group of men whose names appear on certain "interlocking" committees.[1] Would not a frank recognition of this fact through the establishment of a small unicameral legislature tend to

[1] An unpublished study of two recent sessions of the Kentucky General Assembly reveals the fact that about a dozen men dominated the important committees and practically operated the legislature. These men were members of all the important committees.

make the body less cumbersome, more effective, and produce a situation in which responsibility can be definitely placed? There has never been a better device for evading and covering up responsibility for legislative acts than the two-house system.

The question whether or not the houses check one another is not a matter of serious concern since legislation is checked more effectively by other means. The committee system affords a more effective check on hastily prepared legislation than any other device which has been set up within the legislative body. Again, the courts with their power to nullify unconstitutional acts check the activities of legislatures, as does the governor's power of vetoing undesirable measures.

In brief, then, it may be argued that the unicameral legislature will tend to expedite legislation, prevent the members of the legislature from dodging their lawful responsibility, reduce the number of members in a legislature, and enable the states to pay salaries that will attract a personnel of high caliber to the legislatures. In view of these alleged advantages, students of government have advocated the unicameral system for the states for many years, and in several states efforts have been made to secure the adoption of the principle. In Oregon (1912 and 1914), in Oklahoma (1914), and in Arizona (1916) constitutional amendments were submitted but in each case they were defeated. In 1913 the governor of Kansas proposed a legislature composed of one house of less than twenty members, all of whom would be experts in legislation and would give all their time to legislation. This interesting proposal was never submitted to the voters. Since 1910 no less than twenty states have given some thought to the adoption of a unicameral legislature, but Nebraska has been the only state to adopt the plan.

The Nebraska Experiment. The adoption of a unicameral system of legislation had been proposed in Nebraska intermittently for some twenty years. It remained for United States Senator George W. Norris actively to sponsor the plan and bring about its adoption in November, 1934, despite the fact that it was criticized as radical by practically all the newspapers of the state.[1] The constitutional amendment which put the plan into effect provides for a single-chambered legislature of not more than fifty members, who shall be elected in nonpartisan elections. The legislature fixed the number of

[1] Norris, G. W., "The State Constitutions of the Future," *Annals of American Academy of Political and Social Science.*, vol. 181 (Sept., 1935), pp. 50–58.

members at forty-three, and the first session of the unicameral legislature met in January, 1937.

The success of this experiment on the whole has been most gratifying. The legislature proved to be as nearly nonpartisan as could be expected. Despite the fact that they were elected in a year when the Democratic party nationally was in the ascendency, Nebraska's legislators were almost equally divided between the two major parties. Democrats and Republicans sat on the committees and were selected for these places without serious regard for their political affiliations. On the whole the unicameral legislature proved that the system attracts to legislative halls men of higher caliber than are ordinarily found under the bicameral system. Also, the unicameral legislature did much to remove the actual legislation from hotel rooms to the state capitol.[1] Senator Norris has said repeatedly that the Nebraska system proves that the unicameral form of legislation does much to prevent the usual passing of the buck from one house to another and from both houses to a conference committee. Every member in a unicameral system has an increased responsibility and realizes as never before the obligations of his position. The unicameral system in Nebraska is also economical. In 1935 the bicameral legislature cost $202,500. The unicameral legislature of 1937, which lasted longer,[2] cost only $150,000. The Nebraska experiment will be watched by statesmen all over the country. Already, as a result of the attention it has attracted, proposals looking toward the establishment of the unicameral plan have been made in more than a dozen states; but undoubtedly it will be necessary to observe and analyze several sessions of a unicameral state legislature before some of its more skeptical opponents are convinced that the plan of legislation used in practically all of the cities of the country is a satisfactory plan for the states.

Size of Legislatures. In most states the number of senators and representatives in the legislature is fixed by the constitution. In some, however, the number is determined by the legislature itself. When the number is fixed by the constitution a maximum is usually stated; in numerous cases this was reached years ago. The number

[1] Aylesworth, L. E., "Nebraska's Nonpartisan Unicameral Legislature," *National Municipal Review*, vol. 26 (Feb., 1937), pp. 77–81.

[2] The 1935 bicameral body sat for 98 days, while the unicameral legislature of 1937 stayed in session for 110 days. These figures are quoted from Kenneth Keller, who reported the unicameral legislature for the Lincoln (Neb.) *Star*, in an editorial, "Unicameral Assembly," South Bend (Ind.) *Tribune*, Aug. 1, 1937.

of senators in the various state legislatures ranges from 17 in Delaware to 67 in Minnesota; the average is around 40. Membership in the lower house varies from 35 in Delaware to more than 400 in New Hampshire, with an average of slightly more than 100. The New England states appear to have larger lower houses than other sections of the country, owing to the system of town representation which necessitates a larger number of representatives.

In recent years there has been a tendency for state legislatures to increase in size. The new counties that have been added in the several states naturally have demanded representation in the legislature, and no county has desired to have its representation decreased. The result, then, has been an increase of membership in both houses.[1] This increase has meant that state legislatures have become rather unwieldy bodies. Undoubtedly, smaller legislatures would function more efficiently, and in some cases no damage would result if membership could be reduced as much as half.

REPRESENTATION IN STATE LEGISLATURES

Geographical Basis. Representation in state legislatures has been based largely on geographical units. In New England, representatives are elected from the towns. In the rest of the country the county is the unit of representation. Presumably either unit – the town or the county – represents a certain block of population, but it will be observed that little attention is paid to the matter of equal representation. Especially is this true in New England. In many sections of the country, however, the counties theoretically are represented in proportion to population. This means that large counties have two or more representatives in the lower house of the legislature, while small counties may even be combined with other counties as legislative districts. In some states there exist situations comparable to rotten boroughs. In Georgia, for example, which uses the so-called county unit rule of representation, the limitations placed upon large counties have the direct effect of producing a situation in which sparsely populated areas are overrepresented in the legislature while the larger urban centers are considerably underrepresented.[2] Examples of this kind can be found in practically

[1] A table showing for the legislature of each state the number, terms and dates of meeting is reprinted in Graves, W. B., *American State Government*, pp. 194–195.

[2] For the Georgia situation see Gosnell, C. B., "Rotten Boroughs in Georgia," *National Municipal Review*, vol. 20 (July, 1931), pp. 293–397. Under the

all the states. On the whole it can be said that the rural communities through their representatives dominate the legislatures. These rural communities were in the majority when the system of legislation was devised in the state, and they continue their domination in spite of the constant growth of urban sections.

Problem of Representation. The question might be raised: Should representation in state legislatures be solely in proportion to population? What constitutes a truly representative legislature? Many students and statesmen agree that real representation involves more than mere numbers, and that a modified plan is probably preferable to the principle of representation solely according to numbers. The argument has been advanced that various interests in the state should be represented as well as population groups. Such a plan as was adopted in California in 1926 has the merit of providing a basis for true representation of both population groups and economic and social interests. Under this plan, population remains the basis of representation in the lower house, but no city is permitted to have more than one member in the upper house. The rural areas are further provided for, in that as many as three counties with small populations may be formed into one senatorial district. In brief, the plan means that the rural element dominates one house of the legislature while the urban element is more adequately represented in the other.[1] Such a plan should solve, at least in part, the urban-rural controversy in state legislatures.

Gerrymandering. The legislative district, whether it be a county, a combination of counties, or parts of a county, is determined by the legislature itself. State constitutions have at least paid lip service to the requirement that these districts be as nearly equal in population as possible. The legal provisions, however, are easily evaded. Thus there is a tendency in practically all states to gerrymander districts. In districting or redistricting, the majority party in the legislature attempts to give itself the advantage. If the legislature is Democratic there is usually a tendency to provide overrepresentation for the Democratic districts and underrepresentation for the Republican areas. In Kentucky, for example, a Democratic county of approximately 7000 and a Republican county with approximately 70,000 people each have one representative in the state legislature.

Georgia plan, a county with a population of 318,000 has but three representatives in the legislature, while a county with a population of 2700 has one member.

[1] Dodd, W. F., *State Government*, p. 159.

Of course the explanation is that a Democratic legislature determines the districts. Similar instances can be found in a rock-ribbed Republican state such as New Hampshire at the present time or Iowa and Pennsylvania a few years ago.[1] Neither constitutional provisions nor judicial decisions have been able to prevent such gerrymandering. Gerrymandering means that the principle of true representation, if not destroyed, is decidedly weakened.

TERMS, QUALIFICATIONS, COMPENSATION, PRIVILEGES OF MEMBERS

Terms of Office. In the early state constitutions the term of state legislators was limited to one year. At present, however, thirty-one states elect senators for a term of four years, while in fifteen states senators are elected for a term of two years. New Jersey is the only state in the Union whose senators are elected for three years. Four states elect their representatives for four years, while New York and New Jersey cling to the principle of annual elections; all others elect for two years.

Qualifications. The qualifications for members of the state legislature usually relate to age, citizenship, and residence. In all states both senators and representatives must be United States citizens and residents of the districts they represent, and ordinarily must have attained a higher age than is required for voting. Actually these requirements are of little importance as any person with the slightest chance of election would in most cases have exceeded them.

Compensation. The compensation of legislators in the great majority of states is notoriously low. The amount is fixed by the state constitution or determined by the legislature. When compensation is set by the constitution, it is extremely difficult to make desirable adjustments in legislative salaries because of the necessity of adding amendments to the constitution to effect the changes. In many states the compensation of legislators is on a per diem basis. Five dollars a day for the period of the legislative session is typical of a number of states. This figure is grossly inadequate. Hence it is difficult to persuade capable men to become candidates for the state legislature. In addition to the per diem, legislators are allowed expenses for transportation to and from the state capitol.

Privileges and Immunities. State legislators, like Congressmen, have certain privileges and immunities not enjoyed by the average

[1] For interesting examples of such inequalities see Dodd, W. F., *State Government*, p. 154.

citizen. Among these are freedom from arrest while in attendance at legislative sessions and in traveling to and from such sessions. This provision is found in all states except for cases of treason, felony, and breach of the peace. Likewise, legislators are entitled to freedom of speech while on the floor of the legislature. They can be held for nothing they might utter on the floor of either house, being accountable only to their constituents.

LEGISLATIVE ORGANIZATION

Sessions. During the nineteenth century, when most states were entering the Union, a distrust of state legislatures was developing. As a result, forty-three states hold biennial sessions. In four states — New Jersey, New York, Rhode Island, and South Carolina — the early constitutional principle that the members of the legislature should be kept responsive to the wishes and desires of the people is reflected in provisions for annual sessions. Alabama, which now holds its regular sessions quadrennially, will hold biennial sessions after 1943. It happens that the legislatures of the majority of states meet in the odd-numbered years at about the same time.

The trend from annual to biennial legislative sessions ran its course about 1880, since only two states subsequently have substituted a biennial session for an annual.[1] The question of the relative merits of the annual and biennial sessions may be raised. In a recent study made by the American Legislators' Association, five states of the same approximate population holding annual sessions were compared, on the basis of legislative costs, with five states of approximately the same population holding biennial sessions.[2] This study shows that the legislative expenses are higher in states with annual sessions and that a larger proportion of the total state revenue is used to operate the legislature in these states. It was observed, however, that the ratio for the annual states is less than double that for the biennial states and that some of the annual states had legislative costs below those of the biennial states. Of course, the efficiency of a legislative body cannot be determined by the number of sessions held or the amount of money expended for legislative work. One of the least desirable economies in government may be the slashing of legislative costs. The study cited above indicates, then, that the

[1] Georgia, 1924; Massachusetts, 1938.

[2] Mott, R. L., *Annual or Biennial Sessions*, American Legislators' Association, Sept. 19, 1934.

savings apparently made by biennial sessions hardly offset the waste which might arise from the lack of an opportunity to consider legislation fully. Undoubtedly the biennial session affords a better opportunity for legislative planning than is achieved in many annual sessions.

The length of the regular session in most of the states is restricted to a limited number of days. This varies from thirty to ninety, with the average around sixty. Such restrictions apparently arise from the same distrust of legislators that is exemplified in the trend from annual to biennial sessions. Apparently it was reasoned that, since legislatures are necessary evils, they should be allowed as little time as possible in which to do their work. Some state constitutions, instead of fixing a maximum number of days for the legislative session, reached the same objective by stipulating that legislators shall receive no compensation beyond a certain period. Suffice it to say that the average duration of a state legislature of about sixty days has brought about the difficulties which are so prevalent in the end of the session rush. State legislatures are compelled to consider an ever increasing mass of legislation. Perhaps a sixty-day session was sufficient when state governments were called upon to render little service. At the present time, however, it is entirely too short to afford adequate consideration for all measures coming before the legislature. This limitation, together with defective rules, has meant that the legislature must work under pressure toward the end of the session. As a result, many bills are approved without having been read and considered by a majority of the members. "To repeal the limitation, however, would be like freeing a dog from his leash. We cannot tell to what distance the lawmaker may wander." [1] Nevertheless, if more time is needed in which to consider legislation, a state can probably afford to spend the additional money, since the cost may be greater in the long run when inadequate consideration is given many of the bills which become parts of the state law.

To avoid many of the difficulties which arise from the end of the session rush, and to prevent waste of time during the first part of the session, a device known as the split session has developed in the state of California. The split session was also used for a time in West Virginia. Under this plan the legislature meets for a certain period (one month in California) for the purpose of organization and for the introduction of bills, At the end of that time there fol-

[1] Phillips, R., *American Government and Its Problems*, p. 244.

lows a recess of a month. During the recess it is intended that members shall study the content of the bills which have been introduced and on which they will be called to vote at a later period. Also, it is expected that they will avail themselves of the opportunity to determine the attitude of their constituents regarding pending legislation. At the end of the recess the legislators reassemble and devote the remainder of the session to consideration, debate, and approval of the measures introduced during the first part of the session.

The split session plan has appealed to many students of government and the question has been raised why more states have not adopted it. Several studies have been made of the operations of the system, which show that in many respects the plan has not produced legislative results of a higher order than those found in states operating under the traditional plan. Professor Thomas S. Barclay has pointed out that in California the operation of the plan has resulted in the introduction of skeleton bills in considerable numbers. It has also created a pre-recess rush not unlike the familiar end of the session rush – which incidentally has not been eliminated. Moreover, it was found that legislators rarely consulted their constituents. In addition, during the period of 1915 to 1929 post-recess introductions averaged at each session two hundred bills for the one hundred and twenty members."[1] The more experienced legislators were unanimous in desiring the abolition of the split session. Numerous proposals to this end have been introduced in California, but majorities sufficient to repeal the amendment have not been secured.

The split session was adopted in West Virginia in 1920 but abandoned eight years later. Apparently it failed to solve the problems of that state and there has been no effort to restore it. The constitution of Massachusetts since 1918 has authorized the legislature to adopt this split session plan, but the Massachusetts General Court has preferred to operate under the usual system. Legislatures of other states, including Alabama, New Jersey, Texas, and Kentucky, have frequently split their sessions without constitutional authorization. In New Jersey it has become the regular practice for the legislature to adjourn about ten days after organizing in order that legislative leaders may have some time to develop their legislative programs. In 1930 the regular Texas legislative session was divided into three parts. The first month is devoted chiefly to the introduc-

[1] Barclay, T. S., "Bifurcation Out West," *State Government* (Apr., 1932), pp. 5–6; (May, 1931), pp. 5–6.

tion of bills, then comes a month's period of committee hearings, and the remaining period of sixty days is given over to debate and action upon bills. The constitution of Georgia in 1933 was amended so that that state holds two regular sessions in each legislative year – a ten-day session in January and a longer session limited to sixty days in July. In spite of these modifications of the split session principle, the plan has not met with favor in a great number of states; and certainly, if recent researches are to be considered, the California plan has been disappointing. It has not prevented the enactment of bad legislation and has not accomplished any strictly good legislation.[1]

Special Sessions. In all the states the governor is authorized to call the legislature into special or extraordinary sessions when in his opinion the circumstances require such action. Ordinarily the legislature when called into special session may consider only the subjects listed in the governor's call; the constitution prohibits it from considering any other matters. In recent years there has been an increase in the number of special sessions in the various states. From January, 1927, to July, 1934, 158 special sessions were called in all the states. Undoubtedly many of these were due to the necessity of considering the then pending amendments to the Constitution of the United States, and to the need of enacting legislation dealing with emergency and unemployment relief.

The special session, which is limited to matters mentioned in the governor's call, may prove a useful means by which the governor may better control his legislation. In 1936 the governor of Kentucky asked the regular session of the legislature to enact its hobby bills and then adjourn in as short a time as possible, promising the members that in this event he would recall them to consider reorganization, revenue, the budget, social security, and other matters. During the year four special sessions were held, each devoted to a limited number of subjects. The result was that the governor's legislative program was enacted into law with relatively little difficulty. A special session if limited to one or two topics does not permit the usual legislative trading which prevails in a regular session, which has all types of legislation before it. The special session seems to

[1] Faust, M. L., "Results of the Split Session System of the West Virginia Legislature," *American Political Science Review*, vol. 22, p. 109; Barclay, T. S., "The Split Session of the California Legislature," *California Law Review*, vol. 20 (Nov., 1931), pp. 43–59.

prove that a legislature is made up of ordinary men who are not capable of considering too many different subjects at one time.

Officers. The officers in state legislatures correspond in general to the officers of the Congress of the United States. Each house has its presiding officer, known in the lower house as the speaker and in the senate as the president. Where there is a lieutenant governor, this officer has the duty of presiding over the senate. In the states without a lieutenant governor the senate selects a president from its own membership. Where the lieutenant governor is the president of the senate he exercises functions similar to those of the speaker of the lower house except that he does not have the power of appointing legislative committees. The senate in addition to its regular president, whether he be the lieutenant governor or a presiding officer elected from the senate, selects also the president pro tem., who acts when the regular presiding officer is absent or incapacitated.

The speaker of the lower house is the state counterpart of the Speaker of the House of Representatives. He is selected by the house itself, or rather by the majority caucus, and presides over the house as a strict partisan. He is responsible for the maintenance of order during the session and has general control of the business of the legislature, both on and off the floor. He acts as chairman of the Committee of the Whole and appoints all special and standing committees. He has control over the journals, registers, papers, and bills of the house. The speaker of the lower house in the state legislature compares favorably in importance with the Speaker in the lower House of Congress.

The other officers of a state legislature include for each house a chief clerk with his assistants, a sergeant-at-arms, and other employees. These perform duties similar to the duties of such officers in Congress.

The Committee System. The committee system of a state legislature exists for the same purpose and performs the same work as its counterpart in Congress. It is even more necessary in the state legislatures than in the national body. In every session of a state legislature large numbers of proposals are placed before the legislators. Some means of separating the wheat from the chaff must be found; hence the committee system. The committee system in the legislature applies the principle of the division of labor to the process of legislation. It would be physically impossible for any one member to familiarize himself with all the proposals made in a session of an

average state legislature. The committee system affords different members an opportunity to work on the subjects in which they have some interest and about which they possess some knowledge, and at the same time gives the lawmaking body the benefit of the wisdom and experience of the various members. Also, the committee system serves the purpose of making it easier for interested citizens singly or in groups to present their cases before legislation is enacted.

The committee system in a state legislature covers all the important topics of legislation, and is usually organized on a functional basis. For example, there are usually one or more committees dealing with the following subjects: finance, appropriations, revenue, education, the judiciary, local government (including cities, counties, and townships), public utilities, welfare, highways and public works. Usually there is at least one committee to consider every possible topic which might be presented to the legislative body.

The number of standing committees in both branches of a state legislature varies considerably in the several states. In 1931 senate committees ranged from nine in Wisconsin to fifty-three in South Dakota. Committees in the lower house in the same year varied from fourteen in Rhode Island to sixty-nine in Florida. Undoubtedly there is some logic in the argument that the number is higher than is desirable or necessary. In some cases a number of committees exist for no other purpose than to provide some member with a coveted chairmanship and allow members of the legislature to add another committee assignment to their letterhead. The more committees of which a legislator may be a member, the more important his position back home. Of course the committee may never meet, but the average person in the legislator's district probably does not know the situation. Again, the large number of committees may be explained by the fact that some of them are intended to do nothing. It is well known that many a legislative proposal is introduced simply in order to satisfy a particular citizen or group of citizens and is never intended to meet with legislative approval. Thus a "graveyard committee" serves a useful purpose in that a particular bill may be given it with the expectation on the part of legislators generally that no action will be taken. The inactivity of the committee constitutes its duty.

Committees in the lower house of a state legislature are usually chosen by the speaker. This is true in all states except Nebraska and Oklahoma, where committee selections are made by a committee on

committees. In the selection of senate committee members there is no uniform practice. In fifteen states the choice rests with the senate itself, or rather with the caucus. In the other thirty-three states the power of selection is vested in the lieutenant governor or in the president of the senate.

Senate committees vary in size from an average of two in Connecticut to an average of twenty-three in Illinois. In the lower house the range is from about five in Nevada to more than thirty-five in Georgia.[1] This means that legislative committees are usually much larger than is necessary for effective work. Ordinarily the major portion of the work of the legislature is carried on by a few of these major committees. It was shown in Kansas recently that seven committees handle sixty-one per cent of the bills, leaving relatively little work for the remaining committees.[2] This situation obtains in practically all of the states. The number of committees could be reduced and the legislative product would not suffer.

In spite of the fact that there may be too many and too large committees in state legislatures, and at the same time some overworked committees and some idle committees, the system continues to play a highly important role in the legislative process. In a study of legislative committees in Maryland and Pennsylvania it was found that committee action was "really the final action in somewhat more than ninety-two per cent of the instances in the former state and eighty-three per cent in the latter."[3]

The Dual and the Joint Committee Plan. In most states the dual committee system is used. This means that each house has its own set of committees; and before a bill becomes law it must run the gauntlet of double committee consideration. Since the large number of committees in most state legislatures affords in itself what many people believe to be sufficient legislative hindrances, it has been suggested that a joint committee system might be substituted for the dual plan. As a matter of fact three states — Massachusetts, Connecticut, and Maine — have introduced the joint committee plan, under which each committee consists of members from the two houses. Such a system has the effect of not burdening legislators with too many committee assignments. It also avoids the necessity

[1] Sterling, P., "Some Practical Aspects of Legislation." Address before the Pennsylvania Bar Association, June 24, 1932. Quoted in Graves, W. B., *State Government*, pp. 215–216.

[2] Kansas Legislative Council, *Expediting Legislative Procedure* (1935), p. 4.

[3] Winslow, C. I., *State Legislative Committees*, ch. 5.

of dual consideration by separate committees. Undoubtedly one committee representing the two houses saves time and expense for both the legislature and the public. It is logical to believe that the joint committee system produces cohesion and understanding between the two houses of the legislature and reduces the tendency to shift responsibility from one house to the other. The joint system tends to break down bicameralism. As a matter of fact it is the nearest possible approach to unicameralism with the retention of the bicameral principle. If unicameralism is desirable, yet practically impossible, the logical alternative is the establishment of a joint committee plan.

LIMITATIONS ON LEGISLATIVE POWERS

Procedural Limitations. State constitutions not only give a wide variety of powers to state legislatures; they also impose upon them a number of limitations. Procedural limitations cover such matters as the length of sessions, the number of members, the compensation of members, legislative procedure, the method of voting, and the authority of the legislature to enact laws on specified topics.

Financial Limitations. Among the more important restrictions placed on legislative bodies are those concerning taxation and expenditures. State constitutions generally stipulate that taxes must be uniform and equal for all types of property. In recent years, however, this limitation has undergone modification through the grants of power given the legislature to enact income tax laws and to classify property for purposes of taxation. Often state constitutions limit the rate of taxation for both state and local purposes. In some cases the tax limitations which have been imposed upon local units have had the effect of seriously impairing these units, but without such limitations it is possible that the units might plunge into programs of excessive taxation. It should be mentioned also that some state constitutions deny the legislature the power to exempt certain types of property from taxation, such as property belonging to schools and religious institutions.

Constitutions ordinarily limit the power of the legislature in making appropriations. Generally legislatures may appropriate money only for public purposes; grants to individuals and corporations are prohibited. Some state constitutions stipulate also that no grant may be made to anyone except for service rendered. The form of an appropriation bill is usually specified in the constitution. Some

states require, for example, that all appropriations shall be made by separate bill, embracing but one subject. There is a tendency away from this, however, so that the entire appropriation program can be brought under control through the executive budget.

The power of the legislature to borrow money is often restricted. Ordinarily the total is limited to a small percentage of the assessed valuation of the taxable property of the state or local unit, and this amount may be exceeded only with the approval of a majority of the voters.

Local and Special Legislation. To save the legislature's time and to prevent many abuses, most state constitutions place restrictions on the passage of special and local laws. Frequently a constitution will prohibit the legislature from passing a special law when a law of general application can be made to serve, but often these limitations are ineffective since the legislature decides in the first instance whether or not a general law can be made applicable. The courts are the only body which can determine the matter. In some states the constitutions contain a list of subjects concerning which no special law can be enacted, but these prohibitions do not prevent the legislatures from making reasonable classifications. The Fourteenth Amendment to the United States Constitution, for example, prohibits the states from denying to any person the equal protection of the laws, but this does not prevent state legislatures from making a reasonable classification of persons for purposes of taxation and regulation. Thus, one set of regulations may be applied to doctors, and another to lawyers, but no doctor or lawyer can be singled out and subjected to special treatment.

Loss of Confidence in Legislatures. An extraconstitutional limitation upon state legislatures is the growing lack of public confidence in such bodies. In the early days state legislatures were looked upon as protectors of liberties against the autocratic acts of government. This high esteem was short-lived. It will be remembered that land speculators in the early history of the states intrigued with legislators for grants of land at extremely low prices. In many cases the legislators yielded to these demands. Furthermore, while legislative powers and duties have increased, legislative salaries have remained low. Consequently, public service has ceased to attract able men. These are but two factors in a combination of forces that has discredited the legislature in the eyes of the general public. The result of this attitude of suspicion has been a tendency to place more

and more restrictions upon the powers of state legislatures. In some cases the people have demanded and retained the right to become legislators themselves. As a result, several state constitutions contain provisions for the initiative and the referendum.

Legislative Rules. The rules of a state legislature differ from those in the Congress chiefly in being more detailed because of requirements in state constitutions governing legislative procedure. These specifications refer to such matters as the three readings of a bill on three separate days, the title of the bill, the method of voting, the exact phraseology of the enacting clause, and even the time and manner in which the presiding officers affix their signatures to bills passed by either house. These minute constitutional requirements are often the cause of many state laws being declared unconstitutional on purely technical grounds. For example, in some states, if a bill has not been signed by the presiding officer in the presence of the house, the bill is unconstitutional.

With the exception of the constitutional requirements for legislative procedure, rules in many cases are copied *in toto* from rules enforced in other states or in Congress. As in Congress, state legislative rules are seldom changed. Probably the fundamental reason for this situation is the fact that the public has exerted little pressure on the legislatures to make their proceedings more efficient. There are always people who demand reform but who in many cases know little and possibly care less about the methods by which these reforms might be brought about in the legislature. In many cases new and inexperienced members, irked because of the obsolete procedure which must be followed, demand changes. State legislative sessions are so short, however, that by the time these insurgents are ready to effect changes, the session is on the point of adjourning, and in the rush and pressure of business toward the end of the legislative session there is little chance of reforming the rules.

LEGISLATIVE PROCEDURE

How a Bill Is Enacted. In general, state legislative procedure, which corresponds rather closely to that followed in Congress, may be considered under six heads: introduction of bills, committee consideration, house consideration, action by the conference committee, final passage, and approval by the governor. Bills may be introduced by individual members at any time they deem wise, except that in some states there is a time limit after which no bill can be introduced

without unanimous consent of the house. Many bills are introduced in state legislatures by request. The individual legislator may have little interest in promoting a bill, but as an obligation to his constituents he feels that the bill must be introduced. The introduction of a bill by request is little more than notice to his fellow legislators that he is introducing the bill but will not urge its approval.

While the majority of bills presented to a state legislature are recommendations of individual members, some of the more important bills are introduced by committees as administrative measures. These bills usually form parts of the legislative program of the governor and administration in power. Officially such administrative measures do not take precedence over any other bill, but in practice — and this is especially true when the governor and the legislature are in agreement — administrative measures receive prompter consideration than measures sponsored by individual legislators. In any event a bill is introduced in a state legislature by depositing it with the clerk, who gives it a number, after which the bill is usually referred to an appropriate committee by the speaker or by a committee for that purpose.

Committee consideration of bills in a state legislature is much like that process in Congress. Ordinarily, however, state committee hearings are not so widely advertised and thus do not become as important features of the legislative process as such hearings in Congress. A committee may appoint a subcommittee to hear a measure, and all interested citizens may be invited to present their views on the measure under consideration. Often, however, such hearings are held by the entire committee.

In disposing of a bill, the committee exercises rather wide discretion. While a few states require committees to report all bills submitted to them, the majority permit the committees to approve, disapprove, change, or bury a bill. Thus, the committee system in a state legislature becomes an excellent means of smothering proposed legislation. Undoubtedly this is one of the purposes of committee consideration, but many students of legislation are of the opinion that committees should report all bills regardless of the recommendations concerning them.

The practice prevails that a committee will select only those measures which meet with its approval and report these to the house. No mention is made of the other measures before the committees. Occasionally, however, bills are reported unfavorably, but it is the

general practice in state legislatures to make no report or a favorable report. Bills reported unfavorably usually have little chance of success. This means that committee action becomes an all-important feature in state legislatures and the committees become little legislatures within themselves, exercising the power of life and death over legislative proposals. Undoubtedly there is some justification for this practice since many bills introduced in the legislature and referred to the committees are either crank bills, hobby bills, or bills possessing so little merit that a serious waste of time in the house would result if they were reported.

Legislative rules in some states provide for the recall of bills from committees. This prerogative of legislators to "discharge a committee" is seldom exercised, however, since all the important committees are controlled by majority leaders whom the individual legislators cannot afford to offend.

When a committee reports a bill favorably it is ordinarily placed on the calendar. It is then ready for a second reading. The first reading, which is by title only, took place when the bill was introduced. In most states the second reading is the stage at which debate on the bill ordinarily occurs and amendments are offered to it. This debate in state legislatures is not so free as in either house of Congress. Possibly the greatest freedom in such debates occurs when the house sits as a Committee of the Whole, but this device is not used so frequently in the states as in the national government. State legislative rules have given to the speaker enormous power which he exercises arbitrarily and often in a partisan manner. Possibly steam roller tactics are resorted to more often in state legislatures than in Congress. Also, the rules of most state legislatures employ the "previous question" as an effective method of closure, and recourse is often had to this summary method of closing debate.

After a bill has passed through its second reading it is engrossed. Engrossing may amount practically to rewriting, depending upon the amendments and changes made at the second reading stage. Engrossed bills are then placed upon the calendar for the third reading and final passage. In many cases the debate in the third reading is confined to the consideration of the bill as a whole; except with the unanimous consent of the house, legislators are not permitted to consider the bill part by part. Following brief debate at this stage, the bill is voted upon and, if passed, recorded in the journal of the house and transmitted to the other house for further action. Assum-

ing that the second house makes certain changes in the bill, it must be returned to the first house for action upon these changes. In case the houses are not able to agree on the amendments a conference committee, as in Congress, is used to iron out the differences between the two houses. This committee exercises the same arbitrary powers in state legislatures as in Congress. It may introduce serious changes in the bill. Any change agreed upon is made with the approval of the party leaders in the legislature. The report of the conference committee is then submitted to both houses. If approved – and this is usually the case – the bill is finally passed by both houses and sent to the governor. His action in such matters is discussed in Chapter XV.

LEGISLATIVE PROBLEMS

Securing Information. Legislators are confronted with several important problems in securing the information necessary for intelligent action on the bills before them. The scope of items considered by a typical state legislature requires not only an adequate library but extensive use of that library by the legislators. In too many cases the library is not present, and where it does exist little use is made of its facilities. Anyone who has had experience in dealing with a state legislature knows that legislators desire assistance but that in too many cases they do not know where to secure information. The existence of the lobby in most states partially solves this problem, since it acts as an information bureau supplying needed data in convenient form. In many cases the major portion of the information secured by state legislators on many proposals coming before them emanates from the lobby. Of course the lobby is biased and exists for the purpose of advocating what might be and often is a selfish point of view. Legislators should not be compelled to rely so heavily upon it. The fact that so few state legislatures provide official bureaus of information makes the lobby more powerful and possibly more corrupt in the states than in the national government.

An examination of state efforts at control of the lobby shows that relatively little attention has been paid to the regulation of the "third house" of the state legislature. Most states provide that lobbyists must register with some state official, usually the attorney general, and make public the interests for which they work. Likewise in most states lobbyists are compelled to submit bills of particulars showing the purposes of their expenditures at stated periods.

Some efforts are made also to prevent lobbyists from appearing on the floor of the house to persuade legislators to take certain actions. In many states lobbyists often cannot be distinguished from members of the legislature.

Because of the need for sources of information in the legislature, the regulation of the lobby constitutes a serious problem. Too stringent regulation would do nothing but drive the lobby under cover. Abolition would be futile. Possibly the best method for dealing with the lobby is to "fire against it." This means that state legislatures must provide official sources of information so that reliance upon selfish, unofficial sources will not be necessary.

Legislative Reference Bureaus. The attempts to supplant what often amounts to the pernicious influence of the lobby have given rise to legislative reference bureaus. Wisconsin was the first state in the Union to adopt such a plan, in 1901. At the present time approximately three-fourths of the states have provided for such agencies. These bureaus attempt to place before the legislature, and make available for its use, unbiased and scientific sources of information. In some states the legislative reference bureau is engaged constantly in the collection of information on all subjects likely to be of value to members of the legislature, and during the legislative session the staff members of these bureaus are at work night and day assisting the lawmakers.

In recent years a promising nonpartisan organization of legislators has been developed which has as its major objective the rendering of aid to legislatures in the solution of their problems. This is the American Legislators' Association, which conducts researches, arranges conferences for legislators, and publishes a monthly magazine, *State Government,* which contains articles of interest to legislators. In a very real sense the American Legislators' Association is the clearing house for legislative information, and assists the various legislative reference bureaus in the states. Other organizations which furnish various types of aid to state legislators are the Brookings Institution, the American Laws Institute, and the National Institute of Public Administration.

Legislative Drafting. Closely connected with the problem of securing information is the problem of legislative drafting, which deserves attention. Prior to assuming seats in the legislature relatively few legislators have attempted the drafting of bills. Bill drafting, especially as it concerns the more technical phases of legislation,

has become a difficult matter, for which many legislators are not equipped. Some legislators even have difficulty in saying what they intend. Laws must be written to say exactly what is intended, nothing more nor less; and not only so that the meaning may be understood, but so that it cannot be misunderstood.[1] Many legislative bills, if not totally inadequate, often are water-logged with legal phraseology to such an extent that there is much uncertainty concerning their meaning. There are many classic examples of legislative drafting where the legislator said nothing, or even contradicted himself. An extreme case is illustrated by the sentence: "When two trains approach each other at a crossing, they shall both come to a full stop and neither shall start up until the other has gone." [2]

Lacking sufficient knowledge, state legislators are compelled to turn to outside lawyers and lobbyists for much legislative drafting. Lobbyists especially are always eager to assist. This practice means that too many laws are drafted by people having a selfish interest in the law, and many of these contain technicalities designed to serve the interest of a particular group rather than promote the general welfare. To avoid a situation of this kind more than half the states of the Union have provided agencies whose duty it is to assist legislators in the drafting of measures. Many states provide that the facilities of the attorney general's office shall be available at all times for the convenience of legislators. In other states legislative reference bureaus are assigned the function of assisting in the drafting of measures. In any event, there should be some type of official agency to aid legislators in constructing and writing bills.

Control over Committees. Another problem which confronts all state legislatures in the process of legislation is that of control over the committees. The typical state legislature uses the dual system of committees, which means that there is a set of committees in one house parallel to that of the other. Some of these committees become quite powerful. In many cases there are no rules which prohibit the reference of more than a certain number of important bills to any committee, and in very few cases is there any requirement that committees report bills referred to them. Undoubtedly the number of committees tends to complicate the legislative process. The only way that legislatures can retain any degree of control over committees is to reduce their number. There are no good reasons, other

[1] Bates, F. G., and Field, O. P., *State Government* (Revised edition), p. 202.
[2] *Ibid.*

than political, for the retention of the present large numbers of committees in state legislatures.

The dual system of committees in the two houses means much duplication of work and a shifting of responsibility. Massachusetts, Nebraska, and Wisconsin have employed the joint committee system, and its use has demonstrated its effectiveness. Under the joint plan, each committee is made up of members from both houses, and identical committee reports are presented to the two houses. As long as the state retains the bicameral system the joint committee plan appears to offer the best hope for legislative effectiveness.

End of Session Rush. It is not unusual for a state legislature to pass over half its measures during the last few days of the session. The end of the session is the time when the legislative steam roller works best. Many laws are rushed through with little or no consideration. Enactments appear to be simply a matter of legislative bargaining, conducted when the members are weary and their resistance is low. One student of the subject has called this period a lawmaking hemorrhage.[1]

The causes for this situation are not difficult to locate. To some extent the constitutional limitations placed upon the length of legislative sessions are a contributing factor, though these are probably not the principal reason for the rush since some states without a time limit in the constitution still experience it. The chief cause of the situation is to be found in the faulty procedure employed by state legislatures. If the situation is to be improved, the remedy lies in improved procedure, such as is employed in Massachusetts. In that state practically all bills are introduced in the early days of the session, and committees are required to report on them before a given date. The split session employed in California is a less successful remedy.

A committee of experts acting for the National Municipal League some years ago offered several interesting suggestions for improving the operation of a state legislature. This committee advocated, among other things: (1) the adoption of a unicameral system; (2) the establishment of a legislative council with a research staff to investigate the problems of government and provide a legislative program for the legislature when it convenes; and (3) closer relationship between the legislature and the governor.

The Legislative Council. In recent years legislative councils have been established in eight or nine states, including Kansas, Illinois,

[1] Johnson, C. O., *Government in the United States*, p. 383.

Virginia, and Kentucky, and it is fair to expect that the movement will continue and that the plan will find approval in many other states. The council serves as a permanent body and provides the expert assistance and leadership which are so sorely needed in a state legislature. Ordinarily it is composed of the governor and members of the legislature chosen by that body. (See page 284.)

Relationship of Legislature and Executive. The problem of bringing the governor and the legislature into closer relation is partially solved by the adoption of the legislative council of which the governor is a member. It has been suggested many times that an even closer relationship might be effected if the governor and the heads of departments were allowed seats in the legislature so that these administrative officers might be present to discuss with the legislature and explain the many administrative bills which are always before that body for consideration. Such a plan offends the theory of the separation of powers, but it has the merit of providing a constitutional means whereby the governor could exercise needed leadership.

LEGISLATIVE POWERS AND LIMITATIONS

Since the states exercise reserved powers and can do anything not prohibited to them, the state legislatures as the reservoirs of such powers possess even a greater degree of freedom than does Congress. While it is true that the theory of the separation of powers is adhered to in state government, the state legislature has probably received the lion's share of state powers. It exercises legislative and non-legislative powers and in so doing it elaborates upon the constitution by filling in the framework provided in that document. The operation of every agency of the state depends to a large extent upon the legislature.

Non-Legislative Powers. The non-legislative powers of the state legislature correspond to like powers and functions exercised by Congress. Among these are the power to decide contested elections in certain state offices, to confirm gubernatorial appointments, to select certain judicial and executive officers, to remove certain officers by joint action, and to conduct impeachment proceedings. Since the nature of these functions has been described in connection with Congress, further discussion at this point is unnecessary.

Legislative Powers. The legislative powers of state legislatures include the power to pass ordinary legislation and revenue or appropriation bills; to set up the machinery of government under constitu-

tional restrictions; to delegate powers to the local governmental units, except in those states which grant a measure of home rule to such units; to regulate the relations of individuals and groups of individuals to the government and to themselves; to protect the public against crime; and to pass any legislation under the state's police power designed to protect the general public and to promote its convenience and welfare.[1] Viewed broadly, the legislature determines the policies of the state and adopts measures by which these policies may be executed.

Delegation of Legislative Powers to Administrative Agencies. In determining state policy legislatures until recently went beyond the mere determination of policies and concerned themselves with many minute details of legislation. For example, legislatures have described in detail the organization of departments and have set forth exactly the manner in which these departments are to discharge their duties. When regulations have been imposed the legislatures have often gone into detail in prescribing procedures. In other words, the state legislature has set itself up as a body of technical experts to determine not only what the policy should be but exactly how it should be carried out. This duty can better be performed by administrative officials. It is encouraging to see more and more state legislatures leaving these details to the discretion of administrative authorities and satisfying themselves with the determination of general policy. An example of this may be seen in the establishment of various public utility commissions by state legislatures and the delegation to these commissions of the authority to fix rates. There are many other examples of similar action which partake of the nature both of administrative legislation and of administrative adjudication. Under this policy the legislature will have ample time to formulate general policies, and the burden of execution will fall upon administrative agencies whose duty it is to determine not what should be done but how the general policy is to be made effective.

QUESTIONS

1. What are the essentials of a good legislature?
2. What are the arguments for and against a one-house legislature? Which do you favor? What do you think is the future of the unicameral system?

[1] See Dodd, W. F., State Government, p. 173 ff.

3. What are the causes of underrepresentation of urban areas in state legislatures? How can true representation of both rural and urban interests be guaranteed?
4. Discuss the advantages of special sessions.
5. What are the steps in passing a bill through your state legislature?
6. Discuss the joint and dual committee systems. What is the function of the legislative council? Does your state have such a council?

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CHAPTER XIV

Local Legislative Agencies and Their Work

MUNICIPAL AGENCIES

The Growth of Cities. The growth of cities is having a profound effect upon governmental organization and operation in the United States. Prior to 1920, less than half the people of the United States lived in cities. According to the 1940 census, 56.5 per cent of the total population of the United States lived in cities of 2500 or more population. In 1850 there was only one city (New York) of over 500,000 and only five others of over 100,000. In 1940 there were five cities with populations of over 1,000,000. Nine additional cities were inhabited by more than 500,000 people, and seventy-eight more had populations of over 100,000. In 1930 ninety-two of the larger cities of the United States included 28.8 per cent of the total population of the country, and five cities of 1,000,000 population embraced 12.1 per cent of the total. Economic reasons have been the chief cause of the growth of larger cities and of the increase in the number of cities. Just how big cities will become is an undetermined question. We are beginning to think now of urban centers of 15,000,000 or more population, with double or triple tiered streets and soaring skyscrapers.

The Municipal Corporation. In the sight of the law a city is a municipal corporation. As such, it is a creature of the state and is called into being at the pleasure of the state, to be governed in the manner deemed best by the state. The legislature is the state's mouthpiece and possesses the power, subject to the provisions of the state constitution relative to cities, to regulate cities as it sees fit, without regard to local sentiment.

In the regulation of cities and the establishment of governments therein the state gives to the municipal corporation a charter which guarantees certain obligations and places certain limitations upon it. In many respects the municipal corporation is comparable to a private business corporation, with the notable exception that the mu-

nicipality is subject to considerable legislative interference of which the private corporation is free. In other words, a city charter does not constitute a contract. A city differs from a private corporation also in the fact that it is an involuntary association of individuals, whereas a private corporation cannot be compelled to accept an unsatisfactory charter. In granting a charter to a city, the state is simply delegating to the municipal corporation power sufficient to make it a miniature state within a limited locality. It must be remembered, however, that the city is so completely the creature of the state that the state may strip it of every power, even to the extent of taking away its charter.

Municipal Charters. Generally, city charters granted by state legislatures may be classed as follows: special charters, general charters, classification charters, optional charters, and home rule charters. At first the special charter system was used in the creation of municipal corporations. Under this system a city charter became a mere local statute since the charter for each city required a special act of the legislature.

With the increase in the number of cities, the special charter system gave way to the general charter plan, which meant that the legislature passed one general law applicable to all cities of the state. Such a system as this tended to put all cities in the same mold regardless of size or varying conditions within them. It had the merit, however, of removing the city from the extremes of legislative control and eliminating much of the interference which was so prevalent under the special charter plan.

Recognition of the fact that cities differ in size as well as in social and economic character led to the classification charter plan. Under this system cities were classified usually on the basis of population, and each class was given a different charter. This plan did not meet the situation squarely, however, since it failed to take into consideration the different characters of cities of the same size. The result has been the introduction, in recent years, of the optional plan and the home rule system. According to the optional plan a city selects from a limited list the plan of government under which it will operate; under home rule it is allowed to undertake any system it desires, so long as it remains within constitutional limitations. The home rule system has grown considerably in recent years, and it appears that state legislative bodies will be more inclined in the future to grant such charters.

The City Council. The municipal council in the United States is a miniature legislature. The procedure followed in the council is simple and informal, and the powers of the body are so limited that it is not a full-fledged lawmaking body. Several types of city council are used in the cities of the United States, depending largely upon the general type of government followed in the city. For convenience these types may be grouped as follows: the bicameral council used in the mayor-council form of government; the unicameral council used in the mayor-council, manager, and commission types of government.

The original city council was bicameral, with the members of one chamber elected by the people from different districts of the city. The upper chamber was usually known as the board of aldermen and the lower chamber as the common council. The former was a dignified, somewhat aristocratic body, while the latter was looked upon as more democratic. There appears to be little justification for the bicameral council in cities; apparently they owe their existence to the fact that the cities imitated the state and national governments. Many cities have found the system too cumbersome and inefficient to fulfill the demands made upon a city council, and today there is not a city among the twenty-five larger American municipalities, with the exception of New York, which uses this plan.

The unicameral city council, which appears to be the predominating type, is used in practically all the mayor-council governments as well as in the city manager systems. The single-chamber council of the commission type of government has not only legislative powers but administrative functions. The commission type, then, disregards the principle of separation of powers.

Present Position. Before the organization and procedure of the city council are discussed, something should be said of the importance of the council in American cities. In the early days of American governmental development, the council virtually constituted the city government. It appointed the mayor and supervised the administration. Under state constitutional limitations and legislative overlordship, it passed ordinances for the city. In a very real sense the council was supreme since it controlled the mayor, even in cities where he was not appointed by the council, and shared in the performance of judicial functions. In the last two or three generations, however, the city council has lost prestige. Along with other legis-

lative bodies, it has declined in importance. The mayor, like the governor and the President, has gained power at the expense of the legislative body. He exercises the veto power and in many cases through his power of recommendations has exerted a considerable measure of control over the activities of the council. The mayor in American cities today usually frames the budget; hence he cannot be ignored when financial matters are considered. The mayor is the chief executive and, except in city manager governments, has been placed in charge of various phases of administration. Thus, matters which were originally controlled by the council have passed to the mayor.

Limitations on Council Action. Not only has the council lost power and prestige with the transfer of functions to the executive branch of the city, but many matters which were formerly decided by municipal councils are now the functions of state authorities. Also, through the increasingly popular initiative and referendum in cities, the people have taken powers of legislation from the council and have provided means for exercising these powers themselves. Furthermore, until recently, city charters were largely restrictions on councilmanic action. They contained numerous restrictions relating to such minute matters as the time and manner of passing ordinances, limitations on bond issues, and various matters of procedure. It should not be understood, however, that the council has outlived its usefulness. It is still the policy-determining body of the city, in so far as the city determines policy. And even in its narrow and restricted sphere its decisions affect every phase of municipal life.

The Council under the Manager Plan. Under the city manager plan the council is made the seat of ultimate authority in the city. Thus it has assumed a position that is somewhat foreign to American legislative tradition. While the plan gives the council no direct control over administration, it provides that the council shall appoint the manager who directs administration. The manager is subject to removal by the council and is solely responsible to it. In other words, the council in the city manager form of government is a miniature Parliament. There is a very close analogy between the council in this type of government and the British Parliament in that the administrative branch is dependent upon the legislative branch. In fact the city manager form of government is the nearest approach to the parliamentary type to be found in the United States.

Under the manager plan, there is a concentration of all municipal

power in the council but a division of municipal functions between the council and the manager. The council not only returns to something resembling its former prestige but even assumes a more important position in municipal affairs. Theoretically the council under the city manager form of government does not meddle and interfere in administration; rather, it occupies the true position of a legislative body and is interested only in the determination of policy. The development of city manager government has undoubtedly checked the otherwise rapid decline of the importance and prestige of the council in municipal government.

Terms of Councilmen. For many years members of the city council were elected annually. The people had an abiding faith in short terms of office and looked to that device as a cure for all governmental ills. In recent years there has been a tendency to extend the term of office of councilmen; the two-year term has now become the rule, with even longer terms in some cities. Half the cities with populations of 300,000 or more elect councilmen for four-year terms.[1]

Compensation of Councilmen. With longer terms have come higher salaries. While there are many smaller cities in which councilmen serve without compensation, the theory that a man should give freely of his time and talent with only the joy of public service as his reward has been abandoned in the large municipalities. The annual salaries now paid councilmen range from $6500 in Pittsburgh to about $100 in many smaller cities.[2] In many cities, both large and small, councilmen are paid on a per diem basis, usually with a maximum for the year.

In the smaller cities there is considerable justification for asking a councilman to serve without pay. The council is called upon to meet only a few hours a month, and any public-spirited citizen should be willing to give a small amount of his time to his community without pecuniary reward. It is entirely possible for citizens in the smaller areas to serve on the council without sacrificing their business or professional interests, and in many instances the smaller cities do obtain the services of their leading citizens without compensation. The miserably low pay that is sometimes offered to small-town councilmen draws into the council men who are attracted by the idea that possibly there may be indirect compensation, includ-

[1] MacDonald, A. F., *Short Course in American City Government*, p. 186.
[2] *Ibid.*, p. 187.

ing certain "favors" which might be thrown their way by contractors and job-seekers.

The major metropolitan centers must be considered in a different light. It has been estimated that a position on the council in a city such as Chicago or New York requires at least half the time of any individual. No one can be expected to give this much time to civic duties without adequate compensation for his services.

Size of Councils. City councils vary in size from three to over seventy members. While it might be expected that the size of city councils bears some relationship to the population of the community, this is not the case. The board of aldermen of New York City is composed of seventy-one members, whereas the city council of Cincinnati is composed of but nine. It was assumed for a long time that large councils tended to be more representative than small bodies. Since there have been no objective criteria for measuring the representative character of legislative bodies, it is difficult to say which is the more representative. The city council of Cincinnati, for example, appears to be just as representative as the larger councils in Chicago and New York. It is generally believed that large councils are more like legislatures, and are thus more deliberative than small councils. On the other hand, a large council is not capable of quick action. Undoubtedly the reason for the reduction of the size of the council, at least in some cities, is the fact that the small council has proved a more effective means of obtaining immediate action on needed legislation.

Election of Councilmen. Members of city councils are usually elected by the people from the ward or from the city at large. While choice by wards is widely used, it is open to many objections and there is a tendency to change to election at large. The ward plan of representation means a shorter ballot for the voter, and also that more than one party is likely to have representation on the council, since no party, except in a large city, would be likely to carry every ward. The ward plan has another advantage, in that it provides for the selection of men who are interested in the welfare of their particular sections of the city. While this may be a theoretical advantage, it has been stated that election by wards necessarily results in the choice of men who have only the interests of their own wards in mind, and engage in logrolling to secure them, whereas a city council is supposed to represent the city as a whole. Phillips states that "if the current saying is true, that the smaller the district the

smaller the man it chooses, these ward councilmen must frequently be like the inhabitants of Lilliput – no bigger than a man's thumb." [1]

Because of the obvious shortcomings of the ward plan there has been a tendency in recent years to abandon it in favor of election at large. This method enables the voters to choose men to sit on the city council whose vision is relatively broad and who are likely to put the city's interest above that of a particular ward. It does much to eliminate logrolling and pork barrel politics. Under this system, since all councilmen are elected by the voters of the city as a whole, it is possible to make use of all available talent regardless of artificial areas within the city. Election at large forces a candidate to make his appeal to the voters on a city-wide program. It recommends itself for another reason also. While the ward plan tends to increase the number of councilmen, the city-wide plan tends to keep the number down to a reasonable figure. In few cases does a city council elected at large have more than nine members. It is too much to expect the people of the city to vote intelligently on more than this number, and perhaps even nine is excessive. Advocates of small councils are inclined to favor election of councilmen at large.

The chief difficulty with the plan is the fact that the system practically assures the majority party that its entire slate of candidates will be elected. This may be majority rule, but majority rule is not always democratic rule. The minority in a democratic system must not be denied a voice in proportion to its strength, else there is no democracy. This situation may be avoided if councilmen are elected on nonpartisan tickets; but as long as national political lines are carried down to the city, the majority of voters are inclined to vote the straight ticket whether party names and symbols appear on the ballot or not. The ward system may fail to give the minority party representation on the council in proportion to its exact strength, but election at large is open to the more serious criticism that it may exclude the minority from representation.

The election of councilmen at large has also been criticized on the ground that it increases the cost of municipal election in that the candidate must run in the entire city rather than present his appeal to a relatively small group of voters in the ward. The larger the group to be reached, the higher the cost.

In an attempt to avoid the major difficulties of both the ward sys-

[1] Phillips, Robert, *American Government and Its Problems*, p. 249.

tem and election at large, some cities have experimented with a compromise plan. In St. Louis, for example, councilmen are nominated by wards but elected from the city at large. In Kansas City approximately half of the council is chosen at large and the other half by wards. For many years several cities experimented with what is called "limited voting." Under such a system each person's vote is limited to a number of candidates less than the full number to be selected. For example, if nine councilmen are to be elected the voter is to vote for only five. This gives the majority party five councilmen and the minority party four. The plan has not met with popular favor and has been abandoned in all cities where it has been tried. Such a plan as this closely resembles the scheme of cumulative voting used for electing members of state legislatures, as in Illinois, but no American city has adopted such a plan.

There has been a movement, which has met with success in some quarters, to elect members of city councils under the Hare system of proportional representation. At present such a system is used in Cincinnati and several smaller cities.[1] This plan is devised to secure representation of every current of public opinion in proportion to its voting strength. Proportional representation is useful only in the selection of a group of officials such as members of a city council; it cannot be used in electing a single officer. Proportional representation is discussed more fully in Chapter VII.

The city, more than any other unit of government has made use of the various methods of direct legislation, including the initiative, the referendum and the recall. The initiative and referendum, as was pointed out in Chapter VI, are based on the assumption that the elective representatives of the people frequently do not represent their constituents accurately or fairly. Often an ordinance which expresses only the views of the individual councilmen or the city political machine, and which may even be opposed by the majority of the people, will pass the city council. Because the city is closer to the actual needs of the people than many other units of government, it is logical that the initiative and the referendum should be used so that the people may retain more direct control over their councilmen. The whole purpose of any direct form of government is simply to make the government more responsive to public opinion.

Powers of the City Council. While it is difficult to generalize on

[1] See Hoag, C. G., and Hallett, G. H., *Proportional Representation*, pp. 280–287.

the specific powers exercised by city councils in the United States, there is some degree of certainty regarding the general powers of a municipal legislative body. Courts agree that city powers not specifically delegated to other agencies of the city reside with the council. The council then, like the state legislature, is the reservoir of power for the city. In the exercise of its powers the council performs legislative and judicial as well as executive or administrative functions. It is limited by direct and implied grants of power in the state constitution and the city charter. The separation of powers is not so clearly marked out for city councils as it is for state legislatures or for Congress. Many of the powers exercised by the council are combinations of legislative, executive, and judicial functions. Because it is difficult to say when a certain power is legislative, administrative, or judicial, the powers of a city council cannot be discussed adequately from the traditional point of view. A more satisfactory list of municipal powers can be made by simply listing these powers according to the subjects involved. Probably the greater part of the council's time is taken up with the passage of ordinances designed to promote the general welfare and create and regulate the government organization provided in the charter. Thomas H. Reed's classification of functions of the city council as (1) the adoption of local laws or ordinances, (2) the control of expenditures, and (3) the performance of administrative acts [1] gives a comprehensive view of these powers.

VILLAGE AND BOROUGH AGENCIES

Legal Status. Throughout the United States there are more than twelve thousand small urban areas variously called villages, boroughs, and in some cases cities. Practically all of these, with the exception of unincorporated towns, are legal municipal corporations. In recent years there has been a slight tendency for both the number and size of these small urban communities to increase.

Generally these units, regardless of size, are given the legal status of the municipal corporation but are materially different from the typical city. They occupy a legal middle ground between the city and the rural section.[2] In most cases the village is organized in a

[1] Reed, T. H., *Municipal Government in the United States* (Revised edition), pp. 166–168.

[2] In Nebraska a village is a municipal corporation, according to the decision in *City of Wahoo v. Reeder*, 43 N. W. 1145 (1889). In New York the court in *In re* Eiss, 199 N. Y. 544 (1923) said that "while a village is a municipal corpo-

somewhat similar manner to the city, and in many places it is considered as a regular municipal corporation under the state constitution and laws. Many states have general laws applying to these units. A village incorporation law simply indicates that the state has unofficially adhered to a classification charter system treating cities slightly differently from villages. The distinction in most cases is made purely on the basis of population.

Nature of Legislative Agencies. In any event the governmental organization of a village is relatively simple. Frequently all powers exercised by the village rest with a village board, consisting of five or seven members elected at large. These boards or councils have the power to pass ordinances on many subjects set forth in the laws. Usually they are bodies of limited jurisdiction and are permitted to exercise only the functions enumerated in the law. In many places their powers are as broad as those exercised by the typical city council. In addition to exercising their legislative powers the boards often select the village officers, including the mayor or the manager if there is one. There appears to be a tendency in the Middle West to elect village officials, but in other sections of the country the majority are appointed.

RURAL LEGISLATIVE AGENCIES

Legal Status of the County. In 1845 Chief Justice Taney stated that "counties are nothing more than certain portions of the territory into which the state is divided for the more convenient exercise of the powers of government."[1] Following this general rule, counties are looked upon as units of government existing only for the purpose of the general political government of the state. They are agents and instrumentalities of the state in the performance of its functions.[2]

A county, then, is not a municipal corporation; rather, it has been designated in the sight of the law as a quasi-corporation. The distinction between the quasi-corporation and the municipal corporation was set forth some years ago by the supreme court of Ohio when it said: "Municipal corporations proper are called into exist-

ration, it differs materially from a municipal corporation like a city." In Maine, the court stated that a village partakes of the nature of a municipal corporation (*Camden v. Camden Village Corporation*, 1 Atl. 689).

[1] *State of Maryland v. Baltimore and Ohio R. R. Co.*, 3 Howard 534 (1845).

[2] *Maddenn v. Lancaster County*, 65 Fed. Rep. 188 (1894); *Yambell v. Foster*, 99 Pac. 286 (1909).

ence rather at the direct solicitation or by the free consent of the people who compose them . . .; counties are local subdivisions of a state, created by the sovereign power of a state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. . . . A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large for the purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely any exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state and are, in fact, but a branch of the general administration of that policy." [1] It may be added, for emphasis, that in the application of this doctrine of supremacy over counties the legislature has complete and plenary powers except where provisions of the constitution apply to the contrary. The supremacy of the state is seen not only in the matter of powers alone; county organization, also, has been determined in many cases by general state law.

Number and Size of Counties. The fact that counties are quasi-corporations, and thus assume subordinate positions in the general governmental organization, does not mean that counties are unimportant. In the United States there are over three thousand such units; and in all states except one, counties exercise important functions and spend relatively large portions of the total tax dollar. For the most part these counties are small, having an average population in all states of the Union of 39,991 and an average area of 985.6 square miles. In some states there are found unusually large numbers of counties. In Texas there are 254, while Georgia and Kentucky have 159 and 120 respectively. The mere fact that there are so many counties in the United States indicates the attention which has been given this unit of government.

Types of County Boards. In the county, legislative and administrative functions are usually combined in one body – the county board. In three states – Kentucky, Tennessee, and Arkansas – the county board members also perform definite judicial duties. Thus the principle of separation of powers has been widely disre-

[1] *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 109 (1857).

garded in county government. In general, county boards are of three types: (1) the New York type, (2) the Pennsylvania type, and (3) the justice of the peace type. In the New York type, members of the board are elected from townships and districts. These are usually large boards. The Pennsylvania county board, or the board of county commissioners, is composed of a relatively small number of members, usually three or five elected from the county at large. The justice of the peace or magisterial type, as used in Tennessee, Kentucky, and Arkansas, is composed of justices of the peace elected from magisterial districts, plus the county judges.

County Boards as Legislative and Executive Agents. No unit of government in the United States spends as much money and performs as important functions as the county without the service of an executive head. In some cases attempts to meet this need are made by the use of committees of the county board. This procedure has produced satisfactory results in English local government, but American tradition has not made a place for it, and it may be said that the use of the committee system in county boards has not solved the problem of executive responsibility. Another step toward providing needed executive control is the provision made in some states for a county auditor whose duty it is to relieve the board of the burden of numerous claims and like clerical duties. In Cook County, Illinois, there is a county president who is elected as a member of the board, and who in turn appoints county officers not elected by popular vote. In many respects the county president is the responsible head of the county government. There are, however, many elected officers with whom the president is compelled to share his responsibility. Another approach to a county executive is seen in the county ordinary in the state of Georgia. This official acts as probate judge and chairman of the county board when such an agency exists.

The County Board and the County Manager. In several states of the Union, including Virginia, North Carolina, and California, counties are permitted to adopt a county manager form of government, wherein the manager becomes the executive agent of the county board. This form follows closely the model of the city manager plan. The manager is appointed by the board and acts as an administrative head over all functions controlled by the board. Under such a plan the county powers are not changed but there is a separation of county functions with a consolidation of county powers. Recently

in the state of Virginia optional plans of county government have been adopted, one of which provides for the manager system and the other for what is called the executive type of government. In the executive plan the chief executive officer of the county is elected by popular vote and not appointed by the board.

Compensation of Board Members. Members of county boards are usually paid on a per diem basis although regular salaries are provided in some states. Compensation on the per diem basis ranges from four to eight dollars per day, and in many cases a limit is placed on the number of days for which board members may be paid.

Duties of County Boards. Generally, county boards are legislative bodies in only a limited sense of the word. They exercise only the functions conferred upon them by law. Their most important duty is the general supervision of county activities. At first glance it would seem that the power of the board to supervise county affairs generally is quite broad, but closer examination shows that it is somewhat restricted. The board may investigate, examine, and demand reports from most county officers, but in rare cases does it possess the power to issue authoritative orders. It is most difficult for a board to supervise the activities of popularly elected county officials.

In addition to their general supervisory powers, county boards are charged with (1) keeping records; (2) determining county policies within constitutional limits; (3) awarding contracts; (4) purchasing land, property, and equipment; (5) making needful rules and regulations for county institutions; (6) appointing minor officers such as the superintendent of poor farms and health institutions and other functionaries; (7) extending poor relief; (8) passing upon claims before they may be legally paid; (9) administering certain phases of the tax machinery of the county; (10) serving in some states as a board of review or tax equalization; (11) approving bonds of county officers; (12) supervising elections; and (13) numerous minor functions, such as making jury lists, ordering land surveys, changing township and district lines, and suppressing nuisances.[1]

Limitations on Powers of Boards. This somewhat comprehensive list of functions indicates that the county board exercises considerable authority. It must be remembered, however, that in the per-

[1] Porter, K. H., *County and Township Government in the United States*, ch. 6.

formance of many of these duties the county board must share its control with a host of other officials elected by the people and in no way responsible to the board. Even with their limited powers county boards are unique legislative bodies in that all governmental powers are to some extent given to these boards in much the same sense that powers are concentrated in English legislative bodies. From this point of view, the county is the unit of government in the United States which furnishes the closest approach to the English system of parliamentary government.

Procedure in County Boards. County boards are not concerned with formal rules of order or with any of the procedural techniques employed in city councils, state legislatures, or Congress. In many counties a board meeting is conducted like a session of a small committee.

TOWNSHIP AGENCIES

Legal Status of Townships. In New England the primary unit of self-government is the town. In many sections of the West and Middle West this unit is the township. For purposes of discussion the two may be considered together, in spite of the fact one is a distinct rural legislative agent, while the other operates primarily in urban sections. The New England town is a quasi-corporation much like a municipality. It is considered a mere agent of the state and a creature of the legislature, constituted for governmental purposes and possessing only limited powers of government. In a strict sense the town is more autonomous than either the county or the township. In Connecticut, for example, towns may exercise any power not expressly delegated to any other part of the body politic.

Functions of the New England Town. The functions performed by the New England town include the construction and maintenance of roads and streets, the operation of schools, the extension of poor relief, the levying and collection of taxes for town purposes, the operation of sewer systems and other sanitary facilities, the operation of utility plants and libraries, the maintenance of parks and hospitals, the enactment of police ordinances and, in some cases, the custody of land records, and the judicial function of probation. The New England town corresponds to the county in other sections of the country in that it is charged with the assessment and collection of state taxes, the keeping of vital statistics, and the enforcement of all state health laws, and in that it serves as an election dis-

trict for the state. Thus the town has both a governmental and a corporate existence.

The Town Meeting. The primary legislative agent of the town is the annual town meeting or assembly, which consists of all qualifying voters of the town. The town meeting is the nearest approach in the United States to direct democracy. Surprisingly enough, many town meetings are well attended. In a New England town with 2500 voters and 1500 votes cast, some 600 persons attended the annual appropriation meeting.[1] Town meetings are usually held in the town hall and are called to order by a town clerk. The procedure followed involves the election of a moderator, or presiding officer, who usually serves for that meeting alone and is not one of the regular town officers. This procedure has the advantage of freeing the town meeting from the control of the town officers. The town meeting serves two general purposes: the election of the various town officers, and the determination of general policy. Such minute matters as the issuing of licenses for the sale of liquor, the proposals of utility contracts, zoning ordinances, and traffic regulations are considered at the meeting. One of the important functions of the town meeting is the levying of taxes and the voting of appropriations for the coming year.

The town meeting is a full-fledged legislative body in every respect. In many cases, from twenty to fifty subjects are considered at the meeting. The discussion on these items is often enthusiastic. "The thing most characteristic of a town meeting is the live and educating debate, for attendants on town meetings from year to year become skilled in parliamentary law, and effective in sharp, quick argument on their feet. Children and others than voters are allowed to be present as spectators. In every such assembly, four or five men ordinarily do half of the talking, but anybody has a right to make suggestions or propose amendments and occasionally even a non-voter is allowed to make a statement; and the debate is often very effective." [2]

The Town Council. During the interval between town meetings a board known as the board of selectmen or the town council administers affairs. The membership of this board varies from three to

[1] See Sly, J. F., *Town Government in Massachusetts*, p. 148; quoted in Fairlie, J. A., and Kneier, C. M., *County Government and Administration*, p. 431.

[2] Hart, A. B., *Actual Government*, p. 171; quoted in Fairlie and Kneier, *op. cit.*, p. 432.

nine. Members are elected annually in most cases, although some serve for two or more years. The board is not so much a legislative agent as an administrative group – for example, the board has no authority to levy taxes; it can do only those things delegated to it by the town meeting under authority of the state constitution.

Many towns have no single executive head, but in some states – notably Vermont – the position of town manager has been created. This official is appointed by and is subject to the supervision of the selectmen. In addition to the manager the town has its coterie of minor officers, such as treasurers, overseers of the poor, constables, school board members, library trustees, and park commissioners. The most interesting official is the town clerk, who in most cases is elected for one year but often remains in office from year to year. His position is a close approach to that of the officer of the same name found in English local government.

The Township. In the Middle West, below the county, the township is the important unit of local self-government. It is nothing more nor less than a geographical subdivision of the county and exercises only those powers specifically granted it or necessarily implied. It is much less important as a policy-determining unit than is the New England town. The rule of limited power applies to the township. Generally its jurisdiction is confined to three main objects: highways, poor relief, and schools. In addition, the township serves as a state administrative district for the assessment and collection of taxes, for the conduct of elections, and for the administration of petty justice. The legislative body of the township may be either a township meeting or a board of township supervisors or trustees. Several states, following the New England model, provide for a township meeting. This meeting, however, does not possess the wide functions of the New England town meeting. Often this body has no taxing power, since this function is performed by the county board. Because of its limited powers the township meeting, where provided, is meagerly attended. It is unusual, out of a total vote of five or six hundred, to have an attendance of more than a dozen persons.

Township Supervisors or Trustees. Probably the most effective legislative agency found in many townships is the board of township supervisors or trustees. These officials are elected either by the township meeting or by regular ballot and possess powers over such matters as fall within the province of the township. This board cor-

responds to the county board, but its powers are more limited. As a legislative agency it is probably the lowest and the least important of any found in the United States.

Special Districts. In addition to the county, the township, the New England town, and the villages and boroughs, there is in practically all the states a multiplicity of special districts created for particular purposes. Generally there is a board or commission with a certain amount of rule-making power in charge of each district, but these local agencies should be looked upon as administrative organizations rather than as policy-determining bodies. They are set up by the state for specific purposes, and exercise very little discretion or local initiative. Districts of this kind may be set up for drainage purposes, for reclamation purposes, for sanitary purposes, and for a variety of local activities. In very few respects would any of them be considered local legislative agents.

QUESTIONS

1. Why are city councils almost universally unicameral?
2. Contrast the organization and powers of a city council under a mayor-council, a commission, and a city manager form of government.
3. How are council members selected in your city? What is their term of office, and what is their compensation?
4. What is the difference between a city and a county in the sight of the law?
5. What kind of county board is used in your county? How many members does it have? How long do they serve? What are they paid?
6. What type of legislative body is found in townships and towns? Compare these agencies with the county board.
7. To what extent are special districts policy-determining units of government? What kinds of special districts exist in your state?

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The Legislative Council (continued). The legislative council promises a satisfactory solution for several important legislative problems. Many of the difficulties of legislatures result from the absence of legislative planning. In too many cases legislatures meet without any plan of action at all, and proceed to pass bill after bill introduced by individual members without any thought of the needs of the state as a whole. A legislative council, with its research staff, is able to develop a plan or plans for the consideration of the body when it meets, and to supply the members with information relative to the various parts of the projected plan. Again, many of the difficulties of state legislatures arise from the inability of the two houses to cooperate on a program of action. Under the guidance of a legislative council, whose membership comes from both houses, coöperation is assured and the two houses are able to work together with full knowledge of each other's work. Similarly, the council usually promotes a better relationship between the legislature and the governor. At least, each is in a better position to know the plans and programs of the other. In some cases, however, the council has been pointed to as the instrument by which the governor is better able to subordinate the legislature to his own desires and reduce it to a "rubber stamp" body. Even though the legislative council movement may reflect the weakened position of the legislature and the increase in the power of the office of governor, it conforms to the modern trend in government of thinking of the executive as the chief policy-determining agency and the legislature as a confirming or approving body. In any event a legislative council organized with a research staff is in a position to give intelligent approval or disapproval to measures suggested by the executive, and to plan a program of intelligent legislative action.

PART IV

Administration: Unified Agencies and Processes

CHAPTER XV

The Presidency

UNITY IN ADMINISTRATION

WHILE the importance of policy determination should not be minimized, it must be remembered that policy is of no effect without accompanying execution. In academic circles there has been considerable controversy as to which is the more important, policy determination or policy execution. Actually, one is the complement of the other and of no value without it. In recent years, with the enormous growth of administrative activity, many persons are of the opinion that administration is assuming primary importance in the process of government. These persons are committed to the practical philosophy expressed in the phrase, "For forms of government let fools contest; that which is best administered is best." In this and the next three chapters administrative activity on all levels of government will be discussed. It will be observed that there is a great deal of similarity in administration regardless of the governmental unit. The mayor is the chief executive in the city in much the same sense as the governor in the state and the President in the United States. All perform executive functions; the major difference is seen in the size of the unit, not in the nature of the functions. We shall discuss first the presidency, then state executive and administrative agencies, and finally local administrative organization.

THE OFFICE OF PRESIDENT

Decision for a Single Executive. After the Constitutional Convention of 1787 had decided that there should be three departments of government, the question of the type of executive to be established divided the convention. The framers of the Constitution had had experience with the executive departments of the new states. They were also conscious of the difficulties that had resulted from the lack of a separate executive department in the government under the Articles of Confederation. Hence they were agreed that there must be an executive. But the question still remained as to whether it

should be a single or a plural executive. Some members of the convention, remembering their experience with despotic colonial governors and beset with fears of autocratic rule, continued to demand an executive council or a plural head in spite of their experience with the ineffectiveness of the Articles of Confederation. The majority, however, were of the opinion that executive power must be vested in a single executive elected directly or indirectly by the people,[1] and this opinion prevailed. The delegates had learned a lesson in government, both from the experience of the colonies and from the wider experience of the national government under the Articles of Confederation. It is not surprising then that the Constitution says that "the executive power shall be vested in a President of the United States."

Question of Tenure. This decision did not determine the type of single executive that should be established, what his tenure should be, or whether he should be eligible for reëlection. On all these matters there were differences of opinion among the members of the convention. Some, including Hamilton, urged life tenure or tenure on good behavior.[2] The majority of members, however, favored a fixed term, but disagreed on its length. Some advocated a term of seven years with the provision that the President be ineligible for reëlection. Finally a four-year term was agreed upon. No mention was made of reëlection. The two-term tradition, which has no sanction in law, was established by Washington and strengthened by Jefferson, both of whom, after being urged to accept a third term, refused it. Since that time it has been followed by other Presidents, with the exception of Grant, Theodore Roosevelt, and F. D. Roosevelt. Grant sought reëlection for a third term in 1875; Roosevelt, after serving the greater portion of McKinley's second term and one in his own right, sought reëlection again in 1912. For many decades the tradition set by Washington met with favor both from Congress and from the general public. In 1875 in connection with Grant's attempt to serve a third term, Congress passed a resolution that a third term would be "unwise, unpatriotic, and fraught with peril to our free institutions."[3] Public opinion apparently supported the two-term

[1] The early arguments for and against the plural executive are set forth by Hamilton in *The Federalist*, No. 70.

[2] See *Hamilton's Works*, vol. 1, p. 350.

[3] In 1928, before Coolidge made his historic utterance, the Senate again passed a formal resolution favoring adherence to "the precedent established by Washington and other Presidents." See *Congressional Record*, vol. 4, part I, p. 228.

limitation, whether the incumbent served two full terms or whether his first term consisted of the unexpired term of a deceased President.

Near the end of the term of every popular President his friends and supporters attempt to start a third-term boom for him. It will be recalled that such a situation was responsible in 1928 for the famous Coolidge phrase: "I do not choose to run." The fact that so many Presidents have refused to allow themselves to be considered for a third term tended to fix the tradition rather firmly. Many people looked upon the custom as part and parcel of American democracy, and any attempt to break with it would cause that President to be regarded as an autocrat and a dictator. It remained for President Franklin D. Roosevelt, who has not been a novice in shattering other precedents, to become the first third-term President in 1941. It is possible that the objections normally held by many persons to a third-term were put aside because of the international situation facing the United States during the campaign. The fact remains, however, that the precedent has been shattered, and it is possible that the return of normal world conditions will not cause the American people to return to tradition.

Compensation. The compensation paid the President is fixed by Congress. The only restriction on congressional action is the requirement that Congress may not increase or diminish a President's compensation during the period for which he is elected. The Constitution further provides that the President shall receive no other compensation from either the national government or the states. Originally the President's salary was fixed at $25,000. This was increased to $50,000 in 1871, and to $75,000 plus emoluments in 1909. It has remained at that figure to the present time. Congress has felt free to change the emoluments as occasion demands without regard to the constitutional restriction. Apparently they are intended to cover traveling expenses, the expenses of official entertainments, and the expenses of maintaining the White House. For travel and entertainment at the present time the President receives $25,000. The upkeep of the executive establishment, including the hire of domestics, secretaries, clerks, ushers, and messengers, brings the total cost of maintaining the Presidency to approximately $500,000 a year. While this may appear to be a large sum, it must be remembered that the demands upon the President's purse are enormous. It has been shown that very few Presidents save money, Coolidge being an exception. The cost of running our executive establish-

ment is far less than the sums paid in some other countries for the same purpose.

Personal Immunity of the President. In accordance with the ancient theory expressed in the phrase, "The king can do no wrong," the President, like the heads of governments the world over, enjoys complete personal immunity from any sort of judicial action. No civil officer in the United States or any of its divisions has the authority to arrest the President regardless of the crime. No court of the United States may assume jurisdiction over him.[1] It is true that he can be brought to trial through impeachment, but only for bribery and other high crimes and misdemeanors. Moreover, impeachment, which is a legislative process, is slow and operates only to remove the President from office. After removal by impeachment the President is subject to indictment, trial, judgment, and punishment according to the law, but when this takes place he is no longer President.

ELECTION OF THE PRESIDENT

Indirect Election. The method by which the President should be elected was an important question before the Constitutional Convention of 1787. Several points of view were expressed. One group favored the direct election of the President by the people. Another group considered that the people were incompetent and could not be trusted to make a wise choice; one member of the convention even declared that election by the people is as unnatural as "to refer a trial of colours to a blind man."[2] A third method suggested was that Congress select the President. The adoption of this procedure would have destroyed the division of powers and in the long run would have set up a system corresponding very closely to parliamentary government. Selection by the state executives and the state legislatures was also proposed. This suggestion met with instant disapproval, in spite of the fact that some of the states' rights delegates had voiced the same opinion.

The plan adopted was largely the suggestion of Hamilton, who proposed that the chief executive be chosen by a group of electors chosen by the people.[3] This plan was based on the assumption that the electors would be men of more than average capacity and well

[1] *Kendall v. United States*, 12 Peters 524 (1838).
[2] Quoted in Phillips, R., *American Government and Its Problems*, p. 286.
[3] Farrand, M., *The Records of the Federal Convention*, vol. 1, p. 292.

qualified to select both the President and the Vice-President. The electoral college plan did not anticipate or foresee the development of political parties, which has reduced the electors to the position of pliable rubber stamps. Electors still have the constitutional right to vote for any candidate of their choice, but there have been few instances – certainly in recent decades – when an elector voted for any candidate other than the nominee of his party. Thus, even though the electoral college does not meet and cast its vote for several weeks after the election, the people know who will be the next President a few hours after the closing of the polls. For this reason many persons are convinced that for all intents and purposes, the electoral college has outlived its usefulness. Before the plan is criticized further, it may be well to describe the process by which the electors elect the President.

Selection by the Electoral College. The constitutional provisions relating to the election of the President are notable for their omissions rather than for their completeness. Each state is authorized to appoint, in such manner as the legislature directs, a number of persons, holding no office under the United States, equal to the number of its Representatives and Senators in Congress. In the beginning these electors were named by the state legislatures. Today they are elected by the people in state-wide elections. After election the electors meet in the state capitols before the opening of Congress in January and cast their ballots for a President and a Vice-President. The vote of the electors is transmitted to Congress and on the appointed day, in the presence of both houses, the Vice-President of the United States, who is the president of the Senate, sees that the ballots are counted and the results announced. This constitutes the actual election of the President. Also this is the whole procedure as outlined in the Constitution.

The Constitution fails to tell the entire story of the election of the President. At the present time, under party control, each party has a slate of electors who are pledged to vote for its candidates for the Presidency and the Vice-Presidency. The names of the candidates for President and Vice-President do not appear on the ballot except in a few states. The ballot contains simply the names of electors arranged by groups or parties. The voter is asked to vote [1]

[1] By act of Congress the election for presidential electors is held on Tuesday after the first Monday in November of every fourth year. See *Code of Laws of the United States* (1926), p. 19.

for one list of electors, but he does so with the knowledge that these electors, if elected by a plurality of those voting, will cast their ballots for the candidate for whom they are pledged. Actually, then, the choice of a President is made at the polls and not in Congress as the result of the counting of the electoral ballots. Because of this rubber-stamp method which has developed as a tradition in the electoral college, and because few voters pay any attention to the names of the electors, but vote by party affiliation, about one-third of the states now substitute for the names of the electors the names of the party candidates. This system has the effect of revising the constitutional provision and substituting a reality for constitutional theory.

Changes Made by the Twelfth Amendment. Until 1804 the electors cast one ballot for each of two persons for President. The candidate receiving the highest number of votes was declared President, and the individual receiving the second highest number became Vice-President. In that year, because of a tie vote and the demonstrated defects of the plan, the Twelfth Amendment was adopted, which provided that electors should cast separate ballots for President and Vice-President. This change was due to the emergence of the political party as a dominant force in American government. Prior to 1804 it was almost impossible to select a President and a Vice-President from the same party. With the adoption of the Twelfth Amendment, however, a party could capture both offices, and since that time these two officials have always represented the same political party.

How Contested Elections Are Decided. If no candidate receives a majority of the electoral votes, the House elects the President, and the Senate chooses the Vice-President. The Twelfth Amendment provides that the House select a President from among "the persons having the highest numbers not exceeding three." In such a contest the state delegations vote as units, with each state having but one vote; the state vote is determined by the majority of the state delegation in the House. A majority of all the states is necessary to elect. If no candidate for the Vice-Presidency receives a majority of the electoral vote, the Senate chooses from the highest two. The Senators vote as individuals, and a simple majority elects. Since 1825 but one President has been chosen by the House – John Quincy Adams. In the same period one Vice-President has been elected by the Senate – Richard M. Johnson, in 1836.

In deciding contested elections in Congress, the right of contested

groups of electors to cast ballots must be determined. Congress has grown more and more reluctant to assume a definite attitude in this matter. In 1876 Samuel Tilden and Rutherford B. Hayes were deadlocked for the Presidency, since neither candidate had a majority of the electoral college. The outcome in this election depended on the contested votes from four states. Congress hesitated to decide the matter, and as a result could not agree upon a selection. To solve the dilemma it appointed a special electoral commission consisting of five Senators, five Representatives, and five members of the Supreme Court. The commission gave Hayes the contested votes from all four states and he was declared the winner.[1] All members of the electoral commission, including the members of the Supreme Court, voted according to their party affiliations. Suffice it to say, this method of deciding so important a question is not a satisfactory one.

In order to prevent the recurrence of such a situation Congress passed the Electoral Count Act of 1887. Under this law a state itself must settle disputes about its presidential vote and name the group of electors which shall be regarded as qualified to cast the state's vote. If a state does not do this the two houses of Congress acting separately are empowered to determine the votes to be cast. If the houses disagree, the state loses its votes. No occasion has arisen since 1886 to test the effectiveness of this law.

Criticisms of the Present Method. In recent years there has been widespread dissatisfaction with the system of electing a President. It has been argued that the original purpose of the electoral college has been defeated by political parties, and that the method of election should be changed in recognition of changed conditions.[2] The criticisms of the present system may be summarized under two general heads: (1) it may defeat the will of the people; (2) it makes the voice of the individual voters unimportant and places too great emphasis on the votes of states. In 1888 Cleveland polled 100,000 more votes than did Harrison, yet Harrison's votes in the electoral college were so distributed that he won a majority of the electoral votes; thus the will of the people was defeated. The vote of one large state may decide the election in spite of the fact that the total number of votes for President may not indicate the same choice.

[1] Haworth, P. L., *The Hayes-Tilden Disputed Presidential Election of 1876.*

[2] For criticisms and recommendations concerning the electoral system see Allen, J. C., "Our Bungling Electoral System," *American Political Science Review*, vol. 11 (1913), pp. 685–710; and Kallenbach, J. E., "Recent Proposals to Reform the Electoral College System," *ibid.*, vol. 30 (1936), pp. 924–929.

Phillips gives a clear illustration of how this might happen in the following table.[1] It will be observed that the total Republican popular vote is larger than the total Democratic popular vote, but the Democratic party won New York with its forty-seven electoral votes, and thereby gained a majority of the electoral votes.

	DEMOCRATIC		REPUBLICAN	
	Popular Vote	*Electoral Vote*	*Popular Vote*	*Electoral Vote*
New York	1,000,000	47	900,000	0
Michigan	400,000	0	600,000	19
California	400,000	0	500,000	22
Total	1,800,000	47	2,000,000	41

Under the present electoral system little effort is made to get out the votes in the "sure" states, which means that the voice of the individual voter in these states is unimportant. Emphasis is placed on the vote of the state, especially the doubtful states. For example, it makes little difference to either the Democratic or the Republican party whether Mississippi has a Democratic majority of 3000 or 300,000, but the outcome in such doubtful states as Ohio and Indiana makes considerable difference to them. Many persons are of the opinion that a system in which the votes of all persons count in the election would be superior to the present emphasis on carrying particular states.

The adoption of an amendment to the Constitution providing for direct popular vote is the most common suggestion which has been made for effecting a reorganization or readjustment of the electoral system in the United States that will guarantee that the President will be definitely the choice of the people. This plan was favored by Andrew Jackson, and since his time many other statesmen and students of government have urged its adoption. Among the outstanding statesmen of the present generation, none has been more fervent in his arguments for direct popular election of the President than Senator George W. Norris.

PRESIDENTIAL SUCCESSION

The Constitution provides that the Vice-President shall succeed to the Presidency upon the death, removal, or disability of the Presi-

[1] *American Government and Its Problems*, p. 291.

dent. The Vice-President simply fills out the unexpired term of the President. It will be observed that this system differs from that of the French Republic, where there is no Vice-President. In France when a person is selected to succeed the President before the expiration of the regular term, the new President is chosen for a full term of seven years. In the history of the United States there have been only six cases in which the Vice-President has succeeded to the Presidency.

Presidential Disability. In case of the death, resignation, or removal of the President, it is clear that the Vice-President succeeds to the presidency immediately upon the vacation of the office, but the interpretation of the constitutional provision concerning disability has not been settled with any degree of finality. When is a President disabled to such an extent that he must be succeeded by the Vice-President? Apparently the President himself is the sole judge. President Garfield was unable to perform the duties of his office for two months prior to his death, but he remained President during that period. Wilson, in spite of his serious illness from 1919 to 1921, continued as President. It appears also that absence from the country does not incapacitate a President or render him unable to perform his duties. Wilson remained President of the United States even while he attended the Peace Conference following the World War. President Franklin D. Roosevelt visited South and Central America but remained the chief executive *in absentia.*

Presidential Succession Act of 1886. In case of the death, resignation, removal, or disability of both the President and the Vice-President, the Constitution gives Congress the power to determine succession. In 1886 Congress passed the Presidential Succession Act which provides that cabinet officers in the order of the establishment of their departments succeed to the Presidency upon the inability of the Vice-President. The only restriction placed upon this succession is that the persons concerned must meet the constitutional requirements of age, residence, and citizenship.

QUALIFICATIONS AND COMPENSATION OF THE PRESIDENT

Constitutional Qualifications. Presidential qualifications may be considered under two heads: (1) the constitutional, and (2) the extraconstitutional or practical. The latter might be called essentials of presidential availability rather than presidential qualifications. The Constitution states that a President must be a natural-born citi-

zen of the United States or a person who was a citizen at the time of the adoption of the Constitution. This temporary provision was inserted so that such persons as Alexander Hamilton and James Wilson would not be barred from the presidency. No naturalized citizen is now eligible for the office of chief executive. In addition to citizenship, the Constitution specifies that the President must not be less than thirty-five years of age, and that he must be fourteen years a resident of the United States. Some question has arisen as to the meaning of the fourteen-year residence requirement. Does it mean that the President must have been a resident for fourteen consecutive years, and must these years of residence have immediately preceded his candidacy for the Presidency? The question was tested when Herbert Hoover was elected to the office. Apparently the constitutional requirement means that the fourteen years need not immediately precede the President's term of office. Hoover had lived abroad part of the fourteen years before he took office, but apparently he had met the constitutional qualification on this score.

Extraconstitutional Qualifications. The American people have been most exacting in their choice of Presidents. What things make a man available for the presidency? Briefly, they may be summarized under the headings: character, physique and personality, ability to speak, experience, geography, race and religion.[1] Americans demand that a President be a man of unimpeachable character. During the campaign the searchlight of publicity and investigation is turned upon him. His public and private life become matters of public knowledge. If he has been guilty of dereliction of duty or has failed to abide by the accepted moral code, those facts will be brought to light during the campaign. It is deplorable that much misinformation, also, is fabricated concerning candidates for the presidency.

The American people also demand that the President possess a vigorous physique and a pleasing personality, though there have been a few exceptions to this general rule. In any event, the American people like a good speaker and a man of magnetic personality in the presidency. It may be observed in this connection that various polls of presidential popularity have indicated an upward trend after each fireside chat delivered by President F. D. Roosevelt.

It appears that a President before he can hope to gain his high

[1] For a fuller discussion of these factors see Brooks, R. C., *Political Parties and Electoral Problems* (1933), ch. 10.

office must serve an apprenticeship in politics or public life. The length of that apprenticeship has not been determined, but we like a President to be an experienced politician. What kind of public service best fits a man for the presidency? On many occasions before the Civil War and once since, the American people have displayed a preference for military men. It must be admitted, however, that the country's experience with military heroes has not been a happy one, since many of them possess little political acumen. There was some suggestion following the World War that General Pershing become a candidate for the presidency, but in recent years military men, in spite of their popularity, have been passed over. The people demand more than the laurels of war as experience for the presidency. Legislative experience, even though it may qualify an individual in certain respects, has not been considered the best training. James K. Polk is the only Speaker of the House of Representatives who reached the presidency. Only a few Presidents have gone directly from Congress to the presidency. There is ample evidence that we demand administrative rather than legislative experience of our Presidents. Many ex-governors have become President. In fact, most of the successful and some of the unsuccessful candidates since Hayes have served as governors of their states. This fact raises the question whether or not all Presidents in the future must serve an apprenticeship as governor before they can be considered for the office of chief executive.

Geography is another factor which determines the availability of a candidate for the presidency. Practical politics have dictated that a presidential candidate must live in a hotly contested state with a large bloc of electoral votes. This is shown by the activity of political parties in their attempts to capture pivotal states. No President since Andrew Jackson has been elected from the South, and Coolidge has been the only New Englander within recent decades. While it is true that Hoover was elected from the Far West, his economic and social background was that usually demanded in a state such as New York, Pennsylvania, or Ohio. The most fertile presidential field appears to be the territory from New York to the Mississippi River and from the Ohio River to the Great Lakes. The states included in this region are doubtful politically and most of them have considerable electoral votes. A candidate from this region is likely to carry with him the votes of these doubtful states. There was a time when Virginia was considered the "Mother of Presidents."

In recent years Ohio and New York have furnished more Presidents than any other states. There is a practical reason for this, and that reason is not that men living in these states are exceptionally capable, but rather that the parties need the votes of these states.

While the Constitution implies political equality of all races and creeds, practical politics in the selection of a party candidate for President denies such equality. All Presidents have represented the following races: English, Scotch, Scotch-Irish, Welsh, Dutch, and Swiss. It will be observed that none of our Presidents have come from the southern European or Scandinavian races. Again, every President of the United States has been a member of a Protestant church. The American people have never elected to this high office a Catholic or a Jew. William Jennings Bryan supported Associate Justice Louis Brandeis for the presidency in 1920, but Brandeis, a representative of the Jewish race, sensed the situation when he remarked: "Gentlemen, let there be no mistake. I should make a good President but a bad candidate."[1] The Democratic party nominated Alfred E. Smith for the presidency in 1928. Among other reasons for Smith's defeat was the fact that he was a member of the Catholic church. These situations raise questions as to the existence of tolerance in politics in spite of the legal reverence we pay it in the law.

Why Great Men Are Not Chosen President. In a pessimistic mood Lord Bryce some time ago asked why great men are not chosen President.[2] If there is any truth in the implication of this query, the electoral system must be given as the chief reason for the characteristic mediocrity. It is an interesting inquiry to examine the validity of Bryce's implication. Undoubtedly some really great men have been elected to the Presidency, while on the other hand there have been some hopeless mediocrities and a number of men of only average ability. Would the results have been any different under direct election? The electoral college plan undoubtedly has not been so successful as Hamilton believed it would be when he said: "There will be a constant problem of seeing the station filled by characters preëminent for ability and virtue." It is too much to expect any system of selection in a democratic government always to select the best. In many respects our Presidents have been as able as could be expected under any democratic system.

[1] Quoted in Phillips, R., *American Government and Its Problems*, p. 294.
[2] Bryce, James, *Modern Democracies*, vol. 2, p. 73.

POWERS OF THE PRESIDENT

Powers under the Parliamentary and Presidential Systems. The framers of the Constitution saw fit to establish a system of government based upon the separation of powers. In other words, there was set up in the United States a presidential as distinguished from a parliamentary type of government. In parliamentary government the executive comes from the legislative body and is directly responsible to it; he holds his office as long as he receives the support of the majority of the legislature. The legislature is the controlling force in the government. In the presidential type the executive branch is outside the legislature. It receives its power from non-legislative sources and is not responsible to the legislature, but rather is a coördinate branch of government with the legislature. Thus in the presidential type of government the chief executive may become a powerful official. It was not intended in the Constitutional Convention of 1787 that the President should be such a power. The fear of despotism was one of the motivating forces behind the philosophy of American government. In *The Federalist*, Hamilton tried to prove that the presidency would not menace the liberties of the people, and contended that the President would be no stronger than the governor of a state. History has shown that Hamilton was wrong, since the presidency, even from the beginning, has grown in prestige out of proportion to the position of governor. The growth of presidential power and prestige in the United States should not cause amazement. It is the natural outcome of the doctrine of the separation of powers. Leadership must exist somewhere. Congress cannot provide this leadership, and the only other source is the executive.

Kinds of Presidential Powers. Presidential powers may be discussed under three heads: executive, legislative, and judicial. While the Constitution is based upon the doctrine of the separation of powers, it is not possible in discussing any branch of government to adhere strictly to this division. The President is not only the chief executive; he may be called the chief legislator as well. In any event, he exercises all three general types of functions.

Executive Powers — Direct and Indirect. The Constitution states that the executive power is complete and plenary and that the President exercises all executive powers of the federal government. The Constitution further declares that the President "shall take care

that the laws be faithfully executed." These two provisions furnish the constitutional basis for the exercise of executive powers by the President. In addition, however, he exercises certain powers — which may become important in the hands of a strong President — derived from acts of Congress and judicial interpretation.

Phillips has classified all presidential powers as direct or indirect.[1] The direct powers of the President are those exercised by virtue of his office without the necessity of congressional aid. They include the President's command over the army and navy and the militia when called into service, and the authority granted him to require reports from heads of departments, to grant pardons and reprieves, to make appointments, to send messages to Congress, and to receive foreign ambassadors. The indirect powers of the President are those derived from congressional action and judicial interpretation. Practically every law passed by Congress requires executive and administrative enforcement. This means in virtually every case an increase in presidential power. Congress, for example, has the power to lay and collect taxes, but the actual administration of the tax machinery is in the executive department and is thus under the control of the President. Congress has also authorized the President to use his discretion in raising or lowering tariff schedules and in expanding or contracting the currency. Presidential powers of this type expand in times of emergency. It will be remembered that President Wilson was practically made the dictator of the United States during the World War, and was granted the power to curtail the liberties of the people. New Deal legislation in the administration of Franklin D. Roosevelt has increased the power of the presidency to such an extent that Congress has been popularly called a rubber stamp. The possibilities of further expansion indicate that presidential powers are enormous. Apparently this expansion depends upon the times and the ability of the President to lead and influence Congress.

Types of Executive Powers. The President's executive powers may be discussed under the following heads: (1) enforcement of law; (2) pardons and reprieves; (3) appointment and removal; (4) direction; (5) foreign relations; (6) and the war power.

Law Enforcement. The enforcement of law is definitely authorized in the Constitution. The President takes an oath of office to protect and defend the Constitution, and that document requires

[1] Phillips, R., *American Government and Its Problems*, pp. 299–300.

him to see that the law normally is enforced by administrative machinery provided by Congress. In emergencies the President may use the army and navy as well as the state militia to enforce the law. The Supreme Court has said that the "entire strength of the nation may be used."[1] This power may supplement or even supplant the law-enforcing efforts of the states. The superior effectiveness of the presidential power is seen in the requirement that the United States shall protect the states against invasion and domestic violence. The President decides when such protection is necessary, and he may use the military forces to this end even if the governor of a state does not call upon him for assistance or protests against it. This situation was demonstrated in 1894 when President Cleveland interfered in the Pullman strike in Chicago and sent the armed forces of the United States to that city in spite of the objections of Governor Altgeld,[2] to see that the mails were kept open and that interstate commerce remained unobstructed.

Pardons and Reprieves. The President's pardoning power is plenary except for two restrictions: (1) he cannot pardon a person convicted upon impeachment and restore him to office; (2) he can pardon only violators of the federal Constitution and laws as distinguished from violators of state laws. In exercising the power of reprieve, the President may postpone the execution of a sentence imposed upon any violator of any ordinary federal law. In both pardon and reprieve the President may be advised by the Department of Justice or other agencies of the national government, but the responsibility for action rests upon the President alone; he cannot share it with any other official.

Appointment: Superior Officers. One of the most important prerogatives of the President is his power of appointment and removal. To show the extent as well as the limitations of the power of appointment, it is necessary to distinguish the two types of officers involved: superior and inferior. With regard to the superior class, the President exercises wide discretion and is limited only by the requirements of senatorial confirmation. What officers are included in this class? The Constitution states that the President "shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers, and consuls, judges of the

[1] *In re Debs*, 158 U. S. 564 (1895).

[2] Cleveland, Grover, *Presidential Problems*, ch. 2; Browne, W. R., *Altgeld of Illinois*, chs. 12–16.

Supreme Court and all other officers of the United States whose appointments are not herewith otherwise provided for and which shall be established by law." In addition to the superior officers named in the Constitution there are the heads of cabinet departments, bureau chiefs, members of boards and commissions, revenue collectors, postmasters, and others. It was originally intended that the President should nominate persons of his own choice for these offices, and that the Senate should simply approve or disapprove of these nominations; the initiative rested with the President. Custom, however, has dictated a different procedure, under which individual Senators recommend and actually nominate many of these so-called superior officers. This practice is known as "senatorial courtesy." There are so many officers to be appointed in the several states, as well as in the national capital, that the President cannot know the merit or fitness of all. Hence the Senators from the respective states, if they are of the same party as the President, suggest persons to fill the offices in their states. Ordinarily such recommendations are followed by the President and are not questioned when submitted to the Senate, if that body knows that the recommendations were originally made by the Senators from the states concerned.

Inferior Officers. The second group of officers appointed by the President may be called inferior officers. The Constitution states that "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." These inferior positions are filled without senatorial confirmation. Exactly what are inferior officers? It is difficult to make a definite distinction between inferior officers and employees. It may be assumed that Congress in establishing positions has the power to determine the status of any officer.

Limitations Imposed by the Merit System. The President's power of appointing inferior officers and employees has been limited by the establishment in 1883 of the Civil Service Commission. In the early days the President appointed inferior as well as superior officers on a nonpartisan basis. As political parties developed, the spoils system came into existence; thereafter, appointments to these positions were given only to persons having the same party affiliation as the President. This was the situation from the beginning of Jacksonian Democracy until the establishment of the United States Civil Service Commission in 1883. The administration and operation of the merit

system will be discussed in Chapter XIX. It is enough to say at this point that the adoption of a merit system has meant that the President must appoint from a list of persons who have demonstrated their fitness for the position in question.

The merit system is based on the theory that there is a difference in recruiting policy-determining and policy-executing officials. Contrary to the underlying tenets of Jacksonian Democracy, it denies that the duties of public employees are so plain and simple that any man of average intelligence is qualified to perform them. The duties of public officials today, and especially those of inferior officers, are becoming so technical that allegiance to the President's party alone will not suffice. Technical competence is necessary, and seldom is this found in professional politicians. In one sense, the merit system is not a limitation on presidential power, for in the long run it means the strengthening of executive control; through it the executive is able to accomplish more and render more effective his power of policy execution. It is interesting to note that politically minded Franklin D. Roosevelt, who has had all the charges of dictatorship thrown at him, has proposed that the merit system be extended upward, downward, and outward.[1]

Removal. If executive responsibility is to mean anything, the power of removal must accompany the power of appointment. The Constitution provides for the removal of civil officers by impeachment, but impeachment is a judicial process and does not affect the President's power over administration directly. How, then, can a President remove administrative officers, and what limitations are imposed on this power? Does the President have the right to remove anyone he appoints? If so, is it necessary that his action be approved by the Senate if that body shared in the appointment? The Constitution does not answer these questions explicitly, and there has been some controversy over them from the beginning. At the Constitutional Convention of 1787 two general points of view were expressed. One group looked upon removal as part of the general power of direction over administration, and would give to the President complete power over removal. Another group considered that the President must share this power with the Senate. Not until 1867, however, was it necessary to take any definite action in the matter. In that year, as a result of controversies in Congress over the proposed removal of a cabinet member by President Johnson, Congress

[1] *Report of the President's Committee on Administrative Management*, p. 7.

passed the Tenure of Office Act, which imposed limitations on the President's power to remove cabinet officers. After the passage of the act, Johnson disregarded it on the ground that it was unconstitutional. This action led to his impeachment, but with his acquittal the issue remained unsettled.

The Myers Case. It was not until 1926 that the Supreme Court attempted to lay down any rule regarding the President's power of removal. In that year the court decided the famous Myers Case.[1] Myers had been appointed to the postmastership in Portland, Oregon, by President Wilson. Later he was removed from that position by order of the President, and this action was taken without senatorial approval. Myers sued for his unpaid salary. The court decided that the President may remove any executive officer he appoints without seeking the advice of the Senate. It was stated that the power of removal is inherent in the power of direction. If the President is to be held responsible for the faithful execution of the laws it is essential that he be free from interference by the legislative body. Only in this way can he control his subordinates and administer the law. Since the case concerned a superior officer it may be concluded that the same is true of inferior officers, who are appointed without senatorial confirmation. This decision is significant in that it points to unlimited power of removal on the part of the President.

The Humphrey Case. In 1934, however, the court appeared to impose some limitations on the unrestrained exercise of the power of removal. In 1933 President Roosevelt dismissed William E. Humphrey from membership on the Federal Trade Commission. Humphrey had been appointed by President Hoover for a seven-year term. The removal was based purely on political grounds. The act establishing the Federal Trade Commission provides for dismissal on grounds of inefficiency, neglect of duty, or malfeasance in office, but this clause was not invoked. The Supreme Court in this test case, instituted by Humphrey, did not make a decision until after his death; it then ruled that the President cannot dismiss a quasi-legislative or a quasi-judicial officer in the same way that he can remove an executive officer.[2] The removal of a quasi-legislative or a quasi-judicial officer in no way affects the direct control of the President over the administration; hence power to remove such officers is not

[1] *Myers v. United States,* 272 U. S. 52 (1926).
[2] *Rathbun v. United States,* 295 U. S. 602 (1935).

a part of the President's power of direction. In summary it may be said that the President has the power to remove an executive or administrative official whom he may appoint, but he cannot remove a quasi-legislative or judicial officer. Removal must be exercised as part of the President's power of direction.

Power of Direction. Beyond the power of appointment and removal the President as chief executive possesses the power to direct officials in the performance of their duties. This prerogative has had a long and hazardous development. In the beginning it was apparently intended that administrative work should be divided between the executive and legislative branches of the government. This is shown in the establishment of the first three cabinet positions. While the State and War Departments were to be directed by the President, the Treasury Department was to report directly to Congress. With the growth of the Presidency, however, questions were raised as to the scope of the President's power of direction. Undoubtedly Congress exercises the basic control over the executive departments, through its control of the purse, its power to delegate authority to administrative agencies, and its privilege of investigating the work of executive agencies. Once set up and financed, however, these agencies come under the immediate and direct control of the President, whose power of removal gives him also the power of direction.

The Ordinance Power. The constitutional basis for the President's directive power is found in his obligation to take care that the laws be faithfully executed. The scope of administrative activities is set forth in the Constitution and the laws in broad general terms. In order that the agencies may function effectively it is necessary that the details of procedure be left to the administration. As a result the various administrative agencies have come to issue numerous ordinances, or rules and regulations, as broad in scope as the activity of the agencies themselves.

While it is true that there has been a remarkable growth of the ordinance power in recent years, the United States has not accepted administrative rule-making wholeheartedly. In many continental European countries a separate system of administrative law has been frankly recognized. In the United States, however, the situation is slightly different. One of the fundamental principles of American constitutional government is the theory of the separation of powers. If this theory is accepted, the legality of delegating legislative powers

to administrative bodies is questionable.[1] The controversy has not been settled, but the executive and administrative bodies continue to exercise legislative functions. The Supreme Court in numerous New Deal decisions has avoided the issue.[2] Probably it is correct to say that delegation has come to be legal by default.

Control of Foreign Relations. In exercising his vital and important functions concerning the control of foreign relations,[3] the President must share his responsibility with Congress. His present position and powers in this field are the result of a gradual development. The Constitution does not locate the control of foreign affairs definitely. In the opinion of some of the framers, Congress was to play the major role in the conduct of foreign affairs,[4] and it will be remembered that Washington was denounced for announcing his famous neutrality policy. Since then, however, the initiative in foreign relations has gradually passed from Congress to the President. Constitutional sanction for the exercise of such powers by the President is found in the general grant of executive powers, in the President's position as commander-in-chief of the armed forces, and in his power to make treaties and to appoint diplomatic representatives.

Forms of Control. The President exercises his control of foreign relations in the following ways: (1) through carrying on diplomatic intercourse; (2) through his power to recognize foreign governments; (3) through framing our foreign policy; and (4) through protection of American citizens abroad.

The President is the medium of intercourse between this government and other governments; the states have no powers in the sphere of international relations. Only twice in the history of the United States has a foreign government attempted to deal directly with the people: (1) in the ill-fated Citizen Genêt episode, and (2) in the "surprising irregularity" of the German government in 1915 when it warned the citizens of the United States, through American news-

1 See Blachly, F. F., and Oatman, M. E., *Administrative Legislation and Adjudication;* Fairlie, J. A., "Administrative Legislation," *Michigan Law Review*, vol. 23, pp. 181–200.

2 In *Schechter v. United States*, 295 U. S. 495 (1935) the court held that the National Industrial Recovery Act was unconstitutional on the ground that it delegated legislative power to the executive.

3 See Beard, C. A. and Wm., *The American Leviathan*, ch. 22; Corwin, E. S., *The President's Control of Foreign Relations;* Wright, Q., *The Control of American Foreign Relations;* Mathews, J. M., *The Conduct of American Foreign Policy.*

4 *Hamilton's Works*, vol. 4, p. 135.

papers, to keep off the high seas because of its submarine policy.[1] One instance resulted in the recall of a foreign representative and the other, ultimately, in grave difficulties which led to the participation of the United States in the World War.

The President possesses the power of recognizing or withholding recognition from foreign governments. This power grows out of his conduct of diplomatic intercourse. In exercising his power of recognition, the President determines the American attitude toward political situations abroad. He may recognize a government by means of a proclamation or by sending or receiving official representatives. If he resorts to a proclamation he simply recognizes the belligerent status of an otherwise questionable regime, though such action may lead eventually to formal recognition.

In some cases it has been impossible to distinguish whether the action of our government was a recognition of international facts or mere intervention. Our recognition of certain Latin American and Caribbean governments may be pointed to as examples of this difficulty. American recognition in some instances has meant the success of one warring party and the defeat of the other; in other cases, recognition was tantamount to intervention, since the United States through the President simply selected the faction which would best promote our own interests.

The strategic position of the President enables him to determine the foreign policy of the United States. In this matter he has a decided advantage over the Senate in that he has at his disposal sources of information which are denied the Senate. The President may frame foreign policy through one of several methods. He may announce it in messages to Congress, as did President Monroe in 1823 when he promulgated the famous Monroe Doctrine, or he may frame foreign policy in any utterance, as did Franklin D. Roosevelt in October, 1937, when, in dedicating a new bridge, he appeared to reverse the traditional policy of American isolation. The usual method of framing foreign policy, however, is through the negotiation of treaties and agreements.

Role of the President and the Senate in Treaty-Making. The Constitution states that the President may negotiate treaties with the advice and consent of the Senate. In practice the President initiates treaties with foreign nations, though it was assumed by many people in the early days that the Senate and the President would be equal

[1] Wright, Q., *The Control of American Foreign Relations*, ch. 3.

partners in the conduct of foreign relations. The Senate, however, occupies no such position of equality. The President may, if he desires, consult the Senate as a whole or the Senators as individuals in the negotiation of treaties; Washington tried this in the early days but swore that he would not attempt it again. Officially, however, the Senate has no contact with a treaty until it has been negotiated by the President and submitted by him for confirmation.[1] The Senate may attach reservations to the treaty, making it necessary for the President to re-open negotiations, but the fact remains that in the process of negotiation the President has already committed the country to a certain policy, and seldom has that policy been reversed by the Senate. A notable exception to this rule was the futile effort of President Wilson to have the Senate ratify the Treaty of Versailles.

It is the general belief, in some quarters at least, that a treaty is endangered the moment it enters the Senate. John Hay said: "A treaty entering the Senate is like a bull going into the arena; no one can say just how or when the final blow will fall – but one thing is certain: it will never leave the arena alive."[2] This is an extreme statement, since the Senate has refused to approve fewer than thirty-five treaties in the history of the United States. There has been some dissatisfaction with the treaty-making power, however, since a minority of the Senate can undo all the President and the diplomatic forces have done. This dissatisfaction and the remedies suggested go back almost to the beginning of government in the United States. Among the changes proposed, two have assumed major importance.[3] It has been suggested (1) that the House of Representatives, which is assumed to be more representative of the people, share the responsibility of treaty approval with the Senate; and (2) that an amendment be added to the Constitution providing for treaty approval by a simple majority vote in the Senate rather than the two-thirds vote now required.

Treaties, when approved, become the law of the land, but custom and practice have dictated that Presidents may abrogate treaties without consulting the Senate.

Since treaties require a two-thirds vote of the Senate, situations have arisen in which the consummation of treaties has been impossible. To avoid the necessity of asking the Senate to concur in a

[1] See Fleming, D. F., *The Treaty Veto of the American Senate.*
[2] Thayer, W. R., *Life and Letters of John Hay*, vol. 2, p. 393.
[3] *Ibid.*

proposed treaty, Presidents have sometimes resorted to executive agreements. While it is true that most executive agreements have dealt with minor matters, such agreements afford the President a method by which he may disregard the Senate.[1]

Protection of American Citizens Abroad. The President has the obligation of seeing that protection is afforded American citizens abroad. The limits of this power have not been marked out, but it may be assumed that a President may go to any limit short of a declaration of war.[2]

War Powers. The Constitution makes the President commander-in-chief of the army and navy. This does not mean that he must take command of the forces in the field, although he may do so if he so desires. Normally his effectiveness as commander-in-chief is dependent upon congressional action, since Congress must first pass the measures providing for an army and navy, and fix the limits of these forces. In employing our military and naval forces the President exercises wide discretion. As commander-in-chief he manipulates the armed forces much as he sees fit. He cannot declare war, since this is left to Congress, but he may make a declaration of war inevitable. At the time of the Mexican War, President Polk and his lieutenants forced such a declaration upon Congress. A somewhat similar situation prevailed at the time of the Spanish-American War. Never has a President asked Congress to declare war without having received favorable action by that body. In some cases the President's actions in matters of war and peace have been deemed unconstitutional and beyond his authority. This may be, but if he is to remain the commander-in-chief of the armed forces of the country he must not be deprived of his authority to manipulate them as he deems wise.

The Constitution guarantees to every state a republican form of government and makes it obligatory upon the national government to protect the state against invasion and domestic insurrection. In the enforcement of this provision the President may call out the militia or the regular army. The President himself determines when

[1] It should not be assumed that all executive agreements concern minor matters. Some of them have to do with important questions. Originally the arrangement with Great Britain for the elimination of naval forces on the Great Lakes was an executive agreement. The Boxer Indemnity agreement in 1901, the Panama agreements of 1914 for enforcing the neutrality of the canal, the Lansing-Ishii agreements in 1917, and the Armistice of 1918 were executive agreements.

[2] Borchard, E. M., *The Diplomatic Protection of Citizens Abroad*, p. 452.

such action is necessary. The state does not have to request the protection of the military forces of the United States. The President may even take action, as did Cleveland in 1894, without concurrent state action.[1]

There are two other ways in which the President may exercise his military powers. He may extend military control over captured territory as was done during the Spanish-American War, and he may suspend the writ of *habeas corpus* when, in his opinion, the regular civil agencies of government are disabled and cannot function effectively. Many have thought that the suspension of this writ is a prerogative of Congress. Be that as it may, the President appears to be able to exercise this power whenever an emergency arises demanding such action. Lincoln did so, and from his action there was no recourse.

POWERS OF THE PRESIDENT — LEGISLATIVE

The President as Chief Legislator. Despite the theory of the separation of powers, Congress does not exercise all the legislative powers of the national government. In a very real sense the President is the chief legislator as well as the chief executive. The framers of the Constitution were wise enough to see that absolute separation of powers was not possible. Thus they gave to Congress, and especially to the Senate, a share in executive affairs, and on the other hand they provided that the President should share in legislative powers. Thus the Constitution authorizes the President to call Congress into special session; to adjourn Congress when the two houses disagree upon a date for adjournment; to give information to Congress concerning the state of the Union; to recommend measures for congressional consideration; and to approve or veto measures passed by the legislative body. The Constitution alone does not show the complete powers of the President over legislation. His position as party leader and his personal prestige, as well as the prestige of his office, are aids in his control over legislation. In many respects the President is strong in proportion to the extent that he exceeds his strictly constitutional power over legislation.

The question may be raised as to why the President should occupy the position of chief legislator. The answer is a practical one: he represents the whole country while Congressmen represent states or districts. The President is in a better position than individual Con-

[1] *In re Debs*, 158 U. S. 564 (1895).

gressmen to see the needs of the country as a whole, and is certain to recommend to Congress national legislation rather than local measures.[1]

Constitutional Legislative Powers. The President's constitutional legislative powers include the power (1) to convene and adjourn Congress; (2) to send messages to Congress; and (3) to veto bills. In addition to these constitutional methods the President also uses his strategic position as party leader to control the action of Congress.

Power to Convene and Adjourn Congress. The Constitution sets the date for the opening of the regular annual session of Congress — January 3, unless Congress fixes another date. It also provides that the President may call Congress — either both houses or one house — into special or extraordinary sessions at any time, at his discretion. In recent years a number of Presidents with a definite program of legislation have exercised this prerogative and called Congress into special session immediately after inauguration. Taft did this in order to bring about tariff revision. Wilson called Congress into special session to urge the adoption of his "new freedom" program. Harding considered it necessary to take similar action to pave the way to a return to "normalcy." Hoover called a special session of Congress for farm relief immediately following his inauguration, and Franklin D. Roosevelt convened Congress in special session the day of his inauguration for the enactment of his New Deal program. The Twentieth Amendment will make this type of special session unnecessary since Congress will be in session at the time of the inauguration. The amendment has not made special sessions impossible, however. Franklin D. Roosevelt, for example, issued a call for a special session to meet November 15, 1937, in spite of the fact that the regular session was to convene on January 3, 1938. In the opinion of the President there was a need for legislation at this particular time, and to enact it he convened the extra session. On a number of occasions Presidents have called the Senate into special session for the consideration of treaties and the confirmation of appointments.

The President's power to adjourn Congress is hedged about with strict limitations. Once Congress is in session, either regular or special, the President can exercise this constitutional prerogative only when the houses themselves disagree upon a time for adjourn-

[1] See McBain, H. L., *The Living Constitution*, p. 116.

ment. Since this has never happened, the President has never exercised this power.

Messages. The Constitution states that the President "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 deem necessary and expedient." This furnishes the constitutional basis for the President's annual message to Congress at the opening of each session. The annual message is indeed a serious affair and is so considered by both Congress and the public. Usually these messages consider actual problems to be solved as well as certain items of a political nature. In a very real sense the annual message is the guide for the legislature and furnishes a program of action. In addition to the annual message, the President may send messages to Congress at any time dealing with any subject. While there is a tendency for the annual message to be couched in general terms, the other messages tend to be more specific and support the general recommendations by more explicit ones. Certainly this has been the procedure followed by Franklin D. Roosevelt.

Washington and Adams delivered their messages to Congress orally. Jefferson, conscious of his poor delivery, sent his messages to Congress to be read by a clerk. This practice was followed by every President from Jefferson to Wilson. Wilson, in 1913, returned to the original method of oral delivery. Harding followed Wilson's example. Coolidge delivered his messages orally on but two occasions. All of Hoover's messages were in writing except one. Franklin D. Roosevelt, the possessor of a perfect radio voice, revived Wilson's practice.

Some questions have been raised as to the effectiveness of the two methods. It has been contended that oral delivery more directly influences Congress than does the transmission of a message in writing. While there may be some doubt as to the influence of the oral message upon Congress, there can be little controversy as to its effect upon the people, in that an oral message tends to bring about a crystallization of public opinion, and this directly affects the action of Congress. In the hands of an adroit political leader presidential messages can be made very effective. Congress usually considers the message seriously even though it may be intended for the public as well as for congressional consumption. Many messages are intended for world-wide consumption, and tend to give the President a position of leadership in world affairs. It will be remembered that

the Monroe Doctrine was a presidential message and nothing more. Wilson's Fourteen Points suggesting a basis for concluding the World War were first presented in a message to Congress.

Veto. A more important and direct method by which the President controls Congress is afforded by the constitutional requirement that all bills, before they become law, must be approved by the President. The President's privilege in this regard is limited by certain conditioning factors. He is allowed ten days for the study of a bill before he is required to take action upon it. If at the end of ten days he has not acted and Congress is still in session, a bill becomes a law without his signature. If the President holds a bill without taking action for ten days after adjournment, it receives a pocket veto. If the President disapproves the bill and returns the measure to Congress with his objections, Congress has the privilege of overriding his veto and passing the bill by a two-thirds majority. In this event the bill becomes law without the President's signature.

Hamilton stated that the veto serves two chief purposes: "The primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design." [1] The President defends himself through his veto against hostile and unwise legislation and at the same time affords protection to the country against the same eventualities. In this connection it should be observed that the presidential veto is not absolute. This fact affords protection to the country against unwise use of executive power. Early Presidents used the veto sparingly. Jefferson's view was that the veto should not be used unless it was clear that a bill was unauthorized by Congress. Jackson broke with the practice, and his "twelve vetoes descended upon Congress like the blows of an iron flail." [2] Presidents since Jackson have exercised the veto freely. At present a veto occasions no particular excitement. Although most Presidents have not gone to the extreme Jackson did in setting his judgment against an opinion of the Supreme Court, Presidents have exercised the privilege of vetoing bills upon any ground. Since 1900 there have been over two hundred presidential vetoes, and in numerous cases public opinion has supported the President rather than Congress. With the exception of Johnson's vetoes, relatively few

[1] *The Federalist*, No. 73.
[2] Quoted in Brooks, *op. cit.* (1933 ed.), p. 55.

vetoes have been overridden by Congress. Only two of the 358 vetoes by Cleveland were overridden.

To January 11, 1937, Franklin D. Roosevelt had a score of 221 vetoes with only two overridden. The requirement of a two-thirds majority to override a veto is probably the reason why the President's disapproval is so seldom reversed. Because of this unusual majority Congressmen have been known to vote for measures which they hoped would be vetoed by the President. Many such measures are introduced for the sole purpose of pleasing constituents, and a veto indirectly shifts responsibility for their failure to the President.

The threat of a veto by a President in some cases is as powerful a weapon as the veto itself. Of course, the threat of veto must be used with tact or it may become a boomerang, for a sensitive Congress is likely to resist dictation. A popular President can afford to take an aggressive stand; other Presidents must follow a more cautious procedure.

Presidents, unlike many governors, have no authority to veto separate items in a bill. They must take the whole bill or disapprove the entire measure. Undoubtedly item veto would be a useful weapon in checking congressional extravagance. This is all the more important when it is remembered that Congress sometimes attaches to appropriation bills riders which relate to subjects entirely foreign to the bill itself. Many of these would be vetoed if the President possessed the power to disapprove separate items in a measure.

Powers of the President as Party Leader. Any outline or enumeration of the constitutional powers of the President will not tell the whole story of his role in legislation. His position as a party leader enables him to influence legislation and Congress as well, and the country itself looks to him for such leadership. If he does not supply this legislative leadership he is counted a weak President. Thus, he must not only use his constitutional methods of control over legislation but must resort to extraconstitutional means. What are the extraconstitutional methods which are at the disposal of the President? In the first place the President has at his disposal considerable patronage, and this can be used to influence legislation. Congressmen feel that they must provide jobs for hungry constituents, and in return for these jobs they are willing to follow the President's leadership in legislation. The question might be raised as to whether patronage is a means of buying legislation with public funds, to the detriment of public service. In any event, the President has patron-

age to bestow, and this, in addition to his supervision of officeholders, enables him to build and use a powerful political machine. Moreover, Congress, being a large body, cannot be expected to provide effective legislative leadership. It lacks unity, and in too many cases is a mere babble of tongues. The voice from the White House is much more effective than 435 voices from Capitol Hill. In this connection it must be remembered that the President represents the country as a whole while Congressmen are elected from states and districts. The President then is nationally minded while individual Congressmen are locally minded. Woodrow Wilson asked a pertinent question in this regard: "Who is there in Congress to speak for the whole people? No one. Every man represents his district and distinctly local interests. It is the President, and the President alone, who speaks for the nation, and speak he must if the nation is to be served." [1]

These factors have elevated the President to a position of legislative leadership undreamed of by the framers of the Constitution. To a considerable extent, H. L. McBain was right when he said, "The prime function of the President is not executive at all. It is legislative." [2] But exactly how does the President exert his influence over legislation outside the use of patronage? The mere prestige of his office carries considerable weight when he is interviewing Congressmen concerning legislation. These interviews, which are frequently held over the breakfast or lunch table in the White House, have become real institutions and undoubtedly count for much in the control of legislation. Furthermore, the President has certain unofficial spokesmen in Congress who act as liaison officers. The cabinet members who attend committee meetings are powerful aids in the success of any President's program. Also the custom has arisen whereby preference is given to so-called administrative measures in Congress to such an extent that practically all important legislation now emanates from the White House. These means of presidential control over Congress are frequently supplemented by presidential appeals to the voters over the radio. The fireside talks of President Roosevelt have become events in the political life of the country. An appeal to the voters must be handled tactfully. Not all Presidents could succeed, but a strong President with an appealing personality and a pleasing voice can use this method effectively.

[1] Quoted in Creel, George, "The Man Behind the President," *Saturday Evening Post*, Mar. 28, 1931. [2] *The Living Constitution*, p. 115.

While a strong President in large measure controls Congress, no President is independent of Congress. The two agencies of government must work together and their relation must be one of give and take. Congress controls the purse; hence the President is often forced to yield to it on some measures. As a result, doubts have been raised concerning the actual extent of presidential control of Congress. Something can be said in support of the opinion that Congress controls the Presidency.

POWERS OF THE PRESIDENT-JUDICIAL

The President not only exercises executive and legislative functions; he is also a quasi-judicial officer. His judicial functions consist of his veto of bills and his use of the pardoning power. In either case he acts as a judge and passes upon the justice or expediency of certain proposals. These powers have been discussed before and need no further mention here.

FUTURE OF THE PRESIDENCY

The Presidency has grown in prestige and power. What is its future? Will it completely eclipse the other branches of government? The American people still pay homage to the theory of the division of powers, but the growth of presidential power has been pointed to as something which, while inevitable and necessary, is likely to destroy the balance between the three branches of government. It is hardly conceivable that the executive branch will swallow the other departments. As long as the constitutional system exists there is always a check upon presidential power. Much of the President's power has been delegated to him by law; by the same token these delegations can be recalled. Undoubtedly delegations of power to the President will continue as long as such action serves the interest of the largest number of people. When this ceases to be the case, there is every reason to believe that Congress will take from the Presidency in somewhat the same measure it has given to that office.

QUESTIONS

1. Show how the electoral college may defeat the will of a majority of the people in selecting a President.
2. It has been stated that the United States selects a President on the

basis of availability rather than ability. Comment on this statement.

3. To what extent does the merit system impose a limitation on the President's appointing power?
4. Contrast the doctrine set forth in the Myers Case with that of the Humphrey Case. Is there any conflict between the two?
5. Show how the President and the Senate divide the responsibility for treaty-making.
6. How does a President control legislation? Should the President assume the role of chief legislator as well as chief executive? Does it tend to break down the doctrine of the separation of powers?
7. What is the difference in the roles played by the President in the United States and the prime minister in Great Britain?

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CHAPTER XVI

National Administration

THE CONSTITUTION, CONGRESS, AND THE EXECUTIVE DEPARTMENTS

THE President, or any other executive in a large unit of government, is faced with many vital tasks of policy execution. It is physically impossible for the executive to perform all of these tasks alone. He must have assistants and subordinates. This is especially true of the President, whose duties are numerous, comprehensive, and constantly increasing. The limitations of time require him to give attention only to policies and administrative decisions of a general nature, leaving the details to subordinates.

Implied Basis for Departments. The Constitution does not provide specifically for administrative departments but implies their necessity in the provision that the President may "require the opinion in writing of the principal officers in each of the executive departments upon any subject relating to the duties of their respective offices." Also, it would appear that the framers of the Constitution assumed the necessity for executive departments when they authorized Congress to "make all rules 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." The Constitution also mentions heads of departments in the provisions for appointing inferior officers.

These constitutional provisions are simple and flexible. They refer to the heads of departments but do not specify what departments there shall be or how the heads shall be selected. So far as the Constitution is concerned, the President might create these departments and determine their activities. It has been generally assumed, however, that Congress shall determine what departments are necessary, and outline both their structure and their functions. In 1933 when Vice-President Garner was Speaker of the House he proposed a measure which would have allowed the President to reorganize the administrative structure without consulting Congress

as to the details. An uproar was created in Congress and the argument was advanced that under the Constitution this power properly belongs to Congress. The fact remains, however, that there is no constitutional provision for such exclusive congressional action.

Congressional Policy in Establishing Departments. The first Congress took the initial step in 1789 in establishing the executive organization by creating the State, Treasury, and War Departments and setting up the office of Attorney-General which later was advanced to cabinet rank. The general framework and functions of these departments were set forth in the law but the details of departmental organization and procedures were left to the President. This policy has been generally followed from the beginning. Some administrative agencies of the government are headed by single officials, while others have the board or plural type of executive. Apparently there is no general principle which has determined the form of administrative organization. If action and decision are needed, a department should be headed by a single executive; if, on the other hand, deliberation and study are the necessary factors, the board type of organization is useful. Unfortunately these principles have not been followed by Congress in setting up all the so-called independent establishments of the government.

Executive and Administrative Agencies. There is a difference between executive agencies proper and administrative agencies. Some students argue that administration should be considered a fourth branch of government.[1] Others are of the opinion that administration is simply an arm of the executive. In any event, executive agencies are those that determine, or assist in determining, policy and have power to issue orders and to make rules and regulations. Administrative agencies have only a limited discretion and engage for the most part in work designed to carry out policies determined by the legislative and executive branches of the government. The President and the cabinet are considered executive agencies while most other branches of the executive department can be classed as administrative agencies.

THE CABINET [2]

No Constitutional Basis for the Cabinet. The cabinet, as an executive arm of the government, is not mentioned in the Constitution.

[1] Willoughby, W. F., *Principles of Public Administration*, p. 81.

[2] Hinsdale, M. L., *History of the President's Cabinet*; Learned, H. B., *The President's Cabinet.*

However, the fact that the Constitution authorizes the President to require opinions from department heads on any subject relating to their office indicates that it was the intention of the framers that the President should advise with department heads. On matters of general policy it was assumed in the beginning that the Senate would act in an advisory capacity. Washington himself leaned to this opinion, but soon after assuming the presidency he found that the upper house could not function in an advisory capacity, and that it was not only desirable but necessary that he take the department heads into his confidence as a group and depend upon them for advice and counsel.[1] Before the end of his term the cabinet consisting of all department heads (four at that time) was serving as an executive council advising the President on matters of general policy.

How Cabinet Members Are Selected. At the present time there are ten cabinet departments, the heads of which are appointed by the President with the advice and consent of the Senate. Seldom does the Senate refuse to confirm the appointment of a cabinet officer. It has been assumed that the President must have a free hand in choosing his immediate assistants if he is to be responsible for the work of administration.

What, then, should be the basis upon which cabinet members are selected since they are advisers to the President as well as heads of administrative departments? During the history of the United States many and varied considerations have entered into the selection of these officers. Generally there are factions within any political party. To placate them and to bring about party harmony the President sometimes appoints some member of an influential faction to a cabinet position. It will be remembered that Lincoln appointed Seward, his principal rival for the Republican nomination, Secretary of State. Wilson appointed Bryan, who had been one of his chief opponents in the nominating convention,[2] to the same position. Such appointments may be made in the interests of harmony, but in too many cases they have produced discord, especially since the cabinet is an advisory body.

The President in the course of the campaign may incur obligations to various individuals or interests. In some cases these debts are paid with appointments to cabinet positions. There are, for example,

[1] Beard, C. A., *American Government and Politics* (1931), pp. 173–174.

[2] In the early balloting Bryan supported Champ Clark, but later he supported Wilson, who undoubtedly owed his nomination to Bryan's support.

financial obligations which must be repaid. Likewise the President feels that his campaign manager and other individuals offering services during his campaign should be rewarded. It is becoming traditional that the campaign manager for the successful candidate shall receive as a recompense for faithful services an appointment as Postmaster-General.

Geography is another factor which enters into the appointment of cabinet members. Political expediency demands that all sections of the country be represented in the cabinet. This is not always achieved, but at least some efforts are expended in this direction.

For many years competence and administrative ability were factors which received little consideration in a cabinet appointment. Fortunately there is a tendency now to give more and more attention to administrative fitness for a cabinet position. The emphasis is shifting from the advisory function of the cabinet to the necessity for knowledge of the work of the particular department and ability on the part of the head to operate the department as an administrative entity and not as a patronage machine. Many of the persons appointed to cabinet positions in recent years have had little or no political experience; they were chosen because of their competence. The work of cabinet heads is becoming more exacting and is demanding more knowledge of the subject matter of the departments than ever before. Doubtless their acquaintance with the problems of their respective departments was a major consideration in the appointment of Secretary of Agriculture Wallace and Secretary of the Interior Ickes to the New Deal cabinet.

The President's Use of the Cabinet. The functions of the cabinet should be distinguished from the functions of its individual members, who, in addition to acting as advisers to the President, are also heads of the executive departments. The cabinet is the President's council. He may use it as he pleases; he may ask its advice, but he is under no obligation to act upon such advice. Some Presidents have used the cabinet extensively. Others have more or less ignored it. All Presidents must have some official or unofficial body to advise with. Jackson practically abandoned his official cabinet and sought instead the advice of his famous "Kitchen Cabinet," which consisted chiefly of undersecretaries and assistants. Franklin D. Roosevelt, on the other hand, developed a super-cabinet known originally as the Executive Council and later as the National Emergency Council. This group consisted of department heads, the heads of recovery

agencies, and outside advisers – experts, professors, and others. At one time it consisted of thirty-three members. Included in this group were the so-called "brain-trusters" who, it is generally conceded, worked out the details of the New Deal program. Doubts have been expressed as to whether it will ever be possible to return to the use of the original cabinet as an advisory body. The comparative success of the super-cabinet demonstrates the weakness of the original cabinet and its failure to function under strain. The question has been raised whether the so-called "brain trust" is to become a permanent fixture in American government. Of course no American President has ever tried to exercise his executive and administrative powers without the aid of brains. The Roosevelt "brain trust" has attracted attention principally because a few professors insisted upon projecting themselves into the limelight as the real forces behind the executive department.

The cabinet meets at the call of the President or upon a regular date set by the President. Some Presidents have called cabinet meetings regularly twice a week; others have advised with their cabinets at infrequent intervals. In any event cabinet business is semi-official and conducted according to no formal rules of procedure. No record is kept of it, and for all intents and purposes freedom of opinion and thought exists. In spite of the fact that the proceedings of the cabinet are more or less secret, these secrets have sometimes leaked out and members of various cabinets of the past have revealed the inner workings of this advisory group.[1] Probably the element of informality and the freedom of discussion in the cabinet are in large measure responsible for whatever degree of coördination, harmony, and unity of purpose exists in the administration.

Congress and the Cabinet. As an advisory body to the President the cabinet is responsible to the chief executive alone. It has no legal relationship to Congress and is unknown to the Constitution. It is based upon custom and not upon law. Its deliberations are the concern of the President alone. Congress has no right to inquire into cabinet proceedings. The President's conversations with his cabinet members are in the nature of consultations with his friends. During Jackson's administration the Senate asked for a copy of a statement on the removal of federal deposits from the Bank of the United States which was supposed to have been read in a cabinet

[1] Among some of the more interesting memoirs are Redfield, W. C., *With Congress and Cabinet;* Houston, D. E., *Eight Years with Wilson's Cabinet.*

meeting. Jackson replied: "I have yet to learn under what constitutional authority that branch of the legislature has a right to require of me an act of any communication either verbally or in writing made to the heads of departments acting as cabinet council." [1] The only contact, then, that Congress has with the cabinet is in the confirmation of appointments to cabinet posts and the possible removal of these appointees by impeachment. Definitely the cabinet is an executive arm of the government.

In the early days it was customary for the heads of cabinet departments to appear before Congress and advocate certain legislation and explain administrative measures. There was thus a faint resemblance to parliamentary government. At the present time, however, Congress operates under a rule which prohibits non-members from taking part in debate. Many persons, including President Taft, advocated that the practice of allowing department heads to sit in Congress and participate in debate without a vote be restored. It has been argued that such a practice would give greater influence to the President in legislation and set up a system in which he could better defend his policies. The suggestion is in line with the general trend toward greater executive control over legislation. In addition, if cabinet members should hold seats in Congress, Congress would be better informed on administrative measures. This is all the more significant when it is recalled that administrative measures constitute the major proposals before Congress. Opponents of this plan would say that to allow cabinet members to sit in Congress would mean a breakdown of the time-honored separation of powers and would allow greater executive usurpation. It has been argued also that such a system would impose an undue burden on both the legislature and the cabinet members. Often these executive heads are called before congressional committees and there give their opinions on pending legislation. Why expect them to repeat in the legislature what in many cases has already been said in the committees?

THE EXECUTIVE DEPARTMENTS

The heads or executive departments are not only, as members of the cabinet, advisers to the President; they are also, together with the heads of other administrative agencies, the officials responsible

[1] Quoted in Johnson, C. O., *Government in the United States* (Revised edition), p. 248. See Richardson, J. D., *A Compilation of the Messages and Papers of the Presidents*, vol. 3, p. 36.

for the varied and extensive work which enables the President to "take care that the laws are faithfully executed." Administration is an integral part of the whole process of government. It has close contact with both Congress and the President. While the Constitution does not provide for administrative departments it assumes their establishment. Congress creates and determines the organization and functions of the several executive departments. In many cases it concerns itself with minute details relating to term of office, compensation, method of appointment, and other matters. Through its control of the budget it determines how much money the several departments may spend. It has the power to abolish departments or transfer functions from one department to another. These facts imply rather complete legislative control of administration. It must be remembered, however, that the President also plays a most important part in this control. He appoints executive and administrative officers with the advice and consent of the Senate. He directs the activities of the departments through his power of appointment and removal over the inferior officers, as explained in a previous section. In short, after the departments have been created by Congress, the President is responsible for the activities of these agencies.

Fundamental Features. Before the several executive departments are considered in detail, the common fundamental features of all such departments should be mentioned. In the first place, it should be observed that the federal government maintains its own corps of officials and employees and rarely calls upon the states for the services of such employees. In reality, however, with the increase of federal aid and the development of social welfare programs this principle is not rigidly observed. Under the grant-in-aid system state employees do the biddings and adhere to the regulations of federal agencies. In the second place, all federal administrative and executive work is carried on under departments and establishments created by Congress. All of these departments tend to be separate and distinct administrative entities. This does not mean that there is complete separation and that departments do not perform overlapping functions. Strictly speaking, however, each department lives to itself and is coördinated with other departments only through the executive.

Departments vary widely in their internal organization; nevertheless certain features are more or less common to all executive departments. For example, all departments are organized under single

heads appointed by the President with the advice of the Senate. The independent establishments for the most part are under the direction of a board or commission. This is in accord with sound administrative practice in that the departments proper perform executive and administrative functions while many of the independent establishments are quasi-legislative and quasi-judicial agencies. Again, practically all departments have one to four assistant secretaries, as well as undersecretaries, to assist the head of the department and assume primary responsibility for the various functions performed by the department. The work of the department is ordinarily divided among various divisions, bureaus, and other agencies, and the various functions, with certain exceptions, are then coördinated into a unified department. The distribution of these functions is not always logical, and the relation of bureaus to divisions follows no definite principle. The brief descriptions of the functions of the several departments which follow indicate clearly that many departments have been used as dumping grounds and exercise various unrelated functions.

The heads of departments are directly and fully responsible to the President. Congress, of course, may impose certain functions upon the departments, but the department heads are responsible only to the President for the performance of these functions. This complete executive control is seen in the power of the President to remove department heads. This situation is in striking contrast to the lines of responsibility which prevail in parliamentary governments. Department heads in the United States are responsible to the chief executive and not to the legislative branch, except through impeachment.

Department of State. The Department of State was originally called the Department of Foreign Affairs, and is one of the older departments, having been created a short time after the Treasury Department was established. It is one of the smallest of all the executive agencies. It is headed by a Secretary of State, who is assisted by an undersecretary and four assistant secretaries. The undersecretary acts for the Secretary in many routine matters and assumes his place when the Secretary is absent. The assistant secretaries are each in charge of a group of departmental functions. Staff agencies within the department include a legal adviser and an economy adviser, performing functions indicated by these titles. There are some thirty divisions and bureaus within the department,

employing approximately 625 employees in addition to those in the foreign service. These latter employees number approximately 650, with about twice as many clerks. The position of Secretary of State is the prize plum of the administration. In some cases it has been given to the leading opponent of the successful President. In recent years, however, there has been a tendency to name to this position not only a person thoroughly acquainted with American foreign policy, but one who is known to possess certain definite ideas concerning that policy. Secretaries Hull and Kellogg are examples of this trend. In the history of the United States the secretaryship has been held by some of the best-known Americans, few of whom have attained the presidency. Among these may be mentioned Clay, Webster, Hay, Root, Hughes, and Hull.

The functions of the Department of State fall into two general classes: home and foreign. Foreign affairs are the more important. The home functions of the department would normally fall to home departments in other countries. These include the following activities of the department: (1) it receives the laws of Congress, promulgates them, and files the original copies for preservation; (2) it keeps the great seal of the United States and affixes it to executive proclamations, commissions, and warrants; (3) it proclaims the admission of new states to the Union; (4) it transmits proposed constitutional amendments to the states and receives notices of state action and proclaims the results; (5) it receives from the states official lists of presidential electors and transmits this information to Congress. In earlier days this class of functions was considerably more important than at the present time. Many of the original home functions have been transferred to other departments with the establishment from time to time of additional executive departments. The postal administration was reassigned in 1849. The management of the Census Bureau was transferred from the Department of State in 1850. The granting of copyrights was taken from the department in 1858, and it was relieved of its supervision of territorial affairs in 1873.

The Department of State is the mouthpiece of the President in his control of foreign relations. Through the department the President negotiates treaties, conducts correspondence, gives instructions to foreign representatives, handles matters of extradition, regulates international tariff relations, issues passports, arranges conferences, and gathers information affecting all sorts of matters in foreign countries. These functions for the most part are carried out through the

foreign service maintained and operated by the department and extended to every civilized country.

The foreign service at present consists of two parts: the diplomatic and the consular agencies. The chief diplomatic representatives of the United States are ambassadors and ministers. These officials perform practically the same functions, regardless of title. The United States names an ambassador to practically all the larger and more important countries of the world, and to many of the smaller nations. Generally we send an ambassador to a country which sends us an ambassador. The same general reciprocal relationship exists for ministers. These diplomatic representatives are chosen by the President personally, and in case of the larger and more important diplomatic posts, they are usually from the President's party. Many of them secure these honors as payment of political debts. There is a tendency, however, to use career men in the higher diplomatic positions. Especially is this true in connection with the Central and South American countries. Career diplomats have had extensive experience in diplomatic work, and the United States has found that they are more dependable than political appointees.

The salaries paid diplomatic representatives are meagre, ranging from $10,000 to $17,500. This means that only rich men can afford to accept these posts in the larger and more important countries. There have been many suggestions that the salaries of diplomats be raised in order that the United States, through its foreign representatives, may be able to appear as something more than the frugal and miserly Uncle Sam. Undoubtedly low salaries in the diplomatic service prevent the appointment of many capable individuals who cannot afford to render this service at a personal financial sacrifice.[1]

Ambassadors and ministers are assisted at their posts by a corps of secretaries, clerks, and technical experts. These higher officials are not selected under a merit system.

The duties of a diplomat are many and varied, and are extremely difficult to classify.[2] It is almost impossible to distinguish between consular and diplomatic functions. In any event, a diplomat is obligated to carry out the instructions of his government and become the eyes and ears of the United States abroad. Among other duties he

[1] See Stone, W. T., "Overhauling Our Diplomatic Machinery," *Current History* (Feb., 1930), pp. 896–901.

[2] See Hendrick, B. J., *Life and Letters of Walter H. Page*, vol. 6.

" negotiates, with tact, sound judgment, and intimate knowledge of conditions at home and abroad, protocols, conventions, and treaties, especially regarding international intercourse, tariffs, shipping, commerce, preservation of peace, etc., in strict conformity to government instructions." He " analyzes and reports on political and economic conditions and trends of significance to the United States." He makes executive representations to the authorities of foreign governments concerning the protection of American citizens in their persons and property in accordance with international law. He " establishes and effectively utilizes personal contracts in farsighted ways for the benefit of his government and American citizens." He " creates good will and common understanding, and with restrained and critical leadership, born of mature experience and profound knowledge of men and affairs, uses these instruments for enhancing international confidence and coöperation among governments and peoples." [1] In order to perform all of these functions satisfactorily any individual holding a diplomatic post must be a diplomat indeed.

In addition to the diplomatic branch, the foreign service includes also the consular branch. There are consul-generals-at-large, consul-generals, consuls, vice-consuls, and consular agents. A consul-general-at-large is a traveling inspector of consular officers. A consul-general is a person who has immediate responsibility for the operation of a consulate; he is assisted normally by consuls, vice-consuls, and consular agents, together with clerks, secretaries, and others. All of these employees of the consular branch of the foreign service are selected by the President and the Senate, subject since 1924 to the merit system.

The duties of a consul are primarily commercial although he performs many of the functions of the diplomat where there is no embassy. Among his duties are the following: he observes, analyzes, and reports on conditions of trade in his region or district; he replies to trade inquiries from American citizens; he promotes good will; he prevents the importation of prohibited goods; he enters and clears American ships; he issues passports and visas; he performs certain notarial services; he settles the estates of American citizens; and he assists in the negotiation of reciprocal trade agreements. The consular offices are located in the chief cities of all civilized countries. While ambassadors are ministers representing the United States at

[1] Quoted in Johnson, C. O., *Government in the United States* (Revised edition), p. 464.

the capitals of the countries, the consuls are located in all important trade centers from London to Timbuctoo.

Since Cleveland's administration there have been various attempts to place the foreign service on a merit basis. This was accomplished in 1924 with the enactment of the Rogers Act, which, with the important amendments to it in 1931, has tended to place this important arm of the government on something resembling a career basis. Under this act the foreign service is set up, including both the diplomatic and the consular branches, and is divided into classes that cover both diplomatic and consular work. Admission is gained to the foreign service now on the basis of examination only. After a candidate passes the required examination he is given training in either the State Department or in nearby consular offices. After this he is sent to school in the Foreign Service Officers' Training School operated by the State Department. After this rigid system of training, foreign service officers are given regular posts when vacancies exist. They may be transferred anywhere at any time, and even from one branch to another. The Rogers Act and the amendments to it have adjusted salaries upward and have had the effect of encouraging higher types of young men to enter the foreign service. It is needless to say that the service has been improved as a result.

The Treasury Department. The Treasury Department was created by act of Congress, September 2, 1789. The intention of Congress appears to have been to set up a department which should be charged with the administration of the entire financial structure of the government and which would report directly to Congress rather than the President. From this point of view the Treasury is an executive department, but one not directly responsible to the chief executive. In spite of the fact that this was the original intention of the lawmakers, the presidential power of removal, especially during the Jackson administration, brought the Treasury Department under control of the President. Today it is just as truly an executive department as any of the other cabinet agencies.

Originally the Treasury was a small department, but it has developed into one of the larger executive agencies, employing more people than any other cabinet agency with the exception of the Post Office. The Treasury has been subject to frequent changes in internal organization. At present, in addition to the Secretary of the Treasury, there are an undersecretary and three assistant secretaries, plus some twenty bureau chiefs and their staffs. All of these bureaus,

offices, and divisions are under the general direction of a chief who reports to the Secretary and his immediate assistants.

The functions of the Treasury Department may be divided into two classes: fiscal and non-fiscal. The fiscal functions consist of the collection of revenue, the custody of funds, and the control of currency. The department is charged with the collection of practically all federal revenue with the exception of post office receipts. This includes both customs duties and internal revenue. Attached to the Treasury is an official called the Treasurer of the United States; the division which he heads is charged with the custody of federal funds. Until 1921 the department maintained nine subtreasuries in addition to the main office in Washington. With the establishment and development of the Federal Reserve System, the nine subtreasuries were abandoned and the Federal Reserve banks were used in that capacity. The department operates a bureau of engraving and printing, a bureau of the mint, and assay offices. Through these agencies and its supervision of the national banks, the Treasury Department administers the currency policy of the United States.

For a long time the Treasury Department was the dumping ground for offices and activities which Congress could not place elsewhere. As a result many non-fiscal functions were placed in the department. Several of these have been transferred from the department to newer agencies. For example, the postal service was in the Treasury Department until 1829. The Land Office with all its widespread activities was administered through this department from 1812 till 1849. Many commercial and labor functions remained with the Treasury until the creation of the Departments of Commerce and Labor. Prohibition enforcement was an obligation of the Treasury from 1927 until 1930. At the present time the following non-fiscal agencies are found in the department: the Office of the Supervising Architect, the Coast Guard, and the Bureau of Narcotics.

The War Department. The War Department (including the Army and the Navy) was created in August, 1789, succeeding a similar department which was established prior to the Constitution. Originally it encompassed activities which since then have been delegated to the Navy Department and the Department of the Interior. The mere fact that the President is commander-in-chief of the armed forces of the United States necessitates an administrative arm of the government to carry out the details arising out of the

commander's office. From 1789 to 1798 the War Department exercised all functions concerned with the national defense. In 1798 Congress established the Navy Department; thus, since that time there have been two major departments concerned with defense. From time to time numerous suggestions have been made that the two defense departments be consolidated into a single Department of National Defense. The first serious suggestion of this kind was made in the report of the Taft Commission on Efficiency and Economy in 1913.

The Secretary of War is head of the War Department and is assisted by an assistant secretary, the chief of staff, and the War Council. Seldom is the Secretary a soldier by profession. His task is to harmonize the interests of soldiers and citizens and interpret one to the other. His office demands wide administrative experience rather than military experience. As a matter of fact, he may not be in any sense a militarist. Elihu Root was one of the best-known Secretaries of War; yet he was a genuine lover of peace. It is the duty of the Secretary to perform such functions as are required of him by law or as may be required of him by the President. He is specifically charged with the supervision of all estimates of appropriations for the expenses of the department, and with the execution of the National Defense Act of 1920. He is responsible for the protection of seacoasts, harbors, and cities; for the development of improved weapons and material; for the proper instruction of all military personnel; for the discipline and morale of the military establishment; and for the defense and administration of government in these establishments. He directs the corps of engineers in their work, whether it is military or non-military in nature.

The General Staff of the army headed by the chief of staff serves as technical adviser to the Secretary of War. Under the supervision of the chief of staff are found the divisions of personnel, military intelligence, operation and training, supply, and war plans. It is the duty of the General Staff to develop plans of mobilization and study military strategy. By act of Congress in 1920 the War Council was reorganized after it had been set up by executive order three years earlier. This council consists of the Secretary, the assistant secretary, and several high ranking army officers. It has come to be the planning agency of the War Department, and considers the military and munition problems as well as the formulation of general defense policies.

In times of peace the armed forces of the United States are relatively small. The Army of the United States is composed of three parts: the regular army, of approximately 125,000 men and 12,000 officers; the national guard, consisting of approximately 183,000 men and officers organized in and largely under the control of the states although its discipline is prescribed by national authority and it may be called into service by the President; and the organized reserves consisting of about 110,000 officers, which is a skeleton organization to be filled out by conscription in case of war. Through these three branches of the Army of the United States, it is possible to raise an army of over 4,000,000 men in case of emergency. The Conscription Act of 1940 contemplates a trained army of this size.

The War Department, like a number of other executive departments, has been obliged to perform certain functions not germane to its existence. These may be called non-military to distinguish them from the functions relating to the maintenance and control of the armed forces. The corps of engineers is a part of the War Department and consists of a highly trained group whose talents are utilized in the construction of dams, or rivers and harbors. This organization is interested in defense, but its chief work is concerned with non-military affairs. The second major non-military function of the War Department is the control of certain insular possessions of the United States, consisting of the Panama Canal Zone and, to some extent, the Philippines. This function is a heritage from the days of a military occupation, when it was considered necessary to provide military forces for these outlying possessions.

The Navy Department. Sea defense was the function of the War Department until 1798. At that time a separate Navy Department was established. This department is supervised by a Secretary of the Navy and two assistants, one of whom is responsible for naval aeronautics. The organization consists of many bureaus, including those in charge of navy yards and docks, construction equipment and repairs, provisions and clothing ordinances, hydrography, and medicine and surgery. The Secretary is usually a civilian and, as interpreter between sailor and citizen, occupies a position analogous to that of the Secretary of War. The United States Marine Corps, as well as the navy proper, is under the Navy Department.

The functions of the Navy Department may be classified as naval and non-naval. It supervises the naval forces of the United States, consisting in times of peace of some 85,000 sailors and 5000

officers, and is responsible for the construction and the maintenance of warships, the recruitment and operation of the Naval Academy at Annapolis, and the procurement of arms and supplies. The non-naval functions of the department are relatively unimportant. They consist of the maintenance of the naval observatory and hydrographic office, the supervision of the sea control, and the administration of the islands of Tutuila and Guam.

Supplementing the naval forces, the United States maintains a Marine Corps of approximately 18,000 men. The operation and maintenance of this organization of sea soldiers bear a greater resemblance to the army than to the navy.

The War and Navy Departments both maintain air forces. There is a growing feeling that the air forces of the United States should be under a separate Department of Defense or a Department of Aeronautics. About 13,000 officers and men have been assigned to the air forces of the army and a slightly larger number to the naval air corps. Some measure of coöperation between these is achieved through efforts of a coördinating board, but in case of a national emergency it is not too much to expect that there will be a definite consolidation of these armed forces.

The Department of Justice. The Department of Justice is the legal arm of the executive branch of government. It was created in 1870 with an Attorney-General as its head. Prior to the establishment of the department the Attorney-General was a member of the President's cabinet, but not a head of an executive department. In spite of the fact that a so-called Department of Justice was created in 1870, the various legal offices of the several executive agencies were not consolidated in this department till 1918. The consolidation was effected by an executive order rather than by congressional action. The affairs and activities of the Department of Justice are directed by the Attorney-General, who is assisted by a solicitor-general, an assistant of the attorney-general, six assistant attorneys-general, a director of investigation, a director of prisons, a director of war risk litigation, and an administrative assistant. Included in the department is the famous Federal Bureau of Investigation. Also the district attorneys and marshals in the more than eighty judicial districts report to the department.

The primary functions of the Department of Justice are the giving of legal advice to federal officers and the prosecuting of offenders against federal law. Legal advice is given in the form of opinions

of the Attorney-General, which are limited to answering current questions asked by the President and the several departments and agencies of the government. These opinions are in the nature of judicial opinions, and are often conclusive on points of law. The prosecution of offenders in the federal courts entails a wide range of duties. The more important cases are under the general supervision of the solicitor-general, who represents the United States in the courts. The district courts do most of the work of prosecuting offenders of federal law. It should be pointed out also that the Department of Justice supervises and administers the federal prisons, and advises the President in connection with the granting of pardons.

The Post Office Department. The Post Office Department became an executive department in 1872. The Postmaster-General had been a member of the President's cabinet since 1829, but his department was not admitted to cabinet status until 1872. This department is the arm of the government which is most familiar to the average citizen. The Post Office is the government's greatest business enterprise, doing a business of more than three-fourths of a billion dollars a year. It is perhaps the greatest business on earth. The Post Office Department is directed by the Postmaster-General, who is assisted by an executive assistant, a special assistant, a chief clerk, a secretary, an administrative assistant, an assistant chief clerk, a personnel officer, and a disbursing clerk. In addition to these there are four assistant postmasters-general, each of whom has supervision over a particular activity of the department.

The original purpose of the postal system was to provide "the best means of establishing posts or conveying letters of intelligence through this continent." In the early days this was considered a minor function, since the charge for carrying a letter a relatively short distance was prohibitive for all except the wealthier classes. The mail service was used but little and post offices were few. Most of the rural population was not served by a post office nearer than twenty-five or thirty-five miles. Contrast this situation with the present wide extension of the postal system. From time to time new obligations and activities have been imposed upon the department. Among the more important developments of the Post Office Department in the order of their establishment were: postage stamps in 1847; registered mail in 1855; the railway mail service in 1862; foreign money orders in 1867; special delivery service, 1885; rural delivery service, 1896; postal savings, 1911; village delivery, 1912;

parcel post, including insurance and C.O.D. (collect on delivery) service, 1913; and air mail, 1918.

Not only has the Post Office Department assumed responsibility for these various services within continental United States and its possessions, but mail is now carried between inhabitants of different countries. Some years ago, this was arranged by treaties and agreements between the countries. In order to bring about something resembling world-wide postal service, a number of governments united in establishing the Universal Postal Union in 1874. In 1939, this "Postal League of Nations" included 168 countries, colonies, and territories. It maintains headquarters in Berne, has little part in politics, and is one of the most effective and efficient, yet little known, services covering the entire world. The United States entered the Postal Union by means of an executive agreement, and not a formal treaty.

There are numerous complaints from time to time that the Post Office Department does not pay its way. It has been suggested that postal rates be raised sufficiently to make the department self-supporting.[1] Fortunately this has not been accomplished. The carrying of the mails is more than a cold-blooded business; it is an important social service which cannot be measured in terms of dollars and cents.

The Department of the Interior. The Department of the Interior, created in 1849, corresponds to the "home office" in many countries. As a matter of fact, the title to the act establishing it reads: "An act to establish the home department." This executive department is presided over by a Secretary of the Interior, who is assisted by the first assistant secretary and the assistant secretary. In addition there are a solicitor and a chief clerk. Each of these assistants is responsible for the administration of specific branches of the department. The department includes the following divisions: the Office of Information, the Division of Investigation, the Division of Geography, the War Minerals Relief Commission, the Division of Grazing Control, the Division of Petroleum Conservation, the Bureau of Reclamation, the Geological Survey, the Bureau of Mines, the Office of Indian Affairs, the National Park Service, the Bureau of Insular Affairs, and the eleemosynary institutions.

The Department of the Interior is charged with the responsibility

[1] See Collins, A. C., "Shrinking the Postal Deficit," *World's Work*, vol. 59 (Jan., 1930), pp. 73–75.

for advancing the domestic interest of the people of the United States. All of the functions of the department either directly or indirectly have to do with the promotion of domestic welfare, the maintenance of the hospitals for the mentally defective, the supervision of mining operations, or the management of the Alaskan Railroad. It may be said that the Interior is now one of the major service departments of the federal government.

The Department of Agriculture. In spite of the fact that the Department of Agriculture was not created until 1862, agricultural work was not neglected by the federal government before that date. From 1862 to 1889 agricultural affairs were administered by a Commissioner of Agriculture who, with the enlargement of his functions by the act of 1889, became the Secretary of Agriculture. The organization of the Department of Agriculture included the Secretary, an undersecretary, and an assistant secretary, together with the bureau staffs, technicians, and clerks. The department includes the following bureaus: Agricultural Economics, Agricultural Engineering, Animal Industry, Biological Survey, Chemistry and Soils, Dairy Industry, Entomology and Plant Quarantine, home economics, plant industry, and public roads and weather. In addition, various offices and administrations have been attached to the department, including the Food and Drug Administration, the Forest Service, the Grain Futures Administration, the Office of Experiment Stations, and such services as Surplus Marketing, Soil Conservation, Farm Credit, and Rural Electrification. A mere enumeration of the divisions of the Department of Agriculture indicates that its work is largely scientific and technical. It is practically free from political interference, and may be looked upon as a service agency to the farmer.

The Department of Commerce. The Department of Commerce was created by act of Congress in 1903 as the Department of Commerce and Labor. The labor functions were transferred from the department in 1913 to the newly established Department of Labor. The activities of the Department of Commerce are under the Secretary of Commerce, who is aided by two assistant secretaries, a solicitor, an administrative assistant, and the chief clerk. In the department are the following bureaus: Census, Fisheries, Foreign and Domestic Commerce, Standards, Lighthouses, Patent Office, Coast and Geodetic Survey, Marine Inspection and Navigation, the Shipping Board, and the Civil Aeronautics Authority.

The purposes of the Department of Commerce include the foster-

ing, promotion, and development of (1) foreign and domestic commerce, (2) the mining, manufacturing, shipping, and fishery industries, and (3) the transportation facilities of the United States. It administers the lighthouse service; conducts population, agricultural, and other censuses; collects commercial statistics; makes coastal and geodetic surveys; enforces the navigation and marine inspection laws of the United States; establishes standards of weights and measures; administers the aircraft laws; encourages the development of the merchant marine; regulates carriers by water engaged in foreign and interstate commerce; supervises the issuance of patents and the registration of trademarks, printing, and labels; and performs other related functions. It occupies the largest building in Washington, which, with its 3311 rooms, has been designated as the "Temple of Business."

The Department of Labor. The last executive department to be established was that of Labor, which was created as a separate department in 1913. It is directed by the Secretary of Labor, who is assisted by an assistant secretary, a second assistant secretary, a solicitor, and a host of minor functionaries who carry on the work of fostering, promoting, and developing the welfare of wage earners in the United States. The work of the department is described simply by mentioning the several principal bureaus and divisions: the Bureau of Labor Statistics, the Children's Bureau, the Women's Bureau, the Immigration and Naturalization Service, the United States Conciliation Service, and the Division of Labor Standards.

THE INDEPENDENT ESTABLISHMENTS

Until 1880 practically all the administrative work of the federal government was carried on in the major executive departments. With the creation of the Civil Service Commission in 1883 and the Interstate Commerce Commission in 1887 there has developed what has been called the fourth branch of the national government. Since that time about a hundred independent commissions, boards, administrations, and agencies have grown up in the executive branch, outside the regular departmental organization. Theoretically these agencies function under the control of the President, but many of them are independent regulatory agencies which are neither under the President nor in any department. They perform quasi-legislative and quasi-judicial work in addition to their regular administrative activities.

These agencies have been set up by Congress without plan or design as were required of the government, and little attention has been given to making them fit into any scheme of departmentalization. They consist of such establishments as the Federal Trade Commission, the Federal Reserve Board, the Federal Radio Commission, the Reconstruction Finance Corporation, the Tennessee Valley Authority, the Social Security Board, and a host of other more or less independent arms of the executive branch.[1] Possibly their establishment outside the regular departmental organization is based upon the theory that the old departments are inadequate for the performance of the entirely new functions of government.[2]

On June 24, 1939, as a result of the Reorganization Act approved on April 3 of that year, an executive order became effective which established three new and important independent agencies. These were the Federal Loan Administration, the Federal Security Administration, and the Federal Works Administration. Each of these is headed by an administrator appointed by the President. They were designed to unify the new functions of the government, as well as bring some semblance of functional departmentalization to some of the earlier functions. At present (1939) the functions of the following former agencies have been placed under the Loan Administration: the Reconstruction Finance Corporation, the Electric Farm and Home Authority, the Reconstruction Finance Mortgage Company, the Disaster Loan Corporation, the Federal National Mortgage Association, the Federal Home Loan Bank Board, the Home Owners Loan Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, and the Export-Import Bank. The Federal Security Administration took over the functions of the Social Security Board, the Employment Service, the Office of Education, the United States Public Health Service, the National Youth Administration, the Civilian Conservation Corps, and the Printing House for the Blind. The Federal Works Administration assumed the responsibility for the work done by the former Bureau of Public Roads, the Public Buildings Board of the Procurements Division, the National Park Service's Board of Building Management, the United States Housing Authority, the Public Works Administration, and the Works Projects (or Progress) Administration.

[1] See Bent, S., "Bureaucracy Triumphant," *Century*, vol. 107 (June, 1926), pp. 180–189.

[2] Beard, C. A., "Government by Technologists," *New Republic*, vol. 63 (June 18, 1930), pp. 115–120.

Quasi-Legislative and Quasi-Judicial Functions. Some of the independent establishments perform administrative, quasi-legislative, and quasi-judicial functions. Theoretically the legislative and judicial powers of the government rest with Congress and the judiciary respectively. Congress, however, with the growth of administrative activities, has found it necessary to pass only broad and general acts on complicated subjects, and then set up agencies to administer these activities. Thus it has become imperative that Congress give to the agency concerned the power to make necessary rules and regulations. In a very real sense many administrative agencies serve as miniature legislatures. Likewise numerous independent agencies are called upon to conduct hearings in much the same manner as courts. Theoretically they are not courts; nevertheless they operate as such, even to the extent that appeals may be taken from them to higher tribunals.

The Problem of Independent Agencies. The independent regulatory commissions create difficult problems in the field of administration. As was pointed out in the report of the President's Committee on Administrative Management, "they suffer from an internal inconsistency and unsoundness of basic theory." [1] This inconsistency and unsoundness is due to the fact that these agencies are vested with both administrative and policy-determining functions, with respect to which they should be directly responsible to the President. At the same time, a number of them exercise judicial functions, in the performance of which they should be wholly independent of executive control. Thus the creation of commissions brings about a situation in which governmental powers — in many cases important powers — are exercised under conditions of virtual irresponsibility. They have been called "irresponsible regulatory commissions" instead of independent regulatory commissions; as such, they violate the theory of democratic control, that power without responsibility has no place in a democratic system. Responsibility is the people's only weapon against abuse of power.

Proposed Distribution of Functions. The question has been raised as to how these various administrative bodies can be incorporated into the regular administrative structure and still remain independent miniature legislatures and courts. Both the report of the President's Committee and the report of the Select Committee on Government Organization of the first session of the Seventy-fifth Congress recom-

[1] *Report*, p. 36.

mended a distribution of functions as a possible solution of the problem of independent commissions. Under the plan presented in the report of the President's Committee, "the regulatory agency would be set up, not in a governmental vacuum outside the executive departments, but within a department. There it would be divided into an administrative section and a judicial section. The administrative section would be a regular bureau or division in the department, headed by a chief with career tenure and staffed under civil service regulations. It would be directly responsible to the Secretary and through him to the President. The judicial section, on the other hand, would be 'in' the department only for purposes of 'administrative housekeeping,' such as the budget, general personnel administration, and material. It would be wholly independent of the department and the President with respect to its work and its decisions." [1] This division of work appears to be relatively simple, and to meet squarely the problem presented by the independent commission. It appears to bring about executive responsibility for the administrative and policy-determining aspects of the agencies, and at the same time tends to guarantee the independence and neutrality of the agency for that part of the work which it must do as a miniature court.

Advantages of Independent Agencies. There is something to be said for the creation of independent commissions in the executive structure. For the most part these establishments are headed by a board of three, five, or more members, since it is believed that a group can be trusted with policy determination where a single director cannot. Moreover, since personnel is not changed completely at any one time in these commissions, continuity of policy can be expected. Likewise, the commission form makes possible the representation of various interests. Some of the commissions are bipartisan; bipartisan or not, their membership is often drawn from different sections of the country. For legislation and judicial work these alleged merits of independent commission organization appear to be logical, but for the exercise of administrative functions the commission or board type of organization has proved to be impossible.

Administrative Reorganization in the National Government. For over a hundred years after the federal government was established, no consideration was given to the systematic organization of the

[1] *Report*, p. 37.

executive branch of government. As the demands for service became insistent, Congress added agencies for the performance of new services within the existing departments as well as outside the regular departmental organization. Little attention was given to the logic of its allocations. The result has been that many departments have been used as dumping grounds for functions which have little or no relation to the work of the department. The placing of public health services in the Treasury Department is a case in point. Furthermore, an examination of the administrative structure reveals that the control of a number of important functions, such as aeronautics, is scattered among several agencies. These considerations make it plain that neither the President nor any of his executive agencies is in a position to control the whole of administration. In other words, the haphazard development of administrative agencies and services has made impossible of execution the constitutional mandate that the President shall " take care that the laws be faithfully executed."

Purposes of Reorganization. The main purpose of any proposed administrative reorganization should be that of enabling democracy to function. To this end, an up-to-date agency and executive instrument for carrying out the will of the people should be set up.[1] The administrative organization of the national government for a long time failed to do this to the fullest extent. Recent reorganization has remedied conditions to some degree, but it can still be charged that in general too much attention to detail is expected of the President. Even with the creation of executive assistants under the Reorganization Act of 1939 [2] it is physically impossible for the chief executive to keep in touch with the varied and numerous agencies theoretically under his control. He is limited and restricted to a much greater extent than was anticipated in the Constitution. He has not been given control over many of the agencies and independent establishments which have grown up over a period of years, and those over which he has been granted some degree of control are so loosely knit that adequate executive control of them is almost impossible. This is true especially of the many so-called independent agencies. Until recently the managerial agencies have been weak and poorly organized.

In order that the chief executive might maintain control over the numerous executive agencies and be accountable for their acts,

[1] *Report of President's Committee on Administrative Management*, p. 3.
[2] *Public Acts*, No. 19, 76th Congress (April 3, 1939).

the agencies dealing with budget, efficiency, research, personnel, and planning needed to be strengthened as executive arms. The Reorganization Act of 1939 attempted to attain these purposes, but did little to improve the matter of personnel management. This problem is considered in Chapter XIX. One of the most serious problems of administrative management is concerned with auditing and financial control. In order to hold the executive accountable for his actions the fiscal and auditing systems of the government should be adequately staffed and satisfactorily organized. It was suggested in the report of the President's Committee on Administrative Management that the office of Comptroller-General be abolished and in its place there be established the office of Auditor-General. The act which became law did not make this change.

Early Attempts at Reorganization. The first serious attempt to reorganize the executive branch of the government was made in 1913 with the report of the Taft Commission on Efficiency and Economy. This investigating committee, appointed to consider the instrumentalities and agencies through which the President manages the executive branch, recommended the adoption of a national budget system, made certain proposals for improving the accounting and reporting methods of the government, examined the civil service, recommended the adoption of a retirement system and efficiency ratings, and suggested the abolition of certain services and the consolidation of others. No action was taken by Congress on any of these proposals until 1921 when the Budget and Accounting Act was passed setting up the Bureau of the Budget and the General Accounting Office under control of the comptroller-general. The Congressional Joint Committee on Reorganization, 1920–1924, made suggestions for reorganization which received no more favorable attention than those suggested by the Taft Commission.

In recent years there have been many suggestions for administrative reorganization of the national government. In 1928 both major parties were pledged to reorganize. After assuming office, President Hoover recommended legislation to enable the President to carry through reorganization plans by executive order. In 1932 Congress granted this authority to the President but set up certain limitations on executive reorganization, the chief of which was that any plan looking toward reorganization must be submitted to Congress before its adoption. In December, 1932, the President submitted a series of orders to Congress proposing to regroup the

hundred-odd agencies of the government. The orders were set aside on the ground that the reorganization should be made by the incoming President.

The President's Committee on Administrative Management. In May, 1933, President F. D. Roosevelt, after asking his cabinet to assist in drawing up plans for reorganization, found it necessary to put those plans aside for more pressing problems. In March, 1936, the President announced the appointment of a committee to investigate the executive branch of the government and examine the problems of administrative management. At the same time Congress was requested to create a special joint committee for this same purpose. The President appointed a committee consisting of Louis Brownlow, chairman, Charles E. Merriam, and Luther Gulick. This committee made its report to the President in January, 1937. The President approved the report and submitted it to Congress with the request that legislation be enacted to carry out its recommendations. At about the same time the Select Joint Committee on Government Reorganization, which employed Brookings Institution to make its investigation, reported its findings. It is significant that two separate committees working independently of each other should agree so completely that the more than one hundred administrative agencies of the government are unsuited to carry on the work demanded of them, and should be thoroughly reorganized.

Principles of Administrative Reorganization. Before the recommendations of these committees are considered the principles of administrative reorganization might be stated. These principles have come to be recognized wherever men have worked together for a common purpose. They have been written into constitutions and laws and exist as habits of work in organized society. Stated in simple terms, they are: (1) the establishment of a responsible and effective chief executive as the center of administrative management; (2) the systematic organization of all activities in the hands of qualified personnel under the direction of the executive, and the establishment of appropriate managerial agencies to aid the chief executive; (3) provision for comprehensive governmental planning; (4) the establishment of a complete fiscal system and of the means of holding the executive responsible for his actions. To a considerable extent these principles are incorporated in the recommendations of both the President's Committee on Administrative Management and the Joint Select Committee of Congress.

employees and has provided for more adequate means of planning on the part of the national administration.

In consequence of the Reorganization Act of 1939 President Roosevelt has submitted a number of executive orders on government reorganization. The first two are of special significance. The first became effective on June 24, 1939, and the second on July 8, 1939. Briefly, the orders set up three new federal agencies — namely, the Federal Loan Administration, the Federal Security Administration, and the Federal Works Administration [1] — made various additions and reallocations in existing administrative agencies. These changes are too numerous to mention in detail, but some of them are of particular significance. Probably the most interesting feature of this phase of the plan is the strengthening of the executive office of the President. The Bureau of the Budget, the Central Statistical Board, the National Resources Planning Board, and the functions of the National Emergency Council were allocated to the office of the President. Other changes also were made, affecting in all, the Departments of State, Treasury, Justice, Interior, Agriculture and Commerce, and the National Archives. Apparently the attempt was made through these executive orders in pursuance of the law to strengthen the office of President as the executive arm of the government and to provide more adequate control over the various administrative agencies by the President. It will be observed that this arrangement makes possible a better functional departmentalization of administrative functions.

Further reorganization is not a dead issue by any means, and it is safe to say that it will never become such as long as the national administration remains in its present state of transition.

QUESTIONS

1. What are the constitutional provisions for executive departments?
2. How do executive agencies differ from administrative agencies?
3. What considerations influence the selection of cabinet members? How does the President use the cabinet and who may attend cabinet meetings?
4. What is the relationship between Congress and the cabinet?
5. Discuss the organization and functions of each of the executive departments.
6. What are the independent agencies? What problems have they created? Can they ever be used to advantage?

[1] See page 339.

7. Why is there a need for administrative reorganization? What are the defects of the present organization? What are the purposes of reorganization?
8. What are the principles of administrative reorganization?
9. What attempts have been made at reorganization? Discuss the report of the President's Committee on Administrative Management.
10. What obstacles are in the way of administrative reorganization?

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CHAPTER XVII

State Administrative and Executive Agents

WHILE the process of administration is much the same in the national government, in the states, and in the local units, and while the same general purposes may be sought in national, state, and local administration, different machinery to achieve these objectives has been set up in these three branches of government. State administrative organization consists of the governor and the many administrative agents, both elective and appointive, who are, at least theoretically, responsible to the governor, and who are engaged in carrying out policy as determined by the legislative body.

THE GOVERNOR

It has been said that the governor, next to the President of the United States, engages the interest of the voters.[1] He occupies a position in the state government analogous to that of the President in the national government.

Qualifications. The qualifications required of the governor are usually confined to citizenship, residence, and age. He must be a citizen of the United States and a resident of the state for a certain number of years — usually five — and he must have attained the specified age, which is usually higher than the age qualification for electors. The typical state constitution provides that the governor shall not be under thirty or thirty-five years of age. These qualifications are hardly necessary, for few persons would be inclined to vote for a governor who is not an American citizen, who has not reached maturity, and who has not lived in the state long enough to indicate his interest in and ability to perform outstanding public service.

State constitutions omit qualifications concerning education and experience, but it may be said that such requirements exist outside

[1] See Solomon, S. R., "American Governors since 1915," *National Municipal Review*, vol. 20 (Mar., 1931), pp. 152–158.

the law. Formal education has not been a determining consideration in the selection of governors in the past, for the states have adhered to the Jacksonian principle that any man is capable of rendering any type of public service. However, it appears that some attention is now being given to this important matter, and the great majority of governors today are educated men and must necessarily be so, because of the complexity of the problems of modern government with which they must deal.

Public opinion has also made political experience a necessary prerequisite. Few persons go from private life to the governor's chair. Usually a governor must have served his apprenticeship in some minor public office. He may have been a county officeholder, he may have served in a district public office, he may have occupied a minor state post, or he may have served in the state legislature. In rare cases does a man succeed in being elected governor without having had some practical political experience.

Nomination and Election. In some states the governor is nominated in a direct primary election; in others he is nominated in a nominating convention. In either event the governor is elected by direct popular vote in all states of the Union except Mississippi.[1] The governor is a politician, and it is logical to elect him as such. The majority of governors have been elected as Democrats or Republicans, though a few have been named by minor political parties. The question might be raised as to why a governor should be elected as a Democrat or a Republican since no major issue divides the parties in the states. The only practical explanation is that the national political parties desire to maintain state and local units.

Term. The fear of tyranny caused early state constitution makers to allot short terms to the governor. One year was the usual period for which a governor was elected. Experience has demonstrated that annual election is not only unnecessary but actually disadvantageous. It is expensive and has resulted in a rapid turnover in administration. In recent years there has been a tendency toward longer terms for the governor – two years in some states, and four in others. At present the governor serves for a term of four years in twenty-three states, for two years in twenty-four states, and for

[1] In this state the governor is elected by a combination vote of the people and the legislature. To be elected, a candidate must receive a majority vote in the election and in the legislature. If no candidate receives the necessary vote, the governor is chosen by the lower house of the legislature from the two competitors who have received the largest popular vote.

three years in one state.[1] In some states the governor is ineligible to succeed himself. Apparently this restriction has been imposed because it was feared that the governor might build up a political machine and through it perpetuate himself in office, even against the wishes of the majority of the people. In some states there are no such limitations, and many governors serve for as many as four or six terms. It will be recalled that the late Governor Ritchie of Maryland occupied the governor's chair for more than fifteen years. In some states where the two-year tradition prevails, governors are allowed to succeed themselves but, as in Tennessee, a governor may not serve more than six years out of any eight.

Removal. Usually two methods are provided for the removal of the governor from office – impeachment and recall. Impeachment may be used in all states except Oregon.[2] The process is similar to that employed in the national government, in that the charge is made by the lower house of the state legislature, and the trial is held by the upper house. In the history of the states few governors have been impeached, and in some cases of impeachment the process has been used for political reasons rather than for high crimes and misdemeanors.[3]

There are practical reasons why impeachment has been little used in the states. Because the legislatures meet only once every two years, and then hold sessions for only a limited number of days, it is practically impossible to complete the process of impeachment before the legislature has adjourned and the charges are forgotten. Moreover, the governors in twenty-three states hold office for only two years. Before impeachment can be resorted to, a governor must have time to do something which would cause his impeachment, and public opinion must be built up to sustain the action of the legislature in bringing charges. In many cases two years is too short a period for such action.

The second method of removal of a governor is the recall. Undoubtedly the recall has been designed because impeachment is impracticable, and also because recall of officials is in accord with the growing democratic tendencies in government. The recall has been

[1] New Jersey is the only state with a three-year term.

[2] In Oregon the constitution provides that incompetency, corruption, malfeasance, or delinquency in office may be tried as an ordinary criminal offense.

[3] The following states specify no grounds for impeachment, leaving the matter wholly to the determination of the legislature: Connecticut, Georgia, Idaho, Maryland, New York, North Carolina, South Carolina. See *Encyclopaedia of the Social Sciences*, vol. 7 (1932), p. 601.

adopted in approximately one-fourth of the states. The process of recall in the state is similar to that process as it is employed in municipalities. Recall has an advantage over impeachment, in that it is a convenient method of removal and can be invoked at any time. Its effectiveness cannot be measured by the number of times it has been used. Like the initiative and the referendum, it may be looked upon as a "gun behind the door" method. It is an ever present incentive to good government, and probably causes governors to think before they act. Whether the recall is used or not, it undoubtedly tends to keep the governor in a straight and narrow path.

Succession. While the recall is a means of replacing a governor who is unsatisfactory to the people, other methods are provided for filling the office in case of the governor's death, incapacity, resignation, or impeachment. In about two-thirds of the states the lieutenant-governor succeeds to the governorship in the event of a normal vacancy; where the office of lieutenant-governor does not exist, the president of the senate or the speaker of the house becomes governor.

It will be recalled that the Model State Constitution (Sec. 45) makes no provision for a lieutenant-governor, but provides instead that the presiding officer of the legislature shall act in this capacity. The succession of a legislative leader, such as the president of the senate or the speaker of the house, to the governorship is open to criticism. In many cases this legislator is a member of the opposite party, and is not elected by the people of the state as a whole, even to his legislative post.[1]

Compensation. In some states the governor receives a salary fixed by the constitution, but in recent constitutional revisions the matter has been left to the legislature to determine. Salaries range from $3,000 in South Dakota to $25,000 in New York. In most cases the governor receives a relatively low salary, averaging about $5,000 a year. In practically all the states he receives, in addition to his salary, the use of an executive mansion, and he is ordinarily provided with limited funds for certain designated public expenses. In Kentucky, for example, the governor receives an annual salary of $10,000 and a contingent fund of $500 per month for the upkeep of the executive mansion and other necessary executive expenses.[2]

The governor occupies a unique position in the American gov-

[1] The suggestion made elsewhere in this chapter (pages 363–364) relative to a proposed assistant-governor might be considered in this connection.

[2] See Graves, W. B., *American State Government*, p. 301.

ernmental system. His office is one of dignity and power, and corresponds somewhat to the Presidency. The governorship is coveted by all politicians, but it carries with it worries, troubles, and long hours in addition to glory. Many politicians regard the governorship as a stepping-stone to national politics. It is not uncommon for a governor to look to the United States Senate before his term has expired. It should be remembered also that the majority of Presidents in recent years have served an apprenticeship as governor in their respective states. Such experience is probably the best training one could have for the Presidency.

Powers of the Governor. The governor's powers are of three general types: legislative, administrative or executive, and judicial. The state constitutions, like the national Constitution, have the doctrine of the separation of powers incorporated in them. A review of the powers exercised by the governor and by the other governmental agencies of the state demonstrates that absolute separation of powers is mere fiction. In order to be chief executive, the governor must exercise all types of powers.

The governor's legislative powers may be discussed under two heads: constitutional and extraconstitutional. His constitutional powers include: the right to send messages to the legislature; the authority to call special sessions of the legislature; the exercise of the veto; the power to adjourn the legislature when the two houses fail to agree on a date for adjournment; and the ordinance- and rule-making power.

State constitutions require that the governor address or send a message to the legislature at the opening of a regular session. Usually this message outlines the governor's program and suggests legislation to make this program effective. The governor's message to the second session of a legislature, in addition to containing suggestions for legislation, is likely to be a report of his stewardship in office. The governor's messages to the state legislature are comparable in that respect to the President's messages to Congress. The governor may send such messages to the legislature at any time. Aggressive leadership on the part of the governor makes frequent messages necessary. In addition to his regular messages he usually sends a budget message. The messages may be read by a clerk or delivered in person by the governor. While the great majority of Presidents have sent their messages to Congress to be read by a clerk, the majority of governors have read their messages in person

to the legislature. The governor's messages are comparable in other ways to the messages of the President. Often such messages are intended for general state and national consumption rather than for the guidance of the legislature. In numerous cases the governor in his message indicates his stand upon pressing national problems, and through his message he may even make a bid for national office.

The governor may call the legislature into special session at any time to consider any subject he desires. The governor determines the necessity for such sessions and selects the subjects to be considered. Unlike Congress, the legislatures in most states, when in special session, must confine their attention to the subjects indicated in the governor's call. The power to call a special session of the legislature may be used to strengthen the governor's control over legislation. In Kentucky, in 1936, the governor used this power very effectively. He asked the legislature to limit its regular session to the consideration of private and "hobby" bills and then adjourn, with the promise that he would call it back in special sessions for the consideration of the question of reorganization, the budget, taxation, and other matters. This was done and the major administrative measures were presented one at a time in special sessions. Reorganization was the only subject before the legislature at one session. The budget was the only topic of consideration at another session. In all, five special sessions were held during the year, with the result that there was a limited opportunity for legislative trading. Furthermore, since attention was centered on one measure at a time, the governor was able to secure the enactment of his program with relatively little difficulty. The special session served as a useful device in promoting the influence of the governor as the state's chief legislator.

The governor possesses the veto power, but it is a more restricted power than that exercised by the President. The President has four alternatives in disposing of a bill presented to him for his signature. He may sign the bill, he may return it with a statement of his objections, he may use the pocket veto, or he may permit the bill to become a law without his signature if Congress is still in session. In a number of states the governor has only two of these alternatives – he may either approve the bill or return it within a limited time to the legislature with his objections. Some state constitutions allow a bill to become law without the governor's signature, but in no state does the governor possess the pocket veto. Unlike the President, the

governor possesses the power to veto items of a bill. This device has been useful in strengthening the governor's control over the budget, since he has the authority in a number of states to strike out items without disapproving the entire bill.[1] In some states the governor may even reduce items in a bill.[2] This would suggest that the governor, in a large measure, is usurping legislative prerogatives.

Most state constitutions permit the governor to fix the day for the adjournment of the legislature only in the event that the two houses are unable to agree upon such a date. Regular sessions of the legislature in most states are limited to a stated period of time, and adjourn *sine die* at the end of that period. The length of special sessions, in most states, is decided by the legislature; the governor may adjourn such a session only in case of disagreement between the houses.

The governor not only exercises control over state legislatures but, in numerous instances, possesses the power to make rules for the operation of various administrative agencies. There has been a somewhat extensive development of executive rule-making in recent years. Legislation has become so complicated that the legislature itself cannot be expected to know enough about the technical details of certain subjects to enact legislation that will meet all contingencies. The executive, then, directly or through some executive agency, must have the power to supplement the general policies determined by the legislature. This trend is observed in both national and state government; and in spite of the fact that it violates the traditional theory of the separation of powers, it is developing rapidly in government today.[3]

As is true of the President, a governor's strength and capacity for leadership are measured by his activities outside the confines of his constitutional powers. If he is content simply to control legislation through messages, special sessions, vetoes, and his limited power of adjournment, legislative leadership is likely to be weak. He must go behind these constitutional functions and resort to bargaining and

[1] Wells, Roger H., "The Item Veto and State Budget Reform," *American Political Science Review*, vol. 18 (Nov., 1924), pp. 782–791.

[2] Graves, W. B., *American State Government*, p. 306.

[3] Pfiffner, J. M., *Public Administration*, pp. 388–413; Walker, H., *Law Making in the United States*, pp. 468–469; Rosenberry, Justice, "Administrative Law and the Constitution," *American Political Science Review*, vol. 23 (Feb., 1929), pp. 32–35. Also see Justice Rosenberry's opinion in *State v. Whitman*, 196 Wis. 472, 220 N. W. 929 (1928).

compromising, threats of vetoes, appeals to the voters, devices for building up favorable public opinion, and even the use of contracts and patronage to effect his purposes. His success as a legislative leader necessitates constant contact with legislators. During the legislative session the governor's office, if the governor is striving to control legislation, must be open to legislators at all times. If he can encourage legislators to use his office for the discussion of pending legislation, his control over the legislature is likely to be more effective.

The difference between the successful and the unsuccessful governor is measured in many cases by the difference in their use of the so-called extraconstitutional legislative powers. While the tactics mentioned above are pertinent factors in legislation if properly used, they sometimes act as boomerangs if inexpertly and arbitrarily handled.[1] More depends upon the manner than upon the extent of their use. Legislators generally resent a dictatorial attitude on the part of the governor, but will tolerate and often applaud use of the same tactics when a feeling of coöperation exists between the executive and the legislative. Some governors are able to work with legislators; others are complete failures. Some are even able to secure favorable legislation from a hostile legislature. The governor's success or failure is largely a matter of his method of attack and his attitude in securing legislative coöperation.

The Governor as Chief Legislator. Executive leadership in the legislature raises the question of the proper functions of a legislature. Is a state legislature a policy-determining body or is it simply to confirm or reject policy as determined by the governor? Since the most important measures in both the national government and the states are administrative measures, it would appear that the executive is exercising the real leadership in legislation, and that the legislature is for the most part approving or rejecting executive policy. This does not mean that the legislature has abdicated in favor of the executive, but simply that the establishment of responsible executives, plus the growing complexity of governmental problems, has necessitated a shift in emphasis. The governor, as a representative of the whole people, leads the way, while the legislators, individually representing small sections of the state and collectively forming the reservoir of state power, approve or reject the policy of the executive.

[1] For an interesting comment on dictatorial tactics see "Sign on the Dotted Line," *State Government*, vol. 4 (Mar., 1931), pp. 18–20.

Executive Powers of the Governor. As the chief executive of the state, the governor exercises both mandatory and discretionary powers. Both courses of action are open to him in the exercise of practically all of his executive and administrative powers, which include those relating to administrative supervision, appointment, military affairs, general law enforcement, and supervision of local governments.

As head of the state government, the governor has supervision and control over the acts of his subordinates. Their acts are his acts, and he is responsible for them. The power of administrative supervision is a general power, and is exercised through other powers, such as the power of appointment and removal, the ordinance-making power, and control of the militia. In the states, even more than in the national government, administrative supervision is an arduous and vital work. The governor is presumed to be in closer touch with the various agencies of administration than is the President, and this is generally true. The extensive use of the spoils system in the states is partially responsible for this attitude. As the dispenser of jobs, the governor is popularly believed to know all the details of administration. The small size of a single state in comparison with the whole United States is another important factor in enabling the governor to keep in closer touch with administration than is possible for the President.

The power of appointment is probably the most far-reaching executive and administrative function of the governor. Upon his use of it depends in great degree the success of his administration. If a governor chooses wise and capable assistants, he can devote his time to matters of general supervision and coördination. If his assistants are weak, he must assume a greater burden himself and take the responsibility for a poor administration. The governor in most states, including those with extensive merit systems, must appoint a large number of subordinates, from heads of departments to minor functionaries. Theoretically, it would appear that the governor's power of appointment is unlimited, and that he can appoint anyone he likes. There are, however, a number of factors which tend to restrict this power. In many cases appointees must be approved by the senate. Hence, if the governor wants his appointments to be approved, he must be careful to select persons whom the senate will endorse. He may go to such extremes in this regard that he will be accused of subservience to the senate or to the political organization.

At least it is the part of wisdom to consult the political organization, whether or not its advice is followed. Theodore Roosevelt, whom no one accused of subservience, found it necessary to consult Boss Platt on appointments. In his autobiography, Platt said: "Roosevelt had from the first agreed that he would consult me on all questions of appointments. . . . He religiously fulfilled this pledge, although he frequently did just what he pleased." [1]

Other limitations on the governor's power of appointment are imposed by law. The membership of various boards and commissions set up under the law must be distributed on a bipartisan basis, and in some cases on a geographical basis. Moreover, the laws in some cases set forth the technical qualifications which must be met by board members, and a governor in making such appointments must abide by these requirements. Again, civil service regulations impose limitations on the governor's otherwise extensive power of appointment. Furthermore, there are various political considerations which limit his appointing power, such as payment of political debts, the necessity for party harmony, and the obligation to serve his political organization. Also, if a governor is to make wise use of his appointing power, he must ascertain the loyalty of prospective appointees. There is nothing that tends to wreck his organization more than "boring from within."

If the governor is to be held responsible for administration, he must have both the power of appointment and the power of removal. Therefore, as a part of his power of supervision, in the majority of states the governor possesses the power of removal. In conformity with the decisions of the Supreme Court of the United States,[2] many states have given the governor unrestricted power to remove any official he appoints, and in many cases he may do this without giving reason for his action. In other states the governor is allowed to remove officials he appoints, but in doing so he must give proper cause for such removal. In many states the removal power is limited by the constitution and the laws. The governor is not given authority to remove elective officers, nor does his control extend to judicial and local officers. Some states, such as New York, provide that the governor may remove certain local officers after a hearing. It will be remembered that Governor Franklin D. Roose-

[1] Holcombe, A. N., *State Government in the United States* (Third edition), pp. 337–338.

[2] *Myers v. United States*, 272 U. S. 52 (1926).

velt held a hearing which resulted in the resignation of Mayor Walker of New York.

Powers of Law Enforcement. The constitution imposes upon the governor the responsibility for enforcing the law and for protecting life and property. This duty is not exacting in normal times, but the governor must be prepared to act quickly if an emergency arises. In the enforcement of the law the governor may send troops or at least threaten to supply the state's armed forces. Frequently he is called upon to protect citizens and property in cases of strikes, lynchings, and other public disturbances. Even though his power may be complete in this regard, practically it is impossible for him to go further than public opinion will allow. At least it has been demonstrated that attempts at law enforcement are futile and politically dangerous if carried on in the face of hostile public opinion. The governor's activities concerning law enforcement, however, are not confined to the handling of emergencies. If he is enthusiastic and strong-willed, he may assume active leadership in campaigns for the control of crime, and through his official and personal prestige be an important factor in moulding public sentiment.

Military Powers. The governor's military power consists in his control over the state militia, which may be exercised in various ways. Only one phase of this power is seen in the governor's obligations concerning general law enforcement. The chief executive is responsible for the organization, maintenance, and training of the state militia. His power over the organization and discipline of the militia is comparable to that of the President over the army and navy. The governor may use the militia as he deems wise, sending it into any section of the state, even without the request and approval of local authorities. In spite of the fact that the constitutional military powers of the governor were intended to be used only for the protection of the people's rights, some governors have used the militia to strengthen and control their office. Such activities in recent years have been observed in Georgia, where Governor Talmadge practically placed his executive agencies under martial law in order to maintain his control over such offices as the highway department; and in Louisiana, which in large measure was under the military sway of the late Huey Long. In this regard the governor's military power becomes purely a personal power.[1]

Supervision of Local Officers. Governors possess limited power to supervise local officers in some of the states. This power may mean

[1] Graves, W. B., *American State Government*, p. 320.

that the principle of local self-government is disregarded, and as a result some states definitely prohibit such action. Even the principle of local self-government is so guarded in some states that the state police force, which is organized on a state-wide basis and financed by the state as a whole, has been prevented from operating in the cities.

Judicial Powers. In addition to his legislative and executive powers, the governor exercises certain judicial or quasi-judicial powers in connection with executive clemency, the veto, the suspension of the writ of *habeas corpus,* and extradition. Matters of executive clemency, involving the granting of pardons and paroles and the issuing of reprieves, consume much of the time and energy of governors and probably cause more miserable hours than all other duties performed by the chief executive. Former Governor Alfred E. Smith of New York frankly reveals his very human attitude on the matter of executive clemency: "I gave a great deal of my time to talking to the relatives of the men in our state prisons. . . . Nothing is so distressing as the attention the governor is compelled to give to applications for executive clemency when the prisoner is to be put to death. It is impossible for a man to escape the thought that no power in the world except himself can prevent a human being from going over the brink of eternity after the Court of Appeals has sustained the verdict of the lower courts. I had very many unhappy nights when executions took place."[1] In recent years there has been an increase in the use of executive clemency. In some cases it may be assumed that the power has been abused and justice has been thwarted. In any event much of the governor's time is given to this duty.

The governor's veto power has been discussed in another section. At this point it should be mentioned, however, that in exercising this power the governor occupies the position of judge of the merits of proposed legislation. Thus, in approving or disapproving legislative acts, the chief executive is exercising a judicial function. Especially is this true when the veto is exercised for constitutional reasons.

The suspension of the writ of *habeas corpus* involves the exercise of judicial power. The governor in suspending the writ must decide, much as a judge does, whether or not the circumstances justify the action. In other words, he becomes the judge of the necessity for suspending the normal civil processes.

In asking for the return of an alleged criminal of the state from

[1] Quoted in Graves, W. B., *American State Government,* p. 324, from A. E. Smith, *Up to Now.*

another state to stand trial, the governor sits as judge, at least to some extent, of the guilt or innocence of the individual. He may issue requests for the return of a person from another state or he may refuse to do so. He may honor extradition papers issued by another governor or he may refuse to acknowledge such requests. In any event he exercises his judicial function and becomes a judge in a very real sense.

OTHER EXECUTIVE AGENCIES

In addition to the governor, who is the state's chief executive and the head of the state's administrative establishment, every state has a large group of executive officers elected by the people, chosen by the legislature, or appointed by the governor. Because of the variation in selection and the resulting lack of coördination between the various executive and administrative organizations, the state structure differs from that of the national government. The only elective executive and administrative officers in the national government are the President and Vice-President. All others are appointed by the President. Thus the federal administrative structure is highly integrated in comparison with that of a typical state.

The Lieutenant-Governor. In the state, the executive officers fall logically into two groups: the elected independent officers and the appointed officers. The most important of the elective independent officers as found in most states are the lieutenant-governor, the secretary of state, the attorney-general, the comptroller, the auditor, the treasurer, and in some states the superintendent of public instruction. Each state, of course, has its own group, and seldom will the same group of officers be elected by the people in all the states. The group mentioned constitutes a typical list of state elective executive officers.

The office of lieutenant-governor is provided for in thirty-six states.[1] Where found, the office is comparable to the Vice-Presidency, in that it serves a like purpose. The lieutenant-governor is both an executive and a legislative officer. He succeeds the governor in case of the latter's death, resignation, removal, or disability, and he sometimes acts as governor in the absence of the chief executive. As acting governor he has all the powers and preroga-

[1] The office of lieutenant-governor exists in all states except Arizona, Florida, Georgia, Maine, Maryland, New Hampshire, New Jersey, Oregon, Tennessee, Utah, West Virginia, and Wyoming.

tives of the governor. He may exercise any of the legislative, judicial, or executive powers belonging to the governor's office, and his acts are as valid and constitutional as those performed by the regular executive. In 1935 a lieutenant-governor in Kentucky, in the absence of the governor, called a special session of the legislature, which, according to the decision of the state supreme court, could not be revoked even by the governor himself. The second and probably most important duty of the lieutenant-governor is that of presiding over the state senate. As the president of the senate he is merely a parliamentarian, for political leadership in the senate is vested in the president pro tem and the majority floor leader, both elected by the body itself. As presiding officer the lieutenant-governor has the privilege of voting only in case of a tie. The practical reason for reducing the lieutenant-governor to a mere parliamentarian is that the second in command in the state is often selected from an opposite political faction to that of the governor. Thus, to give him the powers of a partisan legislative speaker might disrupt party leadership and harmony in the legislature.

The office of lieutenant-governor has seldom been one of great value in state administration since the lieutenant-governor in so many cases is aligned with a party faction opposed to the governor. This is especially true when the convention system of nomination is used. In order to balance the ticket the lieutenant-governorship is filled by naming a defeated opponent of the governor to that office or by selecting a person who represents a faction of the party not strong enough to name its candidate to the governorship, yet sufficiently powerful to defeat the party in the general election unless it is given some consideration on the ticket. It is possible, however, for the lieutenant-governor to become an important factor in both administration and legislation. If given the opportunity, he could follow the development of administrative policies and acquaint himself with the work of the state, thus better fitting himself to assume the duties of governor in case they should devolve upon him. If he attends conferences and participates in the determination of administrative policies he serves a useful purpose. It has been suggested that the office of lieutenant-governor be made into that of an assistant governor, who might take over some of the duties which consume so much of the governor's time.[1] As assistant governor he would be appointed by the governor, and harmony would prevail

[1] Crawford, F. G., *State Government*, p. 176.

between the two. So far as legislation is concerned, he might become a valuable liaison officer between the governor and the legislature. In recent years in states which have established legislative councils, the lieutenant-governor has been made chairman of this policy-formulating agency and as such serves a useful purpose in both administration and legislation.

THE EXECUTIVE DEPARTMENTS

There are three executive officers, elected in most states by the people, who should be discussed separately from the executive departments under the control of the governor. These officers – namely, the secretary of state, the attorney-general, and the auditor – in many states are considered heads of executive departments, but since the departments are to some degree separate from the regular executive agencies under the supervision of the governor, we shall consider them as outside the ordinary administrative departmental structure. Especially is this true of the auditor's department.

The Secretary of State. The secretary of state is elected by popular vote in all states except six. In three of these, this officer is appointed by the governor, and in the remaining states he is elected by the legislature. The secretary of state is custodian of state records and keeper of the state seal. For the most part his duties do not require the exercise of discretion, being ministerial in nature. The typical duties of the office have to do with the issuance of corporation certificates, the granting of licenses, and the countersigning of proclamations and commissions. In some states the secretary of state has charge of elections. All candidates for state or district political office are required to file their petitions with the secretary of state, who prepares the ballots, issues certificates of elections, and receives statements of campaign expenditures according to law.

The Attorney-General. The attorney-general is the most important legal officer of the state. In many states he is the head of the department of law or the department of justice. In forty-three states this officer is elected by the people. In the other five he is appointed by the governor or named by the legislature. His duties are dual in nature. In the first place, he is the attorney in litigation for the state, and represents the state in all suits to which the state is a party. In the second place, he is a legal adviser. State agencies and officers may call upon the attorney-general for an opinion whenever

his advice is needed. Frequently the executive departments under the supervision of the governor are reluctant to seek the advice of the attorney-general, since in many cases he is selected by the people and may represent an opposing political faction. The attorney-general's office affords the best opportunity for the building up of a state department of justice comparable to that of the federal government, and for the establishment of an agency which, among other things, could combat crime waves in the states.

The Auditor. In a number of states the state auditor or the auditor of public accounts is elected by the people, at the same time and in the same manner as the governor. The duties of this officer are often dual in nature. In some instances he is concerned with the regular accounting work of the state government and serves in the capacity of pre-auditor of current expenditures. As such he is a definite adjunct to the administrative organization, which is or should be supervised by the governor. He is also charged with review of the fiscal operation of the executive branch of the state. In this capacity he is a post-auditor. As such, he should not be subservient to the executive branch, but rather should report directly to the legislature. Even in a highly integrated administrative structure this officer should be elected by the people or appointed by the legislature, since his office is not an executive office, but rather a check upon the executive branch of the government.[1]

The executive departments in the several states present a wide variety of administrative agencies and machinery. Some are headed by elective officers while others are presided over by appointive officials. W. B. Graves points out that the heads of the original executive departments, such as the secretary of state, attorney-general, treasurer, auditor, and superintendent of education, are generally elective as a result of the continuing influence of the Jacksonian tradition, that these departments are provided for in state constitutions, and that their duties are confined to governmental housekeeping, or what has been called staff services.[2]

Reasons for Establishment. The newer departments which have been established since the Civil War, out of demands for more public services, are chiefly statutory creations and are headed by officials appointed directly by the governor. The duties of these newer

[1] Bromage, A. W., *State Government and Administration in the United States*, p. 341.

[2] Graves, W. B., *American State Government*, p. 357.

agencies have to do with regulatory and general services. For the most part they tend to be line agencies, although a department of finance, which is a staff agency, appears in practically every state reorganization in recent years.[1] These new departments include those having to do with agriculture, banking, commerce, conservation, health, welfare, insurance, labor, mining, public utilities, and safety.

For a long time state legislatures, like Congress, responded to the increasing demands for new services by the creation of additional administrative agencies, and in numerous instances they paid little attention to coördinating these new agencies with those already established. Since the original administrative agencies, under the control of elective officials and free from executive supervision, represented a distinct decentralization of authority, the legislatures continued to follow the line of least resistance and set up these new agencies under separate boards and commissions, many of which were not responsible to the governor. Thus the governor was placed in an unfortunate position, in that he is held responsible for administration, yet is able to exert only a limited control over these newer independent administrative agencies. Under such an arrangement responsible administration is impossible. The result is naturally waste, inefficiency, high cost, as well as numerous conflicts of authority.

Administrative Reorganization. About 1909 a movement for efficiency and economy began when the People's Power League in Oregon prepared a plan to put all administrative agencies in that state in the hands of the governor. The movement made little progress until 1917 when the first successful administrative reorganization plan was adopted in Illinois under the leadership of Governor Frank O. Lowden.[2] Since that time more than twenty states have adopted some plan for readjusting agencies. All have tended to embody the following general principles of administrative re-

[1] Graves, W. B., *American State Government*, p. 362.

[2] The Illinois Administrative Code of 1917 consolidated fifty-four independent statutory agencies into fourteen units. Nine of the new units were headed by single directors, while the remaining new agencies were commissions nominally attached to the administrative departments but actually operating independently. The governor appointed all directors, assistant directors, and bureau chiefs. This plan, which formed the basis for many reorganization schemes in recent years, attempts to consolidate and articulate all administrative agencies into a series of unifunctional departments.

organization: [1] (1) increased power for the governor; (2) proper coördination of the terms of office of administrative officials; (3) functional departmentalization for all departmental work; (4) definite lines of responsibility for all departmental work; (5) abolition of boards for purely administrative work.

The movement for administrative reorganization has been the most important single aspect of state government since 1917. Its influence has been felt in every state and in many local governments. Less than one-half of the states have reorganized their administrations, but numerous reports and surveys have been made, and there is scarcely a state which has not given some attention to the possibility of reorganization. The primary purpose of such movements has been to establish the chief executive as the center of energy and direction in administration, and to provide means for holding him accountable for his acts. These movements have been closely associated with other readjustments in state governments, such as the short ballot, adequate budgetary control, and improved personnel practices, although many states have tended to neglect the latter administrative adjustment.

Limitations on Reorganization. In state after state it has been demonstrated that complete administrative reorganization is impossible so long as the state retains the customary large group of elective department heads. Reorganization cannot be accomplished effectively without the adoption of the short ballot. In order to bring about this needed reform, and change the elective department heads to an appointive basis, constitutional amendments are necessary in most states.

Interesting attempts have been made to solve this problem of making the administration responsible to the chief executive by other means. Some of these proposals have even violated the principles of administrative reorganization. In Indiana, for example, boards dominated by the chief executive were set up to administer the affairs of the several departments. Such an arrangement gave the governor control over departmental policy when the board in charge was composed of the elected officer and an official appointed by the governor, but it did violence to the principle of unified control in the departments.[2] The other method of attaining the same end is to

[1] Buck, A. E., *Administrative Consolidation in State Governments* (Third edition), pp. 5–6.

[2] Bates, F. G., "Indiana Puts Its Faith in Governor," *National Municipal Review*, vol. 22 (Mar., 1933), pp. 137–140.

transfer as many functions as possible from the elective agencies to duplicating and somewhat conflicting appointive departments. This tends to give the governor control over the administration, but it does not provide for the elimination of useless agencies and functions, and thus does not achieve one of the objectives of the organization – economy.

Reorganization and the Budget. The principle of the executive budget has been accepted in all recent state administrative reorganization. As stated before, every state which has reorganized its administration has set up a department concerned with finance, which is another way of saying that the governor has been given executive control over state receipts and expenditures. In many cases the functions of such departments cover not only the current auditing of expenditures but also budgetary control, purchasing, and personnel. Administrative reorganization has tended to make the governor the business manager of the state.

Reorganization and Personnel. The factor that looms larger than all others in state administrative reorganization, and yet has been sadly neglected in many attempts at administrative readjustment, is personnel administration. No state government is any better than its administrative personnel. In the states, spoils politics has been the all too dominant characteristic of administration. If reorganization is to be more than a mere gesture, increased attention must be given the recruitment, classification, training, discipline, promotion, and retirement of the state's employed personnel. The more technical phases of this subject are discussed in Chapter XIX.

QUESTIONS

1. How is the governor in your state nominated and elected? What is his term of office? What is his salary?
2. Compare the legislative powers of the governor with those of the President.
3. In what ways does the governor in many states fail to be a real chief executive? What are his limitations in this regard in your state?
4. Make a chart of the administrative organization in your state. What are the chief defects of this organization?
5. What state executive and administrative officers should be elected, and what officers appointed? Upon what basis should this be determined?
6. How can the governor be given control over the state administration, and at the same time be prevented from building up a powerful political machine and becoming a dictator?

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CHAPTER XVIII

Local Administration

THE administrative process is naturally much less formal in the local government units than in the state or in the national government. These local units, however, are highly important agencies of government. Even a cursory examination of the various administrative units will reveal that the local administrative services account for the major cost of government. Despite this fact, little attention has been paid to the rearrangement and reorganization of local agencies in accordance with sound administrative principles. Whereas the tendency in the national government is toward separation of politics and administration, locally there has been a merging of these two processes, and administrative services continue to be rendered as political services.

We shall discuss local administrative units in two parts – namely, the urban and the rural units. The urban units consist of the municipality in its various forms, while the rural administrative agents include the county, the town, the township, and certain special districts. All these units are primarily administrative districts created for the convenience of the state. State laws define the subject matter and set the limits for city ordinances and county orders, compelling or allowing the local units to carry out certain policies.

THE MUNICIPALITY

The city as a problem of government did not emerge until after the first two or three decades of the nineteenth century. This does not mean that there were no cities prior to that time, but rather that the city had not come to be a governmental problem of any significance.

Growth of Cities. From 1790 to 1880, of the forty-six millions added to the population, more than two-thirds became rural dwellers. Since 1880, however, the urban population has increased much faster than the rural population, and the drift to cities is constantly

gaining momentum. From 1890 to 1900 the population of cities grew three times as fast as that of rural areas. From 1900 to 1910 the rate of growth of urban sections was four times that of country districts, and from 1910 to 1920 urban growth was nine times that of the country.[1]

Improvement in City Government. In the early days of city development the structure of city government was simple and the demands for municipal services were few and easily satisfied. Even until the opening of the twentieth century relatively little attention was given the city despite the fact that cities had become a distinct problem of American democracy. Lord Bryce as late as 1887 stated that government of cities represented the most conspicuous failure of the American governmental system.[2] This same point of view was emphasized and supported by the so-called Muckrakers, such as Lincoln Steffens.[3] Since 1900, however, extraordinary progress has been made in city government, until today the city is, by and large, the best governed and most effective unit in the American system. The city has been used as a laboratory for various governmental and administrative experiments. So comprehensive has been the study of the city that we may say that, if government in the city is corrupt and inefficient, the reason is not that we are ignorant of the situation and do not know the better forms and techniques of administration. Our knowledge of the city today is sufficient to enable us to have as good government as we demand.

The growth of American cities is an interesting story, but in this discussion of administrative agents we must confine ourselves to the organization and operation of the city as an administrative unit.

State Supremacy over Cities. The city is a creature of the state, established and controlled by the constitution and the legislature.[4] It is created for a dual purpose. In the first place, it is a creature of the state set up for the better administration of state affairs. In the second place, it is a corporation designed to serve local needs and possessing a charter which guarantees to it certain rights and privileges. The accepted doctrine of the city's legal status was stated many years ago by Judge Dillon when he said: "It must now be conceded that the great weight of authority denies *in toto* the

[1] MacDonald, A. F., *American City Government and Administration* (Revised edition), pp. 26–27.

[2] *The American Commonwealth* (1888), vol. 2, p. 281.

[3] See *Autobiography of Lincoln Steffens.*

[4] Dillon, J. F., *Municipal Corporations* (Fifth edition), vol. 1, p. 143.

existence, in the absence of special constitutional provisions, of any inherent right of self-government which is beyond legislative control. The Supreme Court of the United States has declared that a municipal corporation in the exercise of all its duties, including those most strictly local or internal, is but a department of the state." [1] This means that the city receives all its powers from the state, and that the state reserves the right to strip it of any or all powers at its discretion. The city, then, performs state functions, but to a lesser extent than the county, since city charters tend to recognize the existence of certain local functions which are performed primarily in the interest of the community and with little regard to the general welfare of the state. The city is called a corporation, while the county has been designated a quasi-corporation.

City Charters.[2] Each city has a charter or a constitution given it by the state.[3] In some states these charters are mere statutes drawn up by the legislature alone. In other states the provisions of the city charter are partially specified in the constitution, and the constitutional provisions are completed by the legislature. The charter may be granted by a separate act of the legislature, and each city may possess a different charter. This method is known as the special charter system. At the other extreme the legislature may pass an act setting forth the charter to be used in all cities. This is the so-called general plan. Since neither of these plans has proved entirely successful, legislatures have classified cities according to population and have given separate charters to each class of city. This is known as the classification charter plan.

The so-called optional charter plan allows a city to choose from certain charters approved by the legislature the charter best suited to its particular needs. Even though the optional plan avoids certain obvious difficulties of the other plans, it does not provide adequately for the variations in governmental needs of cities of the same size.

In order to avoid the difficulties in general, classification, and op-

[1] Dillon, J. F., *Municipal Corporations* (Fifth edition), vol. 1, pp. 154–155.

[2] For a brief discussion of city charters as they relate to city councils see Chapter XIV.

[3] For a general discussion of city charters see MacDonald, A. F., *American City Government and Administration* (Revised edition), chs. 5–6; Munro, W. B., *The Government of American Cities*, ch. 5; Anderson, W., *American City Government*, ch. 6; Reed, T. H., *Municipal Government in the United States* (Revised edition), ch. 3.

tional charter systems, sixteen states now allow home rule charters.[1] Such charters have been suggested as the solution for many of the city's problems. Home rule allows the people of a city to determine their own form of government, and anything not in conflict with the constitution can be written into the charter. The process of adopting a home rule charter is comparatively easy. After the legislature passes an enabling act, charter commissioners are elected, who are responsible for drafting the charter and submitting it to the people. If the people approve, the charter becomes effective, although some states require that it be approved by the legislature as a final step.

The contents of city charters are much alike, regardless of type. A charter simply provides the framework of city government and states the methods of administration, in greater or less detail. It names the officials, designates the method of selecting them, specifies terms of office and compensation, and outlines the powers and limitations of the municipal corporation. Charters also set forth the rules to be followed in financial transactions, such as letting contracts, budgeting, purchasing, and employment.

Strict Construction of Charters. Courts usually construe city charters strictly. In this respect a charter differs from the federal and state constitutions. The nature of charters, as well as the method of granting them, indicates complete state control, and courts are inclined to look upon city charters as limiting agents rather than as broad grants of power. The general rule of interpretation which has been applied by the courts has been stated by one authority as follows: "It is a general and indisputable proposition of law that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in expressed words; second, those necessarily or fairly implied or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient but indispensable. Any fair, reasonable substantial doubt concerning the existence of a power is resolved by the courts against the corporation, and the power is denied." [2]

[1] MacDonald, A. F., *American City Government and Administration* (Revised edition), p. 93.

[2] Dillon, J. F., *Municipal Corporations* (Fifth edition), vol. 1, sec. 237.

FORMS OF MUNICIPAL GOVERNMENT

In the United States four general forms of municipal government are used: the weak mayor plan, the strong mayor plan, the commission type, and the council manager type.

The Weak Mayor Plan. The weak mayor plan was the first to develop in the United States. It represents an attempt to adapt the federal system of government to urban areas and embodies the principle of separation of powers. In general, it emphasizes the protective rather than the service phase of city government. Government under this type includes two general governmental agencies, the mayor and the council. The mayor's office is one of dignity rather than power. In the early stages of municipal development the mayor, under this type of government, was often elected by the council and served both as its presiding officer and as the ceremonial head of the city. Until recently the council usually consisted of two chambers, which meant that it was a relatively large policy-determining body. Besides exercising strictly legislative powers, it interfered in administrative matters, and in some cases administration was largely left to council committees. In recent years the council has been made into a one-house body and has been relieved somewhat of its direct control over administration. In addition to the legislative and executive departments of government there was, of course, a judicial system. The local judiciary has not changed very much with the introduction of other types of government. The weak mayor type of government prevailed generally in the United States until almost the opening of the twentieth century. It was this type of government which Bryce indicted when he pointed to the city as the most conspicuous failure of the American system of government. It existed through the so-called dark ages of municipal government, and no serious attempt to replace it was made until the opening of the present century when, more or less by accident, more workable and serviceable forms of city government were devised.

The failure of the weak mayor type of government was largely due to decentralized administration. Under it the mayor made few appointments. His removal power, if he possessed it at all, was restricted. He had little power of supervision, and was a figurehead rather than a city executive. City government under this form was

a powerful agency of government, but it was difficult to place responsibility for the exercise of its power.

The Strong Mayor Plan. The first attempt at reorganization took the form of the strong mayor type, which was adopted in recognition of the fact that the city is primarily an administrative unit, and therefore there must be a definite allocation of responsibility for administrative functions in the city. Under this type the mayor was authorized to appoint department heads and other superior officers. He was given the power of removal and supervision. The cumbersome bicameral council was abolished and a small unicameral body was substituted for it. The judicial branch remained practically unchanged. The strong mayor type made the mayor a real executive and placed upon him the responsibility for administration of the city's affairs.[1] The major objection to the strong mayor type is that it does not provide for a separation of policy determination and administration. Political techniques are employed in dealing with administrative problems. Under this system there could be no other alternative, since the mayor is elected by popular vote and must offer himself as a candidate for the office on a party ticket. He is selected as a politician rather than as an administrator.

The Commission Type. While city government under the strong mayor plan has developed steadily in the United States, a new form — the commission plan — came into existence in 1900 as the result of a major catastrophe.[2] In 1900 a tidal wave swept the city of Galveston, Texas, killing some seven thousand people and destroying $20,000,000 in property. The inefficient and corrupt city government was not equal to the emergency. The necessity for action caused the Deepwater Commission of that city to take over some of the functions of rebuilding. Undoubtedly this commission, set up for purposes of regulating commerce and navigation in the harbor, exceeded its authority, but the need was imperative.

The commission appointed three able lawyers who drafted a charter later approved by the legislature, which ignored the existing plan of government and set up an all-powerful commission of five members elected at large. Soon, under the administration of the commission, Galveston became a model in public improvements and

[1] See Story, R., *The American Municipal Executive.*

[2] On the commission plan see Woodruff, C. R., *City Government by Commission.*

finances. It should be stated that the Galveston plan was not new since it had been used by colonial boroughs and in certain southern cities immediately after the Civil War. The plan disregarded the principle of separation of powers. Collectively the commissioners were legislators, and individually they were administrators. One commissioner was designated as mayor, but he possessed only restricted powers. He had no power of removal and no power of veto. He became merely the presiding officer of the commission and the ceremonial head of the city.

The fact that it proved itself useful in an emergency tended to popularize the plan. From 1900 to 1914 a modified form of the commission plan — the so-called Des Moines plan — spread widely over the country. When the city of Des Moines, Iowa, adopted the commission plan, the original features of the Galveston model were retained, but the initiative, the referendum, and the recall were added. By 1914, some four hundred cities were following this plan.

The commission plan of government, like all others, has its advantages and disadvantages. For one thing, it provides the simplicity which is much to be desired in any administrative unit. There is no system of checks and balances and no shifting of responsibility. The plan seeks to provide a business government, and proposes to improve municipal standards. It has not, however, brought about any significant changes in the type of elective officeholder, since the popular politician is still elected to the commission; nor has it reduced taxes. In this connection it must be remembered that city government, like other units, follows a law of increasing costs per capita. Undoubtedly a simplified administration gives the taxpayer more for his money, but reorganization does not mean the spending of less money.

The commission plan has two serious defects. In the first place, it lacks executive unity; it is a pyramid without a peak. While it must be admitted that it is better to distribute power among five than among fifty-five, responsibility still remains divided. Also the plan does not encourage the use of experts; rather, starting with the department head himself, it promotes amateur administration. Since many cities cannot afford both an elective commissioner and an expert at the head of various administrative departments, they take the elective commissioner. While the elective official might serve well as a responsible officer, he may lack entirely the qualifications of a technical administrator. Moreover, the plan failed to

carry to its logical conclusion the principle of the concentration of power. As contrasted with the mayor-council system, the commission plan represents an attempt to change the form of government but not the detailed functioning and the methods followed in the government.

The City Manager Type. While cities were groping for a satisfactory plan of government, Staunton, Virginia, developed a new plan in 1907. From this point the city manager plan of government has spread widely, and has been accepted by students of government as the most perfect system of municipal government yet devised.[1] In Staunton, in 1907, certain repairs were needed on the waterworks. The council advertised for bids, but rejected all of them because they were considered too high. More or less by accident a councilman discussed the matter with the maintenance engineer of a railroad, who offered to do the work for much less. He was given the contract, and his success raised the question as to whether similar savings would not be possible if more businesslike methods were applied to the government generally. This engineer became city manager of Staunton and served for two years.

Little attention was paid to the new plan until 1913. At that time, because of a flood of the Miami River, extraordinary methods became necessary in the government of Dayton, Ohio. Suffice it to say, a charter commission drew up a new charter for the city and a colonel in the National Guard was appointed as manager. From Dayton the new form spread rapidly until at the present time there are some five hundred cities and a dozen counties in the United States operating under the manager plan of government.

The manager plan restores the council to its original position as a legislative agency. In addition to exercising its traditional powers of policy determination, the council appoints a manager who is given complete charge of the administration. The mayor is retained but he becomes the political head, while the manager is the chief administrator. The city manager plan provides for a concentration of legislative power in the hands of the council, with a separation of legislative and administrative functions between the council and the manager. It makes use of the short ballot for the selection of the small council, and a single expert administrator.

[1] For discussion of the manager plan of government see Griffith, E. S., *Current Municipal Problems;* Ridley, C. E., and Nolting, O. F., *The City Manager Profession;* Taft, C. P., *City Management: The Cincinnati Experiment.*

A New Profession — The City Manager. The development of the plan has brought into being a new profession — that of city manager.[1] This profession has its own international organization and its own code of ethics, and is as much a profession today as medicine or law. While the plan is not perfect, it affords the best solution to date for problems of municipal administration. It may be observed that it represents the nearest approach to a parliamentary system of government in the United States, in that the administration is responsible directly to the legislature for its actions and is subject to control by the elective representatives of the people. The legislative body determines what shall be done and leaves the method to expert administration.[2]

OTHER URBAN ADMINISTRATIVE AGENCIES

In addition to the city, there are other urban administrative agents which deserve mention. These urban or semi-urban areas are not incorporated as cities but are usually designated as boroughs or villages. The plans of government followed in these smaller urban areas correspond closely to those described above, except that the procedure is more informal.

RURAL ADMINISTRATIVE AGENCIES

The County.[3] There are more than three thousand counties in the several states of the Union. As a governmental agency the county is found in all states except Rhode Island.[4] The number per state varies from 3 in Delaware to 254 in Texas. In recent years the necessity for the continued existence of the county as such has been questioned. In defense of the county it should be said that the state, of which the county is an integral part, does not have a sufficient administrative organization to do its necessary work. The national government uses its own agents in tax collection, law en-

[1] White, L. D., *The City Manager.*

[2] The various matters with which municipal administration deals, including safety, health, public utilities, education, social welfare, and public works, are discussed in Parts VIII and IX.

[3] The standard texts on county government are Porter, K. H., *County and Township Government in the United States;* Fairlie, J. A., and Kneier, C. M., *County Government and Administration;* and Bromage, A. W., *American County Government.*

[4] Anderson, W., *Units of Government in the United States;* Manning, J. W., "The County in the United States," *Southwest Review,* vol. 20 (Spring, 1935), pp. 303–318.

forcement, and the exercise of other functions, but the state in performing similar services must depend upon local officers, especially those in the county. In their continued use of the county as an administrative arm of the state the American people are expressing their belief in the principle of administrative decentralization.

Legal Status of Counties. The American county has a legal position wholly subordinate to the state. The early Anglo-Saxon shire, the forerunner of the American county, was a district possessing local autonomy. With the development of centralized government in England after the Norman conquest, the county was considered an administrative district of the central government. When the county as a governmental institution was transplanted to the western hemisphere, the same legal rule was applied to it. Today courts tend to hold to the principle expressed by Chief Justice Taney many years ago, when he stated that "counties are nothing more than certain portions of the territory into which the state is divided for the more convenient exercise of the powers of government."[1] Thus counties "exist only for the purpose of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are entrusted are the powers of the state."[2] As distinguished from municipal corporations, counties are called quasi-corporations and are brought into being by the sovereign power of the state without the solicitation, consent, or concurrent action of the people within the areas.[3]

County Governmental Organization. Generally county governmental and administrative machinery consists of a county board plus a considerable group of elective officers. In the south the original county board consisted of the justices of the peace and the county judge. This form of county organization has been abandoned in all states of the Union now except Kentucky, Tennessee, and Arkansas. In New York and those states that have since adopted the New York model, the county board is composed of township representatives and is designated the county board of supervisors. In Pennsylvania and the states that have followed the Pennsylvania model, the board is composed of from three to five persons elected

[1] *State of Maryland v. Baltimore and Ohio R. R. Co.*, 3 Howard 534 (1845).
[2] *Maddenn v. Lancaster County*, 65 Federal Reports, 188, 191, 12 C. C. A. 566 (1894).
[3] *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 109 (1857).

at large, and is called the county board of commissioners. The county board is the governing body of the county and possesses all power delegated to the county which has not been given specifically to another agency.[1] Thus county organization does not provide for the separation of powers. The county board serves both as the county legislature and as the county administrative head. In addition to the board there are usually numerous elective officers, including the sheriff, the county judge, the tax collector, the auditor, a variety of clerks, the county attorney, the coroner, the surveyor, and a group of minor functionaries. In many cases these officials are paid on a fee basis and are elected in a strict partisan election.

Financial Officers. Generally county officers may be grouped in the following classes: financial officers, peace officers, and clerical officers.[2] The financial officers include the assessor, the treasurer, the auditor, and in some cases certain clerical officers. In most states the assessor is elected by popular vote. It is his duty to assess property for both state and local purposes. Since he is an elected official, it is not expected that he will use recognized scientific methods of assessment. Desiring to be reëlected, many assessors constantly strive to make low assessments. Gross inequalities in the valuation of property result from this political administrative work, and the county and state must set up agencies of equalization. Scientific assessment would virtually eliminate the necessity for equalization.

The treasurer is elected in some states and appointed in others. He collects and disburses county funds upon order. In many states, especially those in which he is appointed, he is merely a custodial official. In some of these states he has little to do with the collection of taxes since this matter is handled by the sheriff. He simply receives money on proper vouchers and pays it out on order of the county board.

The county auditor is found in about one-third of the states of the Union. In most instances he is elected by popular vote and receives fees rather than a salary for his services. His functions are to examine bills and claims and determine whether they are proper

[1] For a good brief discussion of the organization of county boards see Fairlie, J. A., and Kneier, C. M., *County Government and Administration*, pp. 108–118.

[2] See Porter, K. H., *County and Township Government in the United States*, pp. 136–138.

and legal before they are passed upon and approved by the county board.

The County and the Administration of Justice. Traditionally the county is a unit for the administration of justice. There is, of course, no such thing as county justice or county law. Justice is a state function and the county simply acts as an arm of the state in administering it. The chief county official for the administration of justice is the sheriff. This officer is elected by the people and in most cases is paid fees for his services. He is a descendant of the shire reeve of Anglo-Saxon England, who was a law enforcer, court attendant, and custodian of the royal estates.[1] In some states the sheriff has similar functions today. The modern equivalent of his duties as custodian of royal estates is his function as tax-collector in certain states. More characteristic of the office are his duties as conservator of the peace and executive officer of the local courts. As conservator of the peace he makes arrests and preserves the peace generally. His jurisdiction is county-wide. Numerous charges have been brought that the sheriff has failed miserably as a peace officer, and it is alleged that the office is declining in importance. It seems to be true that the sheriff, with his limited powers, is unable to cope with the modern criminal, who is no respecter of the county boundary lines which the sheriff must observe. The solution seems to lie in adequate state police forces such as many states have established in recent years. The establishment of such a state law-enforcing agency naturally and inevitably has the effect of decreasing the importance and the work of the sheriff.[2] In fact, it is not too much to expect that the office of sheriff will decline until he exercises only his functions as an officer of the court.

Another important peace officer is the county attorney, who is primarily a judicial officer and a prosecutor, but in addition renders legal advice to other county officials. He is part and parcel of the state court system but, in harmony with the recognized principle of administrative decentralization, remains a locally elected official.

Many states of the Union retain the ancient office of coroner, whose duties are chiefly concerned with matters of law enforcement. At one time in the history of English local government the coroner served an important function. Today, however, the office is a polit-

[1] Fairlie, J. A., and Kneier, C. M., *County Government and Administration*, pp. 4–8.

[2] Lancaster, L. W., *Government in Rural America*, ch. 8.

ical pawn sought by undertakers and persons who use it for personal advancement, giving little attention to assisting in the law-enforcing process. Undoubtedly there is need for putting this function in the hands of the prosecutor and giving him authority to employ a competent medical examiner. This has been done in some cases.[1]

Clerical Officers of the County. The clerical officers of the county include clerks, registers of deeds, and others. In some states the county clerk performs numerous duties. He may be the clerk of the county court, collect certain licenses and fees, and perform numerous other clerical duties. In most cases he is elected by popular vote, and unfortunately seeks his office as a member of a political party. His duties are distinctly ministerial in nature, and his election by popular vote violates well-known short ballot principles. Other clerical officers of the county, such as the registrar of deeds, the surveyor, and the trustee, perform duties indicated by their titles.

Reorganization of the County. H. S. Gilbertson has called the county "the dark continent of American politics."[2] In recent years much time and study has been given to the organization and operation of this local unit. It has been pointed out that the county needs considerable overhauling. Both external and internal reorganization have been proposed. Such suggestions are made because of high governmental cost and poor services.

County Consolidation. The number of counties in the United States has been the cause of much comment. It has been pointed out frequently that there are too many counties in the several states, yet in recent years there have been but two instances of county consolidation – in Tennessee in 1919, and in Georgia in 1931.[3] Territorial consolidation of the county appears to be impossible because of the sentimental opposition of local loyalists and the selfish opposition of county officeholders; accordingly some attention has been given to functional consolidation. This type of merger affects only a limited number of functions at a time. It is sometimes possible to merge two or more counties for health administration or for school administration, for example, without encountering the oppo-

[1] Schultz, O. T., and Morgan, E. M., *The Coroner and the Medical Examiner.*

[2] *The County: The Dark Continent of American Politics.*

[3] Manning, J. W., "County Consolidation in Tennessee," *American Political Science Review*, vol. 22 (Sept., 1928), pp. 733–736; Manning, J. W., "The Progress of County Consolidation," *National Municipal Review*, vol. 21 (Aug., 1932), pp. 510–515.

sition which would develop from merging two county governments completely.[1] Undoubtedly some counties are too small for the efficient performance of certain service functions. Consolidation to make the area of control coterminous with the objects to be controlled or increased state centralization seems to be the issue.

Internal Reorganization of the County. Internal reorganization of the county has followed much the same course as municipal reorganization. In some states counties have been classified according to population, and optional forms of county government have been provided for the various classes. Some states even permit the counties to adopt home rule charters.[2]

Certain students of local government are inclined to believe that these movements furnish the best solution of county problems. Others say: "Why try to make the county a self-governing unit when there is nothing to govern? We might as well admit the inevitable, and prepare for state control of all functions now allocated to the county." On the other hand it has been suggested that, so long as the counties continue to exist, something should be done to cause them to function more efficiently. At least some attention could be given the duplications of city and county functions within the same area; and, in fact, serious attempts have been made to bring about needed coördination in metropolitan districts.[3]

The Town. In addition to the county there are other rural administrative agents which should be discussed. In the New England states the town is an important unit of local government, while in other states the township serves local purposes.[4] The New England town is a unit of government containing not only the urban population of a particular region but also considerable rural territory surrounding a town proper. Thus the town is an economic unit

[1] Hammer, C. H., "Functional Realignment vs. County Consolidation," *National Municipal Review*, vol. 21 (Aug., 1932), pp. 515–519.

[2] Miller, E. J., "A New Departure in County Government," *American Political Science Review*, vol. 7 (1913), pp. 411–419; Wanless, W. L., "County Home Rule in Maryland," *National Municipal Review*, vol. 8 (1919), p. 259; Moses, R., "Home Rule for Two New York Counties," *National Municipal Review*, vol. 11 (1922), pp. 5–7.

[3] Studensky, P., *The Government of Metropolitan Areas in the United States;* Merriam, C. E., Parratt, S. D., and Lapawsky, A., *The Government of the Metropolitan Region of Chicago.*

[4] For a good brief discussion of the town and township see Fairlie, J. A., and Kneier, C. M., *County Government and Administration*, chs. 20–21; Porter, K. H., *County and Township Government in the United States*, chs. 6, 16.

with a homogeneous population. Its governmental organization consists of a board of selectmen endowed with administrative functions and responsibilities comparable to that of a city council, as well as with the general administrative direction of all town affairs.

In the New England town there is no single executive, although in recent years there has been a tendency for the board of selectmen to appoint managers who have taken their places along with city managers. In addition to the selectmen there are numerous minor officers such as clerks, recorders, tax collectors, assessors, and a retinue of judicial officers.

The distinguishing characteristic of a town is the town meeting, which is the nearest approach to direct democracy that has been devised in the United States. The town meeting is still a feature of the New England town, but with the increase of population, which makes the successful functioning of town meeting almost impossible, this democratic agency has tended to disappear.

The Township. In the central states the township assumed some importance as a local administrative unit. The township is an artificial area consisting of thirty-six square miles, laid out by the surveyor, and is endowed with the power of performing certain state, county, and local functions. In many cases the township is the subdivision of the county, but a subdivision to which has been delegated certain more or less distinct local functions. The chief administrative authority of the township is the board of supervisors or trustees. In some states there is a single supervisor, while in others there are relatively large boards. Like the county, the township for the most part has no single administrative officer. In addition to the board there is usually a group of independent officers consisting of the clerk, the treasurer, the highway supervisor, and certain school authorities. The chief functions performed by the township are the maintenance of local highways and the operation of the township school system.

Special Districts. In the several states there are found numerous special administrative districts. Some of these may be designated as single purpose districts, while others perform multiple duties. The single purpose districts are illustrated by school districts, drainage districts, road districts, and districts for the operation of public utilities. The managing agent, whether it be a board or a single official, is usually appointed by the county board, although it may be selected by the governor or even be elected by the people of the

district. In any event the functions of the board are primarily administrative, although its duties may include certain forms of legislative rule-making. These special districts, in spite of the service rendered, have added to the confusion of local governments. Many of the districts have been created in order to avoid certain constitutional debt limitations imposed upon counties or cities. In other cases these districts are established for the purpose of eliminating partisan political methods in the administration of special functions.

QUESTIONS

1. Compare and contrast the legal status of the city with that of the county.
2. Is the city primarily an administrative or a political unit? Prepare arguments for each contention.
3. What form of government is used in your city? Prepare a chart of your city government.
4. What are the points of likeness and difference between city manager and parliamentary government?
5. Prepare a chart showing the form of government used in your county.
6. Is there any reason why the county should be called "the dark continent of American politics"?
7. What administrative functions performed by the county are actually county functions and what functions are state functions?
8. What are the lines along which county reorganization has proceeded? What is the future of the county as an administrative district?

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CHAPTER XIX

The Public Service

IMPORTANCE OF PERSONNEL

In previous chapters we have discussed the administrative structure of the several units of government and the higher executive and administrative officers. Attention should now be given to the equally important human side of administration – to the more than three million employees of the national, state, and local units who do the routine work of government which the average citizen sees, and who render the day-to-day service by which the public appraises the work of government. No discussion of administration is complete without consideration of this type of public servant, for servant he is. It is important to know how he gets his job, what his chances for promotion are, how he is disciplined, and upon what basis, if any, he is retired after a career of service to the people.[1] The personnel problem is practically the same in all units of government, but personnel systems have developed differently in the several units, and in the public mind the federal administrative employees are considered apart from their co-workers in the state and local units. We shall consider first the national civil service, and then personnel problems as they are found in the state and local governments.

THE NATIONAL CIVIL SERVICE [2]

The Spoils System. To an alarming extent the public service of the United States has been recruited through the spoils system, and

[1] Good general works on public service personnel include Mosher, W. E., and Kingsley, J. D., *Public Personnel Administration*; *Better Government Personnel* (Report of Committee of Inquiry on Public Service Personnel); White, L. D., *Introduction to the Study of Public Administration*; White, L. D., *Civil Service in the Modern State*; Pfiffner, J. M., *Public Administration*, chs. 8–12; Walker, H., *Public Administration*, ch. 5.

[2] Excellent recent studies of the national civil service are: *Report of the President's Committee on Administrative Management*, and Merriam, L., *Personnel Administration in the Federal Government*. Earlier studies include Fish, C. R., *The Civil Service and the Patronage*; Foulke, W. D., *Fighting the Spoilsmen*; Mayers, L., *The Federal Service*.

it was not until about 1880 that any significant action was taken to correct the situation. The spoils system has meant that the selection, promotion, and dismissal of public employees have been determined by party allegiance. Jobs have been used to control the government by the party in power, and the emphasis has been placed on the job rather than on service. Under such a system a person's eligibility for a public position depends not on what he knows, but rather on whom he knows.

The impression prevails that the spoils system was a doctrine of the founding fathers. This is not true. Washington's appointments were made without regard to party, and he resented the idea that offices should be dispensed as political favors. His policy was based on three considerations: (1) geographical factors, (2) efficiency, and (3) popular preference. This means that Washington was interested in having employees selected from all parts of the country, in securing efficient employees, and in choosing persons who would be approved by the people concerned. In Washington's second administration, even though the same general principles were more or less closely followed, some preference was shown to the Federalists. The same general policy was followed by Adams, but the election of Jefferson was the signal for patronage seekers to make every effort to replace Federalists with Republicans. Jefferson was disturbed over the pressure brought upon him by office seekers, and was not willing to make wholesale replacements. Early in his administration he announced that he would follow a policy of equilibrium whereby, when vacancies occurred, one-half of the jobs would go to Republicans and the other half to Federalists.

In the minds of most people Jackson is held chiefly responsible for what we know as the spoils system. Jackson has been named the father of the system not because he dismissed many officeholders but rather because dismissals under him were made ruthlessly. He publicly announced the policy of distributing partisan favors. The spoils system was not a Jacksonian invention, for it had been used in many of the states for years before. Jackson's philosophy, however, tended to coincide with the principles of the spoils system. He was a representative of the rugged class "who believed that the people should rule in fact as well as in theory." [1] The difficulty then as now lies in the fact that many people fail to realize that policy determination and policy execution require different qualifications.

[1] Johnson, C. O., *Government in the United States*, p. 519.

While it may be admitted that the Jacksonian principle of short terms and rotation of office, and the Jacksonian belief that any man of average intelligence is capable of filling any office, may be applied to policy-determining officials, no defense can be made of it for ministerial or non-policy-determining employees. There may be a Democratic or a Republican policy, but there is no Democratic or Republican method of executing that policy.

There is a more practical reason for the development of the spoils system under Jackson. The followers of the Hero of New Orleans were men of small means and, unlike those of his predecessors, could not give their time to the work of government without compensation. Politics had to pay – and it has been made to pay ever since.

The Beginnings of the Merit System. With the exception of occasional demands for reform the spoils system held almost undisputed sway in the national government until the Pendleton Act of 1883. The Pendleton Act is the basis for the present personnel system in the national government and has been followed in several states and local units. The chief features of the act are as follows: (1) the civil service is divided into two parts, classified and unclassified; (2) entrance to the classified service is by open and competitive examination only; (3) preference in appointments is given war veterans; (4) employees in the classified service are not permitted to participate actively in politics; (5) a bipartisan Civil Service Commission is set up to administer the merit system. In 1883 only about 13,000 of the then 181,000 federal employees were found in the classified service. Every President, however, has added to the classified list, and Congress itself has placed certain groups, such as the employees of the Census Bureau in 1912 and those of the Prohibition Bureau in 1927, under the classified civil service. The last large group to be brought into the system was the postmasters of all classes in 1938.

While it appears to be the plan of the Roosevelt administration to extend the merit system to more and more federal employees, there remains much room for improvement.[1] In 1933, approximately eighty per cent of the federal administrative employees were in the merit system, but with the creation of various emergency agencies and the addition of employees to the national service since then,

[1] By executive order effective February 1, 1939, President Roosevelt placed all employees of permanent agencies of the national government in the classified service.

the merit system in 1937 included only about sixty per cent of all federal employees.[1] The proposals of the President's Committee on Administrative Management would extend the merit system upward, outward, and downward to include all except the policy-determining officers of the government.

Arguments for the Spoils System. The most logical argument for the spoils system is based on the assumption that ours is a government by political parties.[2] It is contended that political parties are necessary in a democratic government, and that party cohesion must be fostered through the bestowal of jobs in the party's interest. Thus it has been assumed that patronage is the price of democracy. This philosophy has been responsible for the defeatist attitude of good citizens and has prevented their taking serious steps to eliminate the spoils system. It should be stated that this argument is fallacious. There are, to be sure, numerous areas of political activity where parties are supported and sustained by patronage, but there are also other units of government in the United States as well as in most of the democracies of the world, where democracy exists, political life is maintained, and parties thrive without the spoilation of the appointive services. Theodore Roosevelt once observed that patronage is the curse of politics and the selling-out price of democracy, because it turns a political party into a job brokerage machine and creates a mercenary army of occupation which, under the guise of democracy, robs us of self-government.

There are numerous other arguments for the continued use of the spoils system, most of them less logical than the foregoing. Spoilsmen usually defend themselves by asserting that it is right and logical, when the people place their stamp of approval upon a political party, that that organization should be given complete control of administration, and that all who are not strict party workers should be removed to make way for the more faithful. This argument fails to distinguish between the necessity for preserving political parties, which are essential elements of democratic government, and the desirability of recruiting personnel on the basis of their competence for the work to be done, regardless of party or policy.

[1] "Government Organization," *Senate Report* No. 1236. 75th Congress, 1st Session, Aug. 16, 1937.

[2] Arguments for the spoils system, with answers to them, will be found in *Better Government Personnel*, pp. 16–22.

Another false notion is expressed in the phrase, "To the victor belong the spoils." This argument presents a major misconception of popular government. Offices do not belong to any group of people, but to all the people. "Public office is a public trust" and not an object of private spoilation. What difference does party allegiance make in the efficiency of a stenographer, revenue agent, or welfare worker? Vice-President Marshall once remarked: "If there is any office under the government which a Democrat cannot fill, I believe that office should be abolished." [1] Undoubtedly this expresses the idea even today of many strict partisans, who put party above public service. In spite of its continued use, the spoils system has never received universal approval. From the establishment of government on this continent, leading statesmen have testified to its weakness and absurdity.[2]

Advantages of the Merit System. The merit system of selection is practicable only for non-policy-determining officers and employees, but it has decided advantages for this ministerial group of public servants. These advantages may be summarized as follows: [3] (1) it removes the demoralizing effects of actual or threatened party turnover with each change of administration; (2) it tends to prevent the assessment of officeholders for political purposes; (3) it tends to promote the public service rather than the political party; (4) it encourages the employee to give his best with some guarantee of tenure as long as good service is rendered; (5) it tends to transform the public service into a career or profession; and (6) it is the only means of promoting and producing the good morale which is essential to the public service.

Divisions of the Civil Service. The civil service under a merit system is divided into two parts, as explained before – namely, the classified and the unclassified service. The unclassified service consists of the policy-determining officers such as department heads, assistants, ambassadors, and confidential secretaries. Also in this class are placed the employees in the lower ranks, such as laborers and unskilled workers, where the only proper test for appointment is physical fitness. The great middle group of public employees logically fits into the classified service. They determine no policy, but do

[1] Foulke, W. D., *Fighting the Spoilsmen*, p. 225.
[2] *Better Government Personnel*, p. 16.
[3] Johnson, C. O., *Government in The United States*, p. 522.

the routine administrative work of government and are presumably parts of the permanent establishments. In discussing the merit system we must confine our remarks to the classified service.

Organization for Operation of the System. The Pendleton Act set up a bipartisan Civil Service Commission of three members appointed by the President with the advice and consent of the Senate. Some of the outstanding men of their time have served on this commission. The United States Civil Service Commission works under the general direction of the President. It proposes rules and regulations for personnel management; it prepares and administers civil service examinations, eligibility lists, and probation; it protects employees from political pressure and makes investigations and reports on personnel operations in the federal government. The commission maintains a central office in Washington and field offices in the larger cities over the country. It has under its control six divisions and two boards — namely, the divisions of editing and recruiting, examining, investigations, research, service records and retirement, and correspondence; and the boards of personnel classification, and appeals and review.

Recruiting of Employees. One of the major functions of the commission is the recruiting of employees in the classified service. This is done by means of competitive examinations. In the United States there is no civil service examination as such, but rather a separate examination for each type of position to be filled. All told, more than 1,700 varieties of examinations are taken each year by more than 300,000 applicants, of whom about 30,000 receive appointments. American civil service examinations are designed as tests of practical knowledge, as contrasted with the academic tests used in England. United States law requires the examinations to be practical in character and to "relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed."

There is another difference between the American civil service examination and the English type. In England the competitive principle is extended almost to the top of the service. Public service is looked upon as a career, where the chief objective is to place in the service the best possible personnel, who will spend their lives in the public employ. Accordingly, English examinations are devised

chiefly to determine general fitness for the service, especially intellectual capacity, rather than fitness to perform the work of any particular position. The English examination tends to be a classical examination, as contrasted with the practical test now in use in the United States. The American attitude toward the public service differs from the English, and the examinations harmonize with the personnel policies of the two countries. In the United States, public service unfortunately has not been looked upon as a career. We recruit for a particular job to be held for a short period, and pay little attention to recruiting employees for the general public service upon a permanent basis.[1]

The result of these two policies is significant. In England the service attracts a highly educated group of young men and women, and it has had little difficulty in securing the best of the group. These are not trained for a particular job, but it is assumed that they are capable of acquiring particular administrative techniques after recruitment. From time to time demands have been made that the United States service be placed on a career basis. To do this, a new recruiting policy must be adopted. It is significant that certain attempts have been made in this direction. A few years ago the United States Civil Service Commission announced examinations for junior civil service examiners. More recent examinations were given for various grades of junior administrative assistants. Recruitment of these two types of positions through examinations indicate some tendency to place the federal service on somewhat the same basis as the British service.

Civil Service Examinations. Two general types of examinations are given for entrance into the civil service: assembled and unassembled. When the average American thinks of civil service examinations he has in mind the assembled type. When such examinations are given, all candidates for certain types of positions assemble at designated places at stated times and submit themselves to examinations which are usually written. The unassembled examinations are becoming more popular and numerous with the development of positions in the public service which demand more training and a greater degree of technical skill. Under a system of unassembled

[1] A good discussion of the British civil service will be found in White, L. D., *Civil Service in the Modern State*, and in Walker, H., *Training Public Employees in Great Britain*. Also see Moses, R., "The Civil Service of Great Britain," *Columbia Studies in History, Economics, and Public Law*, vol. 17 (1914), no. 1.

examinations applicants for the higher posts are not required to report at any time or place for formal examinations. Usually they take no examination at all, but are required to submit data respecting their qualifications to the Civil Service Commission. This information is evaluated and passed upon by examiners, and eligible lists are devised from these ratings. Many positions in the public service, especially those of a highly technical nature, can be filled better by the unassembled examination than by the regular assembled type since the qualifications needed for many of these positions cannot be tested by means of a written examination.

Civil service examinations are usually competitive, although they may be non-competitive in certain cases. The non-competitive examinations constitute what is called a "pass" system. In some cases such a system is little better than no examination at all. There are instances, however, in which non-competitive examinations can be used satisfactorily. For example, when postmasters were brought under the merit system in 1938, the non-competitive system was used, and apparently it was fair to apply it to postmasters already in the service. In recruiting for the service generally, use of the competitive examination is the first principle of a sound merit system.

Appointments. All who pass the examinations with a grade of 70 or higher are placed on an eligible list. When a vacancy occurs in the proper type of position, the appointing officer must fill the vacancies from the three highest on the list. The remainder of the list stays the same until its expiration, or until another examination is announced. Some questions have been raised as to the soundness of this practice of allowing a choice among the first three on the list. No examination is conclusive as to the applicant's fitness. Personality, adaptability, and other important traits cannot be tested formally; hence it is only reasonable that the appointing officer be allowed some leeway. Undoubtedly this discretion has been abused, but on the other hand it may be used to advantage by conscientious officials. Every appointee is put on probation for six months, after which, if he is retained, his appointment becomes permanent.

Certain other restrictions have also been placed on appointments in the classified service. First of all, the law requires that "as nearly as the conditions of good administration will warrant" appointments shall be made among the states on the basis of population. It is often difficult, if not impossible, to follow this geographical principle of appointment. The North Atlantic states usually receive an excess

of federal appointments, while other sections of the country seldom have their proportionate share.

Another restriction is seen in the preference given to war veterans. Every civil service law enacted in the federal government has offered concessions to veterans and the wives and widows of veterans. In all civil service examinations able-bodied veterans are given a five-point advantage while disabled veterans, together with their wives and widows, are given a ten-point advantage.[1] While few would deny that veterans should be shown some consideration by the government for which they fought, it should be stated that veterans preference in the civil service constitutes a definite denial of the merit principle. It has been frequently stated that it would be cheaper in the long run for the United States government to give the veterans a direct grant or increase present pensions than to burden the service with persons incapable of performing the work required.

Classification. Personnel administration involves more than recruitment. It is also concerned with classification, promotion, removal, transfers, service ratings, and training. One of the most important features of any large-scale personnel system is the classification plan. Such a scheme divides all positions into classes and grades in order that the same compensation may be given for the same work, regardless of departments or divisions. Proper classification is a vitally important element of morale. If no such plan is provided, persons doing identical work may be drawing widely varying salaries. Such a situation can only produce employee dissatisfaction.[2]

In 1923, after several reports and recommendations from congressional committees, Congress passed a classification act which, even though it did not follow the exact recommendations of the committee, paved the way for adjustment of salaries to positions and rectified many of the existing inequalities in the system. The act set up a personnel classification board composed of the director of the budget, one member from the Civil Service Commission, and the chief of the bureau of efficiency. This board was given the duty of making inventories of personnel in Washington, grouping together

[1] *The Report of the United States Civil Service Commission* (1931) shows that about one-fourth of the civil service employees appointed in recent years are from the veterans classification.

[2] See Mayers, L., *The Federal Service*, pp. 190–191.

all positions of like nature in the service, and determining appropriate salary ranges for each class of position. Regular salary increases were provided in each class and grade, to be made upon the basis of efficiency ratings. The board was authorized to survey the field service and report its findings to Congress. In 1924 the House passed a bill to abolish the board, but it failed to pass the Senate. The classification board remains, but it has not been given jurisdiction over the field positions in the public service. Unfortunately the United States is still without a classification plan worthy of the name.[1]

Promotions. An adequate system of promotion is another essential of any satisfactory civil service system. It is helpful to both the service and the individual employee.[2] Like classification, promotion constitutes a large and significant element in the whole problem of morale. The public service as a whole, or any part of it, is just as good as the morale of its members, and no better. Esprit de corps can exist only when the employees feel that their efforts are being rewarded and that all are being treated fairly. Thus it is important that a proper basis for promotions be established.

There is a natural inclination to follow the rule of seniority in this regard. Under such a system length of service, and not the fitness of the individual employee, is the only consideration in elevating a person to a higher position. Such a system may and often does mean the placing of "square pegs in round holes."[3] The Pendleton Act provided for promotions after examinations. Experience, however, has demonstrated that examinations are not the most satisfactory method of promoting. Rather, an employee's record constitutes the best basis for determining his fitness for a higher post. Accordingly Congress in 1912 required the Civil Service Commission to institute a system of efficiency ratings for the classified service in Washington. The field service was not included. At present these ratings, along with the examinations which are held, constitute the basis for promotion in the federal service. In spite of the fact that the United States civil service has the essential legal basis for a comprehensive

[1] See *Report of Special Committee on the Personnel Classification Board*, 68th Congress, 1st Session, House Report No. 315 (1925); *Report of Wages and Personnel Survey*, 70th Congress, 2nd Session, House Document No. 602.

[2] An excellent discussion of the problem of promotions in the federal service will be found in Mayers, L., *The Federal Service*, ch. 8.

[3] Dimock, M. E., *Modern Politics and Administration*, p. 309.

system of promotions, the commission has done relatively little about promotions in the service, and has left the matter largely to the several departments.

In any discussion of promotions the question of whether vacancies are best filled by promotion from the ranks or by recruitment from outside must be considered. At present, in the national service, there is no uniform policy. In some instances positions are open alike to those in and those outside the service. On the other hand, some positions must be filled by promotions from the lower ranks; the medical corps of the public health service is an excellent example of this closed system of promotions. In practice, other departments have followed the principle of filling upper-grade positions by promotions from the lower levels, in spite of the fact that there is no legal mandate for such action. This is true in the postal service, where all the employees except the chief officers enter the service as clerks or carriers, with the hope of ultimate promotion to higher grades. The closed system is generally approved by students of personnel administration, but some writers have pointed to the dangers in it. It has been stated that "promotion from within the service is preferable, because it gives the prize to those who have given their lives to the enterprise; however, if the organization has grown stagnant or exhibits ingrowing symptoms, it may be wise to infuse new blood from the outside." [1]

In the federal service a great deal of work is needed on the matter of promotions. A definite policy should be determined and followed. At present, since promotions are largely in the hands of politically appointed department heads, political considerations enter into them. If the merit system is to be observed throughout, promotions as well as recruiting should be on the basis of merit.

Discipline. A regularly established system of discipline is necessary in any form of enterprise, private or public. Little difficulty on this score is encountered in private business, but the government, since it is the business of all the people, has followed a "go easy" policy. Many employees have influence with Congressmen and other political officials; hence department officials are inclined to allow the service to remain below standard. Furthermore, the profit motive which dominates private business, and which is a strong incentive for rigid employee discipline, is absent in govern-

[1] Dimock, M. E., *Modern Politics and Administration*, p. 309.

ment. To be sure, administrative departments may, and often do, apply certain methods of discipline, but they are usually of a lenient type.

For discipline to be effective, administrative authorities must have the power of removal. It is just as important to rid the service of unfit employees as it is to secure qualified persons for it. Many people are distrustful of the merit system as it exists, because practically all attention has been centered on recruiting and none on discipline. A satisfactory merit system should provide both. Of course, administrative officials should not be free to remove employees because of personal differences; just cause must be given for such action. Congress in 1912 enacted a law that no persons in the classified service may be removed "except for such cause as will promote efficiency of said service." An adequate system of service ratings should be the best indication of the efficiency or inefficiency of an employee. Discipline of all types might well be based upon service ratings.

Protection from Political Interference. While employees in the states and in local units are subjected to all sorts of political pressure, members of the federal classified service are reasonably well insulated against partisan politics. This is one of the most fortunate aspects of the federal service. The law definitely prohibits employees from engaging in partisan activities, but civil service rules allow an employee to vote as he sees fit, and to express his opinions privately. However, the rules restrain him from using his official authority to influence or coerce the political action of any person. Employees in the classified service must not take part in political campaigns, nor hold office in political organizations. They may not become candidates for public office, nor attend as a delegate any party convention, nor work at the polls, distribute literature, or bet on elections. Furthermore, the law prohibits any officer of the United States, except the President, from soliciting or receiving political contributions from employees. The Civil Service Commission is authorized to investigate instances of alleged violation, and has shown some activity in this regard. There is nothing in the law, however, to prevent a party, through someone other than an officeholder, from soliciting contributions or coercing employees. The law needs to be strengthened to prohibit solicitation by anyone. It has been charged that the rights of the employees as voters and citizens has been restricted by the civil service rules, but such restric-

tions are necessary, so long as classified employees work under the supervision and control of politically appointed department heads, to prevent constant coercion. By the enactment of the Hatch Acts of 1939 and 1940 the same general restrictions which were previously applied to the political activities of federal employees have been extended to cover state employees paid in whole or in part from federal funds. This means the political activities of many state highway, welfare, and health employees have been definitely limited. Heavy penalties, among which may be the withdrawal of federal funds from state enterprises, have been imposed by these acts.[1]

Public Employee Organization. A definite labor consciousness has been developing among civil servants. The National Federation of Post Office Clerks and the Railway Mail Association are large and powerful groups. In 1917 the National Federation of Federal Employees was organized. It proposes to include in its membership all federal employees except postal employees otherwise organized. Out of a dispute with the American Federation of Labor in 1931, the American Federation of Federal Employees was formed. Along with others, it has advocated the maintenance and extension of the merit system, the improvement of working conditions, increased salaries, extension of classification, and adequate pensions.

Undoubtedly these organizations have had the effect of extending the merit system and of building up morale in the service. Some questions have been raised, however, as to the propriety of public employee organizations affiliating with organized labor. Such affiliation has improved the lot of employees, both as to hours and as to wages. Since 1912 postal employees have been affiliated with the American Federation of Labor. There is a general feeling that public employees have a right to affiliate but not to strike, which naturally has the effect of weakening them as allies of organized labor. It should be added, however, that there is no unanimity of opinion on questions of labor affiliation. Some people say that such affiliation confuses industrial and political questions, and makes employees selfish in their demands. Others argue that such organization is necessary, since public opinion is not strong enough to insure just treatment of employees. A compromise solution, resembling a company union, has been suggested, whereby councils composed of employees and administrators are formed to consider all matters relating to the welfare of employees. These councils are considered by some to be the best solution for the problem yet devised.

[1] Senate Document, No. 264, 76th Congress, 3rd Session.

Retirement. If morale is to be sustained, the establishment of a retirement system is necessary in the classified service. Such a system benefits both the employee and the service. Salaries in the public service are often low, and after a person has given his life to the service, as a matter of justice he must be provided for by a retirement allowance; otherwise he becomes a public charge or is dependent upon relatives. Provision for superannuation is also necessary from the viewpoint of the service itself. If there were no such system, administrative officers would be reluctant to dismiss aged employees and would keep them on regardless of ability to render service.[1] Without a retirement system, the public payroll becomes a charity list.

In an effort to meet the problems of superannuation, Congress passed a retirement act in 1920. Under it and the subsequent amendments to it there is set up a compulsory joint contributory pension system which includes all employees in the classified service, as well as some in the unclassified groups. The law fixes the age of retirement for various positions at 70, 65, 62, depending upon the nature of the work. Employees who have served for as long as thirty years may retire earlier, at 68, 63, or 60. Employees may be retained in the service four years beyond retirement age if their expert knowledge is advantageous to the government.

To maintain the pension fund established, all employees pay into it three and one-half per cent of their annual salaries. These payments, together with the amounts contributed by the government from time to time, provide an annuity at retirement. The amount of the annuity may not exceed three-fourths of the average salary received for any five years of service, and in no case must it exceed $1,200. If an employee has served less than thirty years but more than fifteen, he receives a smaller annuity, depending upon the average salary and the years of service. In addition to superannuation benefits, employees who after five years become totally disabled in service receive disability benefits. If an employee leaves the service before retirement, he receives all he has paid in, with interest at four per cent. The federal system is a cash disbursement type rather than an actuarial reserve type of retirement allowance. This means that all employees contribute proportional amounts to the fund, on the basis of their salaries, rather than on the basis of service

[1] Doyle, J. T., "The Federal Civil Service Retirement Law," *Annals of the American Academy of Political and Social Science*, vol. 113 (1924), p. 334.

expectancy, and at the end of the period receive proportional amounts. Experience shows that Congress is compelled to add increasingly larger sums to the account, because as groups grow older additional demands are made on the fund. It has been suggested that the system should be transferred to an actuarial basis corresponding to the regular annuity plans of commercial insurance companies. Suffice it to say, several cities of the United States are operating retirement systems of this kind, and have found that they are self-supporting.[1]

Needed Reorganization of the Public Service. Because of the obvious waste and inefficiency which result from unsatisfactory personnel practices, there have been numerous suggestions for reorganizing personnel management in the United States. In the first place, the classified service does not include all non-policy-determining employees of the government. In particular, it has not been extended to many persons engaged in the new emergency activities undertaken by the New Deal. Also, the United States Civil Service Commission has not been given either the authority or the necessary funds to enable it to meet the requirements of government agencies in recruiting quickly the large number of employees required in the emergency period. Many of these emergency organizations undoubtedly will become permanent agencies of the government. If they are to function satisfactorily it is essential that all the posts be filled with persons who are capable of performing efficient service.

Recommendations of the President's Committee. In 1936 the President announced the appointment of a Committee on Administrative Management. The committee made its report in January, 1937.[2] Among other things, it recommended that the merit system "be extended upward, outward, and downward to include all positions in the executive branch of government except those which are policy-determining in character." Also, it recommended that "the civil service administration should be reorganized into a central personnel agency under a single head and a nonpartisan citizen board appointed to serve as a watchdog of the merit system."[3] This was

[1] Mosher, W. E., and Kingsley, J. D., *Public Personnel Administration*, pp. 450–451.

[2] This committee was composed of three eminent political scientists: Louis Brownlow, Chairman, Charles E. Merriam, and Luther Gulick.

[3] *Report of the President's Committee on Administrative Management.*

indeed a startling recommendation, and if enacted into law it will constitute one of the major advances in American democracy.

The committee's recommendations may be briefly summarized as follows: [1]

(1) The merit system should be extended to positions in new and emergency agencies whose activities are to continue, and the President should be authorized to place such positions, including those in governmental corporations, in the classified civil service.

(2) The merit system should be extended to permanent high posts and all other civilian positions in the regular departments and establishments. Exceptions should be made only in the case of such of the highest positions as the President may find to be principally policy-determining in character.

(3) The merit system should be extended to the lowest positions in the regular establishments, including those filled by skilled workmen and laborers.

(4) The incumbent of any position which is placed within the classified civil service should receive civil service status only after passing a special non-competitive examination, following certification by the head of his agency that he has served with merit.

(5) All civilian positions in regular departments and establishments now filled by presidential appointment should be filled by the heads of such departments or establishments, without fixed terms, except undersecretaries and officers who report directly to the President or whose appointment by the President is required by the Constitution.

These recommendations were incorporated into a proposed administrative reorganization act in 1938. The chief objection raised by opponents of the proposed plan centered upon the transformation of the Civil Service Commission into a federal personnel administration. It was argued that such a scheme concentrated too much power in the hands of the President and placed the administrative personnel of the government under his complete control, allowing him, if he so desired, to use this large group of employees for partisan political purposes. The final reorganization act, which became effective in 1939, did not include these proposals for a reorganization of the personnel agencies of the government. The United States Civil Service Commission continues to be the governing body of the federal personnel system. (See page 408.)

[1] *Report of the President's Committee on Administrative Management*, pp. 8–9.

PERSONNEL ADMINISTRATION IN STATES AND LOCAL UNITS

Importance of Personnel in These Units. In view of the fact that personnel problems are much alike regardless of the unit of government in which they are found, it is unnecessary to devote a great deal of attention to personnel management in the states and local units. It should not be understood that these units are unimportant. As a matter of fact, the problems of state and local personnel are of as great importance as personnel problems in the federal government. While cities have made considerable progress in solving their personnel problems, states have been relatively slow to adopt the merit system, and conditions in the counties have remained practically untouched.[1]

Extension of the Merit System in the States. The spoils system existed in the states for many years before it was actively and openly operated in the federal service. As a matter of fact, the federal spoils model was adopted from the states. Two states, New York and Massachusetts, adopted civil service laws in 1883 and 1884, respectively. Nothing further of a tangible nature was done in the states until 1905. In that year Wisconsin and Illinois adopted merit systems, to be followed by Colorado in 1907, New Jersey in 1908, Ohio in 1912, California and Connecticut in 1913, Kansas in 1916, Maryland in 1920, Michigan in 1935, Arkansas in 1936,[2] and Minnesota, Rhode Island, and Alabama in 1939. Personnel management plans have been adopted in other states, but they should not be called merit laws. In some branches of government in some of the states, merit is used in the selection of employees. The personnel systems fall far short of the federal model in some states, while in others the plans are superior in many respects to the federal system. In some states, the plans started strong and ended weak, while in others the systems were strengthened as time passed. The Connecticut system began as a first-rate merit plan; later it was emasculated, and then repealed. In Kansas the law remains on the statute books, but it has been made inoperative by the withholding of necessary appropriations. In other states, however, merit systems have become significant features of the state government. Personnel

[1] National Civil Service Reform League, *The Civil Service in Modern Government*; Mosher, W. E., and Kingsley, J. D., *Public Personnel Administration*, ch. 2.

[2] The Arkansas act was repealed in 1939.

agencies in these states have become professional and have maintained high standards of personnel administration. In Maryland, for example, a single personnel director responsible to the governor and endowed with rather broad powers has replaced the civil service commission. Merit laws are made to function quite satisfactorily in California, Wisconsin, and other states. Recent acts in Minnesota and Rhode Island are said to be operating successfully. The Rhode Island plan has been pointed to as a model act incorporating the best thought on personnel problems. It has even been stated that this act incorporates these principles to a greater extent than the model act suggested by the National Civil Service Reform League.

It will be observed that fewer than twenty states have adopted merit laws. In the other states, employees are still selected on a spoils basis. The reason for this lack of attention to sound personnel administration in the states is obvious. Strong political machines continue to dominate the great majority of states, and these machines feed on spoils and maintain themselves by paying political debts with jobs. Wherever the people of the states have been given the opportunity to express themselves on the adoption of the merit system, the great majority have always favored the reform.

Merit Systems in Counties. Of the more than 140,000 county employees in the several states, relatively few are selected on a merit basis. In Maryland and New Jersey any county may, by popular referendum, place its employees under the control of the state civil service commission. In New Jersey not more than seven counties have taken advantage of this provision of the law; in Maryland no county has approved such action. Civil service laws in New York and Ohio place certain county employees under the supervision of the state commissions. In New York the great majority of county employees have been included in the state civil service system. In Ohio, however, relatively few such employees are included. The law exempts "deputies" from the operation of the merit provisions, and most of the persons employed in the counties are classed as such. In addition to these states, only about six counties in the entire United States operate merit systems of their own.[1]

Merit Systems in Cities. The cities appear to be in better condition so far as personnel is concerned than either counties or states. It has been estimated that approximately fifty-six per cent of the total urban population in the United States live in areas where some effort

[1] Mosher, W. E., and Kingsley, J. D., *Public Personnel Administration*, pp. 30–31.

is made to maintain a merit system.[1] Recently the National Civil Service Reform League stated that 284 cities either have independent civil service commissions or are served by state commissions. In addition to these, there are nearly one hundred cities which provide merit systems for their fire and police departments only. Nearly all the larger cities – those with populations of 250,000 and over – maintain personnel systems.

Personnel Organization in States and Local Units. Civil service organization in the states and local units corresponds closely to that in the national government. Most of the states mentioned above have set up civil service commissions similar to the United States Civil Service Commission, but these commissions for the most part have not attained the high standard which prevails in some city commissions and in the federal personnel agency. State commissions have been dominated in too many cases by spoilsmen. Some states have substituted a single personnel administrator for a partisan or a nonpartisan board, and others have set up systems of personnel management, without the complete adoption of the merit principle, with the single director but without the board. Cities follow both the board and the single administrator type of organization, but with a decided tendency toward the former.

The problems of classification, promotion, discipline, and retirement in the states and local units are similar to these problems in the federal government.

Undoubtedly one of the chief causes for the failure of civil service agencies to meet the high standards expected of them has been their inability to recruit the best personnel available, and to provide employees in the service with adequate training. Increasing attention is being given in the federal, state, and local personnel systems to training *for* the service and *in* the service.[2] It has even been suggested by such pressure groups as the National Federation of Women's Clubs and the League of Women Voters that the United States government establish a civil service academy, comparable to the military and naval academies, for the training of civil employees of the government. Numerous private and state-supported institutions of learning have launched upon more or less extensive programs of training for the service, as well as programs of in-service training.

[1] *Ibid.*, p. 32.

[2] See Lambie, M. B., *Training for the Public Service;* Mosher, W. E., and Kingsley, J. D., *Public Personnel Administration,* ch. 13; White, L. D., *Government Career Service.*

It is encouraging to observe that the public is coming to appreciate the necessity for training for the public service, and is inclined to question the Jacksonian principle that any man of intelligence can qualify for any position.

QUESTIONS

1. How did the spoils system develop in the public service?
2. Why is the British civil service able to operate without the spoils system, while spoils are considered necessary in the American service?
3. Make a study of the employees in a large department of your city or county and find out: (1) the length of time each employee has served in the office, (2) at what age and with what education and experience he entered the office, (3) what advancement in salary and responsibilities he has had since he entered the service. What career opportunities are there in this office?
4. Why is classification considered such an important phase of personnel administration?
5. Would the recommendation of the President's Committee on Administrative Management tend to strengthen the executive powers of the President, or would the extension of the merit system tend to decrease his executive powers through a reduction in the patronage at his disposal?
6. Should public employees be allowed to organize and affiliate with organized labor?
7. What is meant by a "career service"? How could it be introduced in the state and local units?

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Recommendations of the President's Committee (continued). A significant step was taken toward the attainment of the general objectives set forth in the Report of the President's Committee on Administrative Management with the passage of the so-called Ramspeck Act in November, 1940.[1] This legislation authorizes the President to include within the classified service positions theretofore exempt by statute, with certain exceptions. These exceptions include positions filled with the consent of the Senate; positions in the Tennessee Valley Authority; assistant United States attorneys; and positions in the Works Progress Administration.

In addition to the passage of the Ramspeck Act, two other steps have been taken which tend to strengthen the merit principle in the national government. By executive order, effective February 1, 1939, there was established a Council on Personnel Administration consisting of the directors of personnel of the several departments and independent establishments. The council has the duty of advising and assisting the President and the Civil Service Commission in the protection and improvement of the merit system, and of recommending from time to time needed changes in procedure, rules, and regulations. The council is the guiding and coördinating agency of the entire federal merit system, and has been responsible for much of the recent improvement and extension of the system.

Because of the difficult problem of extending the formal phases of the civil service plan to professional, scientific, technical, and administrative positions, the President appointed a Committee on Civil Service Improvement on January 31, 1939. This committee, known as the "Reed Committee," since its chairman was Associate Justice Stanley Reed of the United States Supreme Court, made a rather comprehensive study of methods of recruiting, selecting, promoting, transferring, removing, and reinstating personnel of an administrative nature.[2] The report is merely a recommendation, but its net result is likely to be the further extension of the merit system to most of the administrative and technical positions which have been outside the classified service.

[1] Public Acts, No. 880, 76th Congress (1940).

[2] *Report of President's Committee on Civil Service Improvement,* House Doc. 118, 77th Congress, 1st Session.

PART V

Adjudication: Unified Agencies and Processes

CHAPTER XX

The National Judiciary



THE ROLE OF THE JUDICIARY

IN the United States the judiciary began as the weakest of the three departments of government since it controlled neither the purse nor the sword. It has developed, however, to a position of equality in the governmental trinity, and in the minds of many it stands today as the most powerful of the traditional branches of government, especially through its function of declaring void the acts of Congress or of the executive when they are in conflict with the Constitution. The federal judiciary is unique among the court systems of the world.

Reasons for the Establishment of the Federal Judiciary. The judiciary is important in government because it provides the necessary machinery for the orderly development of the Constitution.[1] The federal judiciary is the balance wheel of the entire governmental system. The development of the Constitution and indeed of government itself, as pointed out by Young in his *New American Government and Its Work,* is "a never ending duel, in the political arena, between the radical and the conservative."[2] The radicals want rapid change, not steady progress. The conservatives would maintain the status quo. Neither group can be trusted with complete power. The radicals are easy prey for visionary leaders, while the conservatives often fall under the domination of reactionaries. If steady continuous progress is to be made in government a compromise between these extremes must be sought and accomplished. Machinery must be provided to prevent sweeping changes by radicals and violent reaction by conservatives.

Hamilton regarded the absence of a national judiciary as the chief defect of the government under the Articles of Confederation.[3] In early discussions of the new Constitution the necessity for a national judiciary was stressed and universally agreed upon, even though

[1] Young, J. T., *The New American Government and Its Work* (1933), p. 163.
[2] *Ibid.* [3] *The Federalist,* No. 22.

there was no unanimity as to the exact type of judicial organization that should be adopted, nor as to the extent of its jurisdiction. The Constitution makers in the preamble declared it their purpose to provide a "more perfect union" and "to establish justice." To achieve this goal it appeared necessary to establish a system of courts separate and distinct from the state courts, a judiciary which derived its power from the national Constitution and laws, for it was recognized that there could be only confusion and uncertainty if each state continued to adjudicate national matters in its own way.

The reasons for the establishment of a distinct national judiciary are obvious. In the first place, since the national government possesses only the powers delegated to it in the Constitution, an agency had to be established which could decide when the government had exceeded its legal authority. Again, since the Constitution placed certain limitations on the inherent powers of the states, it was necessary to set up an agency with power to enforce these limitations. It was of course possible to achieve these objectives through other means than a national system of courts with almost supreme powers. For example, controversies might have been submitted to arbitration in the states concerned. But such a procedure would have been a doubtful method. The alternative was to establish a national court system, and the decision to do this has been justified by experience. It should be said, however, that the national courts have not proved to be impartial tribunals in controversies between the national government and the states. In spite of occasional setbacks, the system has been characterized by a pronounced trend toward the supremacy of the national government. The situation is one in which disputes are settled by an agency representing one of the interested parties. The result in such a case is determined in advance.

A second reason for the establishment of a national system of courts is seen in the so-called "central clause of the Constitution," which states that the Constitution, the laws made thereunder, and the treaties made in pursuance thereof shall be the supreme law of the land. How could this objective be accomplished without the establishment of a system of national courts? Uniformity of enforcement would be impossible by any other method, and the Constitution could not have been made the supreme law of the land without some agency to sponsor and uphold its supremacy.

A third reason for a national system of courts is that the control

of foreign relations is vested exclusively in the national government. It is therefore essential that controversies arising out of such relations be determined by courts of national jurisdiction. State courts had not functioned satisfactorily in this respect during the Confederation period, and this experience had made the makers of the Constitution conscious of the utter impossibility of making local courts serve distinct national purposes.

Legal Basis for the National Judiciary. The legal and constitutional authority for the national judiciary is found in Article III of the Constitution – the so-called Judicial Article. It is not a lengthy provision and does not provide for a complete set of national courts. It merely states that there shall be a Supreme Court and as many inferior courts as Congress may "ordain and establish." Time has demonstrated that it was a wise policy to leave the determination of judicial structure and power to Congress.

Although it is possible that theoretical considerations entered into the adoption of this policy, practical considerations at the time dictated the apparent incompleteness of the judicial system. The number, composition, and interrelations of courts were subjects of controversy between members of the constitutional convention. Rather than jeopardize the basic necessity for a national court system, the convention, in accordance with its compromising tendencies, characteristically provided merely the framework of the system, leaving the details to Congress including the appellate jurisdiction of the Supreme Court.

The essentials of a complete national judiciary, however, are to be found in the Constitution. The Constitution established a Supreme Court and fixed its original jurisdiction. It provided for life tenure for federal judges and protected them against salary reductions during their term. Furthermore, the Constitution protected the rights of citizens by provisions concerning the conduct of trials and by defining treason. It also indicated in flexible language the scope of national judicial powers. Congress, on the other hand, is given full power to organize the inferior federal courts and to define their jurisdiction. Thus it may be said that the national judicial system has both a constitutional and a statutory basis.

THE LAW APPLIED BY FEDERAL COURTS

Scope of the Judicial Power. The primary function of the national judiciary is to interpret and apply the law. The Constitution states

that "the judicial power shall extend to all cases in law or equity" arising under it. This means that national courts apply both criminal and civil law. It should be stated that the Constitution itself is a law which the courts must apply, and according to its terms all laws shall be measured by it as a yardstick. The Constitution, treaties made under it, and acts of Congress are the supreme law of the land. It should be observed that the Constitution itself is mentioned first, while treaties and laws take second place.

Criminal Law. The federal courts have jurisdiction over two types of criminal cases: those defined in the Constitution, and those growing out of delegations of power to Congress. The Constitution confers criminal jurisdiction over five separate kinds of cases: (1) piracies and felonies committed on the high seas, (2) cases arising under international law, (3) the counterfeiting of coins and securities of the United States, (4) treason against the United States, and (5) offenses committed in the District of Columbia or other places under the direct control of the United States. This includes territories, dependencies, and military reservations.

The criminal cases arising under certain delegations of power to Congress are more important and more numerous than the constitutional criminal cases. They include cases in which the power of Congress to define crime and provide punishment grows out of its power to pass laws upon a given subject. For example, Congress has the power to establish post offices. From this power it is implied that Congress can punish for mail robbery. The Eighteenth Amendment gave Congress power to regulate the liquor traffic, and from this delegation was implied the power to punish for violations of federal law. The commerce power has been a source of many criminal actions in the federal courts. As Congress has the power to regulate interstate commerce, it has the authority to punish violations of its regulations.

Limitations on Criminal Actions. The limitations on governmental action found in the bill of rights are designed to protect the individual in the exercise of his inherent rights. They are carryovers from the English Bill of Rights of 1689, and concern the rights of all persons other than members of the army and navy. They provide, among other things, that no person shall be put on trial without having had charges filed against him and indictment by a grand jury. No one can be compelled to testify against himself. No one can be deprived of life, liberty, and property without due

process of law. Persons accused of crime are entitled to a public trial by an impartial jury, and such a trial must be held in the vicinity in which the offense was committed. An accused person is entitled to witnesses and to legal counsel. He is also allowed to obtain bail pending trial. A further safeguard is the provision that no person shall be put in jeopardy twice for the same offense. Thus procedure of the federal courts in criminal cases is such that the rights of a person accused of a crime are safeguarded against arbitrary prosecution. Prosecution is largely in the hands of the federal district attorney.

Civil Law. While criminal action in the federal courts is limited, civil actions are numerous. The great majority of civil cases get into the federal courts on the ground of diverse citizenship or because they involve a federal question.[1] In numerous instances the points involved are covered in state law, but the parties live in different states; hence the law must be administered by federal courts.

Common Law. Common law is based largely on custom and is the result of certain legal actions which, over a period of time, have built up certain judicial precedents. Little by little the common law has been reduced to something resembling a definite body of law, and certain procedures and practices have become more or less fixed. The common law is subject to constant change, but the change is gradual. Common law cases are largely actions arising out of civil wrongs or torts, or actions based upon contracts. In these cases the redress sought consists of money damages, and remedy is granted only after the wrong has been committed or the contract has been broken. Common law cases are brought into court only in certain forms of action such as assumpsit, trover, trespass, or replevin.

Equity. There are many cases in common law in which the awarding of money damages fails to do substantial justice. Common law affords no remedy except money damages. If it is impossible to secure them, the court should afford some other means of securing justice. Such a remedy is found in equity. Equity proceedings may be described by citing a specific example. Suppose a case arises in which the deed to a particular parcel of property has been questioned. Even though the deed itself may have been

[1] "Diverse citizenship" refers to cases involving citizens of different states, while "a federal question" refers to cases alleged to be in violation of certain constitutional provisions.

properly drawn and executed, under equity proceedings it may be set aside if it can be shown that there has been fraud surrounding the execution of the deed. In many cases equity is carried out by use of the injunction or the writ of mandamus, the violation of which is punishable as contempt of court. For example, if a labor strike which might result in damage to life and property comes before the court in equity proceedings, the court may issue a writ of injunction which enjoins the strikers from injuring the property of the employer. If any damage is done and the injunction has not been obeyed, the offense is punishable as contempt of court. Equity began as a flexible judicial process, but with the passage of time its rules have been reduced to forms which are about as inelastic as those of the common law and often overlap them. Both common law and equity are administered by the federal courts.

Admiralty and Maritime Law; International Law. In addition to the ordinary civil and criminal law, the federal courts are called upon to apply admiralty and maritime law, and also international law. The admiralty law of the United States is found in the admiralty code inherited largely from other countries but modified by Congress and the practice of the federal courts. The Supreme Court of the United States has frequently stated that international law is "our law," and the federal courts are frequently called upon to apply it. Treaties, for example, are not self-executing. Before they can be made effective, Congress must act. All cases arising under international law and involving public and private rights under treaties are heard in the federal courts.

Types of Cases Considered. In discussing the national judiciary it must be remembered that the national government has only delegated powers. Therefore the judiciary has jurisdiction only over classes of cases specified in the Constitution. The state courts, by contrast, have jurisdiction over all matters not definitely prohibited.

According to the Constitution, the judicial power of the United States "shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; 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; 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."[1] These various categories may be grouped into two distinct types of cases: (1) those which come under the federal courts because of their subject matter; (2) those which come under the federal courts because of the parties affected. The first type consists of cases whose subject matter relates to the Constitution or to the laws and treaties of the United States, and cases dealing with admiralty and maritime matters. The second type of cases over which national courts assume jurisdiction are those in which the United States is a party in litigation, and cases between states, between citizens of different states, between a state and citizens of another state, as well as those involving ambassadors, ministers, and consuls.

General Jurisdiction. Before the organization and jurisdiction of the particular types of national courts are discussed, the general jurisdiction of the national courts should be explained. Courts may have the following general types of jurisdiction: (1) original – that is, the jurisdiction assumed when courts admit cases in first instance, which have never been considered by any other court; (2) appellate – the type of jurisdiction employed when a court considers a case which has been previously tried in a lower court and, because of some alleged error or miscarriage of justice, has been appealed to a higher court; (3) exclusive – the jurisdiction possessed by a court when it has sole authority over a case; (4) concurrent – jurisdiction which may be shared with another court; and (5) final – the power of a court to dispose of a case once and for all.

THE FEDERAL JUDICIAL SYSTEM

The jurisdiction of courts has been considered thus far only in general terms. A more detailed picture of the federal judiciary, showing the structure and jurisdiction of each type of court, should be given. The three general types of federal courts will be described: namely, the district court, the circuit court of appeals, and the Supreme Court.

District Courts. The federal district courts form the base of the federal judicial system. At present there are more than eighty federal judicial districts presided over by more than one hundred forty district judges. The number of judges per district varies from one to four, depending upon the amount of business in the district. In small states such as Vermont or New Hampshire, the state itself con-

[1] Art. III, Sec. 2.

stitutes a single district; in large states there may be two or more districts. In some cases a federal court district may consist of parts of two states. In each district, as stated above, there are one or more judges appointed by the President, upon the recommendation of the Attorney-General, and with the advice and consent of the Senate. The judges serve for life or good behavior. At present these judges receive salaries of $10,000 a year. Formerly each judge had to be a resident of the district, and could possess no jurisdiction outside his district. This limitation resulted in overworked judges in some districts, and idle judges in others. In 1922 Congress enacted a law authorizing the chief justice of the Supreme Court to transfer judges from district to district as the occasion demanded. This provided needed flexibility in the system; it has relieved many overworked courts and, in addition, has been of considerable assistance in keeping the federal judicial docket reasonably up to date.

A great variety of cases come before the federal district courts. These courts have original jurisdiction in all federal cases except those assigned by law to other courts. If we exempt the state courts having concurrent jurisdiction over federal subjects, the district courts have practically all the original jurisdiction throughout the United States. They possess no appellate jurisdiction. Contrary to belief in some quarters, cases cannot be appealed from state courts to federal courts. Of course, cases may be removed from one court system to another, but before such removal takes place and before the state courts have decided cases before them, it must be shown that the case involves either a federal question or diverse citizenship. All federal crimes may be prosecuted in the district courts, and such courts have jurisdiction over claims involving less then $10,000, but this jurisdiction is shared concurrently with the Court of Claims. The jurisdiction of the federal district courts also covers admiralty cases; suits arising out of the national revenue, postal, copyright, patent, commerce, and bankruptcy laws; and cases removed from state courts to federal courts.

Circuit Courts of Appeal. The circuit courts of appeal occupy middle ground in the federal judiciary system. Their name indicates their chief function. These intermediate courts were created in 1891 to relieve the Supreme Court of the increasing burden of minor legal controversies. There is a circuit court in each of the ten judicial circuits into which the country has been divided. Ordinarily such a court is presided over by a circuit judge, although a district

judge may be called upon to serve in this capacity. Justices of the Supreme Court are privileged to sit in their respective circuits, and at one time went on circuit. The pressure of business before the Supreme Court now prohibits such judicial circuit riding. Judges of the circuit courts of appeal are appointed in the same manner as district judges. The number of judges per district varies from three to six, with two constituting a quorum.

The circuit courts of appeal possess only appellate jurisdiction, and no case comes before these courts as a matter of original jurisdiction. Thus the work of the circuit court is confined to cases appealed from the district courts, and to the review of orders issued by such quasi-judicial bodies as the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Reserve Board. Thus it may be seen that the courts are designed to take care of the less important appeals which otherwise would consume valuable time of the Supreme Court.

The decisions of the circuit courts are final in the following types of cases: suits between aliens and citizens, cases between citizens of different states where no federal question is involved, and cases concerning criminal, patent, copyright, bankruptcy, revenue, and admiralty matters when the amount in question does not exceed $1,000. A case may be transferred to the Supreme Court, however, before final decision is reached in the intermediate court, upon the petition of either of the interested parties.

Until 1922 the district and circuit courts operated as more or less independent judicial agencies, without supervision by a superior agency. After the World War, as work grew heavy in certain districts, Congress attempted to remedy the situation by creating additional courts, though it was known that some circuit and district courts had comparatively little work to do. Despite this measure, the system in 1921 was over 120,000 cases in arrears.[1] The act of 1922 was designed to bring about long needed unification and equalization of federal court work. It established a judicial council composed of the senior circuit judges of the ten circuits and the chief justice of the United States Supreme Court. Under such an arrangement the chief justice became the directing head of the entire federal judicial system. The law required him to summon the members of the council annually, and made it the duty of the council

[1] Ogg, F. A., and Ray, P. O., *Introduction to American Government* (Fourth edition), p. 501.

to advise as to the needs of the courts in the several districts, and to suggest improvements in the administration of justice generally. The act went further and required every district judge to make an annual report showing the condition of business in his district, especially the number and character of the cases on his docket, the cases disposed of, the cases in arrears, and recommendations for needed assistance for the disposal of anticipated business within the ensuing year. These reports from the several districts make it possible for the council to prepare plans for the assignment and transfer of judges to or from circuits and districts, as may appear necessary. The provisions of this law have produced a degree of unification and a needed flexibility in judicial work which previously had been conspicuously lacking.

The Supreme Court. The Supreme Court is the only part of the federal judiciary established by the Constitution. The meager constitutional provision relative to the highest court of the land simply provides that there shall be a Supreme Court; it leaves the organization of the body entirely to Congress. The Judiciary Act of 1789 provided for a chief justice and five associate justices. Since then, the membership of the court has varied from five to ten, reaching the latter figure in the administration of President Grant. At the present time the Supreme Court consists of eight associate justices and the chief justice, all of whom are appointed by the President and the Senate, and hold office during good behavior. A recent session of Congress passed a voluntary retirement act which allows members of the court to retire at the age of seventy with full pay. At present the associate justices receive an annual salary of $20,000; the chief justice receives $20,500 per annum.

Jurisdiction. The Supreme Court has both original and appellate jurisdiction. The Constitution provides: " In all cases affecting ambassadors, and other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction." Congress may not give the Supreme Court original jurisdiction over any cases other than those specified in the Constitution. Likewise Congress may not deprive the Supreme Court of its original jurisdiction. It does, however, grant to the inferior national courts concurrent jurisdiction in certain types of cases which come within the scope of the constitutional grant of original jurisdiction.

The appellate jurisdiction of the Supreme Court constitutes by far

the larger part of its work. Its scope is controlled by Congress. Under the jurisdictional act of 1925 two general types of cases may be appealed to the Supreme Court. The first involves cases in which a litigant may of right appeal from a lower jurisdiction, while the second type consists of those cases which the Supreme Court feels disposed to review. A few cases may be appealed directly from the district courts to the Supreme Court, but the great majority are appealed from the circuit courts. Many of the cases appealed from the district courts are sent to the circuit courts and there disposed of. In important cases involving the interpretation of the Constitution, and national laws and treaties, as well as cases in which state constitutions and laws are alleged to be in violation of the national Constitution, the Supreme Court exercises regular appellate jurisdiction. It is the belief of many citizens that all cases may be removed from the highest state court to the Supreme Court. In certain types of cases this is true, but it must be emphasized that not all such appeals fall within the province of the Supreme Court. The federal judiciary, including the Supreme Court and the inferior federal courts, possesses no authority to consider a case unless there is a federal question involved, or unless it can be shown that a case involves the principle of diverse citizenship.

While the regular operations of the district courts and the circuit courts of appeal may be passed with little mention, the Supreme Court is an instrument of government which demands special consideration. Ordinarily the court holds one session a year, beginning in October and continuing until late spring. While in session the court is presided over by the chief justice, whose duties differ but slightly from those of the associate justices. The work of the court, especially the writing of opinions, is parceled out among the several members by the chief justice, who also performs other minor administrative functions.

Sessions of the Supreme Court. The opening of the regular session of the Supreme Court is always an important event. In solemn tones the clerk announces: "Oyez! Oyez! Oyez! All persons having business before the honorable judges of the Supreme Court of the United States are admonished to draw near and give their attention, for the court is now sitting. God save the United States and this honorable court." The justices in their black robes have taken their places on the bench, and the most powerful democratic court in the world is in session.

Procedure in the Supreme Court. The Supreme Court of the United States presents an awe-inspiring spectacle, but its work of hearing and deciding cases is a routine matter. Cases are presented by means of written and oral arguments, but the latter are always supplemented by printed briefs. After the arguments are made and the briefs are presented, the members of the court study the case and meet in private for their discussion. The study which must be given the many cases coming before the court consumes much time. Contrary to popular belief in some quarters, the work of the Supreme Court is far from finished when the justices retire from the courtroom after hearing the oral arguments. After the court reaches a decision on the case, the chief justice designates some member of the court to write the opinion, which is read by that particular justice in open court. The court is not required to agree unanimously before it renders a decision on a case; it is only necessary that the majority of the members reach the same general conclusion. In many cases, in addition to the majority decision, there may be a minority dissenting opinion and also individual opinions supporting either the majority or the minority point of view. When such opinions support the majority, they are called concurring opinions.

Importance of Decisions. For the time being the decision of the majority of the members of the court fixes the law as to the particular issue, but the opinions of dissenting members are often interesting and important documents. Dissenting opinions may in time become majority opinions, since majorities in later courts may adopt the general conclusions of a minority in certain cases. In cases concerning major constitutional issues the court may and often does divide on the basis of conservatism and liberalism, and some political speculators have been highly successful in guessing in advance the attitude of various justices on certain questions presented to the court. The dissenting opinions of various members often afford aid and comfort to those who are inclined to criticize the decision of the majority. It may be said that the principles and ideas expressed in some of these dissenting opinions have furnished the arguments which later are used in convincing the public, and even the court itself when it has reversed its attitude on certain fundamental questions of law and justice. In a very real sense dissenting opinions are not mere "futile gestures." Often it takes relatively little time for a court to change its opinion, as was evidenced when

the court in 1923 held unconstitutional a minimum wage law, but sustained a similar law in 1936.[1]

Five-to-Four Decisions. A great deal of criticism has been directed against the so-called five-to-four decisions. Many people who would not suggest that the court be deprived of its power to set aside certain laws see danger in such action by a bare majority of the members of the court. Five-to-four decisions have been called one-man decisions. Such decisions have not been common in the history of the country, but a number of them have been handed down in important cases which have been the cause of bitter political controversy. Six of the twelve New Deal cases which were decided before June, 1936, were five-to-four decisions. Constitutional amendments have been proposed which, if adopted, would require greater majorities at least in those cases in which an act of Congress is declared unconstitutional. In some cases the court itself has sensed the weakness of five-to-four decisions, and a former justice went on record as favoring the adoption by the court itself of a rule requiring more than a simple majority to decide a case.[2]

Special Federal Courts. So far, only the regular federal courts — district, circuit, and supreme — have been considered. These are called "constitutional courts," but there are other federal courts not established under the provisions of the judicial articles of the Constitution, known as legislative courts.[3] These tribunals are set up under other specific grants of power to Congress. There are two kinds of special federal courts: (1) those established under authority of Congress to serve particular areas; and (2) those established under specific delegations of power to Congress and endowed with special jurisdiction. In the first classification will be found the courts in the District of Columbia, consisting of juvenile courts, police courts, the municipal court, a supreme court, and a court of appeals. These are established under authority of Congress to serve the federal district. Also in this classification are the consular courts which have been set up, under the so-called extraterritorial powers of the United States, in China and other sections of the world where it has been alleged American justice should be extended to American citizens in those areas.

[1] *Adkins v. Children's Hospital*, 261 U. S. 525 (1923); *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1936).

[2] Associate Justice Clark.

[3] Katz, W. G., "Federal Legislative Courts," *Harvard Law Review*, vol. 43, pp. 894–924.

The second group includes the Court of Claims, the Court of Customs and Patent Appeals, and the United States Customs Court. The Court of Claims was established in 1885 to hear contractual claims individuals may have against the United States. In cases where the amount involved is in excess of $10,000 the federal district court has concurrent jurisdiction with the Court of Claims. Cases may be referred to this court by Congress or by the several executive departments. The Court of Customs and Patent Appeals was created in 1909 to regulate commerce and to grant patents. It was first called the Court of Customs Appeals, but in 1929 its jurisdiction was extended to cover appeals from the Commissioner of Patents. It now hears appeals from the United States Customs Court, which until 1926 was known as the United States Board of General Appraisers, and has original jurisdiction over cases arising out of the collection of customs duties.

JUDICIAL REVIEW

The most distinctive prerogative of the Supreme Court, and that which has aroused most controversy, is its power to pass upon the constitutionality of legislation. Even though the Constitution does not state that the court possesses the power to review legislation, it has come to exercise this function.

Constitutional Basis. The constitutional basis of judicial review arises from the nature of the federal system of government. The Constitution sets up a national government and recognizes the existence of state governments. It attempts to draw a line of demarcation between the powers of these two territorial units. This line can be drawn only in general terms, and the terms are in constant need of interpretation. The Constitution itself states that it is the supreme law of the land. Obviously there must be some agency to enforce such supremacy and decide when a state law or a state constitution is in conflict with the national Constitution. There are other ways of settling such questions than through the Supreme Court, but all other suggestions appeared impracticable to the Constitution makers.

The power of judicial review finds further constitutional support in the provision that the judicial power of the federal courts extends to all cases arising under the Constitution. Moreover, while the Constitution does not state that the Supreme Court shall exercise the power of judicial review, neither does it stipulate that Congress

or the state legislatures shall be the final judges of the constitutionality of law.

Marshall's Argument for Judicial Review. Judicial review became more or less firmly fixed in the American system by the decision of Chief Justice Marshall in the case of *Marbury v. Madison.*[1] In this case Marshall came to the conclusion that the courts have power to pass upon the constitutionality of law, and presented a logical and convincing argument that such a view must be adopted if national supremacy is to be maintained. Marshall's argument may be summarized as follows: "(1) The Constitution is a superior law. (2) A legislative act contrary to the Constitution is therefore not a law. (3) It is always the duty of the court to decide between two conflicting laws. (4) If a legislative act conflicts with the superior law – the Constitution – it is clearly the duty of the court to refuse to apply the legislative act. (5) If the court does not refuse to apply such legislation, the foundation of all written constitutions is destroyed." [2]

Many students of government today are not willing to accept Marshall's argument *in toto.* While, as Marshall pointed out, limitations on the powers of government become mere fictions if they are interpreted by the agencies which the Constitution intended to restrain, it may be suggested that the Supreme Court in declaring an act of Congress unconstitutional might go beyond its own powers, since the Constitution limits not only Congress but the courts as well. The extreme exercise of the power of review also tends to destroy the theoretical equality of the various departments of government. If the Supreme Court has the power to void an act of Congress, and Congress has no immediate recourse, there can be little doubt that the court is the superior unit. In the minds of many the constitutional guarantee of checks and balances is denied under such circumstances.

Limitations on Judicial Review. The power of the courts to review and pass upon the constitutionality of legislation is not unlimited. Both the Constitution and the Supreme Court itself have imposed definite limitations on judicial veto of legislation. In the first place, judicial review operates only in litigated cases. The court does not propose to pass upon all legislative acts, but will consider

[1] Cranch 137 (1803).

[2] This is the summary made by Johnson, C. O., *Government in the United States* (Revised edition), p. 57.

only those brought before it in regular order. Thus many acts of Congress and state legislatures may never be passed upon by the judiciary. Only in the event that certain damages have been done and constitutional provisions are alleged to have been violated by the operation of a law does the court assume jurisdiction.

The second limitation on judicial review is a self-imposed restraint. The unconstitutionality of an act must be clear and "beyond all rational doubt" before the court will declare it unconstitutional.[1] Otherwise judicial review is refused and the law stands as enacted.

In the third place, the court seldom considers a law in its entirety. Few legislative acts coming before the court are annulled in their entirety, even though certain parts of the act may be declared unconstitutional. Of course there are cases in which the parts of the act are so closely interwoven that they cannot be separated. In that event the court is compelled to consider the entire act, but if the various parts can be considered separately, the court concerns itself only with the unconstitutional phases and allows the remainder to stand.

The court has consistently refused to consider political questions. During reconstruction days in the South, the question arose as to whether or not states under various congressional restrictions had representative forms of government. Suffice it to say, the court refused to restrain the President by injunction from carrying out certain acts alleged to be unconstitutional.[2] From the broader point of view many questions coming before the court – involving such subjects as labor, taxation, social security, and public utilities – are political in nature, in that the laws covering the subjects are sponsored by one group and opposed by another. All that can be expected in such cases is that the judges will maintain a calm objective attitude and not pass beyond the bounds of judicial propriety in their reasoning. It is natural that the members of the court, consciously or unconsciously, should express their own individual political, social, and economic theories and interpret the law in the light of these points of view. It must be admitted, however, that the court has remained relatively free of politics and has been involved in very few controversies of a strictly political nature. Exceptions to

[1] *Sinking Fund Cases*, 99 U. S. 700 (1878).

[2] See *Georgia v. Stanton*, 6 Wallace 50 (1868), and *Mississippi v. Johnson*, 4 Wallace 475 (1867).

this rule are found in the famous Dred Scott decision and the Income Tax Cases.[1]

A fifth limitation on judicial review is found in the practice of the court in refusing to consider the wisdom of a law. The court is interested only in the constitutionality of legislation and not in the motives of the legislators in enacting law. Some persons would say that the judges have sometimes gone beyond this limitation and have nullified laws which ran counter to their political, social, and economic philosophies.[2] Criticism is often directed toward the court on the ground that the judges actually make law and thus usurp the prerogatives of the legislature.[3] Generally speaking, however, the court does not undertake to pass upon the wisdom of legislation.

Extent of Use. The Supreme Court is called upon to pass upon a large number of laws, but the majority are held valid. Only about seventy-five acts of Congress have been declared unconstitutional during the history of the court, and many of these have concerned relatively unimportant matters. About one-fourth of all acts nullified have been state laws.[4] In recent years the number of laws coming before the court has increased, and this fact accounts for the increased number of judicial vetoes within recent years.

Grounds for Holding Laws Unconstitutional. Upon what grounds are laws attacked before the Supreme Court? Many laws are challenged upon the ground that they deprive persons of life, liberty, or property without due process of law as provided in the Fifth and Fourteenth Amendments. In interpreting due process of law the court has been accused of reading into the Constitution its own political philosophy. It has consistently refused to define due process of law once and for all, and by its actions it has furnished some ground for the statement that due process means whatever the court says it does. Extreme examples of such attacks upon law are seen in various cases dealing with minimum wage legislation.[5]

Other cases brought before the court involve questions of the delegation of powers to the national government and the states. The

[1] *Dred Scott v. Sandford*, 19 Howard 393 (1857), and *Pollock v. Farmer's Loan and Trust Co.*, 158 U. S. 601 (1895).

[2] See Haines, C. G., "Political Theories of the Supreme Court from 1789–1885," *American Political Science Review*, vol. 2 (Feb., 1908), pp. 221–244.

[3] Beard, C. A., "The Supreme Court: Usurper or Grantee," *Political Science Quarterly*, vol. 27 (Mar., 1912), pp. 1–35.

[4] McBain, H. L., *The Living Constitution*, pp. 246–251.

[5] *Lochner v. New York*, 198 U. S. 45 (1905); *Morehead v. New York*, 298 U. S. 587 (1936); *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1936).

Agricultural Adjustment Act was held unconstitutional on the ground that it provided for a regulation which falls within the reserved powers of the states, and which therefore could not be imposed by Congress.[1] Many other cases have come within the jurisdiction of the court on this same constitutional ground.

The taxing and commerce powers of the Constitution have been useful pegs upon which to hang questions of constitutionality. The original income tax law was declared unconstitutional because it was in conflict with the requirement that direct taxes must be apportioned among the states according to population.[2] The court in the first child labor case said that the commerce power could not be extended to the regulation of manufacturing.[3] The court, then, is careful to see that these important powers of the national government are exercised within the government's legislative sphere of operation.

Unpopular Decisions of the Court. So many cases coming before the court involve such diverse social and economic interests that there is bound to be some dissatisfaction with the decisions. The criticism which has been evoked by certain decisions has resulted in amendments to the Constitution. Thus the decision in 1793 that citizens of one state cannot sue another state led to the adoption of the Eleventh Amendment; [4] the decision of the Dred Scott Case in 1858,[5] which held that a Negro slave could not be a citizen, led to the Fourteenth Amendment; and the decision in the Income Tax Cases of 1895 led to the adoption of the Sixteenth Amendment.[6]

PROPOSED CHANGES IN THE FEDERAL JUDICIARY

Other unpopular decisions have been the basis for suggestions to alter the court itself. The decisions in the Child Labor Cases, as well as other labor decisions, caused the suggestion to be made that Congress be allowed to recall judicial decisions, and also led to a demand for the abolition of one-man decisions.[7] Such criticisms in many cases are predicated upon the assumption that the

[1] *United States v. Butler*, 297 U. S. 1 (1936).
[2] *Pollock v. Farmer's Loan and Trust Co.*, 158 U. S. 601 (1895).
[3] *Hammer v. Dagenhart*, 247 U. S. 251 (1918).
[4] *Chisholm v. Georgia*, 2 Dallas 419 (1793).
[5] *Dred Scott v. Sandford*, 19 Howard 393 (1857).
[6] *Pollock v. Farmer's Loan and Trust Co.*, 158 U. S. 601 (1895).
[7] See Monroe, A. H., "The Supreme Court and the Constitution," *American Political Science Review*, vol. 18 (Nov., 1924), pp. 737–759.

court does not decide all cases according to strict constitutional intent, but rather that the judges allow their personal opinions and attitudes to enter into the decisions. Judges have their own convictions on major economic and social issues, and it is inevitable that these convictions should affect their judicial attitude; the two are inseparable. Ideally the court should be balanced between liberals and conservatives; practically this has been proved impossible. Presidents quite naturally will appoint to the court persons whose minds are in tune with their own. Thus, if a party with liberal or conservative inclinations remains in power over a period of years, it is to be expected that the majority of the justices of the Supreme Court will represent the attitude of the dominant party. Of course there are exceptions to this general rule, as was shown in the appointment of Associate Justice Cardozo by President Hoover.

Roosevelt's Proposed Reorganization. Criticism of the court took a concentrated form in the suggestion of President Franklin D. Roosevelt for a startling reorganization of the judiciary in 1937. In an address to Congress early in that year, the President declared: "The judicial branch also is asked by the people to do its part in making democracy successful." The President proposed a plan whereby he would be allowed to appoint additional judges in all federal courts in which the incumbents of retirement age do not resign or retire. His purpose was to remove the conservative judges on the Supreme Court who had been blocking part of the New Deal program. In the case of the Supreme Court, the proposal would increase the number from nine to a maximum of fifteen when judges over seventy failed to retire. With six new judges on the court, the President would be assured of favorable judicial decisions involving New Deal measures.

The Controversy and Its Results. It was natural that a storm of protest should be raised over this proposal. The people of the United States divided into two camps. Bitter controversy raged, and no tangible results came from the proposal. The net result, it would seem, was to bring the position of the judiciary and its role in government before the people of the United States as nothing else could do. Some persons were inclined to look upon the fight over the President's proposal as simply a battle of wits between the President and the chief justice.[1]

[1] This opinion was expressed privately by some of the administration leaders in Congress during the court controversy in 1937.

Other Suggested Changes. The President's proposal was a signal for all sorts of suggestions to reorganize the judiciary. These proposals are not new, having been advanced from time to time in the past history of the United States. Generally the suggestions may be classified under four heads: (1) that the Constitution be amended to require judges to retire at seventy or seventy-five years of age; (2) that seven-to-two or six-to-three decisions be required before national laws can be declared unconstitutional – the suggestion of Senator Norris of Nebraska; (3) that Congress, by constitutional amendment, be given power to regulate labor, agriculture, and industry, and that the police power of the United States be extended to the realm of economic reality; (4) that the Constitution be amended to allow Congress by a two-thirds vote to override or nullify a decision of the court.

Federal Judges. Federal justices are appointed by the President with the consent and advice of the Senate, and upon the recommendation of the Attorney-General. In the appointment of justices of the lower federal courts the principle of senatorial courtesy assumes an important role, for the Senator from the state concerned, if he is of the same political faith as the President, usually names the man the President will appoint. In the appointment of judges of the Supreme Court senatorial courtesy plays a much smaller role. In many cases bitter fights have been made against presidential appointees to the higher bench. In the history of the country, however, very few such recommendations to the Supreme Court have been rejected. There was a controversy in the Senate over the appointment of Brandeis by Wilson, and the appointment of Chief Justice Hughes in 1930 was the occasion for a four-day debate. Usually the objections to such appointments arise from the fact that the appointee holds social and economic views not in harmony with those of some Senator. The Senate, however, has seldom refused confirmation for one of its own number, regardless of his views or past affiliations. This was observed in the appointment of Associate Justice Black to the Supreme Court bench in 1937.

Caliber of Judges. In nearly all cases judges belong to the same political party – and usually to the same school of politics and social thought – as the President who appoints them. The justices of the Supreme Court, almost without exception, have been free from political bias and have been men of high ability and character, and few justices of the lower federal courts have been failures.

Minor Court Officials. Among the minor court officials who are parts of the federal judiciary and who are necessary for its operation are the district attorneys, the marshals, the clerks, the commissioners, and the probation officers. District attorneys are appointed by the President for a term of four years. It is the duty of such an attorney to defend or prosecute cases on behalf of the United States. District marshals are appointed in the same manner as other federal court officials, and have the same general duties as sheriffs in state courts. Commissioners of the federal courts are appointed by the district judge and serve for a period of four years, but such officials are subject to removal at any time. These commissioners administer oaths, warrants, and subpoenas, and may call witnesses and conduct preliminary hearings. The office has been established in order to relieve the federal courts of a great mass of details which need not be handled according to regular court procedure.

Administrative Office of the United States Courts. Much administrative work must be done if the courts are to operate efficiently. Recognition of this fact led to the establishment of the Administrative Office of the United States Courts in 1939.[1] The director of the office is appointed by the Supreme Court. As the administrative officer of the United States Courts (except the Supreme Court) he has charge, under the supervision of the conference of senior circuit judges, of all administrative matters relating to the clerks and other clerical and administrative personnel of the courts; the examination of the dockets of the various courts, and preparation of statistical data and reports of business transacted by the courts; the disbursement of monies appropriated for the maintenance and operation of the courts; the purchase and distribution of equipment and supplies; the examination and audit of vouchers and accounts of court officials and employees; the providing of accommodations for the use of the courts; the preparation and submission of the budget of the courts, except that of the Supreme Court; and other matters assigned by the Supreme Court and the conference of senior circuit judges.

QUESTIONS

1. Why was it necessary to establish a federal judiciary? What is the legal basis for a national judicial system?
2. What is the scope of the jurisdiction of the federal courts?

[1] Public Act No. 299, 76th Congress, 1st Session, Ch. 501.

3. What are the general types of jurisdiction which a court may exercise?
4. Outline the federal court system, showing the types of courts, number of each type, jurisdiction of each, method of appointing judges, etc.
5. What is judicial review? What is its constitutional basis? What was John Marshall's argument?
6. What are the limitations on judicial review?
7. What grounds exist for declaring laws unconstitutional?
8. What was Roosevelt's proposed reorganization of the federal judiciary? Discuss the controversy which followed and its results. Discuss other changes which have been suggested.

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CHAPTER XXI

The State and Local Judiciary

SEPARATE NATIONAL AND STATE COURTS

STATE courts had been organized and were in operation long before the establishment of the federal government. When the national Constitution was drafted and adopted there were no proposals that the state judiciary be abandoned in favor of a comprehensive federal court system. On the contrary, there were some suggestions that national courts were not needed, since the state courts might be sufficient for all needs in the realms both of national and of state law. The reasons for the establishment of a separate national judiciary have already been explained. The federal judiciary, it will be recalled, was set up for the purpose of securing national interpretation and application of the Constitution, and for the additional purpose, conscious or unconscious, of upholding the supremacy of national law and making the Constitution the supreme law of the land. Also, the question of diverse citizenship could not be solved by state courts. Thus the federal courts have been established to meet entirely different needs from the ends sought under a state judicial system.

Functions of State Courts. The state courts perform three distinct functions: (1) they provide an agency to settle the estates of deceased persons, as well as an ordinary method of adjusting disputes between individuals and state and local governments; (2) they serve as agencies for determining the guilt or innocence of accused law violators; (3) they serve as guardians of the rights of citizens against infringement by the government. In addition to these strictly judicial functions, some state courts perform certain non-judicial functions, such as the granting of licenses.

Legal Basis. State courts, like national courts, have both a constitutional and a statutory basis; but, whereas the national courts are largely statutory establishments, the organization of the state judiciary often is specified in detail in the state constitution. Pos-

sibly this situation may be looked upon as another illustration of the popular distrust of legislatures. The constitutional basis of the state judiciary means that the state court organization is more rigid than the federal, since constitutional provisions are more difficult to change than mere statutory laws.

KINDS OF LAW APPLIED BY STATE COURTS

In the performance of their judicial functions state courts both determine facts, through the jury, and apply the law, through the judge. With the exception of the supreme court, which in some states must give advisory opinions when requested by the governor or legislature, a state court acts only upon actual cases before it. In general, state courts adjudicate three types of cases: those arising (1) between private individuals, (2) between private individuals and the government, and (3) between the different branches of government. These cases involve both private and public law.

Codification. The law applied by state courts consists of both civil and criminal law; hence it is much the same as that applied by national courts, with the exception that state courts do not apply admiralty and maritime law. Both in civil and in criminal cases state courts concern themselves chiefly with common law and equity. The states have changed and supplemented traditional common law and equity procedure in their administration of them. Some have even reduced both to codes which in some instances have had the effect of practically abolishing the common law. Such codes bring all rules together and give some degree of certainty to an otherwise scattered and indefinable common law. They are useful in bringing about uniformity of laws in the various states.

In spite of these advantages of codification, questions have been raised as to the desirability of codes. The task of bringing together all judicial decisions and precedents and reducing them to a brief statement of the common law is extremely difficult. Moreover, where such action has taken place, the codes are more rigid than the common law, since the rules set forth in the code can be changed only by the legislature. Also, it should be stated that, while the codes make the law more definite and certain, they themselves need interpretation. Lawyers for the most part are inclined to favor uncodified law. The American Law Institute has attempted to reach a compromise between the two extremes. Its restatement

of the common law is not an authoritative code but is intended as a guide through the maze of common law and judicial precedent.

Civil Law. The civil law administered by state courts is concerned with litigations between individuals, with the state acting as the judge. Criminal law concerns itself with wrongs done against the state; in such cases the state is the plaintiff as well as the judge. Civil law includes the law of property, contracts, torts, business associations, and domestic relations.

In the triumvirate of inalienable rights, property is mentioned second only to life, and takes precedence over the pursuit of happiness. In the sight of the law a person has certain rights to ownership and use of property, but these rights are limited so that no one can hold property against the state. The state may take property for public use at any time, provided it makes just compensation.

The law recognizes two kinds of property — real and personal. Real property consists of land and improvements on land. The civil law recognizes two forms of ownership of real property. The first is known as *estates in fee simple,* which is the nearest approach to absolute ownership under the law. A person may buy property and use it as he sees fit so long as he respects the rights of others. The second form of ownership consists of *life estates;* such ownership is limited to the life of a person, and at the end of this period the title of the property reverts to the original heirs. Thus a husband who holds the estate of his deceased wife as a life estate cannot will it to others. Real property may be either tangible or intangible. Tangible property consists of land or buildings. In many instances intangibles consist of the property rights rather than actual property. A right of way is an example of this form of wealth.

Personal property consists of those things which can be moved from place to place. Personal property may be classified as: *real chattels* or leases on land; *personal chattels,* such as books, clothing, jewelry, etc.; and *choses in action,* such as stocks, bonds, securities, patents, and copyrights.

A second important branch of civil law is the law of contracts. It will be recalled that the national Constitution prohibits the states from passing any law impairing the obligation of contracts. Thus cases involving contracts may be heard by either federal or state

courts. In the state courts one may collect damages for breach of contract at common law, or under equity proceedings a court may issue an order for specific performance of a contract.

A tort has been defined as a civil wrong or a violation of individual rights, such as liberty, security, or reputation. Torts may be committed against a person, against property, or against both. When a person is involved, a civil action of this type takes the form of an arrest with probable cause – assault, battery, manslaughter, or libel. A tort involving property takes the form of trespass. A civil wrong against both persons and property may take the form of nuisances or negligence. The jurisdiction of the courts over torts is not unlimited. If the injured person is at fault, under the common law doctrine of contributory negligence and the fellow servant rule there will be no recovery of damages.

Important civil laws in the states have to do with the partnership and corporate forms of business association. The details of state regulation of business corporations are discussed in Chapter XXXIII.

The law of domestic relations has to do with marriage, divorce, the status of married women, and the status of children. Regulation of these matters has become an exclusive function of the states. In all the states marriage licenses are issued according to state law. The grounds for granting divorces differ in the several states, but this action is always a court function. Common law recognizes the principle that a husband is the guardian and protector of his wife. Under common law her property becomes his and she can make no contract of her own accord. In recent years, however, the common law has been modified so that the wife enjoys almost as much freedom as her husband in many states; legal discriminations between them have practically been eliminated. The common law places children under absolute control of the male parent. At the present time, however, with the codification of the law in many states, this principle has been modified and certain safeguards have been thrown about the child so that it is no longer wholly subject to the male parent.

Criminal Law. A crime is an act committed in violation of law and made punishable by law. It is an offense against the state. Crimes are generally divided according to their degree of seriousness into two classes – felonies and misdemeanors. Felonies consist of treason, murder, manslaughter, arson, burglary, robbery, larceny, etc. State laws define these crimes and set forth punishments

in each case. Misdemeanors consist of the less important crimes, and to a large extent such cases are handled by the minor state courts. Defacing public property, reckless driving, the use of profane language, disorderly conduct, and the maintenance of nuisances are examples of some of the more important misdemeanors coming before state courts. It is often difficult to distinguish between felonies and misdemeanors, and between crimes and torts. In any event, state courts have made the matter of intent a determining factor.

Equity. The Constitution of the United States and most state constitutions provide that the courts shall apply both law and equity. Law and equity are two different branches of the common law. They differ from each other in the procedure followed and in the results obtained. Law provides the ordinary remedies, while equity is used where law is inadequate to right the wrong. Thus, equity completes and supplements law. It develops alongside law. One of the simplest examples of equity is seen in the operation of the writ of injunction, which is designed to prevent wrongs from happening. Law does not prevent wrongs, but offers redress of grievances or damages in case of wrongs. The procedure in equity cases is described in the section on judicial procedure.

SYSTEMS OF STATE COURTS

Every state maintains a more or less elaborate system of courts. Some of the courts are created by the constitution and others by statutes. While no two state court systems are alike, it is possible to reduce them to certain rather well defined types, such as minor courts, county courts, intermediate courts, and supreme courts.

Minor Courts. The minor courts consist of the justice of the peace and the police courts. The justice of the peace courts constitute the lowest unit in the judicial hierarchy. They are presided over by a justice of the peace who is in some cases appointed but is usually elected from magisterial districts, towns, or townships within a county. The office of justice of the peace had its origin in Anglo-Saxon England. In England the justice of the peace was the leading citizen of the community and served for the honor rather than for compensation.[1] In the United States the justice of the peace is an officer usually devoid of legal training, although occasionally a

[1] Fairlie, J. A., and Kneier, C. M., *County Government and Administration*, p. 6.

lawyer is selected for the position. Most justices, however, are farmers or shyster lawyers such as are found largely around cities.[1] The jurisdiction of such courts is coextensive with the county and may include petty civil and criminal cases. Any damage or punishment meted out by the court is limited. The court has power to issue warrants or conduct preliminary criminal hearings. In such cases it binds the defendant over to the grand jury. The civil jurisdiction of the justice of the peace in a number of cases extends to the collection of claims, the performance of marriage ceremonies, the administration of oaths, and the acknowledgment of legal instruments. In three states, in addition to judicial functions, the justice of the peace also performs administrative functions and acts as a member of the county board.[2]

This lowest unit in the judicial system has no clerks and maintains no permanent record of proceedings. In few cases are its decisions final; rather, most of them are appealable to higher courts. Justice of the peace courts are declining in usefulness. Such courts were established to meet distinct rural conditions. In the early days of poor roads and inadequate communication, the justice of the peace performed a useful function. The office now exists primarily around cities, which means that the justice becomes a fee grabber and a hindrance to the judicial process.[3]

The municipal courts are found only in incorporated municipalities. They are created to enforce municipal ordinances, and have jurisdiction within the city comparable to that of the justice of the peace courts within the county. In the larger cities these courts have become specialized and highly efficient. The following types of special courts are found in cities: juvenile, small claims, domestic relations, traffic, arbitration and mediation.

The second division of a state judicial system consists of the county or district courts.[4] These courts may have jurisdiction in one or more counties. They are known by different names, such as the common pleas, the district, the circuit, or the superior court, in the

[1] Butts, A. B., "The Justice of the Peace — Recent Tendencies," *American Political Science Review*, vol. 22 (Nov., 1928), pp. 946–953; Manning, J. W., "Kentucky Justices of the Peace," *American Political Science Review*, vol. 27 (Feb., 1933), pp. 90–94.

[2] In Arkansas, Kentucky, and Tennessee.

[3] Manning, J. W., "In-Justices of the Peace," *National Municipal Review*, vol. 18 (Apr., 1929), pp. 225–227.

[4] As a class these courts are referred to as "trial courts" or "courts of first instance."

several states. In any event, they are presided over by a judge elected by popular vote in three-fourths of the states and appointed in the remainder. The jurisdiction of such courts includes both civil and criminal cases. They have original jurisdiction in all criminal cases, and their decisions are usually final on matters of fact. They have appellate jurisdiction over cases appealed from the justice of the peace and other minor courts. In civil cases their jurisdiction is ordinarily unlimited, although it may be restricted to cases involving more than a certain amount. In civil cases these courts have both original and appellate jurisdiction. Cases may be appealed to them from the lower courts. In some states these county or district courts have probate functions. They pass on matters of property, custody, and guardianship. They also perform important administrative functions as agencies for the enforcement of state law and the control of certain phases of county government. These courts are courts of record. In addition to the judge and other officials they are usually provided with regular clerks, elected or appointed. These courts ordinarily use a jury, and the judge is assisted by prosecutors and sheriffs.

Intermediate Courts. Between the highest state courts and the county courts certain intermediate courts are found in about one-third of the states. These courts may serve the entire state or certain districts within it. In any event, the judges are elected or appointed by districts. The jurisdiction of these intermediate courts is both original and appellate, and concerns both civil and criminal law. The original jurisdiction of the courts is determined ordinarily by the legislature. Among other items, it extends to contested elections and to civil cases involving amounts not in excess of certain sums. Its appellate jurisdiction covers appeals from the county and minor courts. Such intermediate courts were set up to relieve the supreme courts of much of their burden. Thus they are comparable to the circuit courts of appeals in the federal judicial system. In some cases such courts have powers of final decision.

Supreme Courts. Every state has a supreme court – though it may not bear that name; in some cases it is known as the supreme judicial court, the supreme court of errors, or the court of appeals. In any event the state supreme court is made up of a bench of judges, ranging from three to nine, who in most states sit together to hear cases, although the court may move about to different sections of the state. Supreme court judges are elected in the majority of the

states and appointed in a few. In most cases where the electoral system prevails, judges are elected from districts rather than from the state at large. The terms of office of state supreme court judges are generally longer than the terms of either executive or legislative officers, extending to twenty-one years in some states.[1] In three states such judges are appointed for life or good behavior.[2]

State supreme courts possess little original jurisdiction; their work is confined largely to hearing appeals and deciding questions of law brought to them from inferior courts. This means that state supreme courts exercise the power of judicial review and may nullify state laws which are in conflict with either the national or the state constitution. The process is much the same as that followed in the federal courts. In one respect, however, the jurisdiction of the state supreme court differs materially from that of its federal counterpart. In six states the constitutions require that the court give advisory opinions when requested by the governor or the legislature.[3] Such opinions are ordinarily not requested except in important cases. These advisory opinions, where given, do not have the weight of an opinion in a regular adjudicated case. In most instances such opinions are *ex parte,* which means that ordinarily but one side of the controversy is heard.

Specialized Courts. In addition to the regular state courts, most states maintain numerous specialized courts which are found on all levels of government within the state. These courts have been created in response to demands for speedy and informal justice, and are of several types. In the first place there are the probate or orphans' courts, which exist for the purpose of settling the estates of deceased persons and adjudicating wills and inheritances. A second type is the equity courts which deal with trusts, fraud, and other matters of equity. In some states separate equity courts are established; in others this work is done by the regular courts. The procedure is that followed in ordinary equity courts as described in the next section. The third type consists of juvenile courts which deal with offenders under a certain age. These courts make

[1] In Pennsylvania a judge of the supreme court serves for twenty-one years; in New York he serves for fourteen years; but in Vermont the term is but two years.

[2] Massachusetts, New Hampshire, and Rhode Island.

[3] In Florida, South Dakota, and Vermont the governor may request advisory opinions, while in Colorado, Maine, and Massachusetts the court must give advisory opinions when requested by either the governor or the legislature.

extensive use of probation and engage in more social service work than the regular courts. Small claims courts constitute a fourth class. These are usually found in the larger cities and deal with small accounts of the poor who are unable to employ a regular attorney. In many cases they are modeled after the Court of Claims in the United States. Domestic relations courts constitute the fifth type. These courts undertake to settle family disputes without resort to regular judicial procedure. A sixth type is the traffic courts, which have the power of enforcing traffic regulations, even by revoking drivers' licenses. A seventh type is the conciliation courts which are found in many jurisdictions. These attempt to settle petty disputes through some disinterested party who endeavors to bring both parties to the controversy into agreement. An eighth type is the arbitration courts. In these courts disputes are referred to an impartial arbitrator who, after hearing the facts, makes his decision.

STATE JUDGES AND OTHER OFFICIALS

Selection. State judges are generally considered inferior to federal judges. While federal judges are appointed by the President and the Senate, three-fourths of the members of the state bench are elected by popular vote. Popular election, however, has not always been the mode of selecting the state judiciary. In the colonies such judges were appointed. This practice is still followed in about six states. For a while after the Revolution, state legislatures selected judges. This method is now followed in some four or five states. In the others, however, popular election has come about in response to growing democracy.[1]

Arguments for and against Popular Election. It is expected that a judge shall be independent and free from political control. The question may therefore be raised as to which of the three methods of selection is most likely to produce judicial independence.[2] Undoubtedly election by the legislature is the most political method. Since there appears to be little demand for its extension, the argu-

[1] In Maine, Massachusetts, New Hampshire, Connecticut, Delaware, and New Jersey the judges of the supreme courts are appointed by the governor, subject to confirmation by the upper house of the legislature; in Vermont, Rhode Island, Virginia, and South Carolina they are chosen by the legislature; in the remaining states they are elected by the people.

[2] Hall, J. P., "The Election, Tenure, and Retirement of Judges," *Journal of the American Judicature Society*, vol. 3 (Aug., 1919), pp. 37–52; Hand, L., "The Elective and Appointive Methods of Selecting Judges," *Proceedings of the Academy of Political Science*, vol. 3 (1913), pp. 130–140.

ment is between executive appointment and popular election. It has been alleged that an elected judiciary must be a political judiciary. In such cases competence is not considered in the election, and the popular politician rather than the able judge is placed on the bench. The federal judges and the English bench are cited as successful judicial agents which do not depend upon popular election. On the other hand, there are arguments for popular election. Governors have not always made wise appointments to the bench, while in certain instances the people have made excellent choices. Then, too, since judges are called upon to pass on political questions, it is logical that they be elected on the same basis. Again, it is pointed out that partisan issues seldom enter into the election of judges. In some cases nonpartisan ballots are used, and judges are elected for other reasons than the mere fact that they belong to certain political factions. Of course, this is not always the situation, but politics probably enter less into the election of a judge than into the choice of any other public officer.

Other Modes of Selection. Many people who favor appointment desire that some method be adopted to prevent politically minded governors from appointing judges on partisan grounds. It has been suggested that the governor's appointments be limited to a list of nominees submitted by the bar association. Since the bar is made up of all political faiths, and is in a position to know the qualifications of a prospective judge, its nominees are likely to be fit for the bench. A few years ago the Cleveland Survey of Criminal Justice made suggestions which deserve serious thought. Those responsible for the survey had in mind the strong popular interest in the retention of the elective principle and proposed the following: "That judges be elected for a first term of six years, at the end of which they should run for reëlection for a longer term, and that in each successive campaign for reëlection they should run against their own record and not against a group of other candidates. Thus the question to be decided when a justice completes his term of office is: 'Shall he be retired or shall he be retained?' In the event of the retirement of a judge, a special election in which he would not be a candidate would be held." [1]

Even under an elective system there is a tendency for state judges to be reëlected and thus lengthen the term of office. It will be observed that the lower the court the shorter the term. While rela-

[1] Quoted in Bruce, A. A., *The American Judge*, pp. 144–145.

tively long terms may be common in state supreme courts, short terms are general in the minor courts. This trend toward a long term and reëlection tends to increase the independence of the judiciary and provide judges with needed judicial experience.

Removal of Judges. State judges may be removed by one of three methods: impeachment, joint address of the legislature, and recall. Impeachment is provided in all the states of the Union, but it is a process rarely used. Joint address of the legislature is used in some states and appears to be a more satisfactory method of removal. Under this system a judge is removed by the governor after both houses approve such action. No trial is necessary as in impeachment. Some states allow a majority of both houses to remove a judge without any action on the part of the governor. While the recall has been adopted in about twelve states for public officers generally, only eight states provide for recall of judges. It has been argued that recall tends to destroy judicial independence and enables a disgruntled element to remove a judge after an unpopular decision. Thus the recall is used sparingly and is looked upon as an emergency weapon. No supreme court judge has ever been recalled in any of the states. Where this method has been used it has been applied to minor judges, and apparently all cases of recall have been based on personal grounds rather than on unpopular decisions.

Caliber of Judges. Except in the lower courts judges are invariably lawyers who are trained for the bar and not the bench. This situation does not prevail in certain other countries of the world. In France, for example, one enters training for either the bench or the bar, and judges are selected only from those trained for the bench. There is a logical distinction between the two types of training. A lawyer is a partisan paid to advocate a certain point of view and is not concerned with broad social questions. A judge should be nonpartisan – one who sees all sides of a question and is concerned with justice regardless of the parties involved. He must be more than a lawyer. He needs a thorough knowledge of history, sociology and economics in addition to mastery of the law. State judges are generally believed to be inferior to federal judges. While this is undoubtedly true, there have been some state judges – such as Cooley of Michigan, Holmes of Massachusetts, Cardozo of New York, and Rosenberry of Wisconsin – who have become well known and whose qualifications have been outstanding. If state judges as a rule are inferior to federal judges, the question may be raised as to why

this situation should exist. Undoubtedly popular election, low salaries, and what is conceived to be necessary partisanship enter into the situation.

Compensation. The salaries paid state judges are fixed by the constitution in some states; in others the matter is left to legislative determination, subject to constitutional restrictions. While salaries are adequate in some states, they are low in others. In many cases compensation is so low that the best talent is not attracted to the judiciary. Seldom do state judges receive salaries as high as those paid federal judges. Undoubtedly higher salaries and longer terms would attract better men and tend to elevate the state judiciary.

Other Court Officials. No court functions with the judge alone. There must be clerks, prosecutors, and executive officers. These are provided in the state courts of records. With the exception of the judge, the clerk is probably the most useful judicial officer in the state. He may be elected by popular vote or he may be appointed by the court. In any event, it is his duty to keep the records and issue writs and processes. The prosecutor is known by different names — such as the district attorney, the prosecuting attorney, the commonwealth attorney — in the several states. He is usually elected, although in some states the higher ranking prosecutors are appointed by the supreme court of the state. The duties of this officer consist in giving aid to the grand jury in the investigation and preparation of indictments, prosecuting law violators in behalf of the state, representing the state in civil suits, and giving advice to state officials. In states where indictment by information is used, the prosecutor takes the place of the grand jury in bringing the indictment. In the performance of all these duties the prosecutor is a vital factor in state law enforcement. The office is often sought by young attorneys who look upon it as a stepping-stone in politics. Fortunately many of these young attorneys perform excellent service in this capacity.

In courts below the supreme court the executive officer is ordinarily the sheriff, who is elected in most states by the people of the county. It is the duty of this officer as executive of the court to serve writs, summon juries, execute judgments, and administer the jail. He performs other functions which, as explained in a previous section, are of declining importance. However, as executive officer of the court, the sheriff serves well.

In addition to the sheriff, in most states there is a constable who serves the justice of the peace courts in somewhat the same capacity as the sheriff serves the county and district courts. He is an extremely limited court executive. There was a time when the coroner performed important duties in connection with the enforcement of law generally. In some states these duties have been transferred to a medical examiner attached to the prosecutor's office. The duties of this officer, as discussed previously, are quite important but usually poorly performed. He could render invaluable aid to the prosecutor and the courts in the matter of law enforcement.

THE JURY SYSTEM

As a preliminary to any discussion of the system of judicial procedure the jury must be considered. In the beginning, jury trial was a fundamental guarantee in every state judicial process, and to a very large extent trial by jury was the most important factor in the states' administration of justice. The jury system is founded on the principle of Anglo-Saxon jurisprudence that no punishment could be inflicted upon anyone except after a full and complete hearing before a group of disinterested citizens. In harmony with this principle, both the grand jury and the petit or trial jury were set up.

The Grand Jury. The grand jury has the primary function of investigating cases of alleged crime and deciding whether there is sufficient evidence to necessitate a trial. The grand jury does not try a case; it merely hears evidence against the accused in *ex parte* proceedings. In the performance of its functions the grand jury is assisted by the prosecuting attorney. If there is evidence which can be uncovered either by the grand jury or by the attorney, the grand jury brings a true bill, after which a formal indictment is drawn and the person accused is held for trial. If, after a proper investigation, the evidence is not considered sufficient, the accusation is ignored and no bill of particulars is submitted.

In addition to bringing indictments in criminal matters the grand jury serves in an important inquisitorial capacity. It is the citizen's chief means of investigating the conduct of public officers and determining whether or not offices are properly operated. As long as the grand jury possesses this function there is little reason to fear that dictatorial power will be exercised in the state. While there have been suggestions to abolish the grand jury as a body to initiate formal judicial proceedings in criminal cases, it must be said that the

jury constitutes one of the best and most effective agencies available to citizens for holding public officers accountable.

At common law the grand jury consists of from twelve to twenty-three members chosen by lot. A choice is made by the court or by an arm of the court sometimes known as the jury commission. The court or its administrative arm causes the name of property holders to be placed in a jury wheel, and members of the grand jury are selected by simply drawing names from this wheel. The grand jury has been criticized as slow, cumbersome, and expensive. It is said to be the mere echo of the prosecutor, who could perform the same function without the assistance of the grand jury. In some states it has been abandoned as a body to bring indictments, and in its place the process of information by the prosecuting attorney has been substituted.[1] While this may be a more satisfactory procedure in criminal cases, it does not afford a satisfactory substitute for the grand jury's important functions of investigation.

The Petit Jury. The petit or trial jury has been established in the states to decide the guilt or innocence of persons accused of crime on the basis of facts presented. This jury is the judge of facts; the judge decides the law. At common law the petit jury consists of twelve members in criminal cases. In some states, however, except for felonies, this required number has been reduced, as in the state of Florida, where the number is eight, and in Utah, where it is six. The composition of this jury in civil cases shows great variation in the several states. In some places there has grown up a feeling that the petit jury should be waived in all but felony cases. About ten states permit this to be done by request of the defense. In the event that the jury is not used for the trial of civil cases a bench of judges takes its place. After hearing the evidence, the law requires a unanimous vote of the jury in all states except Louisiana to convict in capital cases and felonies. Often a two-thirds vote only is required in misdemeanor cases. For civil cases less than a unanimous vote is required in about half the states.

The petit jury, like the grand jury, is selected by lot by simply drawing from a jury wheel as many names as are required for a jury panel. The selection of jurors, it has been alleged, is often influenced by politicians. The jury wheel then, like the ballot box, can be stuffed and the jury loaded. It should be stated, however, that

[1] See Miller, R. J., "Information or Indictment in Felony Cases," *Journal of the American Judicature Society*, vol. 8 (Dec., 1924), pp. 104–129.

in many states, before final selection of a jury is made, both the prosecution and the defense may challenge a certain number of jurors. It is usually required either that a juror know nothing about the case to be tried or that he have formed no opinion on it. Extreme criticism has charged that the average juror is a man who knows nothing.[1] Actually there is little inherently wrong with the jury, but it has become involved in many procedural difficulties which have led to suggestions for its abolition. The chief difficulty with the jury in the states is the result of the method of selection, the requirement of a unanimous verdict, and the restrictions on the evidence that the jury is permitted to hear.

JUDICIAL PROCEDURE

The procedure followed in state courts is sometimes outlined by the legislature and in other cases is determined by the court itself. In the first instance, procedure is determined by code, while in the latter it is largely a matter of common law. In any event the substantive civil and criminal law cannot be enforced without a more or less definite procedural law. While procedure may be simple and informal in the minor courts, it becomes complicated and formal in the regular trial courts. Civil and criminal procedures in state courts, though somewhat alike, differ in certain significant respects.

Civil Procedure. Civil cases are initiated by the plaintiff's filing a bill of particulars with the proper court. The complaint sets forth the facts upon which he bases his claim. The court clerk then has this complaint served on the defendant, who, if he contests it, files an answer. The court then sets a date for the trial, and witnesses and jurors are summoned. Ordinarily both sides are represented by attorneys who are in charge of the actual negotiations.

After the jury is selected and sworn in, the judge orders the attorneys to proceed with the case. The attorney for the plaintiff usually makes the opening statement, in which he sets forth the facts of the case and what he proposes to prove. In this opening statement a wise attorney always tries to create a favorable impression for his client. The opening statement may or may not be followed by a similar statement from the defense counsel. In some courts all the evidence to be presented by the plaintiff is offered before the de-

[1] See Howard, P., "Trial by Jury," *Century Magazine*, vol. 118 (Apr., 1929), pp. 683–690; Oppenheim, S. C., "The Attack on the Jury," *New Republic*, vol. 61 (Jan. 15, 1930), pp. 219–221.

fense begins its case. After the opening statements the counsel for the plaintiff calls and examines his witnesses. This direct examination is followed by cross examination of the same witnesses by the defense counsel. The defense then presents its witnesses, and a similar cross examination follows by the attorney for the plaintiff. The purpose of cross examination is to bring out all the facts, and to attempt to discredit the witness before the jury. After the introduction of all evidence, the plaintiff asks for a directed verdict by the jury. If the judge denies this – and he will unless the defense has little evidence – the case goes to the jury. But before the jury considers the case in private, the attorneys for both sides may make arguments summarizing the case. Finally the judge delivers his charge to the jury. In this charge, which is often quite lengthy, he explains the law applicable to the case and states that the jury must decide the facts and, in the light of these facts, render a verdict of "guilty" or "not guilty." He may also summarize the case and give advice as to how the evidence should be weighed. Such a procedure is often helpful to the jury, which is made up of laymen who are unacquainted with the technicalities of legal procedure.

After the trial in open court, the jury retires and deliberates in secret. When it has reached a verdict it returns to the jury box and the verdict is announced by the foreman upon the request of the judge. If the verdict is favorable to the plaintiff the amount of damages is usually announced. The judge then pronounces judgment and makes the verdict of the jury legal.

In a civil case a court may render a judgment which may or may not be satisfied. If the losing party refuses to pay damages, he is not treated as were debtors some years ago. There was a time when a creditor could cause a debtor to be imprisoned for his refusal or inability to pay his just debt. Imprisonment for debt, however, has now been abolished; but as a matter of actual practice, creditors seldom start suit against a person known to be insolvent. If, however, after a judgment from a court, the losing party simply refuses to pay, the plaintiff's attorney may secure an order from the court directing the sheriff to sell a sufficient amount of the defendant's property to satisfy the judgment. After the judgment is announced, the losing party may appeal the case on the ground of error, and if it is reversed by a higher court a retrial takes place.

Criminal Procedure. The procedure in criminal cases differs in several particulars from that followed in civil cases. The first differ-

ence is in the arrest of the criminal. In such action, anyone may appear before a magistrate or a proper tribunal and make a complaint. On the basis of this complaint the court issues a warrant for the arrest of the accused person. The warrant is then given to a peace officer who is directed to apprehend the accused and bring him to trial. It should be stated, however, that arrests are frequently made without warrant, by the police and by citizens. After the arrest the accused is given a preliminary hearing in a minor court, which simply decides whether there is sufficient evidence to hold the accused for further trial. If the evidence is sufficient the accused is held to the grand jury, since the examining magistrate usually has no power to try the case. In the meantime the accused may be released on reasonable bail or bond, pledged by reliable persons who guarantee that he will be present for the trial. The amount of the bond is fixed by the judge. If the grand jury is convinced that the evidence is sufficient to hold the accused for further trial an indictment or true bill is drawn. In some states this process takes the form of information by the prosecutor.

The next step in ordinary criminal procedure is the arraignment of the accused before the trial court. There the charges are read to him and his attorney is asked to plead "guilty" or "not guilty" to the charges. If he pleads "guilty" the judge imposes sentence immediately. If he pleads "not guilty" the trial begins and the procedure outlined above for civil cases is followed. In such a trial the accused has a right to counsel and witnesses in his behalf, and has thrown about him all the safeguards set forth in the state constitution. If, at the end of a trial, the jury presents a verdict of "not guilty," he is released immediately. If the verdict is "guilty," sentence is imposed by the judge. After the imposition of sentence, unless an appeal is taken on the case, the sentence is carried out by the sheriff. It may take several forms. If the sentence calls for punishment it may be for a fixed term. However, in recent years there is a tendency toward an indeterminate term. Such a sentence is passed on the theory that the ends sought in criminal law are both the reformation of the criminal and the welfare of society. If and when the criminal can be restored to the condition of normal citizenship, he may be released from prison. If, however, he is of the incorrigible type, society must be protected from him and he must be incarcerated.

Equity Procedure. Equity procedure is much like civil pro-

cedure, except that an equity trial is usually held before a judge rather than a jury. The evidence in such a case must be in writing. Different terminology is used in an equity trial from that of an ordinary civil or criminal case. A decision is called a decree, and it requires a performance or non-performance of an act rather than the payment of money damages or punishment. In equity proceedings these decrees are enforced by writs of injunction or mandamus, and the violation of these writs is an offense punishable as contempt of court.

Judicial Review. State courts, like federal courts, have the power to review laws and administrative orders, and to pass upon their constitutionality. The process of judicial review in state courts is practically the same as in the federal judiciary. In passing upon the constitutionality of legislation, many state courts have the power to give advisory opinions, and are not restricted as are the federal courts. Advisory opinions have been little used, however, and the courts appear reluctant to give them.

NON-JUDICIAL FUNCTIONS OF COURTS

In addition to their strictly judicial functions, state courts are obliged to perform certain administrative acts, such as probating and administering estates, and regulating numerous operations of large business enterprises. In some states the court controls the election machinery and appoints minor local officials.

PROPOSED CHANGES IN THE JUDICIARY

Even a cursory examination of the state judiciary reveals several serious defects. Many of these have been mentioned by leading members of the judiciary itself. They relate both to court organization and to procedure. The organizational shortcomings of the state judiciary involve such matters as terms of office, compensation, methods of selecting officials, overlapping jurisdiction, and the absence of unity in the judicial process. For the most part these alleged defects, with the exception of the lack of unity in the state court system, have been discussed above.

Lack of Unity. One of the most serious defects of the state judiciary has been its lack of unity. Each court is independent of the others, and yet all of them are obliged to enforce state law. State law emanates from one source, and it is logical that some degree of uniformity be guaranteed in its application. Suffice it to say, uni-

formity is impossible with the decentralized system of courts found in the several states.

Plan of Unification. Unification involves the vesting of considerable power of direction, supervision, and control of the entire system in the hands of the chief justice or a judicial council. Such a plan would "make all courts *the court.*" [1] In a unified system any judge would hear any case. The powers of the supervising agency, among other things, would include the authority to assign and transfer judges, to establish rules of procedure for the entire system, and to determine types and characters of records and reports. It would have general direction of the work of all courts in the state.

Definite plans for unification of the judiciary differ, but there appears to be some agreement upon the major principles of unification. These have been summarized as follows: [2]

(1) A general court of jurisdiction for the state
(2) Three main divisions of the court
    (a) Some courts with two divisions – criminal and civil – and others if necessary
    (b) District courts – intermediate courts of appeals – with original jurisdiction in a limited number of cases
    (c) County courts – with original jurisdiction over civil and criminal cases and appellate jurisdiction over cases from local magistrates or justices of the peace, if these officers are retained, with authority to establish divisions for probate, juvenile cases, etc.
(3) The establishment of a judicial council

The exact degree of centralization that is desirable has been a matter of disagreement among students of the subject. The American Judicature Society has vigorously advocated centralization. The Committee of the National Municipal League, when it prepared the Model State Constitution, included a provision for definite unification of the state judiciary.[3] This proposal follows very closely the general plans indicated above.

In addition to the logical advantages of unification, which looks to greater uniformity in the application of state law, it has been alleged that a highly centralized court organization gives an elas-

[1] Graves, W. B., *State Government*, p. 529.

[2] See Haines, C. G., "The General Structure of Court Organization," *Annals of the American Academy of Political and Social Science* (May, 1933), pp. 1–11; quoted in Graves, W. B., *American State Government*, p. 530.

[3] Secs. 52–71.

ticity in the judicial machinery which is impossible under the elaborate systems provided in most state constitutions. Objectors to the establishment of a unified court system allege that centralization of authority in the hands of a small group is dangerous, and that the reduction of the influence of the legislature in court matters is undemocratic. It has been pointed out that unification is of little value since the consolidation of all courts in many districts would necessarily mean the creation of divisions, largely organized on a functional basis, set up on a hard and fast line, somewhat similar to the separate courts today.

The Administrative Judge. Along with unification of the court system, the creation of an administrative judge has been proposed as a solution of the problems arising out of decentralization of the state judiciary. Such a plan would make the jurisdiction of the chief justice state-wide, or would set up a presiding judge with authority to assign judges and supervise the entire court system. This compromise plan has been accepted by the bar generally, but has been resented by the judiciary itself.

Judicial Councils. The establishment of judicial councils in several states is one of the most important developments in recent years. The first judicial council was established in Ohio in 1923, and since then some twenty-five states have set up such agencies. The reasons for the growth of judicial councils has been explained by Dean Roscoe Pound as follows:

> In the substantive law there has been steady growth. But growth by judicial decision, through experience of the operation of legal precepts in their application to litigated cases, is too halting to meet the needs of business in an era of rapid development of business methods. . . . Here the main difficulty is that it is no one's business to study the law functionally, to perceive how and where it falls short, and why; to discover leaks in our apparatus of precepts and doctrines and find out how to stop them. Fifty years ago the judiciary committees of the houses of the legislature were equal to the small amount of investigation of this sort that was required for the efficient functioning of the law. Later committees of law reform in bar associations have been able to do part of this task. But today the task has become too great for these agencies. They are not continuously at work. They have no means of surveying the whole field. They can give but a fraction of their time. We must find some agency which is always in operation, which works under conditions of permanence, inde-

pendence, and assumed impartiality, in which, therefore, the public may repose confidence.

The judicial councils have been set up to meet these important needs.

The organization of the typical judicial council is relatively simple. Usually it consists of the chief justice, one or more other members of the state supreme court, and district judges, together with the attorney-general, and often members of the legislature. In some cases laymen have been appointed by the governor to the councils.

The powers and duties of judicial councils consist of general administrative supervision of the court system, rule-making, research and investigation. The judicial council is not a judicial body in the strict sense; rather, it performs administrative work and assists in the formulation of judicial policy. Without a definite unification of the courts of the state, the judicial council offers the best opportunity for bringing about some semblance of unity in the judicial process.

QUESTIONS

1. What are the functions of state courts? What is their legal basis?
2. In general, what are the types of state courts? What types exist in your state? What is their jurisdiction?
3. What are the types of minor courts? Discuss the office of justice of the peace. Is there need for a justice of the peace in your community?
4. Discuss county courts, intermediate courts, and state supreme courts.
5. What are the types of specialized courts? What types exist in your community?
6. How are state judges selected? Give the arguments for and against popular election. How are state judges removed?
7. What kinds of law are applied by state courts?
8. Outline and discuss the jury system.
9. Who determines judicial procedure? What is the procedure in civil, criminal, and equity cases?
10. Discuss the defects of state judiciaries. Discuss proposals for unification, judicial councils, and the administrative judge.

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PART VI

Intergovernmental Relations

CHAPTER XXII

The Reciprocal Relations of the National and State Governments

THE FEDERAL SYSTEM OF GOVERNMENT

THE Constitution of the United States, as we have seen, sets up a federal system of government. Such a system has been defined as one in which "political sovereignty has made a distribution of the powers of government among certain agencies, central and divisional, and has done so through the medium of constitutional provisions which neither the central nor the divisional government has made, and which are beyond the power of either to alter or rescind." [1] Our federal Constitution divides powers territorially between the national government and the governments of the several states. Neither unit has any contact with or control over the other except through the Constitution.

Federal and Unitary Governments. The federal system of government in the United States may be contrasted with the unitary systems found in many European countries. The distinction between the two systems is based on the location of ultimate authority. In a unitary system, all governmental power ultimately rests with the central government, and that government may delegate such powers as it deems wise to the local units. In a federal system, the constitution sets up two separate units of government – central and local – and gives to each certain powers that cannot be taken from it by the other.

The United States is the oldest federal system of government in the world today. Not all of the others have followed the United States model. In Canada, for example, the relationship between the central government and the provinces is a reversal of the division of power indicated in the Tenth Amendment to the United States Constitution. In that country the powers not delegated to the prov-

[1] Ogg, F. A., *Governments of Europe*, p. 53.

inces are reserved to the central government.[1] Thus in federal systems there is a distribution of powers between two units of government, but there is no requirement as to how these powers shall be divided.

Division of Powers in the United States. The division of powers between the national government and the local units in the United States is set forth in the Tenth Amendment to the federal Constitution, which provides 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." This means that the national government has delegated powers, while the states exercise reserved powers. In other words, the states may exercise all powers not specifically prohibited, while the federal government has only those powers especially delegated to it or necessarily implied. Examples of functions reserved to the states include control over education, health, welfare, highways, and intrastate commerce, and the power to regulate business and the professions.[2]

Relation of the States to the Federal Government. The role of the states as members of the Union is best explained by answering the following questions: (1) What are the obligations of the national government toward the states? (2) What do the states do for the national government? (3) What limitations are placed upon the states by the federal Constitution? These will be considered in order. First, however, the meaning of the word *state* requires explanation.

The word *state* as it is used in American government has a special significance. A state in the institutional sense has been defined as "a community of persons more or less numerous, permanently occupying a definite portion of territory, independent of external control and possessing an organized government to which the great majority of inhabitants render habitual obedience."[3] Thus a state is a unit of government possessing full powers of sovereignty and recognized as a member of the family of nations. In American government a state is one of the forty-eight subdivisions of the American Union. These units have many of the characteristics of a state in the institu-

[1] Graves, W. B., *American State Government*, p. 21.

[2] Probably the most significant powers of the state are its police powers, or the powers exercised in the interest of public health, public morals, public safety, and general welfare. The national government does not have police power except as it is implied from enumerated delegated powers.

[3] Garner, J. W., *Introduction to Political Science*, p. 41.

tional sense, but they do not posses full sovereignty. Four of the subdivisions of the American Union call themselves commonwealths — a more accurate description of the kind of government they represent,[1] since *commonwealth* implies a separate unit but does not suggest complete sovereignty. It has become customary, however, to use the word *state* to describe a member of the American Union, and in our discussion of the relations of the national government and the states, we shall follow the usual practice.

OBLIGATIONS OF THE NATIONAL GOVERNMENT TOWARD THE STATES[2]

The Constitution imposes certain obligations on the national government in its activities which concern the states. In many respects these may be construed as restrictions on national action rather than as positive aids to the states, but in any event they tend to show what the national government may or must do for the states.

Territorial Integrity. In the first place, the Constitution requires that the national government respect the territorial integrity of the states. The national government cannot divide a state or consolidate states without the consent of the legislature in each of the states concerned.

Protection. In the second place, the national government is obligated to protect the states against invasion and domestic violence. But when does a state need such protection? Presumably this is a matter for the state itself to decide. In practice, however, the President of the United States has sent troops into a state not only without the request of its governor but even in spite of his protests. This was done in 1894 in the Pullman strike in Illinois,[3] to enforce national power over commerce and the mails.

Republican Form of Government. The United States is also obligated to guarantee to every state a republican form of government. Some questions have arisen as to when and under what circumstances a government is republican in form. The Supreme Court has said that this is a political question, and has refused to define the word *republican.*[4] Presumably Congress, as the political arm of government, is the final judge of the existence or non-exist-

[1] Graves, W. B., *State Government*, p. 18.

[2] See Crawford, F. G., *State Government*, pp. 7–8.

[3] Browne, W. R., *Altgeld of Illinois*, pp. 116–174; *In re Debs*, 158 U. S. 564 (1894).

[4] *Minor v. Happersett*, 21 Wallace 162 (1874); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 118 (1912).

ence of a republican form of government in the states. It passes judgment on this matter in exercising its power to exclude Representatives and Senators from its membership. If Congress refuses to seat a state delegation, it says in effect that the state does not have a republican form of government, and unless the state maintains this type of government it cannot participate in national affairs. When such a controversy arises, Congress decides whether the members seeking seats actually are the representatives of the people. According to this test any government is republican so long as it is representative.

Other Obligations. In addition to the three major obligations just described, the national government performs other services for the states. It insures the states continuing equality of representation in the Senate. Each state is allowed two Senators, and the Constitution provides that " no state without its consent " shall be deprived of its equal suffrage in the Senate. The Constitution also provides that " no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." In the same clause it is provided that vessels of one state sailing to another state are exempt from duties which might be imposed by the latter state. The United States also guarantees the immunity of a state from suit by a citizen of another state or of a foreign state.

So far only the direct obligations of the national government to the states have been mentioned. The national government also aids the states in many ways that are not obligatory. For example, it supplies money for numerous public works and for health, welfare, and education. This involves the interesting question of grants-in-aid, which is discussed later in this chapter, as a means of the expansion of national power.

STATE PARTICIPATION IN NATIONAL AFFAIRS

As the national government is obliged to guarantee certain rights to the states and perform certain services for them, so the states are obligated to participate in certain national affairs. The Union could not exist without this coöperative activity of the several states. As members of the federal Union the states participate in the election of Senators and Representatives to Congress, in the election of the President and Vice-President, and in the process of adding amendments to the Constitution.

Election of Congressmen. Membership in both houses of Con-

gress has a definite state basis. As explained before, each state is entitled to two Senators in the upper house. Representation in the lower house is based on population, with each state entitled to at least one Representative. Under the Constitution, Congress determines the number of members each state shall have in the lower house. In the 1930 reapportionment of House membership, Congress limited the total membership to 435. The number of persons represented by a Representative was calculated by dividing the total population of the United States by 435, and the number of Representatives for each state was found by dividing the population of the state by this ratio.

Presidential Elections. States participate both in the nomination and in the election of the President and Vice-President. As explained in Chapter VII, the candidates for the Presidency and Vice-Presidency are nominated by political parties in conventions. To these conventions the states, or the parties in them, send delegates who are either elected by the party membership directly or chosen in state conventions. The role played by the state in the nominating process is further emphasized in the Democratic party practice which provides that the state delegation shall vote as a whole, with the majority of the delegation determining the vote of the state – the so-called unit rule. The state also plays a vital part in the election proper. The President is elected by an electoral college which is composed of electors chosen from the states. Each state has a number of electors equal to the total number of its Senators and Representatives. The electors vote as the majority of voters in the state have voted.

The Amending Process. In both of the two methods provided for amending the United States Constitution, the states play a major role. By one method, an amendment may be proposed by two-thirds of the members of both houses of Congress, but it must be ratified by three-fourths of the states. According to the other method Congress, on the application of two-thirds of the states, is required to call a convention for the purpose of proposing an amendment, and again three-fourths of the states must approve either through state conventions or through their legislatures.

In addition to these constitutional methods of state participation in national affairs, the states assist in the enforcement of national law and in some instances serve as administrative districts for the national government – for example, in the collection of internal reve-

nue and in the administration of the various relief and public works programs.

ADMISSION OF STATES TO THE UNION

Congressional Power over the Admission of States. The Constitution provides that Congress may admit new states to the Union, but in no case may a new state be carved out of other states without the consent of the states involved. The number and the size of new states are left wholly to the discretion of Congress. The details of the process of admission in individual instances have been determined by time and circumstances. While a more or less definite procedure has developed, Congress is under no obligation to adhere to established practices. A state may be compelled to undergo the territorial stage of development or this step may be omitted. Vermont in 1791, Kentucky in 1792, Tennessee in 1796, Maine in 1820, and West Virginia in 1862 separated from existing states and were admitted to the Union without undergoing territorial status. Also, Texas and California became states in the Union without passing through the territorial stage. The other states, however, have been formed out of organized territories.

The traditional procedure prescribed by Congress for the admission of new states is relatively simple. Once a territory is eligible for statehood on the basis of population and area, the inhabitants of that territory present a petition to Congress asking for admission to the Union. If the petition is granted, Congress passes an enabling act which permits the citizens of the territory to call a convention for the purpose of drafting a constitution. When the constitution has been approved by Congress, a resolution is passed declaring the territory a state of the Union.

In admitting states to the Union, Congress has imposed its own limitations in addition to those set forth in the Constitution, despite the fact that states are equal in the sight of the law, and that the Northwest Ordinance declared that new states should be admitted on an equal footing with the original states. When Ohio applied for admission to the Union in 1802, Congress compelled the state to agree not to tax public lands owned by the United States for a period of five years. When Nevada made application in 1864 the congressional enabling act required that the Nevada constitution should not be repugnant to the principles of the Declaration of Independence, and that polygamy should not be "tolerated and that lands belong-

ing to nonresident citizens of the United States should not be taxed higher than the lands of United States residents." When Arizona wished to join the Union, Congress and the President forced it to eliminate from its constitution a provision for the recall of judges. Likewise when Oklahoma sought admission, Congress specified the location of the state capital.

These last two cases are of particular interest in that they demonstrate that a state, after it has been admitted to the Union, may repudiate the pledge on which admission depended, provided there is no violation of the Constitution of the United States. In the case of Arizona, the constitutional convention remained in session while Congress was considering its petition. The convention willingly and cleverly agreed to strike out the provision for the recall of judges; but once the enabling act admitting the territory as a state in the Union was passed, the convention immediately restored that provision. Congress had already admitted the state and apparently was unable to recall its own decision. In the case of Oklahoma, no sooner was the state admitted than the movement was under way to change the state capital. This was done, and again Congress had no recourse. States may not be equal in seeking admission but they are equal as members of the Union.

LIMITATIONS IMPOSED ON STATES

The role of the states in the Union is further defined by the limitations imposed on states by the federal Constitution, and by the interpretations of these limitations handed down by the courts. These restrictions are of two general types: (1) those imposed for the purpose of giving the national government freedom in the exercise of its constitutional powers, and (2) those designed to protect the lives and property of individuals against the encroachments of the state governments.

Restrictions to Insure the Independence of the National Government. The restrictions imposed on the state for the purpose of giving the national government freedom to exercise its legal powers relate to such matters as treaty-making, the war powers, taxation, currency, and commerce. The second group of restrictions refer to criminal legislation, contracts, due process of law and the guarantee of equal protection, and suffrage.

The Constitution gives the national government exclusive control over foreign affairs. The states are forbidden to enter into "any

treaty, alliance, or confederation" and to make any "agreement or compact with another state or with a foreign power" without the consent of Congress. While the first clause of this restriction is so definite that no questions have been raised concerning it, the second clause has been a matter of some controversy, even before the courts. The federal courts have been rather liberal in interpreting the power of the states to enter into agreements with one another, even without the consent of Congress. In effect, the United States Supreme Court has stated that there are some instances in which states may make agreements without congressional approval. In 1893 the court gave some examples of such cases, one of which is set forth in this statement: "If the bordering line of two states should cross some malarious and disease producing district, there would be no possible reason on any conceivable public grounds to obtain the consent of Congress for the bordering states to unite in removing the disease."[1] In the same case from which this quotation was taken, the court attempted to state the condition which must exist before congressional assent is required for an interstate agreement. It said: "It is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States." Interstate compacts as elements in interstate relations are discussed in Chapter XXIII.

The Constitution specifically prohibits states from keeping troops or ships of war without the consent of Congress, and from engaging in war unless invaded. States are also forbidden to grant letters of marque or reprisal. The power to declare war is vested exclusively in Congress. The states maintain militias, but these forces are under the control of the President as commander-in-chief of the armies of the United States, and can be called into the service of the United States by order of the chief executive. Except for the suppression of domestic violence within the state, the militia is an arm of the national government.

The Constitution prohibits the states from collecting certain taxes without the consent of Congress. While both the national government and the states are prohibited from levying duties on exports, the states alone are forbidden to lay duties on imports. The Constitution indicates that the state may not levy such duties on an article at the time of its importation, and the court has further in-

[1] *Virginia v. Tennessee*, 148 U. S. 503 (1893).

terpreted this limitation of state power to extend to the taxation of such articles before they have become a part of the general property of the state. After imported articles have been commingled with the state's general property they are subject to state taxation along with other similar articles. The states likewise are prohibited from levying tonnage duties. These duties consist of taxes on ships according to their cubical capacity. The Constitution does not prohibit a state from taxing ships as property, but such a tax must not be based on the ship's carrying capacity.[1]

The United States Supreme Court has added to the taxing limitations of the state and has supplemented constitutional restrictions on state taxation. In the famous case of *McCulloch v. Maryland*[2] the court stated that a state may not tax federal bank papers, and in general decided that the state's taxing power does not cover the means employed by Congress to carry out its delegated powers. In a more recent case the court denied the power of a state to tax items used by the United States for governmental purposes – for example, gasoline used by the coast guard.[3] Thus, under both constitutional and judicial limitations, states are not permitted to tax national bonds, the stock of national banks, or the property of the United States.

The Constitution prohibits states from coining money, emitting bills of credit, and making anything but gold and silver legal tender in the payment of debts. This restriction does not apply to banks chartered by the states, which, until 1865, issued paper currency. In that year Congress, acting on the principle that the power to tax is the power to destroy, placed a tax of ten per cent on state bank issues, thereby making it impossible for state banks to issue paper currency.

One of the most serious problems before the Convention of 1787 was the regulation of interstate commerce. The lack of effective control over commerce was the chief reason for calling the convention. The new Constitution placed control over both foreign and interstate commerce in the hands of Congress. This grant of power effectively excluded the states from exercising control over such commerce, and from interfering with congressional regulations of commerce. It should not be understood, however, that states are

[1] *State Tonnage Tax Cases*, 12 Wallace 204 (1871).
[2] 4 Wheaton 429–430 (1819).
[3] *Mississippi v. Panhandle Oil Co.*, 277 U. S. 218 (1928).

prohibited from imposing any regulation on interstate commerce. Courts have allowed the states to make regulations designed to protect health and safety, in spite of the fact that these regulations may incidentally interfere with commerce. If states do not impose too great a burden on interstate commerce, courts will allow such regulation, but they tend to construe state powers in this regard very narrowly. The control of commerce is discussed more in detail in Chapter XXVIII.

Restrictions Protecting the Individual. The restrictions imposed to protect the lives and property of individuals against encroachments of the states concern such matters of criminal legislation as bills of attainder and *ex post facto* laws; the impairment of contract; the deprivation of life, liberty, or property without due process of law; the denial of the equal protection of the laws; and limitations on the state's power over the determination of suffrage qualifications as found in the Fifteenth and Nineteenth Amendments. All of these matters are discussed more fully in Chapter V.

EXPANSION OF NATIONAL POWER

Conditions Leading to Expansion. A mere reading of the Constitution of the United States gives little indication of the actual scope of federal power. In a very real sense the federal government was set up to meet pioneer conditions and to provide meagre governmental services for an agrarian society. With the broadening scope of modern civilization it has increased its power greatly, and in many cases this increase has come about at the expense of the states.[1] This expansion of federal power has been achieved through formal constitutional amendments, judicial interpretation of legislative enactments, increased executive control, the exercise of the treaty-making power, and the activities of recent federal emergency agencies.

Methods of Expansion. Several of the twenty-one amendments to the federal Constitution have had the effect of transferring power from the states to the federal government and imposing serious limitations on the states. The power of the states to determine suffrage qualifications was limited by the Fifteenth and Nineteenth Amendments. The income tax amendment gave the national government a new source of revenue and at the same time projected

[1] Wooddy, C. H., *The Growth of the Federal Government, 1915–1932*; Thompson, W., *Federal Centralization*.

federal control to a field of taxation previously reserved to the states. The Eighteenth Amendment definitely invaded the field of the state's police power. The Fourteenth Amendment, with its due process and equal protection clause, has probably limited state powers to a greater degree than any of the other amendments. Some pending amendments – such as the proposed child labor amendment – if adopted, will further invade the field of traditional state control. In all of these the power of the states has been definitely limited and the scope of the federal government has been greatly enlarged.

Judicial interpretation has been one of the most effective and subtle methods of federal expansion. The United States Supreme Court theoretically is an impartial umpire over the federal system, but it is a part of the national government and almost from the beginning has emphasized and encouraged the expansion of the federal government at the expense of the states.[1] It might be said with some truth that the court has reversed the position of the national government and the states, so that the Tenth Amendment might be made to read: "All powers not delegated to the states nor denied the United States are reserved to the United States." Of course this is an extreme point of view, but it indicates the enormous expansion of national power. In any event the attitude of the court has been one of liberality toward the expansion of the national government.

Federal expansion has also come about through legislative enactments. This method has developed through a subtle but powerful vehicle of national control – the grant-in-aid or subsidy principle.[2] Under a system of grants-in-aid the national government offers financial aid to the states for various purposes, and the states are required to match the federal grant in some specified proportion. Along with federal money, however, goes federal control; for the federal government, when it gives its dollar for these designated purposes, assumes control over its own dollar and the dollar of the states. The net result of this practice has been to coerce the states to make expenditures, and to give the federal government some degree of control over subjects previously belonging to the states. Among the projects for which federal subsidies have been granted are: agri-

[1] Field, O. P., "States versus Nation, and the Supreme Court," *American Political Science Review*, vol. 28, pp. 223–245.

[2] MacDonald, A. F., *Federal Aid*; Thompson, W., *Federal Centralization*, ch. 9.

cultural extension, highways, forest fire prevention, vocational education and rehabilitation, infant and maternal hygiene, public employment, and the emergency unemployment relief and public works program. Since 1925 such expenditures have amounted to not less than $135,000,000 per year.[1] The result has been to extend federal policy-determining power to subjects formerly within the exclusive jurisdiction of the states.

Various federal executive and administrative agencies have taken the initiative in numerous governmental undertakings and have advanced the power of the federal government, especially in recent years, at the expense of the states. In the organization of some of these agencies the subsidy principle has been used, but in others investigation, research, and recommendations have been resorted to as a means of leading the way for the states. Examples of this type of control are seen in the work of such agencies as the office of the Agricultural Extension Sections of the Department of Agriculture, the Bureau of Public Roads, the Food and Drug Administration, the United States Public Health Service, and the Bureau of Standards.

In recent years some federal administrative agencies have not been satisfied to exert and extend federal control over state functions through such mild means as investigation, research, and suggestions, but have attempted to exert a more direct influence on the state legislature itself.[2] This is done adroitly in most cases by simply calling attention to the need for certain legislation, and to the conditions provided in federal laws. The system of federal subsidies under which states may have federal money provided they meet certain conditions affords a means of possible coercion of the states by the federal government.

The treaty-making power of the United States " extends to all subjects of negotiation between this government and those of other nations, and to protecting the ownership, transfer, and inheritance of property which citizens of one country may have in another. It is unlimited under the Constitution except as to restraints found in that instrument, and except those which arise from the nature of the government itself and as to those of the states." Subjects which in themselves are matters of state control are often questions of controversy between this country and other nations. For this reason the treaty-making power of the national government is a means of

[1] Crawford, F. G., *State Government*, p. 19.
[2] Graves, W. B., *American State Government*, pp. 36–39.

extending its authority. The Migratory Bird Treaty between the United States and Canada, for example, concerns matters which are considered by some as subjects reserved to the states. In this case the question of national versus state control came before the federal courts, but the Supreme Court held that treaty-making is a broader power than law-making.[1]

Federal Emergency Agencies. The activities of emergency agencies created by the New Deal logically belong under one or other of the methods of federal expansion already discussed. However, these agencies have been so important since 1933 that separate attention should be given them. Undoubtedly their influence will continue long after the emergency has passed. The chief instrument of federal expansion used by these agencies has been the financial power of the United States. When we consider the relief problems it is obvious to even the casual observer that the state has failed as a relief agency in times of stress and strain.[2] Federal expenditures for relief as well as other purposes have become commonplace. Certainly to a considerable extent the states have given up part of their control over these traditional state and local functions, and we suspect that that control is gone forever. Further extensions of federal control are seen in the activities of the Reconstruction Finance Corporation, the Public Works Administration, and other agencies in the field of public works.[3] In the field of finance and banking, the activities of such agencies as the Federal Reserve Board and the Securities and Exchange Commission have been powerful instruments of national control. In all, these emergency federal agencies have made deep inroads into the powers and functions of the states, and in the minds of many this situation simply proves the declining importance of the states and the growth of these public activities beyond the scope of the state governments.

QUESTIONS

1. Show that the state is the pivot around which the entire federal system revolves.
2. Make a list of the things that the federal government does for the states, and another list of the things that the states do for the federal government.

[1] *Missouri v. Holland*, 252 U. S. 416 (1920).
[2] Graves, W. B., *American State Government*, pp. 36–39.
[3] See Ickes, H. L., *Back to Work*.

3. What powers do the states have to tax the property of such federal agencies as the Tennessee Valley Authority, the Home Owners Loan Corporation, the Reconstruction Finance Corporation, and the United States Housing Authority?
4. What functions or services rendered or performed by your state are partially supported by the federal government? In these cases, where does ultimate control over these services rest?
5. Give examples of federal expansion by constitutional amendment, statutory elaboration, judicial interpretation, and usage.
6. To what extent is control over social security divided between the states and the federal government?

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CHAPTER XXIII

Interstate Relations

GUIDING PRINCIPLE OF INTERSTATE RELATIONS

THE constitutional convention of 1787 faced the problem not only of adjusting federal-state relations but also of bringing order out of chaos in interstate matters. Under the Articles of Confederation the states were practically independent of the national government and of each other. As a result, difficulties frequently arose between them. In view of the existing situation, the solution of the problem of interstate relations was one of the major tasks of the Constitution makers. Under the solution adopted the states, in the exercise of their proper powers of government, are foreign to one another except as that relationship is modified by the Constitution.

Modification of the Governing Principle. The Constitution establishes relationships between the states through the clauses dealing with (1) "full faith and credit," (2) extradition, (3) privileges and immunities of citizens, and (4) the interstate compact. These clauses set up the legal relationships between the states which modify the constitutional principle of isolation. Since the Constitution was adopted, certain extraconstitutional relationships have also developed. Undoubtedly, if the Constitution were being revised today, these considerations would cause important changes to be made in the organic law. These extraconstitutional relationships concern such matters as uniform state laws, conferences of various state officials, reciprocity laws and regulations, and limited regionalism.

The Constitution requires that "full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state." This provision grew out of the bitter experience of the colonial period when each colony looked upon the official acts of other colonies as foreign acts. Forced recognition of such acts was the only practical method of bringing about real state coöperation. The full faith and credit provision applies only to civil acts

and does not require courts of one state to enforce penal and criminal laws of another. It has been applied to deeds, mortgages, contracts, legislative acts, judgments, wills, bills of sale, and other legal documents. When these are properly authenticated they must be given legal sanction in all the states. This means that a state must accept and recognize the legal acts of another state even though those acts do not correspond with its own practice.

Probably the most serious problem arising under this form of interstate relations is that of marriage and divorce laws. Divorces granted in some states have been challenged in others. In view of the full faith and credit clause, the question arises as to how a state may refuse to recognize divorces granted in other states. It has come to be regarded as a sound principle that a state may refuse to honor a divorce decree if the grantor state did not have jurisdiction in making it, or if the defendant in the case was not given proper notice.[1] In spite of the acceptance of this principle, and of the fact that some states in the interest of society generally honor decrees which they might properly contest, the problem has not been solved. It has been suggested many times that the Constitution be amended to give Congress power to establish a uniform system of marriage and divorce laws.

The Constitution provides for interstate rendition of criminals by stating that "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 in the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." It will be observed that the Constitution in considering the obligation of the executive authority in the state uses the word *shall*, but in practice the governors of the states have used their discretion in honoring or refusing to honor extradition papers and surrendering criminals. Thus a governor may refuse to return a fugitive from justice if in his opinion the accused person will not receive a fair trial. In such cases there is no legal method to compel the governor to return the accused for trial.[2] The only solution so far has been sought through agreements between states which allow the serving of warrants on a reciprocal basis.[3] Because

[1] *Haddock v. Haddock*, 201 U. S. 562 (1905).

[2] In *Kentucky v. Dennison*, 24 Howard 66 (1860), the Supreme Court of the United States stated: "The court is of the opinion the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this command created."

[3] Crawford, F. G., *State Government*, p. 30.

of the difficulties in enforcing extradition, it has been suggested that the federal courts be allowed to extend their jurisdiction over such cases. Other proposals call for constitutional authorization for interstate compacts and various forms of reciprocal legislation.

Along with the guarantees of full faith and credit and provisions for extradition, the Constitution attempts to effect a closer relationship between the states by providing that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The purpose of this clause, as explained by the Supreme Court, is to insure that the citizens of each state will be placed "upon the same footing with citizens of other states so far as advantages resulting from citizenship in those states are concerned. It relieves them from disabilities of alienage in the other states; it inhibits discriminating legislation against them by the other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of the laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." [1]

This clause has forestalled a great deal of discriminatory legislation in the several states, and, among other things, has prevented states from imposing a higher tax on citizens of another state than is imposed on their own residents. As the court has said, it tends to make the people of the United States one. It should not be understood, however, that the privileges and immunities clause prevents all discriminatory legislation. Nor does it prevent the courts from recognizing certain types of discrimination as valid. Legislation concerning common property and professions and occupations has been held valid in spite of this constitutional provision.[2] In general it "forbids only such legislation affecting citizens of the respective states as will substantially put a citizen of one state in a condition of alienage when he is within or when he removes to another state or when asserting the rights that commonly appertain to those who are part of the political community known as the United States." [3]

[1] *Paul v. Virginia*, 8 Wallace 168 (1869).

[2] See *Corfield v. Coryell*, Wash. C. C. 371 (1825), and Hall, J. P., *Constitutional Law*, p. 339.

[3] *Blake v. McClung*, 172 U. S. 239 (1898).

Interstate Compacts. Frequent controversies have arisen between the states concerning navigation, boundary disputes, penal jurisdiction, finance, the conservation of natural resources, public utility regulation, and other matters. In general these controversies have been settled by one of two methods: either the dispute has been adjudicated in the federal courts, or the difficulty has been solved through an interstate compact. Enough has been said already of the activities of the federal courts in settling such controversies; hence our discussion will be limited to the interstate compacts.

The Constitution states that "no state shall without the consent of Congress enter into an agreement or compact with another state." Undoubtedly this clause originated in the frequent controversies which arose between the states over questions of boundaries prior to the establishment of the Constitution. By requiring the approval of the national government for interstate agreements, a system was set up which safeguards the national interest and at the same time allows interstate adjustments. From 1789 to 1932, sixty-two interstate compacts have been made with the approval of Congress.[1] In addition, some agreements of this nature have been entered into without the express approval of the legislative body, but according to the courts such approval has been given by implication.[2]

The procedure in drawing up interstate compacts and securing approval of them is somewhat as follows. A question arises between two or more states which cannot be settled by any one of the states acting alone. Yet the matter at issue is not of sufficient interest to attract the attention of Congress. The states then, through their executive authorities, hold conferences and agree upon some type of joint control, after which they present a petition to Congress asking that the agreement be approved. Usually commissioners are appointed by the states to investigate the situation and prepare a report for submission to the states and Congress. If the report and recommendations give promise of providing an orderly settlement of the controversy, Congress will give its approval to this type of joint state action.

Probably the most successful illustration of the use of the com-

[1] A list of acts of Congress authorizing or approving agreements between states was prepared by the Legislative Reference Service of the Library of Congress, and appeared in the *Congressional Record*, July 17, 1935, pp. 11810–11812.

[2] For a chronological list of interstate compacts, 1789–1932, see Graves, W. B., *State Government*, pp. 650–651.

pact clause in settling interstate controversies is the so-called New York Port Authority.[1] In this case there were certain problems of transportation and navigation in New York Harbor which concerned primarily the states of New York and New Jersey. Both inter- and intra-state commerce were involved, but the two states apparently regarded the interstate features as the more important. They appealed to Congress for permission to set up a governing body which would control matters of navigation within the harbor. As a result, the Port Authority, a permanent body composed of commissioners appointed by the governors of the two states, was established. Its expenses are paid by the two states and it has authority to build bridges, develop terminal facilities, construct tunnels, and engage in other public works programs by issuing bonds, based not upon the credit of the states, but upon anticipated revenues from its various enterprises. In addition, the Authority has the power to regulate transportation and navigation of an intra- and inter-state character in the area. The Authority has met with unusual success. It has been reasonably free from political control. It has brought about improvements of lasting value and is operating as an efficient administrative, engineering, and legal agency. Undoubtedly such compacts are more fruitful than litigation in settling many interstate controversies. Certainly the New York Port Authority has justified its establishment.

Other successful interstate compacts include the Lake Michigan Agreement of 1910, by which the states bordering on that lake entered into an agreement for the trial of crimes committed on it; the Columbia River Compact, which regulates the fishing industry on that river; and the Colorado River Compact between seven states, which provides for an equitable division of the waters of the river and its tributaries, as well as the development of the entire Boulder Dam project.

In spite of the apparent success of the interstate compact plan for settling controversies between states, it has encountered obstacles. Chief among these is interstate jealousy. This situation was clearly demonstrated in the Colorado River Compact in 1928, and was even the cause of Senate filibusters which delayed the passage of the act for the building of the dam. Apparently Arizona, one of the states concerned, was fearful that it would not receive its fair share of the waters made available by the dam. It has been

[1] Crawford, F. G., *State Government*, p. 34.

pointed out also that the interstate compact has the disadvantage of being too "American" since it requires the consent of Congress.

EXTRACONSTITUTIONAL INTERSTATE RELATIONS

General Nature. In recent years many problems have arisen between the states which have not been solved through invoking the four clauses dealing with interstate relations in the Constitution. Some of these questions are of such minor importance to the national government that they are really not proper issues in Congress. Frequently they are matters of interstate coöperation and nothing more. Others, such as the regulation of professions and occupations and the licensing of automobiles and trucks, involve problems of reciprocity.

Uniform State Action. Since the states are independent of each other, and legislation is based upon either the actual needs of the states or the whims of the legislators, all types of legislation bearing on similar subjects have been enacted in the several states. On some of these subjects uniformity would be welcomed by the public generally; the need for it has been long recognized. With a reasonable uniformity of practice among the states, from a legislative as well as an administrative point of view, some of our recent important problems would have been solved without the struggles which have taken place in Congress.

The struggle for the adoption of a national child labor law is an example. The protection of children from dangerous and unhealthful working conditions is a matter falling within the state's police power, but not all states have seen fit to adopt adequate child labor laws. Consequently the fight has been taken to the national legislature. The story of this issue is told in Chapter XXXII. It is sufficient here to point out that the struggle for the child labor law as well as the more recent attempt to adopt a constitutional amendment on that subject could have been avoided if states had adopted uniform legislation regarding the labor of children. This is simply one example in which bitter controversy, as well as attempts at subterfuge,[1] would have been made unnecessary if states had uniform laws on matters that are assuming national importance.

[1] The word *subterfuge* is used to describe the attempts which have been made in Congress to enact a national child labor law under the commerce and the taxing power. The same subterfuge has been resorted to in connection with such matters as the Harrison Narcotic Law, the Pure Food and Drug Act, and the Mann Act.

Similarly difficulties in the administration of diverse state laws on other subjects would be solved by a system of state uniformity. The motoring public, for example, has expressed a desire for greater uniformity in state traffic regulations. In the field of business the divergency in state regulations has been the cause of serious confusion. In the matter of corporate charters states often compete with one another, each trying to attract large business interests by lenient charter requirements. In the field of insurance and utilities the diversity of laws and the variety of standards in the several states require different systems of records and the maintenance of otherwise unnecessary overhead expenses and procedures. If state regulations covering these matters were reduced to a uniform standard, undoubtedly it would result in lower costs to the business concerns themselves and ultimately to the consuming public.

Some suggestions have been made that it would also be well to develop uniformity in principles of judicial interpretation in the various states. However, uniformity of administrative practices and more especially uniformity of judicial interpretation are almost impossible of achievement. More fruitful have been the efforts that have been made to bring about some degree of uniformity in legislation through the adoption of uniform laws and the installation of uniform standards.[1]

In 1890 the National Conferences of Commissioners on Uniform Laws was created because the several states felt the need for establishing uniformity on certain subjects falling wholly within the limits of state control. All the states have coöperated in this endeavor. Each state through its governor, and usually with legislative approval, names commissioners to the conference. All proposals which apparently demand uniform state action are now submitted to this conference, and upon approval by it the suggested laws are forwarded to the various states for official action. Such matters as negotiable instruments, bills of lading, warehouse receipts, sales acts, partnership acts, fraudulent conveyance acts, and others of like import have been acted upon by this body and approved in many of the states.[2] In all, the conference has drafted and approved some fifty-five acts.

Conferences of State Officials. In addition to attempts at uniform

[1] Graves, W. B., *Uniform State Action.*
[2] Graves, W. B., *State Government*, pp. 655–658.

legislation and administration in the several states there are various other unofficial forms of interstate relations which should be mentioned. In recent years the governors and other state officials have been meeting annually to discuss their common problems. Out of these conferences there has developed a better feeling between these officials, and as a result some degree of uniformity, as well as a better understanding of the problems of one state by other states.

In 1906 President Theodore Roosevelt invited the governors of the several states to meet in Washington to discuss conservation. Out of this conference grew the regular Governors' Conference which has met almost every year since then and which in 1912 formed a permanent organization and established a regular executive committee with a group of officers to arrange and conduct the conferences as a regular part of the governors' outside contacts. It is difficult to point to any definite progress that has come from these Governors' Conferences, but undoubtedly they have served as instruments of opinion if not as agencies of legislation. Of course, such conferences are limited and weakened by the fact that some governors serve for short terms and are often unable to attend conferences because of the pressure of business at home.

Conferences of other state officials have been held from time to time, and on the whole they have proved more fruitful than the Governors' Conferences. These conferences of various groups of state officials cover all phases of state administration. Many of them are well organized and maintain a paid secretariat. Such conferences have an advantage over the Governors' Conferences in that there is a greater degree of continuity in the terms of their members. Among the more successful conferences are: the National Association of Railway and Public Utility Commissioners, the National Tax Association, the American Association of Highway Officials, the National Association of Attorney-Generals, and the Assembly of Civil Service Commissioners. Such associations have tended to create something resembling a professional attitude among the various officials, and in the long run they have helped to improve administrative techniques in the various state agencies.

The American Legislators' Association. In recent years interstate relations have been influenced considerably by the establishment of the American Legislators' Association, which came into existence in 1925 under the leadership of Senator Henry W. Toll of Colorado. This association, whose membership consists of state legislators,

maintains its headquarters in Chicago. It publishes a monthly magazine, *State Government*, which is sent to every state legislator in the country. The association has interested itself in bringing about state uniformity where needed, and in strengthening state governments as units in the governmental system. It maintains the Interstate Legislative Reference Bureau which provides a variety of services for state governments. It has arranged meetings of legislators in various parts of the country. It has assisted in the development of the Public Administration Clearing House. It coöperates with university and legislative reference bureaus in the states. It has attempted to organize a movement to eliminate double taxation between the states and other units.

The Council of State Governments. The association was responsible for the organization of the Council of State Governments, which brings together state administrative officers as well as legislators. The purpose of the council is to develop unity of purpose and foster coöperation among the states, especially in resisting the encroachments of the federal government. The council, as well as the American Legislators' Association, has been active in promoting the establishment of legislative councils in the several states.

Reciprocal Legislation. Another form of interstate relations is seen in the various reciprocity laws and administrative regulations of the several states. Reciprocal legislation consists of laws whose enforcement is conditioned upon either existing or anticipated situations in other states. Thus it is a method by which states actually enter into agreements in solving their interstate problems without the formality of an interstate compact. In many respects this type of action is the simplest and most logical solution which has been achieved for these problems. It has been prophesied that, as time goes on, this type of interstate action is likely to increase, and that the result will be greater uniformity between the states.

Reciprocal legislation is illustrated by the various laws regulating professions within the states. Doctors or lawyers often desire to change their residence from one state to another and continue their profession. Hence it becomes necessary that some arrangement be worked out between the states so that licenses issued in one state may be used in another. All but four states have adopted some sort of reciprocal legislation to deal with this problem. Usually a board is set up to issue a license to a person who has qualified as a member of a certain profession in another state, or to honor the one he

holds, provided that the requirements for admission to the profession are comparable in the two states concerned. Again, there are numerous instances in which a professional man desires to practice his profession temporarily in a state other than that of his legal residence. In this case he desires no permanent license but merely a temporary permit to carry on his profession in another state. To solve this problem, states have developed reciprocal laws which grant the privilege of carrying on a certain profession if the state in which the individual lives grants the same privilege. Reciprocal legislation of this character has been developed covering the various professions such as law, medicine, architecture, and others; also the licensing of motor vehicles, including buses and trucks. Likewise the enforcement of income and inheritance taxation has been worked out on a basis of reciprocity.

Proposed Regionalism. As the result of the rapid urbanization of the United States and the development of improved transportation and communication, the people of the various states have been compelled to live closer together, and to recognize the existence of other states from which they may be separated only by what might seem an artificial boundary line. Thus the constitutional modifications of the principle of isolation have been extensively used. Moreover, the various extraconstitutional forms of interstate relations are coming into greater use. The problems arising between states are often regional problems. The interstate compact furnishes a legal means of attacking such problems, the solution of which requires the coöperation of the states concerned; but it is cumbersome and slow. Hence suggestions have been made in recent years for the establishment of regions consisting of several states having certain common economic and social problems.

Numerous students of government have suggested that the states have failed as units of government and that there is no solution for state problems except the abolition of these now artificial divisions. While many persons are not willing to go to this extreme, it must be admitted that a unit of government midway between the states and the national government would serve certain definite purposes. The idea of regions is not new. In Europe such a plan has been in use for over a hundred years. Regionalism might be considered a form of that sectionalism which has been discredited as detrimental to national unity, and it is only in recent years that serious students have advocated it.

The need for the establishment of intermediate units of government to solve problems which are beyond state control and hardly within the realm of national supervision is set forth in a statement by Professor Peel, who said: "It is my proposal that they (the states) shall be divested of all the political attributes which they now have except those which are of a historical and purely ceremonial character. These attributes, whether of status or function, I would distribute among a series of political units beginning with the neighborhood or community at the base, and proceeding to the nation at the top. Midway between the units which I have named stands the region, by which is meant that area within which geographic fact, economic organization, social custom, and political interest have been established and fostered a sense of cohesiveness and community interest which distinguishes it from any other area." [1]

This is but one of various proposals looking toward regionalism in the United States. The unanimity of thought in the matter is sufficient to cause serious students of government in the United States to inquire whether or not the states have actually failed, and to determine the alleged need for an intermediate governmental unit. Various administrative functions of the national government are administered on a regional basis, including those performed by the United States Public Health Service, the Office of Education, the Federal Board for Vocational Education, the United States Employment Service, the Emergency Administration of Public Works, and other regular and emergency agencies in the federal government. Probably the outstanding regional administration which disregards state boundaries is the twelve Federal Reserve bank districts.

Future of the State. With the gradual encroachment of the federal government in matters once reserved to the states and the apparent failure of the states to furnish modern services satisfactorily, it is to be expected that proposals for the establishment of regions will become more articulate. It seems, however, that in spite of the obvious advantages of regional administration the state as a governmental unit is fixed definitely in the sentiments of the people. It is too much to expect that the states will disappear if regions are established. Rather, regions are likely to be specialized in character, and to be superimposed upon existing states. The region then does not replace the state, but simply becomes another administrative area.

[1] Quoted in Graves, W. B., *State Government*, p. 760.

QUESTIONS

1. Compare the relationship between states with the relationship between counties in a state. What means of coördination are provided in each case?
2. List the items of reciprocal legislation which have been recognized by your state.
3. Make a list of the questions which might be solved by uniform state action.
4. Make a list of all the interstate compacts that have been authorized by Congress, giving the date of each and the subject covered.
5. Why has there been so much discussion of regionalism in recent years? What would be the advantages of establishing regions in the United States?

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CHAPTER XXIV

The Relation of the National and State Governments to the Local Units

RELATION OF THE NATIONAL AND LOCAL GOVERNMENTS

AMERICAN federalism includes but two units of government: the central government and the states. The Constitution of the United States makes no mention of local government. Hence no legal and constitutional relation exists between the national government and the local units. Of course, local units existed and were recognized by the Constitution makers, but these units were considered as dependent upon the states. In other words, governmental power under the Constitution is divided between the national government and the states, and control over local units rests with the states. Between the national government and the states there is, as has been explained before, a federal relationship.[1] Between the states and the local units there is a unitary relationship.

Types of Federal-Local Relations. In spite of the fact that the local governmental units are not participating members of the federal Union, there has grown up between them and the national government an important, though indirect and to some extent unofficial, relationship. Furthermore, in several units today that relationship is no longer an indirect one; certain direct relationships exist between them and the national government. The various grants-in-aid for roads, health, relief, and other purposes are examples of this new federal-local relationship, in which the national government deals with local units without the intervention of the states.

National and local relationships may be considered from two

[1] See Wilcox-Summers Act, May 24, 1934, and *Ashton v. Cameron County Water Improvement District*, 298 U. S. 513 (1936). In this case the United States Supreme Court declared the Municipal Bankruptcy Act unconstitutional, and said that Congress has no power under the Constitution to interfere in the relation of states with local units. If the national government has the power to regulate such matters as local government insolvency, "the sovereignty of the state, so often declared necessary to the federal system, does not exist."

points of view: (1) general forms of national-local contacts, and (2) specific contacts between the national government and the local units.

General Constitutional Limitations. One general source of national-local relationships is the constitutional limitations on state action. Since local units are arms of the state, all the constitutional limitations applicable to the states are enforced against the local units. For example, a city or county is prohibited from impairing the obligation of contracts in the same way as the state; in fact, the city or county is the state in this regard. Again, like the states, local units cannot take property without due process of law, nor deny the equal protection of the law. Also local units, acting as arms of the state, may not interfere with national powers over commerce, taxation, postal affairs, and other matters.

Service Relationships. A second general form of national-local contacts might be called service relationships. Certain bureaus of the national executive departments aid the local units as well as the states, and in some cases the services of these agencies are even more important to the local units than to the states. Examples are the services rendered by the Civil Aeronautics Authority, the Bureau of Standards, the Bureau of the Census, the Office of Education, and the Federal Bureau of Investigation.[1] Many of these agencies collect important information regarding problems which must be solved by the local units. This information is made available to cities and counties, and through this method the agencies greatly influence the activities of local units. The Civil Aeronautics Authority, for example, collects information relative to the problem of airports and air transport and furnishes it to the cities and counties. The Bureau of Standards has drawn up a model city plan and zoning ordinance and recommended it to the local units. Cities and counties are not compelled to adopt any plan or proposal made by these federal agencies, but the fact remains that the national executive bureaus through their information and consulting services render definite aid to the localities and in a very real sense guide the actions of the local units in certain respects. The great majority of city plans and zoning ordinances in operation in the various cities today follow closely the model furnished by the Bureau of Standards. Thus the federal government, while it does not possess the power to impose a zoning ordi-

[1] See Betters, P. V., *Federal Services to Municipal Governments.*

nance on any city, has succeeded in introducing a certain degree of uniformity in zoning ordinances in the several cities.

The service activities of the Federal Bureau of Investigation are interesting examples of federal-local contacts. The bureau makes its fingerprinting service available to the local units. It stands ready to serve at a moment's notice the needs of local police officers. It attempts to coöperate with these local units, and is no farther away from the local unit than the telegraph office or long distance telephone. Local law enforcement would indeed be weak today without the assistance rendered by this federal law-enforcing agency.

Federal Subsidies to Local Governments. For many years local units in the various states have been assisted in such matters as health work and road building by subsidies from both the state and national governments. These grants-in-aid constitute a very important feature of national-local relationships.[1] As explained in the preceding chapter, federal grants have reduced the importance and prestige of the states, but on the other hand they have been of material assistance to local units. It can almost be said that today the share of local units in highway construction, health work, and various welfare activities – functions which at one time were considered as belonging wholly to the local governments – is confined largely to the privilege of paying a certain portion of the cost of the service; they have little control over the service itself. Federal subsidies usually carry with them extensions of federal control. Even when the grants enjoyed by local units come from the federal government through the states, the effect is the same – that is, increased revenues for local services but decreased local control over these services.

National, State, and Local Relations. Until recently federal subsidies for the maintenance of local services were routed through state channels, and highway construction, health, education, and welfare became state instead of local functions. More recently, however, the federal government has not only given aid to wider local service but has rendered much of that aid to the local units directly, with little state participation, and even in some cases with little federal control attached. In 1928, for example, the Reconstruction Finance Corporation was authorized to make loans to cities and other units for "self-liquidating" projects. In 1933 the amount of federal money available for such construction work was increased and the limitation of "self-liquidation" was removed. At that time

[1] MacDonald, A. F., *Federal Aid.*

thirty per cent of the cost of such projects was given as direct grants to the local units. The remaining seventy per cent was made available to the units as long-term loans. The only restrictions placed on such grants were the requirements that the local units should not employ convict labor, and that preference in employment should be given to ex-service men.

The ultimate effect of a federal subsidy system on local units has been a matter of considerable speculation in recent years. Is it an entering wedge into a wider field of federal control which will eventually destroy the local units as well as the states, or is it to be looked upon as a temporary arrangement which will disappear with the restoration of normal economic conditions? In any event, local services have been expanded, and this expansion has come about as the result of federal coöperation.

The fact that grants of money to local units under national emergency legislation are made without state action raises the question: With the possible continuance of federal subsidies, will there be established a direct relationship between the national government and the local units without consideration of the states, and will such grants strengthen or weaken local governmental services? It cannot be denied that relationships between the national government and the local units are closer than ever before. Does this indicate another conscious or unconscious effort to scuttle the states? Does it mean that the state is becoming less useful in the performance of public service? Will its services in the future be supplied by local units under general national supervision, and be financed with national funds?

THE RELATIONSHIP OF STATE TO LOCAL GOVERNMENT

Legal Status of Local Governments. Local governments, including cities, counties, townships, villages, and special districts, occupy a subordinate legal position in the state. As stated before, the relationship of the state to its local units is unitary as contrasted with the relationship between the states and the national government, which is federal. These governmental units are creatures of the state. The state not only determines the form and structure of local governments but also defines the powers and duties of these local units. Local governments have no inherent powers of self-government; the state legislature, except as limited by the state constitution, is supreme over them.[1]

[1] Dillon, J. F., *Municipal Corporations* (Fifth edition), vol. 1, pp. 154–155.

Limitations on State Supremacy. This supremacy, however, has certain limitations. The general restrictions on state action found in the federal Constitution prevent the state from empowering the local governments to do anything which the state itself may not do. The due process clause in the Fourteenth Amendment applies to the states, but the local units also, as arms of the state, must live within this limitation. Similarly the equal protection clause and the prohibition of the impairment of contracts apply to the local units as well as to the states.[1]

State constitutions throw certain safeguards about local governments and prevent the state legislatures from taking summary authority over them. Many state constitutions, for example, prohibit the legislatures from enacting special and local legislation. Some state constitutions provide home rule for cities and counties. Generally, however, the principle of legislative supremacy over local units is accepted in the several states. It should be mentioned that state control under constitutional limitations may partake of either legislative control or administrative control. We shall discuss these two types of control over local units as they apply to cities, counties, and other districts.

LEGISLATIVE CONTROL

Control over Cities. Cities were once considered sovereign states. One need but think of ancient Athens or Rome, or Venice in medieval times, to realize this. After the Middle Ages, cities came under the domination of the king, and later of the legislative body. The evolution of this control over cities is well illustrated in the history of England and France. In the United States the state legislature has inherited the authority over local units once exercised by kings and parliaments. As stated in other sections of this study, cities are subordinate to the state government. Courts have decided that municipal corporations are departments of the state – mere instrumentalities set up for the more convenient administration of the state.[2] The city is made or unmade by the state and can do nothing except what is allowed it by this unit of government. The state exercises both legislative and administrative control over cities.

[1] It will be observed that national and state constitutional prohibitions against state action impairing the obligation of contracts do not prevent the state from depriving local units of property without due process of law. Thus, property may be taken from one unit and given to another. In theory the property of a local unit is state property, to be disposed of as the state deems advisable.

[2] Dillon, J. F., *Municipal Corporations* (Fifth edition), vol. 1.

Types of City Charters. Under the early constitutions the power of the state legislature over cities was practically unlimited. The first attempt to grant cities some degree of freedom from complete legislative domination was made in Ohio in 1851 when the constitution was amended to impose certain restrictions on special legislation for cities. Legislative control is exercised through the granting of charters to municipal corporations; the charter makes the corporation. States have generally issued five different types of charters: special charters, general charters, classification charters, optional charters, and home rule charters.

The special charter system was used in the states almost exclusively until 1850. Under this plan every city charter was granted by special act of the state legislature. The special charter system has the merit of making it possible for every city to obtain the plan of government best suited to its needs. Unfortunately this ideal was not always achieved in practice. The legislature often interfered with the government of the city and the provisions of its charter, serving the demands of the state political organization without regard to the welfare of the city.

As a result of the natural reaction against the abuse of the special charter plan, the pendulum of legislative control swung to the other extreme, and states adopted the general charter system for cities. Under such a system the legislature passes one act for all cities of the state. Uniformity is substituted for the diversity under the special charter system. All cities are governed according to the same model without regard to their special needs. Among other things, the general charter was designed to prevent legislative meddling in city affairs, and undoubtedly it served this purpose. It has the disadvantage, however, of excessive uniformity, and it does not take into account the fact that cities even of the same size differ in their social and economic composition and in their local problems.

In an effort to avoid the legislative meddling that prevailed under the special charter system on one hand, and the rigid uniformity that characterized the general system on the other, the classification system was developed. It is based upon the principle that cities differ according to size, and within certain population ranges certain problems are similar. The plan is proposed as a compromise between the extremes of special and general charters. In spite of the fact that the classification system has been developed widely over the country and has undoubtedly solved many of the problems under

the other two plans, it does not take into account the differences in the problems of cities of the same population.

As demands were made for a greater degree of local self-determination, state laws in many states were modified to permit cities to adopt so-called optional charters. Under this system a city is free to select any one of several types of charter approved by the legislature. The optional plan recognizes the existence of special problems in the cities and the need for a certain degree of local control, but at the same time it limits the city to plans which have been approved by the state legislature.

The optional charter plan made progress until about 1917. At that time the advance of municipal home rule began.[1] Starting in Missouri in 1875, home rule has developed until now it is allowed in some fifteen states. Cities in these states may adopt charters of their own choice, providing that they contain nothing in conflict with the state constitution or laws. Home rule provisions have been written into a number of state constitutions. The New York home rule amendment is typical of such provisions. It states that "every city shall have the power to adopt and amend local laws not inconsistent with the constitution and laws of the state." [2] In some states home rule has been conferred by legislative act without an express grant in the constitution. Many of these acts have been approved by the courts. Thus home rule is either a constitutional or a statutory matter.

Home rule gives the city the right to frame its own charter. It does not conflict with state supremacy over local governments; on the contrary, in the opinion of many, it meets both the problem of state supremacy and the problem of self-government. Home rule does not propose to give local units control over state functions, nor to give the state government complete domination over distinct local functions. It may be said to extend only to the power of the city to determine its structure of government; it does not interfere with the general powers of government which reside with the state.

The advantages of the home rule system of framing municipal charters have been summarized as follows: [3] (1) It gives the people

[1] For a history of the home rule movement, see McBain, H. L., *The Law and the Practice of Municipal Home Rule*, ch. 3; and McGoldrick, J. D., *The Law and Practice of Municipal Home Rule, 1916–1930*, ch. 14.

[2] Constitution of New York, Art. XII.

[3] These alleged advantages are set forth in Crawford, F. G., *State Government*, pp. 443–444.

of each community an opportunity to have the kind of local government they want, both as to the form of organization and the functions to be exercised. (2) It develops public interest in local affairs, and aids in the public education of the people by placing on the citizens of each community the responsibility for devising, discussing, and deciding on the organization and functions of local government. (3) It enables local communities to deal with local problems more promptly as they arise. (4) It makes local government more flexible and better adapted to local conditions than it is under a rigid system of uniform legislation; it also makes for a more stable system for each community, in accordance with the wishes of the general body of citizens, than is possible under special measures frequently amended by the legislature at the request of temporary local officers or a few persons having influence with the legislature. (5) It facilitates the revision of city charters from time to time as needs arise in the community. (6) It relieves the legislature of the burden of considering local problems.

Home rule is said to be essential to the orderly development of municipal government, and opposition to it has gradually declined until it is looked upon as the only practical way to solve municipal problems. Some degree of home rule is found in practically all the states of the Union. Even with the adoption of optional or home rule charters, the state is of course still supreme in the control of city government; the legal status of the municipality remains unchanged.

The State and the Counties. Counties are subject to state control to an even greater degree than cities. While municipal corporations are created only at the solicitation and with the consent of the people of the area, counties are brought into being at the will of the legislature and by constitutional provision, without local action of any kind. Also, while cities are designed partially to serve particular local needs, counties are created for the better administration of the state.[1] Thus counties may be created, abolished, or consolidated by the legislature under constitutional limitations without local approval. In some states the constitution contains limitations on the power of the legislature to alter county boundary lines, prohibiting such changes from being made until and unless the consent of a

[1] *State of Maryland v. Baltimore and Ohio R. R. Co.*, 3 Howard 534 (1845); *O'Neal v. Jennette*, 129 S. E. 184 (1925); *Franzke v. Fergus County*, 245 Pac. 962 (1926).

majority of the voters is secured. Also, in the creation of counties, some constitutions provide that a certain number of voters must file petitions asking for a new county before the legislature is permitted to act. Some constitutions likewise place prerequisites of area, population, and assessed valuation on proposed new counties.[1]

Legal Status of City and County Compared. In certain states the legal status of the county is comparable to that of the city, since counties are recognized as municipal corporations and operate under charters given by the state. Some state constitutions definitely recognize counties as municipal corporations, and in other states courts have interpreted the law so as to bring counties and cities within the same legal category.[2] In still other states, however, counties are designed as quasi-corporations. Such a county may hold property, but only subject to state control.

Like the state, the county cannot be sued except with the permission of the state. Counties have been made suable in several states by general legislative act. In many states counties cannot be held liable for torts of their agents. In this regard, however, courts are inclined to apply the same test of liability to counties as to cities. Briefly, that test may be stated as follows: If the county or city is performing a public or governmental function, it is not liable for acts of its agents; but liability is attached to the local government unit in the performance of private or corporate functions.[3] While the test of local liability appears to be relatively simple in principle, the application of that principle presents difficulties. When, for example, is a function governmental or corporate? Undoubtedly certain functions are clearly one or the other, but there is a twilight zone within which the determination of liability becomes difficult. Fire and police functions have been classed definitely as govern-

[1] See Fairlie, J. A., and Kneier, C. M., *County Government and Administration*, ch. 5.

[2] In North Carolina and Montana, counties are considered as municipal corporations in the constitution. In South Carolina, Indiana, Oklahoma, Texas, and Wyoming the courts have classed counties as municipal corporations. By act of the legislature of New York in 1892, counties were declared to be municipal corporations.

[3] In *Cook County v. City of Chicago*, 142 N. E. 512 (1924), it was held that such action should not lie against counties and other quasi-corporations because "these organizations are not voluntary but compulsory; not for the benefit of individuals who have asked for such a corporation, but for the public generally." There has been a tendency, however, to depart from this holding in some cases, especially those involving negligence on the part of the counties. See *O'Brien v. Rockingham County*, 120 Atl. (N. H.) 254 (1923).

mental.[1] The operation of utility plants by cities is clearly corporate,[2] but there appears to be a difference of opinion in practically every state in the Union as to the nature of the functions of street and highway maintenance and construction.[3] Thus liability, along with due process of law, appears to be whatever the courts say it is.

A few states – notably California and Ohio – have extended home rule provisions to counties in much the same manner as to cities. Isolated examples of county home rule are found also in certain other states, including Maryland and Colorado. Home rule for counties, however, is somewhat more restricted than home rule for cities. Generally county home rule concerns only governmental organization and not governmental powers. This is consistent with the general principle that counties, to a greater degree than cities, are administrative arms of the state.

ADMINISTRATIVE CONTROL

State Centralization. The second type of state control over local units consists of administrative supervision conducted through the activities and powers of certain state administrative agencies whose functions cover local affairs. The growth of administrative control, or state centralization, in the states is a natural result of the modern demand for increased governmental service, which has been made possible because improved means of transportation and communication have virtually nullified the obstacles of distance and brought the state capital as close to the average individual as were the county courthouse and the city hall a few years ago. Administrative control carried to its conclusion means the creation of state agencies vested with authority to supervise local functions. Under such a plan the state would determine the standards to be maintained in the various units, and the state agency would be endowed with power to supervise their activities. In very few cases in the United States has complete state administrative control been accomplished. Rather it has had a piecemeal growth.

Control in Europe. The European practice contrasts sharply with that prevailing in the United States. Local governments in various

[1] *Brinkmeyer et al. v. City of Evansville,* 29 Ind. 187; *Hafford v. New Bedford,* 16 Gray (Mass.) 297; *Buttrick v. City of Lowell,* Allen (Mass.) 172;.also see *Fowler v. Cleveland,* 100 Ohio St. 158; 126 N. E. 72 (1919).

[2] *Bailey v. New York,* 3 Hall (N. Y.) 531; *Posey v. North Birmingham,* 154 Ala. 511.

[3] See *Mayor and Alderman of Chattanooga v. State,* 5 Sneed (Tenn.) 578; *Kaufmann v. Tallahassee,* 84 Fla. 634.

European countries are subject to minute supervision by a central administrative agency. In England, for example, where local governmental powers are not rigidly fixed by law, in spite of the apparently broad grants of authority to the boroughs the exercise of local powers is always subject to a system of administrative control. This means that in many cases final approval of local action must be given by central authorities before such action can be consummated.

Objections. It is to be expected that state administrative supervision and control would be opposed bitterly by those who favor local self-government. Undoubtedly such control means a loss of local autonomy, and so long as many of our local governmental units remain rural in character the sacrificing of local initiative and independence will be resented. Certain forms of local administration are far superior to state administration, and there are thoughtful students of government in the United States who oppose a further extension of state control until the evils of state administration, largely resulting from the spoils system, have been eliminated.[1] With the drastic overhauling of state organization, local governments are more willing to have the state undertake the supervision of certain of their functions, but until the state puts its own house in order it should not expect to increase its administrative control over the local units.

Advantages. State administrative control over local units, in spite of objections which have been raised to it, presents certain obvious advantages. The chief argument for the extension of such control is its flexibility. It permits variations to be made in general law to fit particular local conditions. It treats each local unit as a separate entity with its own problems, without attempting to impose upon it minute standards which are not applicable. So long as this control is exercised by able, honest, well-trained officials it is likely to produce better city-state relations. If, however, those who exercise this control are selected for partisan reasons there is the possibility of as much harm as good. But again it must be remembered that any type of governmental reorganization which works toward a concentration of power makes it possible to have either a better or a worse government, depending upon the honesty, integrity, and ability of the persons exercising power.

Forms of Control. State administrative control may take several different forms. The mildest type of control is the simple

[1] Former City Manager C. A. Dykstra of Cincinnati has often expressed this sentiment.

requirement of reports from local units. State laws specify that these local units must file reports on finance, public works, education, health, welfare, and other matters at stated intervals. Comparative statistics are then compiled which give the citizens information concerning the operations of the various units.[1] This constitutes a type of state control which is often an important factor in bringing about needed changes in local government, for such reports are important factors in the moulding of public opinion.

A second form of state administrative control is effected through the service rendered by various state agencies to local units. Advice and information given by these state agencies may be influential in improving local activities. Although the local units may not be compelled to take the advice offered, nevertheless the advice and the service rendered by state agencies furnish a means of controlling these units. Examples of this type of control are the assistance given local assessing officers by state agencies and the operations of state bureaus of criminal identification and investigation. While such a system may not be control in the strictest sense of the word, it at least achieves a certain degree of state-local coöperation. The most serious limitation on the ultimate success of such coöperation is the continued existence of the spoils system in the several states, which militates against more effective state and local relationships.

A slightly more drastic form of state administrative supervision is the inspection of local activities. Inspection enables the state government to enforce minimum standards for the performance of local functions. It has been most widely used in assessment and accounting, in health, sanitation, and education. In some cases the state agency can do no more than inspect and publish its findings. In other instances it may have the power to compel performance.

Probably the most effective means of state control over local government is provided by grants-in-aid. Since the principle of such grants has been explained elsewhere, it is sufficient to say at this point that grants-in-aid from the state to the local units, while they provide needed financial assistance, entail the substitution of state supervision for local control. On the other hand, such grants have undoubtedly raised the standards of certain local functions.[2] Education is a matter in point. State grants have equalized educational

[1] Kilpatrick, Wylie, "State Administrative Supervision of Local Financial Processes," *Municipal Yearbook*, 1936; Wallace, S., *State Supervision over Cities*.
[2] MacDonald, A. F., *Federal Aid*.

opportunities between the different sections of the state, and generally they have brought about higher educational standards.

Another type of state administrative control over local units operates through the powers of state agencies in some of the states to examine and approve certain financial transactions of the local units. In many states this takes the form of budgetary supervision and means that local budgets, especially county budgets, do not become effective until they have been approved by the state. More than twenty states provide for the compulsory installation of prescribed accounts for local governments. A greater number of states audit local accounts periodically. This means that local financial procedure in such states is now largely determined by the state.

Probably the most drastic forms of state control over local governments are exercised through the power of the states to appoint and remove local officers and to approve and review local accounts. In some cases there has been an actual substitution of state for local administration. Some states, as explained in a previous chapter, permit the governor to remove certain local officials for cause. In other states, central agencies participate in the appointment and removal of local assessors. It may be expected that this form of state administrative control will increase with the growth of the grant-in-aid principle. When a state grants money for the performance of local functions it naturally provides that it shall have a voice in the selection and removal of local administrators. In recent years some states have gone to the extreme of substituting state administration for local control. In North Carolina, for example, the Local Government Commission has supervisory authority over bond issues of local units.[1] No local bond or note can be issued and offered for sale without approval of the commission. The commission thus passes upon the necessity for the bond issue as well as upon its adequacy. In the event that a local government defaults on any bond issue, the state agency has the right to appoint a finance administrator to assume charge of the tax collections and the custody and expenditure of funds. Thus, state control is substituted for local administration.

Future of Administrative Control. There is ample evidence to indicate that state administrative control is likely to increase in the years to come. Ultimate control must be reduced to laying down general principles by legislative act and allowing state administra-

[1] North Carolina Code, 1931, sec. 2492(10)–2492(12).

tive agencies to supervise the details. This raises the interesting question of the limits of state administrative action, and of the delegation of legislative power to administrative agencies – a matter which was discussed in Chapter XVII. In any event those persons who decry the increase of state control over local governments are in the position of a man fighting the automobile and the development of electrical power in an age of automobiles and electricity. State control of local governments based upon sound principles of law is inevitable. The most serious limiting factor is the lack of professionalism in the state service. Once the state demonstrates that its agencies are more capable of a democratic and efficient administration than the local agencies, the local units will lose even more of their traditional control over traditional public services.

THE COUNTY PROBLEM

Too Many Counties? With the development of modern means of transportation and communication and the increasing encroachment of the state and national governments on matters that were once considered local, the question has been raised as to the necessity for the more than 3,000 counties in the United States. Before the coming of the railroad and the advent of the automobile, a general rule-of-thumb method was followed in determining the size of counties. It was believed that a county should be just large enough to permit any resident of it to make a trip from his home to the county seat by horse and buggy, transact a normal amount of business at the courthouse, and return before dark. Traveling by modern means of transportation, most individuals now would be able to visit four or five county seats in a day. Hence the old county boundary lines are now artificial and obsolete.

Despite the growing public awareness of the obsolescence of existing county areas there are those who raise their voice in protest against county consolidation. Suffice it to say, the consensus of opinion is that there are too many counties in the United States. Many of these counties are costly, and some of them are poverty-stricken. Small counties appear to cost the taxpayers more than larger counties.[1] Some of the so-called pauper counties exist only by the generosity of the state. Practically all services rendered in these counties are paid for out of the state treasury, and the people

[1] Manning, J. W., "The County in the United States," *Southwest Review*, vol. 20 (Spring, 1935), pp. 303–318.

merely support what amounts to a useless and an excessive number of county officeholders.

County Consolidation – Territorial. In response to the demands for a reduction in the number of counties and the enlargement of county areas, various plans of county consolidation have been proposed. Practically all of them seek to readjust county boundaries so that the counties will become more or less natural regions and their boundaries coincide with existing economic and social areas.

In general, county consolidation has been suggested from two different points of view; namely, territorial and functional.[1] The territorial type proposes to erase existing boundary lines and redraw them so as to increase the size of the county and thus enlarge the tax base and cut overhead governmental costs. There have been but two examples of territorial consolidation of counties in modern times.[2] The first occurred in 1919 when Hamilton County, Tennessee, absorbed James County. This consolidation was beneficial to the residents of the smaller and poorer county, but has not met with universal approval in the larger county. In the smaller county the tax levy dropped materially as a result of the merger. Public services, including roads and schools, have been improved. The larger and wealthier county, however, still feels that it has been forced to assume the burden of support for necessary public services in the smaller county. A county official in Hamilton County, in commenting upon the merger, made the following statement: "Enough has been shown to demonstrate without any doubt that, in consolidations of counties of such uneven proportions as Hamilton and James, especially in their assessed valuations, the counties in the James class are benefited economically at the expense of the counties in the Hamilton class."[3]

The second instance of county consolidation in the United States occurred in 1932 when Campbell and Milton Counties in Georgia

[1] See *National Municipal Review*, vol. 21 (Aug., 1932) (County Government Number), in which two studies on county consolidation appear: Manning, J. W., "The Progress of County Consolidation," pp. 510–515; and Hammer, C. H., "Functional Realignment v. County Consolidation," pp. 515–519.

[2] Manning, J. W., "County Consolidation in Tennessee," *National Municipal Review*, vol. 17 (Sept., 1928), pp. 511–514; and "County Consolidation as a Means of Tax Reduction," *South Atlantic Quarterly*, vol. 31 (Apr., 1932), pp. 150–156.

[3] Quoted in Manning, J. W., "County Consolidation — Is It Worthwhile?" *National County Magazine*, vol. 1 (May, 1935), pp. 7–8.

ceased to exist and the territory was added to Fulton County, of which Atlanta is the county seat. The reaction of Fulton County toward consolidation is the same as that of Hamilton County, but in neither case has there been any serious effort to return to the former arrangement.

Even though the question of county consolidation has been considered in a number of states and various recommendations have been made to reduce the number of counties, it is extremely difficult to persuade the people of any given county to agree to consolidate with another. Every county seat desires to retain its distinction as the county capital, and every politician clings to the perquisites which come from the county organization. The fact that two, three, five, or more counties may well get along with one courthouse, one sheriff, one assessor, one clerk, carries little weight with either the county seat which would lose its courthouse or the officials who would lose their jobs. It is to be expected, of course, that county officeholders would oppose any move toward consolidation.

County Consolidation – Functional. In view of the practical objections to the territorial consolidation of counties, another method of solving the problem of county areas has been proposed – that of functional consolidation. This approach is likely to produce more satisfactory results than any attempt to redraw county boundary lines. The merger of existing counties may simply create areas as unnatural as those existing prior to the merger and enlarge the county area without solving the fundamental problems involved. Functional consolidation, on the other hand, would leave the boundaries as they are but would extend the areas of administration of certain functions to cover more than one county.[1]

Probably functional consolidation can be best explained by calling attention to certain instances in which it has been made to operate successfully. Several counties in the state of Virginia, for example, have joined together to maintain a county almshouse. In other states one county superintendent of schools frequently serves two or three counties, and health departments have been set up to administer health matters in a group of counties.

In a very real sense, functional consolidation can be looked upon as a substitute for state centralization. Unless the counties of their

[1] See Hammer, C. H., "Functional Realignment v. County Consolidation," *National Municipal Review*, vol. 21 (Aug., 1932), pp. 515–519.

own free will coöperate in the administration of certain fundamental functions, it is to be expected that the state will yield to demands that these functions be properly performed, and will extend its authority over them, disregarding existing county governments.

Functional consolidation may also be looked upon from another angle. It extends the jurisdiction of the local administrative agency over an area which roughly coincides with the social and economic problems involved. Thus, functional consolidation is a boring-from-within process which allows the county to retain its courthouse, and county officers to keep their jobs, but extends the administration to more natural areas. Eventually under such a process the courthouse will become less useful, and the county officers will find themselves with jobs but no functions. The inevitable result, once the people are convinced of the superfluous nature of the courthouse and the officers, will be their elimination.

County consolidation, desirable as it may be territorially, will undoubtedly be compelled to yield to various forms of functional consolidation. Against the obvious advantages of the latter, it must be admitted that functional consolidation has the disadvantage of setting up numerous administrative agencies covering different areas, and thus adding other units to the many layers of government existing in most states today.

INTERRELATIONS OF LOCAL UNITS

The array of governmental units in the United States presents a bewildering overlapping of layers of governments. A number of these units perform conflicting and duplicating functions. The situation leads one to raise the question of the necessity of so many different governmental units and to inquire what relationship, if any, exists between them.

Number and Kinds of Local Units. In approaching the problem of the relationships of these many and varied governmental units the number and diversity of the local units deserve particular attention. The total number of local government units in the several states is unknown. Attempts have been made to determine the exact number of such units, but the results never agree. The Bureau of the Census in 1930 estimated the total at 194,632. Professor William Anderson in his study, *The Units of Government in the United States,* places the figure for all units at 175,418.[1] The following table shows

[1] Page 1.

the diversity of the types of units making up this total as well as their number:

The Nation	1
The States	48
Counties	3,053
Incorporated Places	16,366
Towns and Townships	20,262
School Districts	127,108
Other Units	8,580
Total	175,418

State Supremacy over Local Units. The state, as we have said before, is supreme over the local units, and a unitary relationship exists between the two. What relationship exists between the local units themselves? It may be stated as a general principle that no official and legal relationship exists between these units except as determined or approved by the state. Counties are subdivisions of the state, and are subordinate to it; but no such relation exists in most cases between the counties and the cities, towns, townships, school districts, and other local units within them; these various units are merely superimposed upon the counties, which have no control over them. In some states there are units such as magisterial or civil districts or even townships which occupy a subordinate position to the county, and the county exercises some degree of control over them; but so far as the cities, towns, school districts, and special districts are concerned, the state legislature is the chief governing agency. Generally the so-called unifunctional districts are not subject to supervision or control by the county.[1] Their existence creates no serious intergovernmental issue. The relationship of cities and counties, however, constitutes a real problem in the states.

The Metropolitan Problem. The existence of a large city of 50,000 or more population in a county raises the whole question of city-county relationships. The problems created by the metropolitan districts concern primarily government finance and economy, but they also involve the deeper issue of responsibility in government. In most such communities the city and the surrounding suburban and

[1] A unifunctional district may be defined as a district, generally established by state law, for a single purpose, such as drainage, flood control, irrigation, water supply, etc. For the most part, these districts are governed by independent boards or commissions established by state law.

rural districts are parts of an economic unit, but politically they are completely separate. Thus the problem of metropolitan government is that of making political unity coterminous with economic unity.

This problem exists wherever there is a large city within a county in the United States. Metropolitan New York, Boston, Philadelphia, Detroit, Chicago, Los Angeles, San Francisco, St. Louis, Denver, Minneapolis, St. Paul, and other places include many smaller urban units as well as the county, all maintaining their own separate and often hostile systems of government. Undoubtedly public service would be improved if these governmental units should be coördinated, and such matters as fire protection, police administration, health, and welfare should be unified. Otherwise there will continue to be duplications of service, conflicts of authority, and even neglect of public service.

The problem is made even more difficult in urban areas which spread across state boundary lines as in Chicago, New York, and Philadelphia. Some students of the subject have been so bold as to recommend the formation of separate states to include these "interstate" cities and metropolitan areas.[1] Thus it has been suggested that metropolitan Chicago become the forty-ninth state of the Union, to be known as the State of Chicago.

Proposed Solutions for the Problem. Serious attention has been given the needs of these metropolitan areas, and different solutions of their problems have been tried, including annexation, city-county consolidation, city-county separation, the borough plan, the extramural plan, and the establishment of the region as a unit of government.[2] The object of all is to produce something resembling political unity in an area possessing economic unity.

The simplest plan for solving problems of city-county relations is the extension of corporate limits as the city grows. In other words, the city annexes territory from time to time as such territory becomes a settled and congested area and an integral part of the metropolitan section. This plan brings about unity within the city but does not solve the problem of city-county relationships. It often meets with serious objections from the rural area concerned, including the county government and the smaller urban centers. Some people purposely live on the outskirts of the city to avoid high city

[1] See Merriam, C. E., Parrat, S. D., and Lepawsky, A., *The Government of the Metropolitan Region of Chicago*, pp. 179–180.

[2] See MacDonald, A. F., *Federal Aid*, ch. 8.

taxes. Undoubtedly these people are selfish to the extent that they avoid paying for advantages they derive from the city. Any proposal to extend the city boundaries to include them is certain to be treated as an attempt at forcing upon them the financial burdens of the city. Also, annexation does not solve the problem once and for all. It must be repeated from time to time and the boundaries must be moved outward as the city grows.

Frequently it is possible to eliminate duplication and simplify the structure of government by combining or separating city and county.[1] The greatest progress toward solving the problems of city-county relationships through consolidation of these two units has been made in San Francisco, Philadelphia, New York, and Boston. A limited degree of consolidation has been achieved in other places — notably in the case of the city of St. Paul and Ramsey County, Minnesota, and the city and parish of New Orleans, Louisiana.

In 1856 the city and county of San Francisco were consolidated; they are now coextensive in area and have a single government. The county board is the city council, and the city council is the county board. Some other officers serve in a dual capacity and thus avoid duplication of functions. Some departments, especially law, have not been completely merged. Also, unnecessary duplication exists in the law-enforcing offices, with both a sheriff and a city police department.

In Philadelphia the limits of the city were made coterminous with those of the county by an act of 1854, and the units of local government within the county were consolidated with those of the city. The Philadelphia plan has not been entirely successful, since some separate and independent agencies exist for the city and county.

Partial consolidation of city and county governments has been effected in New York and Boston. New York City includes parts of five counties within its boundaries. To some extent the functions of the city and county governments have been merged, but the counties remain as units for the administration of justice. The extent of consolidation has been described as follows: "In the first place, the work of financial administration has been completely consolidated. Appropriations and tax levies for county purposes are made by the city Board of Estimate and Apportionment and the Board of

[1] Fairlie, J. A., and Kneier, C. M., *County Government and Administration*, pp. 69–70, 511–523.

Aldermen; and the same city authorities determine the salaries for county officers, so far as they are not fixed by state law. The assessment of county taxes is made by the city department. The city chamberlain acts as treasurer for all five counties. The city comptroller audits county expenditures."[1] But consolidation does not stop with financial administration. It extends to public works, the ordinance power, and other matters. Many of these powers, formerly vested in the several boards of county supervisors, are now exercised by the City Council.[2] The management and control of county property has been assumed by the various city departments. Also, all local public charities are in charge of the city welfare agencies. The counties still act as separate and independent units in the administration of justice; in fact, the counties of New York City have been reduced to the position of judicial districts of the state.

In Boston the functions ordinarily performed by a county board are exercised by the mayor and council. A greater degree of consolidation has been effected in connection with financial administration than with any other function. "The treasurer and the auditor of the city of Boston act as treasurer and auditor for Suffolk County. The ownership and jurisdiction of all county property is vested in the city of Boston; and the entire county expenses, including those of judicial administration, are paid by the city of Boston." Consolidation is not complete, however, since there are a number of elective and appointive positions in Suffolk County, and the number of county employees exceeds five hundred.

St. Louis, Baltimore, and Denver furnish the best examples of city-county separation. As early as 1851 the city of Baltimore was separated from Baltimore County and given the legal status of both city and county. It now performs the functions of both units. Under a provision of the constitution of Missouri, the city of St. Louis was separated from the county; the city government now performs both city and county functions. The greatest defect of city-county separation is that city boundary lines must be drawn somewhere; and unless the city ceases to grow, such lines become obsolete and meaningless. The Missouri plan for the separate city of St. Louis made

[1] Fairlie, J. A., and Kneier, C. M., *County Government and Administration*, p. 514.

[2] By an arrangement which became effective in 1938, the City Council, whose members are elected by a system of proportional representation, was substituted for the Board of Aldermen. See page 505.

no provison for the extension of the boundary of the city to include the suburbs as they developed. The city of St. Louis is not in St. Louis county, and the provision of the law that no city shall be incorporated within two miles of the limit of any other city has prevented the incorporation of cities and towns adjacent to the boundaries of the city of St. Louis. Obviously this situation has complicated the problems of public service in the entire metropolitan area. Plans have been suggested from time to time to alleviate this condition, but so far all have failed at the polls.

Probably the most successful instance of city-county separation is the case of Denver. In 1902 a constitutional amendment provided for the consolidation of city and county government in that city. Under the amendment the city of Denver and all other municipal corporations in the county of Arapahoe were included within the territorial boundaries of a new unit called the City and County of Denver. This represents the nearest approach to complete separation that has been attempted in the United States. The constitutional amendment provides for further annexation of contiguous territory to the new combined unit.

An interesting arrangement may be observed in the state of Virginia, where, under the constitution, counties have no jurisdiction over cities and, in a very real sense, certain cities are mere islands within the county. These cities elect officers who perform the duties of county officials and thus combine city and county functions. The city has no contact with the county, and the county has no contact with the city. Various other attempts have been made to merge counties and cities. In addition to those mentioned, attempts have been made in Michigan, North Carolina, Georgia, Montana, Ohio, and Pennsylvania. To provide a model to be followed in such mergers, a City-County Committee of the American Political Science Association in 1913 recommended that "a standard be adopted for each of our states whereby a city upon attaining a given population, depending upon the needs of the states, automatically becomes a county-city with powers of both a municipality and a county with coterminous boundaries, a single legislative body, and a centralized executive." It will be observed that this recommendation incorporates the principle now followed in Virginia.

Another plan designed to solve the problems of metropolitan regions is the establishment of boroughs. The borough system may be best explained by calling attention to the situation which existed with

the creation of Greater New York in 1898.[1] Here was a metropolitan area with a large territory and more people than had ever before been included in a single city. It was said that annexation, which was pointed to as the logical solution for the problem, would fall of its own weight. A single central government to administer the affairs of the entire region would be top-heavy and burdened with so much work that it would soon be out of touch with local sentiment. In order to provide a plan of government which would give attention to problems of the entire region, and at the same time allow a certain degree of autonomy to the different sections, a borough system was devised. Thus the area is divided into five boroughs, each with its president, its school board, and other officers, and each charged with construction and maintenance of streets and sewers, the limited care of public buildings, and the enforcement of building regulations. Other city functions are in the hands of general city officials.

Under the Home Rule Charter which went into effect January 1, 1938, the City Council of New York became a unicameral body. Councilmen are elected from their respective boroughs on the basis of proportional representation. Functioning side by side with the Council is the Board of Estimate. This body consists of the chief administrative officers of the city, including the mayor, the comptroller, the five borough presidents, and the president of the Council. Only those laws which affect the administration of the city or aim at the amendment of the charter require the concurrence of the "Administrative Chamber," the chief function of which is the preparation of the budget. The presidents of the boroughs have some voice in general city policy, but owing to a system of weighted voting they are kept permanently in a minority. The mayor, the comptroller, and the president of the Council have three votes each, while the borough presidents have but seven among them.

The borough plan has been tried in no other American municipalities. In Europe, however, several cities have been organized in this manner. Generally the plan has been pointed to as one which prevents the burdening of the central city government and allows subordinate units some voice in general city control. Undoubtedly the most serious difficulty of the borough plan is its tendency to perpetu-

[1] Quoted in Fairlie, J. A., and Kneier, C. M., *County Government and Administration*, p. 522. See also *American Political Science Review*, vol. 8 (1914), p. 287.

ate unnecessary duplications. In New York, for example, the five boroughs have control over their streets and sewers; but the city as a whole also exercises a certain control over these municipal facilities. Authority for school administration is likewise decentralized. Moreover, in New York the whole problem of metropolitan government has not been solved by the borough plan because the counties continue to be superimposed upon Greater New York and its five boroughs.

Another possible solution for the problems of metropolitan government is the so-called extramural plan, which is designed to give the city a certain amount of jurisdiction and control over affairs beyond its border.[1] This plan is predicated on the fact that there are many instances in which the city is compelled to go beyond its boundaries in the performance of certain necessary functions. In the event that adequate water supply cannot be found within the city, it is essential to health and comfort that the city seek sources beyond its limits. Many other municipal functions are carried beyond the city limits, such as the maintenance of cemeteries, almshouses, hospitals, and parks. When a city owns property beyond its borders, its control is no greater than that of any private owner.

Cities, with the consent of state legislatures, may exercise a certain amount of governmental power over the affairs of surrounding communities even though they hold no property in them. For instance, a number of state legislatures have permitted cities to control the development of subdivisions in their suburbs. The organization of regional planning boards and agencies is a case in point. The extramural plan has the serious defect of giving to one unit of local government a certain measure of control over other units; thus it is contrary to the accepted idea of democracy. When an outlying section is annexed to the city its inhabitants are given the privilege of voting on city issues and electing city officials, but with the extramural plan a situation may be created which is akin to "taxation without representation." The plan does, however, have the merit of extending political control to sections which are economically parts of the major city.

In recent years a new solution for the problems of metropolitan government has been devised — a solution which has captured the imagination of many students of the problem. It is the establish-

[1] See Anderson, William, "The Extraterritorial Powers of Cities," *Minnesota Law Review*, vol. 10, pp. 475–497, 564–583.

ment of a governmental unit known as a region, to be superimposed upon existing local governments.[1] The establishment of this system assumes that the metropolitan area is already an economic unit, but a unit made up of several more or less autonomous subdivisions, each of which has its particular problems, all of which, however, fit into a composite regional picture. Complete consolidation of the various areas does not take into consideration the particular local problems in these suburban areas, and complete decentralization disregards the fact that the area is economically one. Hence, the proposal has been made that the existing cities and other local units with their separate officers be retained, but that there be superimposed upon them an additional unit of government performing only functions of regional importance. The regional governing body in this case would be a commission or council which would have control over such matters as planning, traffic, transportation, water supply, sewerage, and possibly health and police. The smaller cities and other units within the area would retain their identity and would give up only those affairs which extend beyond their own borders. These would fall to the lot of the regional governing body. An example of limited regionalism is seen in Boston, Massachusetts, where parks, water supply, and sewerage have been taken over by a metropolitan district commission whose jurisdiction extends beyond the limits of Boston and surrounding units for a distance of about fifteen miles. Its purpose, in addition to the administration of the above mentioned functions, is to act as a regional planning agency and coördinator of services which have been designated as regional.

QUESTIONS

1. Make a list of the services which the federal government renders to cities and counties.
2. To what extent has the state been neglected in the setting up of relief in recent years? What unit of government is likely to assume primary responsibility for welfare in the future?
3. In what ways does the federal government subsidize the work of local units of government? How is this possible under a federal system of government?
4. Is there a conflict between home rule and state centralization? Is it possible to harmonize these apparently conflicting tendencies?

[1] For a fairly complete list of agencies administering regional affairs in the United States, see Studensky, P., *The Government of Metropolitan Areas.*

5. What is the accepted doctrine of liability of cities and counties? Give some examples of governmental and corporate functions.
6. What are the arguments for the consolidation of counties? Is it likely that a great deal of progress will be made toward the territorial consolidation of counties? What is likely to be the trend in this regard?
7. Contrast the extent of state control over cities with that over counties. Why should there by any difference?

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PART VII

Colonial and Foreign Policies of the United States

CHAPTER XXV

The United States and Its Colonial Possessions

TERRITORIAL EXPANSION

THERE is nothing in the Constitution or in the early acts of Congress to indicate that the framers of the Constitution intended that the United States should become a colonial power. Congress is authorized by the Constitution to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[1] This clause recognizes the title of the United States to the territory under its control, but it does not grant power to acquire territory. It will be remembered that the Congress under the Articles of Confederation, without an express grant of authority, provided for the government of the so-called Northwest Territory by enacting in 1787 the famous Northwest Ordinance — the most important legislation of the entire Confederation. The Ordinance contemplated the eventual admission of the territory to the Union as a state or a group of states, upon an equal footing with the other members, and was the model for territorial government for over one hundred years. It would seem, then, that the framers of the Constitution, in bestowing power over territories, had no intention of authorizing Congress to acquire regions other than those contiguous to the original states, or to secure any territory which eventually could not be admitted to the Union as a state. Indeed, their purpose seems to have been primarily to provide for the organization of territories as potential states.

The Northwest Ordinance. The region known as the Northwest Territory came into the possession of the United States as a result of its victory in the Revolutionary War and through various cessions made by the states which originally claimed parts of the territory. It was held as a national domain for the benefit of the entire country. The Congress of the Confederation enacted the Northwest

[1] Art. IV, Sec. 3, Cl. 2.

Ordinance for the government of this new territory, which was to be held under temporary tutelage until it could be admitted to the Union. Briefly, the Ordinance provided that in the region there should be a governor, a secretary, and three judges appointed by Congress. In 1789 an amendment provided that these officers should be appointed by the President and the Senate. The territorial officers were authorized to adopt, promulgate, and enforce within the territory the civil and criminal laws of the states so far as they could be applied to existing territorial conditions. The acts of these officials were at all times subject to approval or veto by Congress. Also Congress reserved the right to legislate directly for the territory. Thus, under territorial government, the inhabitants were given no choice in their own government.

When the territory's population should include five thousand free male citizens of voting age, a legislative body was to be established consisting of two houses. The lower house, according to the Ordinance, should be composed of members elected for two years by the qualified residents of the territory. The members of the upper house were to be appointed by Congress, and after 1789 by the President from a list of ten persons nominated by the lower house of the territorial legislature. The nominees were to be residents of the territory who owned not less than five acres of land. The membership of the upper house or the so-called council was to be limited to five who were to serve terms of five years. It was also provided that the territorial legislature in joint session should select a delegate to Congress. This delegate possessed the privilege of participating in debates but was not allowed to vote in the national legislature. The fundamental political and civil rights of the inhabitants of the territory were guaranteed, and attached to the Ordinance was a bill of rights similar to the bills in state constitutions.

The Northwest Ordinance is significant not only because it provided for local self-government in the territory but also because it set a precedent and became the model for practically all territorial ordinances thereafter enacted by Congress. The Ordinance made it clear that the people in a territory were not to be subjected to perpetual congressional control, but rather that the territorial government was to serve only a temporary need until the growth of the territory should warrant admission to statehood. The Northwest Territory was divided in 1800 into two sections – the Indiana territory and the territory northwest of the Ohio River. In 1802 the

greater part of this latter section was admitted to the Union as the state of Ohio. Subsequently the Indiana territory was divided into the territories of Michigan, Illinois, and Wisconsin.

It was not until the end of the nineteenth century that, apart from the purchase of Alaska, territorial expansion beyond the continental bounds of the United States was considered. The reasons why the nation set out upon a course foreign to its traditions are both sentimental and practical. Even from the beginning the people of the United States assumed the missionary spirit, which, though it had behind it economic motives, became highly developed. Great Britain for centuries has been assuming "the white man's burden." As the United States grew in size and power it was logical that it, with its English background, should be impelled by the same sentimental ideas to expansion beyond the continental territory of the United States. Undoubtedly there were many who felt under obligation to help backward peoples, to civilize and christianize them, and to extend to them the blessings of self-government. Since other nations of the world were doing this identical thing, was there any reason why the United States should shirk its moral responsibilities?

Another force making for territorial expansion was the form of economic imperialism known as manifest destiny, which was identified with patriotism. The United States expanded on the continent of North America. Why should it not, once it had the power, extend beyond this? Again there were underlying economic reasons for the expansion of the United States; for as industry and commerce grew and agriculture developed, they demanded more markets and wider opportunities for trade.

Another important factor in the growth of the sentiment for territorial expansion after the Civil War was the influence of American naval officers — an influence greater than was realized by the general public. In cruising around in distant waters these officers saw various islands as excellent naval bases and coaling stations. Since the beginning of the twentieth century some of their activities have become known. Suffice it to say, the navy was able to force its views upon Congress and the Department of State. It may be said, however, that its desires met with sympathy in many quarters. Naval expansion was advocated in Congress by many well-known statesmen, including Theodore Roosevelt, Albert J. Beveridge, and Henry Cabot Lodge. The country was urged to build a bigger navy, and an increased naval force meant an increased need for naval bases.

Power to Acquire Territory. The Constitution contains no express provision for the acquisition of territory. When the question of the purchase of Louisiana was being considered in 1803 there was grave doubt in the minds of many as to whether or not Congress could by any means acquire territory. Jefferson thought that an amendment to the Constitution would be necessary before Congress could exercise such power. However, since the purchase had to be decided upon before an amendment could be put through, he gave up the idea of securing what he considered adequate authority to acquire territory, and proceeded to purchase Louisiana. Concerning the purchase, he wrote to a friend: "The Executive, in seizing the fugitive occurrence which so much advances the good of their country, has 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." [1] It has been said that Jefferson bought Louisiana because he felt that he must do so, but wept because he thought the government was exceeding its power under the Constitution. In other words, the acquisition was a victory of economic considerations over sentimental constitutionalism.

While Jefferson and his followers were taking this rather strict view of the power of Congress to acquire territory, there were others who insisted that the Constitution thoroughly warranted action in the matter. It was urged that the treaty-making powers of Congress permitted it to acquire territory. This view has prevailed and has been sanctioned by the Supreme Court, which has stated that Congress, since it has the power of declaring war and making treaties,[2] possesses as a consequence the power of acquiring territory either by conquest or by treaty.

The treaty-making and war powers of Congress are not the only basis for acquiring territory. In 1898, when the war with Spain was imminent, Congress attempted to secure a treaty which would have annexed Hawaii to the United States. It was impossible, however, to secure the necessary two-thirds vote to validate the treaty. Thereupon the Hawaiian government by resolution relinquished its sovereignty over the islands and ceded them to the United States. On the part of the United States government the act of acceptance was

[1] Quoted in Beard, C. A., *American Government and Politics* (Seventh edition), pp. 453–454.

[2] *American Insurance Co. v. Canter*, I Peters 511.

accomplished by joint resolution of Congress which required only a majority vote of both houses.

It is generally conceded that Congress may acquire territory by discovery. This was the basis of the action of Congress in 1856 when by an appropriate act it authorized the President to promulgate jurisdiction and claim for the United States the Guano Islands providing that they had been discovered by Americans and no other nation held prior claim to them. This act of Congress was upheld by the Supreme Court.[1]

It should be mentioned also that Congress possesses the power to acquire territory through the constitutional provision for admitting states to the Union. Under this power, by joint resolution of Congress in 1845, the United States acquired the Republic of Texas. In all, the United States has acquired the following territories: Louisiana in 1803, Florida in 1819, Texas in 1845, Oregon in 1846, California in 1848, Alaska in 1867, Hawaii, Puerto Rico, the Philippines, and Guam in 1898, the Panama Canal Zone in 1904, and the Virgin Islands in 1917.

Control of Territories. While the Constitution may be silent on the power to acquire territory, there is little doubt that Congress may legislate for the territory after its acquisition. It will be recalled that Congress has the authority to dispose of and make all rules and regulations respecting the territory or other property of the United States. Naturally such a general grant of power led to controversies over the meaning, limitations, and extent of this congressional power. Apparently Congress possesses full authority to legislate for a territory immediately upon the passage of its title to the United States.

In times of war the President as commander-in-chief of the armed forces governs any territory acquired by conquest through the army and navy. After peace is declared, however, the power to govern such territory must be based upon some grant in the Constitution. It has been pointed out that the President may govern such territory under the obligation to see that the laws are faithfully executed. Moreover, it is usually necessary that Congress, under its power to make necessary rules and regulations respecting territory, clothe the President with the power to govern. This has been done on numerous occasions, but sooner or later, in practically all regions acquired before 1850, Congress set up a government similar to that created in the Northwest Ordinance. Thus, such territories were

[1] *Jones v. United States*, 137 U. S. 202 (1890).

eventually prepared for statehood. All territories acquired before the Civil War, with the exception of California and Texas, were admitted as states after passing through the territorial stage.

In spite of the many controversies over the extension of slavery to territories, the power of Congress to determine the form of government in such territories was never challenged. It may be assumed, then, that Congress has full power to govern territory as it sees fit. The regular constitutional requirements relating to the government of the states have not been applied to government in the territories. For example, the territorial government may not be republican in form; it may not incorporate the doctrine of the separation of powers; and, it may not grant to its inhabitants any rights of self-government. In one case, however, the Supreme Court decided that the government of the territory could not deprive inhabitants thereof of their property without due process of law. This issue was raised in the Dred Scott Case, which the court decided in favor of the pro-slavery exponents; as a result the Fifth Amendment of the Constitution was extended to territorial governments as well as to state governments. It should be observed, however, that the Thirteenth Amendment, in so far as slavery was concerned, reversed this decision. In 1897 and in 1905, however, the court upheld the same legal principle when it decided that the Sixth and Seventh Amendments prevented both Congress and the territorial legislatures from abolishing trials by juries and unanimous verdicts.[1]

Incorporated and Unincorporated Territories. In spite of these limitations on the power of Congress to govern territories a new principle was followed after the Spanish-American War. Many of the territories acquired directly or indirectly because of this struggle were of such a nature that it was virtually impossible to extend to them all the provisions and safeguards of Anglo-Saxon jurisprudence found in the Constitution. Until this time all the territories acquired by the United States, with the exception of Alaska, were contiguous and had been settled by American citizens for the most part. Congress therefore felt no hesitancy in extending to them all the fundamental guarantees of life and property as well as the freedom of action which had come to be part and parcel of American citizenship. But the acquisition of non-continental territories inhabited by alien races presented an entirely different situation. Most of the

[1] *Springville City v. Thomas*, 166 U. S. 707 (1897); *Rasmussen v. United States*, 197 U. S. 516 (1905).

peoples of these island possessions were not accustomed to the rights and privileges of free American citizenship. What portions of the Constitution should be extended to these territories and what portions should be denied them?

Recognizing a distinction between them and previously acquired territories, Congress proceeded to extend to the peoples of these territories only those portions of the Constitution which seemed appropriate. The Supreme Court in the famous Insular Cases approved the attempt of Congress to govern such territory, and made a distinction between incorporated and unincorporated areas.[1] The incorporated territories at that time included Alaska, Oklahoma, New Mexico, and Arizona. In legislating for these areas the court said that Congress was bound by all limitations in the Constitution which were not clearly inapplicable to them. They were governmental units which eventually might be admitted to the Union on a footing of equality with the states.

On the other hand, the unincorporated territories, including Hawaii, Puerto Rico, and the Philippine Islands, were not admitted to this privileged position. These territories belong to the United States, but they are not parts of the United States in the same sense as incorporated territories. Congress in legislating for them is not bound by the limitations of the Constitution as applied to states or incorporated territories. Only the fundamental parts of the Constitution, according to the court's decision, are applicable to such regions, and these ordinarily extend to any territory acquired by the United States, without further action on the part of Congress. The so-called "formal" portions of the Constitution apply to such territories only when Congress sees fit to extend such privileges. In a word, the status of an incorporated territory is that of the first stage toward statehood, while the status of an unincorporated territory is that of a colonial possession which has little promise of ever becoming an integral part of the American Union.

The Supreme Court made no comprehensive enumeration of what it considered the fundamental and formal parts of the Constitution. As in its interpretation of the phrase "due process of law," it prefers to consider each case on its merits and determine as each arises what parts of the Constitution shall be extended to a territory. In any event Congress is under no compulsion to observe all the limitations

[1] See Burgess, J. W., "The Decisions in the Insular Cases," *Political Science Quarterly*, vol. 16 (Sept., 1901), pp. 486–505.

applicable to states when legislating for territories. It was even held in the case of Puerto Rico, the Philippines, and Hawaii before 1900 that the act of annexation did not make the inhabitants of these territories citizens of the United States. It is necessary that citizenship be extended to these regions by act of Congress. Congress thus is given almost a free hand in governing territories.

GOVERNMENT IN INCORPORATED TERRITORIES

At present, Alaska and Hawaii are the only incorporated territories of the United States. The inhabitants of Alaska are citizens of the United States, and all applicable parts of the Constitution are extended to this territory. The governments of these two incorporated territories have much in common, but the local variations make it desirable to treat each separately.

The Government of Alaska. The present government of Alaska is based upon an act of 1884 and amendments since that time, especially the organic law of 1912, which gave the region its first organized government of the traditional type set up in the Northwest Ordinance. In Alaska there are the three branches of government as in the states: the executive, the legislative, and the judicial. The executive branch consists of a governor and a surveyor-general, who acts as the *ex officio* territorial secretary. These officers are appointed by the President with the consent of the Senate, for a term of four years. Their compensation is paid out of the national Treasury. In 1927 Congress authorized the Departments of the Interior, Agriculture, and Commerce to designate one of their employees in Alaska to serve as an *ex officio* Commissioner for the territory, each having immediate charge of all activities logically falling to his particular department, subject to the supervision of the departments in Washington. Through the services of these executive departments Alaska receives what amounts to special consideration.

The judiciary of the Alaskan territorial government was divided into four divisions. In each is a district judge, a district attorney, and a district marshal. These officers are appointed by the President and the Senate for four-year terms. The district court has civil, criminal, equity, and admiralty jurisdiction, corresponding to that exercised by the federal district courts of the United States.

The Alaskan legislature consists of a Senate and a House of Representatives. The House of Representatives is composed of sixteen members, with four elected from each judicial district. Members

of the lower house serve for two years while the senators serve for four years. The legislature meets in regular session biennially; the length of the session is limited to sixty days. The act of 1912 provides that the legislature may hold special sessions of not more than fifteen days during each legislative period. The jurisdiction of the legislature extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. The law of 1912 includes also a rather lengthy list of limitations upon legislative action. The governor, however, has veto power over the acts of the legislature, and many items of legislation are subject to disallowance by Congress. The governor's veto power can be overridden by a two-thirds vote of the two houses. In 1906 Alaska was allowed a delegate in Congress. He is elected by popular vote by the citizens of Alaska and represents their interests in the national legislative body, but he is a member without a vote.

In allowing Alaska a delegate in the lower house, Congress prescribed unusual suffrage qualifications. The right to vote for this delegate and for members of the legislature is extended to all citizens of the United States twenty-one years of age or over, who are bona fide residents of Alaska, who have resided in the territory continually for one year preceding an election, and who are able both to read the Constitution in the English language and to write English.[1]

The Government of Hawaii. In 1900 Congress passed the act which is the basis for the present territorial government of Hawaii. Under this act all persons who were citizens of the Hawaiian Republic on August 12, 1898, were made citizens of the United States and of the territory of Hawaii. In addition, all citizens of the United States who resided in Hawaii at that time, or who subsequently have resided there for one year, are considered citizens of the territory. As is true in Alaska, the Constitution of the United States and all applicable laws have been extended to Hawaii.

The present government of Hawaii follows the traditional type of territorial government under the Northwest Ordinance. It differs from that prevailing in Alaska in that there is a dual set of executive officers. One group is appointed by the President and the Senate while the other is appointed by the governor of the territory and the territorial Senate. The governor and the territorial secre-

[1] *Session Laws of Alaska* (1915), Ch. XXVII, pp. 51–54, 44 *U. S. Statutes-at-Large*, Pt. II, Vol. XLIV, pp. 1392–1394.

tary are appointed for four-year terms by the President and the Senate of the United States. These officers are not only appointed by the President but are also removable by him. Their term is for four years.

The legislative branch of the Hawaiian government is composed of a Senate and a House of Representatives, the members of which are elected by popular vote. The Senate consists of fifteen members elected from senatorial districts. These districts, being unequal in size, are entitled to two, three, four, or six senators respectively. They serve for four years. The unequal representation from districts necessitates a plan of cumulative voting. The lower house of the legislature has thirty members elected from six representative districts and serving for two years. The districts are entitled to either four or six members each. The territorial legislature meets biennially. Its sessions are limited to sixty days, but the governor may extend the session for thirty additional days. The power of the legislature corresponds to that of the Alaskan legislature.

The judicial branch of the territorial government of Hawaii differs from that of Alaska in that it consists of two sets of courts — territorial and federal. The territorial courts, corresponding to the regular state courts, consist of a supreme court, circuit courts, and inferior courts established by the legislature. The supreme court is composed of a chief justice and two associate justices, all of whom are citizens of Hawaii. These, together with judges of circuit courts, are appointed by the President and the Senate and serve for four years. The federal court system of the island consists of two judges, a district attorney, and a marshal, appointed by the President and the Senate for six-year terms.

Hawaii, corresponding to Alaska, has representation in the Congress of the United States; but its delegate, like the delegate from Alaska, has no vote. The restrictions imposed on the suffrage correspond to those in Alaska with the exception that a voter must be able to speak, read, and write English or the Hawaiian language. The purpose of such suffrage restrictions is to permit native Hawaiians to vote and to exclude the many orientals who constitute a considerable portion of the population of the islands.

GOVERNMENT IN UNINCORPORATED TERRITORIES

The Philippines. In neither the incorporated nor the unincorporated territories has the United States followed any consistent colo-

nial policy. It has established no central agency to control them. Such control as exists is exercised through one of four executive departments: State, War, Navy, and Interior. Apparently this lack of integration means that the United States has not conceived of territories as permanent appendages to the national domain, and does not intend to remain permanently in the business of governing territories. The whole plan of government for the territories adjacent to the states definitely looked toward statehood, and this objective has been realized. As evidence of the continued existence of the same ultimate objective for other incorporated territories, attention may be called to the fact that no single office has been set up to regulate the affairs of the various territories. Also the national government has not developed a colonial service comparable to that of the British, in which careers may be made. The conscious or unconscious attitude which has been adopted in the United States appears to be that of letting the territories govern themselves as best they can, keeping a vigilant eye upon them, and then allowing them to look forward to ultimate statehood or independence from the United States.

The only territory to realize the hope of independence is the Philippine Islands. After years of agitation, Congress in 1933 authorized the Philippines to take the first step toward independence. The act provided independence at the end of ten years, if accepted by the people themselves. The first act was passed by Congress, vetoed by the President, passed over his veto, and then rejected by the Filipinos. The full import of this act was not independence, for the measure was allegedly designed to erect tariff walls to protect American cocoanut oil and sugar from competition with the products from the Philippines.

Although the Filipinos rejected the first act, another containing almost the same provisions was accepted in 1934. Under the second act, a constitutional convention was elected by the Philippine voters. It met in 1934. A constitution was drafted and submitted to the President of the United States, who approved it and returned it for ratification by the Filipinos. After the constitution was ratified an election was held to choose the new officers. A proclamation establishing the freedom of the Philippines was then signed in Washington on November 14, 1935.

Under the terms of the act authorizing independence, the authority of the United States will not be withdrawn from the Islands

until July 4, 1946. In the meantime they will continue to give allegiance to the United States, and the United States will continue to control Philippine foreign affairs, loans, currency, coinage, imports, exports, immigration, and amendments to the Philippine constitution. The United States also reserves the right to intervene to preserve the government and to protect life and property during the period. Philippine immigration quotas to the United States are limited to fifty persons a year, and trade is restricted by provisions imposing import duties on various Philippine products, and requiring that export duties be levied by the Philippines on goods admitted into the United States free of duty. The income from these sources is earmarked to apply to the Philippine debt.

The Government of Puerto Rico. The Puerto Rico government is based on acts passed by Congress in 1900 and 1917.[1] In the latter year United States citizenship was extended to the residents of the island. Previous to this act, these peoples had been neither citizens of the United States nor citizens of any foreign country. They were merely citizens of Puerto Rico. The act of citizenship in 1917 included a lengthy list of rights corresponding to the first eight amendments to the federal Constitution. The right of trial by jury and indictment by grand jury were omitted.[2]

The territorial government of Puerto Rico consists of the three traditional branches of government. The supreme executive power of the island is vested in the governor, who is appointed by the President and the Senate and holds his office at the pleasure of the chief executive. The act of 1917 established six executive departments, namely: Justice, Finance, Interior, Education, Agriculture and Labor, and Health. The heads of the departments of Justice and Education are appointed by the President and the Senate for four years; all other departments are headed by commissioners appointed by the governor and the Senate of Puerto Rico for four-year terms. These department heads form the Executive Council. In addition to this executive organization there is an auditor, who is the principal financial officer; he is appointed by the President for four years and enjoys rather extensive powers. Thus the United States has not given up its control over territorial finance in Puerto Rico.

The Puerto Rican legislature corresponds closely to that of Hawaii.

[1] *U. S. Compiled Statutes* (1918), pp. 557–575; *ibid.* (1923), pp. 216–217; *Code of Laws of the United States* (1926), pp. 1614–1625.

[2] *Balzac v. Porto Rico*, 258 U. S. 298 (1922).

Its membership is elected by popular vote partially on a district basis and partially at large. Before 1917 the Executive Council was the upper house of the territorial legislature. Since then there has been an elected Senate as well as a House of Representatives. Regular legislative sessions are held every two years, although special sessions may be called by the governor. Legislative powers in Puerto Rico resemble those granted to Hawaii, but legislative organization and procedure are regulated in much greater detail than in Hawaii. All laws passed by the Puerto Rican legislature must be presented to the President of the United States and are subject to annulment by Congress. As is true in Alaska and Hawaii, Puerto Rico is represented in the Congress of the United States by an elected resident commissioner who is allowed to take part in debate but is not allowed to vote. Suffrage requirements in Puerto Rico are fixed by the territorial legislature, subject to the restriction that "no property qualifications shall ever be imposed on or required of any voter."

The judicial branch of the government of Puerto Rico comprises two types of courts – territorial and federal. The territorial courts consist of a supreme court composed of five justices appointed by the President and the Senate for good behavior, and seven district courts presided over by judges appointed by the governor and the Senate for terms of four years. There are some thirty-odd municipal courts with limited jurisdiction in civil and criminal matters. The judges, marshals, and clerks of these local courts are elected by popular vote for two years. The justice of the peace system, as it has been established in Puerto Rico, provides that justices shall be appointed by the governor and the Senate. The federal court in Puerto Rico consists of one judge, an attorney, and a marshal appointed for terms of four years by the President and the Senate.

The Panama Canal Zone. The Panama Canal Zone, acquired from the Republic of Panama in 1902, consists of a strip of territory five miles wide on each side of the Canal. After the completion of the Canal in 1913, Congress authorized the President to discontinue the temporary commission form of government which had been in existence during the construction period, and gave to the President the power of governing the territory through a governor and such other officers as might be necessary.[1] Since that time provision has been made for a governor appointed by the President and the Senate for a four-year term, and also for the establishment of organized

[1] See Goethals, G. W., *Government of the Canal Zone.*

towns in the Zone, as well as a system of courts corresponding to the regular court system found in the United States. There are magistrates courts corresponding to the justice of the peace courts. In addition, there is a district court which sits in two divisions and has original jurisdiction in felonies and important civil cases, and in equity proceedings. This court also has the admiralty jurisdiction of a federal district court. The judge, attorney, and marshal receive their appointment from the President and serve for four years.

The Islands of the Pacific. In the small island possessions including Guana and Samoa, as well as Midway, Howland, Baker's, and Guam Island, there is nothing which resembles either civil or military government. The status of these islands has never been fixed definitely by Congress. The only government in them is that provided by the President through some naval officer designated by him and assisted by American and native citizens. In 1903, after a report by a congressional commission, American citizenship was extended to the inhabitants of Samoa, and Congress authorized the establishment of a representative legislature, the appointment of a governor with veto power, and the creation of a court system with privileges of appeal to the federal court of Hawaii.

The District of Columbia. It will be recalled that the clause of the Constitution which authorizes Congress to purchase sites within the states for the erection of military reservations also confers upon it the power "to exercise exclusive legislation in all cases whatsoever, over such districts (not exceeding ten miles square) as may, by cession of particular states and acceptance of Congress, become the seat of the government of the United States." This means that the District of Columbia, including the city of Washington, has no local legislature; Congress makes all laws and regulations pertaining to governmental affairs within the District. There is no governor, mayor, or any chief executive as such, but since 1878 executive authority has been vested in a three-man commission. Two members are appointed by the President and Senate from residents of the District, for three-year terms, and the third is an army engineer detailed by the President for an indeterminate period. This commission constitutes both a local legislative body and an executive board. It makes appointments to various municipal positions; it has control of fire and police protection; it makes regulations governing health and property; it supervises local utilities – in short, it operates much as a commission government in other cities.

The schools of the district are under the Board of Education, whose members are appointed by the justice of the supreme court of the District. The organization of the District government is completed with the Board of Charities, whose members are appointed by the President. For many years the cost of operating the government of the District was shared equally by the national Treasury and the taxpayers of the area. At present, however, Congress is providing only twenty or thirty per cent of the total cost of the government.

For many years there has been some controversy over the privilege of suffrage in the District. The District does not choose its own officers, but many residents of Washington and surrounding suburbs have made vigorous demands for the privilege of voting in national elections. Suffice it to say, this privilege has been denied, and as a result the large majority of residents of the District retain a legal residence in some one of the states and vote in many cases by mail. In spite of the fact that the residents of the District do not possess the right to participate in their own government, it has been stated that "there is probably no municipal government in this country where the opinion of the individual citizen has more influence on local government." [1]

Indian Reservations. Any list of areas under national jurisdiction should include the Indian reservations. Prior to 1924 Indians were not considered citizens of the United States unless they acquired citizenship by the regular process of naturalization. Thus the United States was not consistent in its application of the principle of *jus soli,* that all persons born or naturalized in the United States are citizens. It is estimated that there are some 350,000 Indians living on approximately two hundred reservations, having an aggregate area as large as New York and New England combined. The informal government of these reservations, if it can be called government, is under the control of the Department of the Interior, which promotes health and physical welfare as well as education and conservation in the reservations.

Protectorates. With the initiation of the American imperial policy following the Spanish-American War, several small Central American and Caribbean areas have come under the influence of the United States. Since these areas cannot be regarded as possessing complete

[1] Havenner, G. C., "Voteless Washington Expresses Itself," *National Municipal Review,* vol. 17 (June, 1928), pp. 326–328.

sovereignty, they are usually designated as United States protectorates. The United States has sent troops into Cuba, Haiti, Nicaragua, and Santo Domingo for the purpose of assuming control of financial administration and for the protection of life, property, and the orderly conduct of elections. In recent years much criticism has been directed toward this policy of assuming "the white man's burden" in these areas. Undoubtedly intervention has been in accordance with the fundamental principles of the Monroe Doctrine, and its avowed purpose has been to bring order out of chaos. Nevertheless there is some ground for the opinion that American intervention has interfered in the domestic affairs of these areas, and charges have been made that the United States was interested in them only insofar as they could be made a fertile field for American commerce and business. Thus the so-called protectorates might well be designated economic protectorates.

PRESENT TERRITORIAL POLICY OF THE UNITED STATES

What, then, is the present territorial policy of the United States? Prior to the Spanish-American War, which marked a turning point in American expansion, the United States government was interested in the extension of its control to what is now the continental United States. Up to that time little attention, if any, was paid to an extension of American authority beyond these limits, but as American business grew and the need for world markets became acute the government adopted unofficially an "empire" policy. Following the lead of other nations, it conceived the idea that it needed colonies, and in the opinion of some students of the subject it took every occasion to provoke trouble in order to get colonies. Today, however, many people believe that this policy has been based on a false premise. The value of colonies is being questioned. Probably the questioning of this general policy is partially responsible for the willingness in recent years with which the United States has granted independence to the Philippines. The question may well be raised: Are colonies worth the money and trouble necessary to maintain them? In very few instances can it be shown that we have regained from the colonies what we have invested in them.

The territorial policy of the United States is considerably influenced, if not largely determined, by the Monroe Doctrine. Probably a correct statement of our present attitude would be that we intend to see that other nations stay out of the Americas, and to that end

we shall set ourselves up as the preservers of all American independence. We are not seeking additional territory; rather we are interested in strengthening our spheres of influence.

QUESTIONS

1. Select the provisions of the Constitution which appear to delegate the power to acquire territory to Congress.
2. Under what constitutional powers does Congress control territories?
3. Compare and contrast the organization of the governments of Alaska and Hawaii; of Puerto Rico and Hawaii; of the Canal Zone and Alaska.
4. What are the arguments for and against denying the suffrage to citizens living in the District of Columbia?
5. Why does the United States appear not to be interested in colonies?

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CHAPTER XXVI

Foreign Policies of the United States

THE agencies through which the United States controls its foreign relations are discussed in Chapters XV and XVI. In this chapter we shall examine the policies which have characterized these relations with other countries and which have shaped the actions of the United States as a member of the family of nations. To understand the traditional foreign policies of the United States it is necessary to call to mind the situation which existed when the country became independent, as well as the natural and physical relationships of the government with the then remote parts of the world.

Since the beginning of the twentieth century the United States has emerged as a world power, but it has by no means reversed its traditional foreign policy, which might be characterized as one of isolation. The control and conduct of foreign relations, it will be recalled, is a matter reserved to the national government. Under the Constitution the states are forbidden to enter into treaties with foreign countries, and to maintain armies or engage in war except as provided in the Constitution.

Elements of Policy. The foreign policy of the United States may be said to include the following elements in whole or in part: (1) political isolation, (2) the Monroe Doctrine, (3) limited international coöperation, (4) the open door, (5) Pan-Americanism. Together these elements amount to a general tendency on the part of the United States to avoid entangling alliances and to maintain our national existence on the basis of self-sufficiency.

POLITICAL ISOLATION

Political isolation has been the chief tenet of general American foreign policy. It is the most far-reaching element of that policy, and has dominated practically all American contacts with other countries. This stand was first announced by Washington in his

famous Proclamation of Neutrality in 1793 when he refused to allow the United States to be embroiled in war between Great Britain and France.[1] The same general attitude was maintained by Jefferson when he called for "peace, commerce, and honest friendship with all nations, entangling alliances with none." American statesmen since Jefferson have reiterated the same view. There are but two instances from 1784 to 1884 in which the United States departed from this tradition; both were cases of participation in international conferences. Since 1884 there have been numerous occasions on which this country has lent its support to international coöperation, but such support is always given circumspectly, and a means is always provided whereby it can be withdrawn tactfully if it appears to be leading us into the foreign alliances against which Washington and Jefferson issued their memorable warning.

The policy of isolation was comparatively easy to follow during the first hundred years of our national existence. European politics had but little bearing on the American scene. The United States was self-sufficient. It was not an exporting nation, and was content to widen the domestic market. It had no colonies to protect and no foreign market to safeguard. Likewise its geographical position tended to promote a policy of isolation since there was little fear of foreign aggression. The American public knew that no foreign power was likely to seek territory on or near continental United States, and it had no desire for conquest elsewhere. We were absorbed in our own problems. Also European jealousies assisted the United States in maintaining an attitude of aloofness. Any threat to the American continent disturbed the European balance of power and was immediately looked upon as an act of hostility by the other European states, which took action among themselves to terminate the acts of the aggressor and thereby rendered interference by the United States unnecessary.

Modifications of Policy. It should not be understood, however, that this policy of isolation was absolute. Even Washington justified "temporary alliances" and recognized the existence of extraordinary emergencies. During the first hundred years of national existence there were several important instances of contacts with European politics. When Jefferson in 1803 was confronted with the seizure of Louisiana by the French, he did not hesitate to "marry ourselves

[1] McMaster, J. B., *History of People of the United States*, vol. 2, pp. 409–410, 414–416.

to the British fleet and nation"; [1] and in the same year the United States again departed from its traditional policy when it sent its navy to the Mediterranean to break up piracy. Also we engaged in war in 1812 when our commerce was interfered with by Great Britain in the course of the Napoleonic wars.

Isolation and Protection. The policy of isolation was basically a policy of self-protection; isolation was simply a means to that end. Since 1900 the United States has modified its traditional policy in several important respects. As a result of the Spanish-American War it became a colonial power, and the possession of colonies demanded participation in world affairs. Furthermore, the United States is no longer situated at a prohibitive distance from other nations. Before the advent of the steamboat, the cable, the airplane, wireless telegraphy, and the radio, American isolation was both physical and political, but today physical isolation has been replaced by elements of proximity which have tied the Old World to the New. The United States is also connected with Europe through race and through the ties of commerce and finance, the inevitable consequences of industrial development. Because of these many social and economic contacts this country found it impossible to stay out of the World War. Or perhaps one should say that because of them little real effort was made to avoid American participation in the conflict.

Steps toward International Coöperation. It should be pointed out also that this country did not participate in international conferences to any significant extent until after the World War. After the war President Wilson played a leading role in the formulation of the Treaty of Versailles, and the League of Nations was largely a creation of the American President. Isolation was so completely discarded for the period immediately following the conflict that the President himself went to Europe to participate in the peace conferences. Nevertheless the country soon reverted to its original attitude and refused to become a party to post-war agreements.

Since the World War the United States has held to rather strict observance of the traditional policy of isolation. It has, however, taken several noteworthy steps toward greater international coöperation. These include participation in the Washington Conference, the various conferences dealing with reparations, and the Kellogg-

[1] Lein, A. J., and Fainsod, M., *The American People and Their Government*, p. 453.

Briand Pact. We have also maintained unofficial contacts with the League of Nations, and American judges have occupied seats on the World Court, participating in the settlement of world disputes as individuals, without involving the United States officially. This government has also been represented at every disarmament conference since the war, and has played a leading role in many of these conferences.

For the past few years the United States has leaned toward a general policy of "collective security," which has been defined as "cooperation among nations to bring about diplomatic and economic pressure, perhaps armed force, to bear on any country that is initiating a war of aggression." [1] President Hoover indicated his approval of this partial reversal of traditional American policy in 1931 when Japan began its undeclared war against China. Not only did he serve notice on Japan of its obligations under the Kellogg Pact, but he raised the question of diplomatic and economic action against the aggressor with other major world powers. In his famous Chicago speech in 1937, President Roosevelt called attention to the violations of national sovereignty in recent years, having in mind Italy's seizure of Ethiopia and Japan's entry into China, and suggested that the peace-loving nations coöperate in a "quarantine" of the aggressors. This policy of collective security is predicated upon the theory that the United States cannot stay out of a European war if it comes, and the best hope for our nation's security lies in a union of the peace-loving nations of the world. Armed coercion would be the last resort of this international union.

American public opinion on matters of isolation is not well defined. Often the attitude of the public changes rapidly. It may be assumed that the basic attitude of the American people is one of national self-preservation. In some instances isolation may serve our national purpose, while in others it may happen that national security can best be attained by participation in world affairs. At the present time, the United States appears to be giving up its traditional policy of isolation.

Neutrality. As a by-product of isolation the United States has been the unfailing champion of neutral rights.[2] We engaged in the War of 1812 in order to maintain the rights of neutrals on the high seas

[1] Beard, C. A., *American Government and Politics*, Eighth edition, p. 279.

[2] See Adams, R. E., *A History of the Foreign Policy of the United States*, chs. 5–6.

and to oppose the British policy of impressment of seamen. Following the Civil War we persuaded Great Britain to make reparation for the aid given the Confederacy, on the ground that it had violated its obligations as a neutral. The entrance of the United States into the World War was due in part to the violation of our neutral rights by the Central Powers. In maintaining its attitude of neutrality the United States has consistently advocated and demanded freedom of the seas. It has been our contention on all occasions that the high seas should be open to all on equal terms and at all times, in both peace and war. This general policy was expressed by President Wilson in his famous Fourteen Points.

The American doctrine of neutrality found its fullest expression in the Neutrality Act of 1937, which even extended the doctrine in such a way that American neutrality would become an instrument to deter other nations from engaging in war. The act declared that, should the President "find" a war raging in any part of the world, the United States would not sell munitions or implements of war nor make loans to belligerents. Also, American citizens traveling in war zones would do so at their own risk. The President was required to list goods, other than munitions of war, which would not be transported on American ships; furthermore, if such action were necessary to promote the security of the United States, the President might require that no article of any kind should be transported to any belligerent until the ownership of that article had been transferred in the United States to some foreign government, and that the article should then be carried at the risk of that government. This remained the American policy until the outbreak of the war between Great Britain, France, and Germany in September, 1939. Congress thereupon amended the neutrality legislation of 1937 and provided that even arms and munitions of war could be sold to any belligerent if that nation would pay cash for the goods and transport them in its own ships. The "cash and carry" provision of the Neutrality Act was designed to attain the same ends sought in the previous act, for it would prevent American ships from being involved in dangerous trade and thus insure that our quest for trade would not involve us in war. The revision of 1939 continued the prohibition of loans to belligerents. The passage of the Lease-Lend Act in 1941 shows clearly that neutrality is as uncertain a foreign policy as isolation. In an era of declared wars, neutrality, even though it was a mere fiction, was a useful device. But when undeclared war is the order of

affairs, as in the modern world, neutrality is inconvenient if not impossible.

THE MONROE DOCTRINE

Another policy which has permeated American foreign relations is the Monroe Doctrine. The Monroe Doctrine is a logical application of political isolation. When President Monroe in 1823 delivered to Congress the message which contained the fundamentals of this foreign policy, he simply served notice on the nations of Europe that the United States, which does not meddle in European affairs, insists that European nations refrain from meddling in American affairs. At the time this pronouncement was made it was a rather bold step on the part of the new nation. From one point of view the Monroe Doctrine might be looked upon as a departure from the policy of isolation. It will be remembered that Spain was attempting, with the support of the Holy Alliance, to reëstablish control over its rebel colonies in South and Central America.[1] For the United States to side with the colonies in such a controversy meant that its traditional policy of isolation was to be extended to the entire western hemisphere.

Major Principles. Fundamentally the Monroe Doctrine includes four major principles.[2] In the first place it stated that "the American continents, by the free and independent condition which they have assumed and maintained, are not henceforth to be considered as subjects for future colonization by any European powers." This particular part of the Doctrine was directed against Russia, which it was feared had designs upon the northwest coast of North America. It was furthermore stated "that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our people and safety." According to this phase of the Doctrine the United States would resent not only political control of territory but even the extension to the Americas of a system of government which is considered foreign to American traditions. Presumably, if the Fascists should attempt to extend their system of government to any South American country today, the United States would take notice of such action and possibly invoke the Monroe Doctrine against it.

The second principle found in the Doctrine is expressed in the

[1] See Cronon, W. P., *The Holy Alliance.*
[2] Hart, A. B., *The Monroe Doctrine.*

statement that " in the wars of European powers in matters relating to themselves we have never taken any part nor does it comport with our policy to do so." This principle needs no further elaboration. It is fundamentally a brief statement of our traditional policy of aloofness.

The third major principle found in the Doctrine is merely a statement of fact: " With the existing colonies and dependencies of any European powers we have not interfered and shall not interfere." The Monroe Doctrine, then, simply recognized the status quo in 1823 and emphasized the fact that we would not molest the existing arrangement but would oppose a further extension of European control over any portion of this hemisphere.

The fourth division of the Doctrine referred to the threatening danger of further European expansion in the Americas. " 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 manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States." By the announcement of this principle the United States made itself the protector of the republics in Central and South America. Hence any internal interference with these countries will be looked upon as an unfriendly gesture toward their more powerful neighbor to the north.

The Doctrine in Action. To what extent has the United States lived up to the principles set forth in the Monroe Doctrine? It may be said that only on a few occasions has this country veered from its original position. During the War between the States Napoleon sent an army into Mexico and established Maximilian as Mexican emperor. Because the United States government was engaged in a struggle of its own at the time, it was unable to enforce compliance with the Monroe Doctrine immediately. It will be remembered, however, that in 1866 United States troops were sent to the Mexican border and this government demanded of France that it withdraw its forces from Mexico. France acceded to the American demand. In the boundary dispute between British Guiana and Venezuela in 1895, the United States, following the principles of the Monroe Doctrine, supported Venezuela and forced a reluctant Great Britain to arbitrate. Again the Monroe Doctrine triumphed.

In 1902 Germany refused the offer of Venezuela to arbitrate their dispute over certain debts, and maintained its navy in Venezuelan waters to enforce its claims. Suffice it to say that President Theodore Roosevelt, by threatening to use the American navy, succeeded in enforcing the principles of the Monroe Doctrine, which calls for non-intervention of European powers in American affairs.

The Hughes Interpretation. In recent years the application of the Monroe Doctrine has been somewhat widened. Charles Evans Hughes, Secretary of State in the Harding cabinet, defined the famous Doctrine in these terms: "It is opposed (1) to any non-American action encroaching upon the political independence of American states under any guise, and (2) to the acquisition in any manner of the control of additional territory in this hemisphere by any non-American power." Under this interpretation of the Monroe Doctrine the United States would oppose the voluntary transfer of territory by any Central or South American republic to any European power. By implication the United States also does not look with favor upon the acquisition of property by foreign capitalists in any American country, or the granting of concessions to them. In 1912 a Japanese corporation sought unsuccessfully to acquire a harbor on Magdalena Bay in Lower California from the Mexican government. The broader application of the Monroe Doctrine was largely responsible for the failure of this attempt at Asiatic expansion in the Americas.

The Roosevelts' Interpretations. An even broader interpretation was given the Doctrine by President Theodore Roosevelt, who declared it to mean that the United States should extend its national police power over its weaker southern neighbors. For example, if a Latin-American country is unable to maintain order and meet its foreign obligations, the United States should assume political control sufficient to prevent any foreign country from intervening in order to obtain a redress for its grievances. Going a step further, President Roosevelt maintained that the United States had the right to prevent conditions from developing in these countries which would give rise to foreign intervention. Thus the United States as a result of this interpretation of the Monroe Doctrine assumed the duty of policeman and protector of the New World.

In 1933 President Franklin D. Roosevelt sought to broaden considerably the trend in the Monroe Doctrine which had developed since the war with Spain in 1898. At that time he announced that

he would follow the " good neighbor " principle. Instead of sending troops to Cuba in the autumn of 1933 to restore order, as he could have done under the terms of the Platt Amendment of 1901, he called a conference of the Latin-American nations and explained to them that the United States intended to act the part of the " good neighbor " and would refrain from intervention in these countries. Subsequently he made three specific statements which have a bearing upon the Monroe Doctrine. In the first place he declared that the policy of the United States " from now on " would be opposed to armed intervention. In the second place he stated that the maintenance of law and order in the western hemisphere is the primary concern of the individual nations. In the third place, he proclaimed that when these orderly processes break down it is the joint concern of the entire hemisphere " in which we are all neighbors."

In accordance with this policy all American marines have been withdrawn from Haiti and a new treaty has been signed with Cuba abolishing American rights to interfere under the Platt Amendment. In addition, treaties were signed at the Pan-American Conference at Montevideo in 1933–1934 providing for the settlement of controversies by coöperative action. This " good neighbor " principle was reaffirmed at the Buenos Aires Conference in 1936 and the Panama Conference in 1939. (See page 556.)

UNITED STATES IMPERIALISM

At the same time that the United States has been maintaining its policy of " America for Americans," as expressed in the Monroe Doctrine, it has been expanding its influence in South and Central America. In other words, the United States has emerged as a world power and has marked out the western hemisphere as its own particular sphere of influence. As a result of its determination to protect the citizens of Cuba against Spanish misrule the United States became involved in the Spanish-American War. The net result of this war was to increase the influence and prestige of the United States in the Caribbean Sea. Cuba became an American protectorate, Puerto Rico was annexed as American territory, and the Panama Canal Zone was acquired.

Peaceful Penetration. The United States subsequent to the Spanish-American War entered upon a policy of peaceful penetration in many of the Caribbean countries in order to safeguard the weaker Central American states and protect them against external

aggression by European nations. It should be said, however, that penetration has not always been peaceful. To put down disorder and make it impossible for other nations to intervene in order to collect their debts, the United States in 1915 and 1916 occupied Santo Domingo. There have been frequent interventions in the internal affairs of Nicaragua. So-called "dollar diplomacy" led the United States to occupy Mexico in 1914 and 1916. The United States has also assumed the supervision of finances in Haiti and Panama. All of these instances of occupation or intervention in Latin America can be traced to the principles of the Monroe Doctrine. The United States has assumed the position of guardian of all American interests. The theory followed in its interventions has been that the United States must occupy these countries and put their governmental houses in order so that foreign interference may be avoided.

The United States has also extended its influence in the Caribbean through the purchase of the Virgin Islands from Denmark in 1916. All things considered, it may be said that economic imperialism on the part of the United States, if it be that, has practically reduced the Caribbean and Central American republics to the position of protectorates of their stronger neighbor to the north.

Pan-Americanism. This extension of control, both political and economic, has brought widespread charges of exploitation against the United States from the Latin-American republics. In recent years the United States has attempted to cultivate the friendship of Latin America through the policy known as Pan-Americanism. This policy is based upon the theory that there is a common bond between the various American nations, and that there are mutual benefits to be derived from coöperation by all nations of the western hemisphere. The application of this policy has led to several Pan-American conferences designed to bring about a better understanding between the American republics. As a result, some important agreements concerning commerce, arbitration, and peace have been formulated. Important as the conferences have been, however, their effectiveness has been weakened by the constant suspicion on the part of the smaller countries that the United States is using the conferences as tools for further economic penetration. The United States has disavowed all imperial ambitions and has assumed the leadership in bringing about a better understanding between the Americas.

Expansion in the Pacific. In the Pacific, as in the Caribbean, the United States has expanded its power since 1898 and has acquired outposts beyond the continental limits of its territory. The first important acquisition was Hawaii, which was annexed in 1898. Since that time many smaller Pacific islands have been acquired, which are useful primarily as coaling stations for the navy.

The Open Door Policy. With the acquisition of the Philippine Islands at the end of the Spanish-American War, the United States became a power in the Far East. It should be understood, however, that economic interest had already extended itself in China prior to the acquisition of the Philippines. In the middle of the nineteenth century the United States had played an important role in opening both China and Japan to world trade. The acquisition of the Philippines simply marked a deepening interest and influence in the Far East. The American Secretary of State in 1899 urged the great powers of the world to preserve the integrity of China and to refrain from seeking special trade privileges there. This policy, generally known as the "open door," advocated equal and impartial opportunities for trade. Though it met with favorable response, it did not immediately end exploitation in China. Continued economic imperialism on the part of the great powers led to the Boxer Rebellion, in the suppression of which the United States played an active role. American policy in the Far East has been characterized largely by the maintenance of the "open door," but in many respects its efforts have been rendered ineffective.

Japan and the United States. The United States, possibly to a greater extent than any other country, opened Japan to world trade. Unselfish in its attitude, it made no attempt to exclude the rest of the world from such trade. Once open to world trade, however, Japan, unlike China, absorbed much of occidental culture and Western ways of living. Within a relatively few years the Japanese with their native cunning and curiosity, plus an inoculation of occidental progress, took their place as a world power. The country soon adopted a policy of aggressive militarism. This policy was strengthened by victory over Russia in the Russo-Japanese War. The United States as peacemaker at the close of the conflict was responsible for the Portsmouth Conference and the treaty bearing the same name, which brought the war to its conclusion. The treaty was not altogether satisfactory to Japan, and since that time there has existed between that nation and the United States a feeling of suspicion.

Ill feeling between the two countries was increased by the treatment of Japanese in California and the restriction of Japanese immigrants to the United States. During the World War the United States and Japan entered into the so-called Lansing-Ishii Agreement, whereby the United States recognized the special interest of Japan in China, and Japan agreed to immigration restrictions in the United States. The two countries were allies in the World War, but no sooner was the war over than friction developed again. Consciously or unconsciously they have entered into a contest for naval supremacy in the Pacific.

The Washington Conference of 1921 was designed to avoid the rapidly progressing naval race, particularly between Great Britain, France, Japan, and the United States. Undoubtedly it did much to compose the troubled situation in the Pacific and, for a while, to establish limitation on the building of capital ships. This four-power naval agreement, to which both the United States and Japan are parties, established a naval ratio and specified that each party to the agreement would respect the others' possessions in the Pacific. The agreement further emphasized the "open door" policy in China, and all the signatories to the agreement promised to use their influence to maintain equal opportunities for trade in China. In connection with this, Japan agreed to withdraw its troops from certain portions of China and surrender certain valuable postal privileges in the area. The Lansing-Ishii Agreement was abrogated. The conference not only brought about a recognition of the "open door" policy in China but it paved the way for freer relations between the United States and Japan.

This friendship, however, was short-lived. The Immigration Act of 1924, which excluded Japanese from the United States and made them ineligible for citizenship, did much to destroy the friendship between the two countries and substituted in its place the previous attitude of suspicion. Japan looked upon the act as an attempt to discriminate against the Japanese people and legislate them into a position of racial inferiority. Relations between the two countries were further embittered by the aggressive militarism of Japan when in 1931–1932 it established a veritable protectorship over Manchuria. The still more recent Japanese intervention in China has practically destroyed any feeling of friendship which might have been produced at the Washington Conference. Apparently the naval ratio has been abrogated and the naval race continues. Thus the only tangible

results of the Washington Conference have been the recognition of the "open door" in China and the maintenance of the territorial integrity of the country. The United States has evidenced a willingness to lead the way toward the gradual surrender of extraterritorial rights in China. It should be observed, however, that this policy has not had the support of Japan.

TRENDS IN THE AMERICAN FOREIGN POLICY

Participation in International Conferences. As is explained in the following chapter the United States, especially in recent years, has been a leader in the movement to substitute arbitration and conciliation for war. The government's attempts at international agreements peaceably arrived at have been opposed by many Americans on the ground that such agreements involve the United States in entangling alliances, and are thus contrary to the policy of political isolation. Undoubtedly the United States will take a greater part in international conferences in the future.

It is doubtful whether it is either possible or wise to adhere strictly to the traditional policy of isolation. The United States has grown to be a world power, and this fact, together with the existence of a new world order which binds the nations of the world in an economic and political network, makes isolation impossible. Geographically and economically the United States is no longer isolated. This country is compelled to accept both Europe and Asia as neighbors. It must maintain contacts with the rest of the world, and if these contacts are to be amicable and relationships are to be peaceable, the United States is likely to find itself obliged to take the leading role in matters of international coöperation, the traditional policy of isolation to the contrary notwithstanding.

QUESTIONS

1. How do you account for the traditional policy of isolation followed by the United States?
2. What are the elements in this policy of isolation?
3. Why has isolation grown more and more difficult?
4. What steps has the United States taken toward international cooperation?
5. What is the importance of the Monroe Doctrine in American foreign relations? What are its major principles? How has it operated?

6. What is the Hughes interpretation of the Monroe Doctrine? The Roosevelt interpretation?
7. Discuss United States imperialism.
8. Discuss Japanese-American relations and Chinese-American relations.
9. What were the purposes and results of the Washington Conference?
10. What are the present trends in American foreign policy?

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CHAPTER XXVII

Peace and Foreign Policy

THE RISING TIDE OF IMPERIALISM [1]

TOWARD the middle of the nineteenth century the nations of the world had begun to realize that war did not pay even those who were victorious. Moreover, they had begun to suspect that their colonial possessions, the chief cause of many earlier wars, were far less of a blessing than they had thought them during the seventeenth and eighteenth centuries when blood and treasure had been poured out to protect them from rival nations and to forestall independence. Mercantilist restrictions, too, which had caused much friction, were being reduced in many directions under the leadership of Great Britain. Free trade was hailed as the harbinger of perpetual peace. At the same time the humanitarian movement was abolishing slavery, serfdom, inhuman treatment of prisoners, child labor, and many other social evils. Would not war itself disappear?

Long before the close of the century, however, it was clear that the highly industrialized nations were rushing toward war at a faster and faster rate. To a certain extent they realized the danger, but they were hastening on to catch the prize of prizes: abundant raw materials and wider markets. The Industrial Revolution was coming of age. This meant that factories had to be fed and markets found for the unprecedented amounts of finished goods which poured from them. Expanding large-scale production required expanding markets. Three-quarters of a century earlier Great Britain had been so far ahead of other countries in industrial development that it could easily dominate the world market. Now, however, with the United States, Germany, and other industrialized nations in the hunt for markets, the task of even Great Britain was not easy. Moreover, in Germany, the United States, and other countries tariffs for the

[1] An excellent account of the development of the imperialistic and other points of view on international questions is given in Russell, F. M., *Theories of International Relations.*

protection of industries were shutting out foreign goods to keep the home market for domestic producers. The surest route to prosperity appeared to be the acquisition, or at least the control, of undeveloped parts of the world. Acquisition was preferable, since it permitted the acquiring country to limit by law the trade of backward peoples with countries outside the empire to which they belonged. If acquisition was impossible, substantial advantages could be secured through control by trade treaties, bribery, loans, diplomacy, or military pressure.

In all highly industrial countries business interests have great political influence, and have everywhere insisted that their respective governments use political and, if necessary, military pressure to obtain trade concessions. Even many non-business leaders were intrigued by economic imperialism, for colonies or other possessions and trade concessions were expected to enhance national power and prestige. The United States, as we know, acquired Hawaii, the Philippines, Puerto Rico, and other possessions before the close of the nineteenth century. Before the end of the first decade of the twentieth century it had also obtained a position of dominance in the Caribbean and was pursuing policies which seemed destined to make that sea an American lake.

Our imperialistic policies, however, were inconsequential compared to those pursued by the great European powers, which proceeded to partition Africa – even the most densely populated and highly civilized parts – with little regard for native governments. But for the insistence by the United States on the "open door" policy in China, the 400,000,000 people of that country and their territory would have been apportioned out. As it was, the Chinese were forced to grant humiliating and costly concessions to further the imperialistic ambitions of the European powers.

Rivalry among the Powers. Imperialism is dangerous business. Backward peoples are not the chief source of danger, for they are generally unable to put up an effective resistance against the latest equipment of the great military powers. The chief danger is other powers who want a share of the country that is being partitioned or the concession that is being granted. The size of the slice each power gets is generally dependent on the relative military strength of the powers involved. This consideration caused the leading large industrialized countries to build up rapidly a large army or navy, or both. The imperialistic race had become so strenuous by

the early years of the twentieth century that the cost seemed unbearable. The psychic cost was, perhaps, even greater than the financial, for many of the militaristic countries now lived in constant fear of being themselves invaded or blockaded. Having armed to get what they wanted, they were now afraid to disarm lest other nations grab them in turn – as Germany had acquired a section of France in 1870 when it exacted a heavy indemnity.

The Concert of Europe. While armaments were growing greater and militaristic attitudes were being strengthened, changes in the relative strength of nations and groups were weakening the cause of peace. Shortly after the Napoleonic wars, which closed in 1815, the great nations of Europe – Great Britain, Prussia, Russia, Austria, and France – formed the Concert of Europe. These countries agreed to consult with one another if danger threatened, and try to arrive at a policy which would enable them to unite in solving the problem which had given rise to the danger. This idea of a united Europe in dealing with problems was an influential factor in reducing wars during half a century.

The Balance of Power. The Crimean War, the War of 1870, and other wars, however, weakened the Concert, and there slowly emerged the idea of a balance of power. The formation of the German Empire during the War of 1870 tended to upset the balance of power, and this tendency was strengthened when Germany made an alliance with Austria and Italy. France and Russia then formed an alliance to strengthen their position against the Central European powers. England, whose commerce was being threatened by increasingly strong competition from Germany, joined France and Russia to form the Triple Entente. Now all the great powers of Europe were divided into two camps, each watching the other with apprehension if not dread.

Armaments as a Guarantee of Peace. Many observers believed that great armaments were a guarantee against war. It was argued that, under the circumstances, the destruction on both sides was certain to be so great that no nation would permit itself to be drawn into war with a first-class power. They thought that, even though the balance of power might get considerably out of balance, not even the stronger side would undergo the hardship of war. Each side felt that safety lay in being better prepared than the other. It was out of such conditions and in such an atmosphere of fear and armaments that the World War developed. More important to us,

it was in the memory of those conditions and under the influence of the emotions generated by them that the nations tried to organize for peace when the war was over.

ORGANIZATION FOR PEACE, GENERAL WELFARE, AND JUSTICE

The idea of the League of Nations, Permanent Court of International Justice, and other international unions to take care of international interests did not originate during the World War. A writer here and there had from time to time suggested leagues, courts, and other organizations to improve relationships between nations. Our own federal union and our Supreme Court had provided a model for the types of organizations which some writers believed the nations needed to bind them together. The real significance of the World War in relation to world organization was that it created a desire strong enough to bring such organizations into being.

The League of Nations. President Wilson was the most influential advocate of the League of Nations. He believed a league, if formed, would be the brightest hope the world had of preventing another great war. Although most foreign statesmen, as well as many in this country, were lukewarm if not downright hostile to the idea of the League, its formation was made a part of the treaty of peace at Wilson's insistence.

The League of Nations enlarged and strengthened the Concert idea of the previous century. It contemplated the inclusion, ultimately, of the entire world. It also created a permanent structure in place of the more or less informal consultation of the powers. It also looked toward disarmament. The Covenant which set up the League suggested that the disarming of Germany was but the first step toward a reduction of their armaments by the other powers. Machinery for handling disputes was provided. The nations, moreover, in joining, accepted obligations which would virtually have made war impossible if they had been observed.

So much of the pre-war suspicion was left, however, and so much new hatred had been generated by the war, that the treaty contained elements of revenge as well as elements looking toward a permanent peace. Such severe and permanent penalties were placed on Germany that that country was certain to renounce the terms of the treaty as soon as she was in a position to do so with impunity. Stripping her of her colonies and letting other nations have mandates over them, depriving her of a right to arm comparable to her neigh-

bors', and other drastic measures set the stage for future trouble. The resentment became greater when the lost colonies remained mandated areas indefinitely. Accordingly Hitler denounced one by one the restrictions which the treaty had placed on Germany, and the German people enthusiastically applauded each denunciation. Even Germany's entrance into the League did not mean that she accepted in spirit the conditions which the League had imposed. The League remained a battleground where two points of view contended for control: that of the nations desiring to use the League to further the cause of international peace, and that of the nations desiring to use the League as a tool to achieve selfish national ends. One point of view would have dictated a continuous adjustment of the policies of the League to iron out the injustices and other causes of friction; the other begot a standpat policy on the part of those nations which were benefiting economically and politically by League support of conditions set up by the treaty, and an irresponsibly radical course in those nations which felt themselves wronged by the conditions imposed by the treaty. The relationship of the United States to the League was constantly influenced by a realization in this country that the two points of view were actively influencing the policies of the League.

American Coöperation. Although the United States remained outside the League, it did not isolate itself from it. On the contrary, we coöperated with the League on numerous occasions. Thus we participated in many conferences called by it and joined a number of organizations under its auspices. We have also coöperated in carrying out certain social and economic policies advocated by it. On the eve of the League's application of sanctions against Italy – the first time that sanctions had been applied against any country – the President of the United States invoked our neutrality law, which forbade arms, munitions, and implements of war to be shipped from the United States to either Italy or Ethiopia. Since Italy was in a position to get arms from us and Ethiopia was not, this strengthened the position of the League in the application of sanctions. Nevertheless, sentiment in the United States for joining the League had long been slowly ebbing. As Japan, Germany, Italy, and other important countries withdrew, the possibility of our becoming a member became progressively smaller. The question of our joining is no longer a political issue in this country. We are, nevertheless, continuing to coöperate with it.

International Agencies for Public Welfare.[1] Many international organizations, some connected with the League of Nations and others independent of it, are trying to promote the general welfare throughout the world. The Universal Postal Union, to which nearly all advanced countries belong, was organized as early as 1875 to regulate the transmission of postal matter in foreign lands. The International Institute of Agriculture, formed in 1905, gathers and disseminates information on prices, markets, farm credits, and other matters of special interest to agriculture. The International Labor Office, connected with the League of Nations, has been particularly active in promoting the welfare of labor throughout the world. At present the United States either belongs to or contributes toward the support of many international organizations, including the following:

Bureau of the Interparliamentary Union for the Promotion of International Arbitration
International Bureau for the Protection of Industrial Property
International Bureau of the Universal Postal Union
International Bureau of Weights and Measures
International Institute of Agriculture
International Labor Office
International Office of Public Health
International Penal and Penitentiary Commission
International Statistical Bureau
Pan-American Sanitary Bureau
Pan-American Union
Permanent Court of Arbitration
Permanent International Association of Navigation Congresses

The World Court. The Covenant of the League of Nations directed the Council of the League to formulate and submit to the members of the League plans for the establishment of a Permanent Court of International Justice. The statute creating the Court was adopted by the Assembly of the League, ratified by a majority of members of the League, and put in force by 1921. The Court has settled numerous cases and rendered many advisory opinions. Its judges, of which there are now fifteen, rank high in the legal profession of the various countries from which they come, and have maintained a fine quality of service.

[1] Many organizations interested in international organizations and supplying information concerning them are described in National Education Association, *Research Bulletin*, vol. 17 (Sept., 1939), pp. 164–217.

Sentiment for joining the Permanent Court of International Justice has been stronger than sentiment for joining the League in the United States. All Presidents since 1920 – Harding, Coolidge, Hoover, and Roosevelt – have advocated adherence to it. In 1926 the Senate said it accepted membership in the Court with certain reservations. Since these reservations were not acceptable to the other members of the Court, we were not admitted to membership. Sentiment for entrance has remained strong, however, but the depression, other matters over which we were deeply concerned, the opposition of several powerful organized sources of propaganda, and other factors have either delayed action or prevented our entrance. A citizen of the United States has been one of the justices of the Court since its organization, save during the brief periods between the resignation of one justice and the appointment of his successor. John Bassett Moore, Charles Evans Hughes, Frank Billings Kellogg, and Manley Ottmar Hudson have all served on the Court. This has been possible because the justices do not represent the country of which they are citizens.

ATTEMPTS TO OUTLAW AND REGULATE WAR

The Briand-Kellogg Peace Pact. The Briand-Kellogg Pact of 1928 for the outlawing of war was one of the most idealistic documents ever signed by the nations of the world, and it was signed by most of them. It was short and to the point, declaring that the countries signing it (1) in the names of their respective peoples condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another; (2) that the settlement of all disputes or conflicts of whatever nature which should arise among them should never be sought except by pacific means.

This peace pact did not set up any effective machinery for its enforcement, and has proved no stronger than world public opinion against war and the loyalty of the signers to their signatures – and there is no evidence that these have had any strength at all. We invoked the pact against Japan when that country invaded Manchuria, but Japan informed us the pact did not apply. Italy, Germany, Russia, and several smaller nations have made war without any indication that they felt any obligation to observe it. Equally disheartening have been the interpretations put upon it by the signers, who have declared that it did not in any manner restrain the right of self-

defense – and what war is not fought in self-defense according to the parties to it? Various nations have intimated that they would not consider the pact binding on them with respect to defensive alliances or in areas in which they have special interests.

Treatment of Belligerents and Neutrals. The regulation of war has taken a twofold form – the regulation of the treatment of belligerents, and the regulation of the treatment of neutrals. Some practices, such as killing prisoners, using poisonous gas, slaughtering civilians, and bombarding unfortified towns have been condemned by modern civilized nations; yet in their recent wars Italy, Japan, Germany, Russia, and the forces fighting for the control of Spain dropped bombs on unfortified cities or sections of cities, killing large numbers of civilians. Military forces in the field are likely to ignore some portions of the wartime codes of civilized nations, even though such conduct may not be sanctioned by the home government. This fact limits the effectiveness of many regulations.

Citizens of neutral nations and their property, under international law, are permitted certain rights, both within the warring countries and on the high seas. There has been much conflict in recent years, however, over the rights of neutrals to trade with a country at war. During the early years of the World War the United States protested vigorously against the British practice of interfering with American commerce to Germany. It protested again when Great Britain and Germany interfered with our commerce in the war which began in 1939. The nation which controls the sea is likely to violate neutral rights in conducting a blockade. Much of the controversy in such cases is over the articles which may be included under the term "contraband of war." Everyone admits that munitions would be included under this term. But what of food, or raw cotton which might be used for textiles or explosives, or pig iron which might be turned into plowshares or guns, and many other kinds of raw materials which have many uses?

Neutrality Legislation in the United States. As war in Europe and Asia became more imminent in the 1930's, the United States, remembering that it had engaged in the World War in defense of neutral rights, determined to avoid being drawn into another war for the same reason. To this end Congress, beginning in 1935, passed several neutrality joint resolutions which deliberately restricted our citizens in the exercise of certain activities which formerly were generally recognized as neutral rights. One resolution was mandatory,

requiring the President to stop shipments to belligerents. An undeclared war, however, gave the President great leeway. President Roosevelt refused to heed the plea of peace societies to invoke the neutrality resolution during the recent undeclared war between Japan and China. When war broke out between the Allies and Germany in 1939, Congress repealed the embargo on munitions. They might be sold even to belligerents for cash. Securities of belligerents might not be marketed in the United States. As an earlier law forbade nations which had defaulted on obligations to us to float new loans in this country, and most of the belligerents were in default, the arrangement for cash sales presented difficulty. At the same time Congress authorized the President to establish a war zone and forbid American ships and sailors to enter it. The right of American citizens to enter the war zone was severely restricted. The war zone established by the President included most of the waters off the western coast of Europe. Congress forbade American ships to carry munitions to belligerents.

The nations of the Western Hemisphere designated a "safety zone" several hundred miles or more in width around the Americas south of Canada and asked that no hostile acts take place within it. The warring nations, however, did not always respect the safety zone.

The neutrality resolutions created the National Munitions Control Board consisting of the Secretaries of State, the Treasury, War, Navy, and Commerce. The Secretary of State is chairman of the board and administers the provisions of the joint resolutions through the agency of the Office of Arms and Munitions Control of the Department of State. This agency is charged with the following duties: the registration of manufacturers, exporters, and importers of arms, ammunition, and implements of war; the issuance of licenses for the exportation or importation of arms and ammunition and implements of war, and also for the exportation of tinplate scrap and of helium gas; such supervision of the international traffic in arms as falls within the jurisdiction of the Secretary of State.

Propaganda for Peace. The neutrality policy of the United States has been strongly influenced in recent years by propaganda within and without the government. Some members of senatorial committees and other investigating groups have tried to prove that munitions makers and financial leaders were responsible for our entrance into the World War. Various records, official and unofficial, have

been publicized. Many of the peace societies, too, have been preaching peace at any price and organizing groups of citizens throughout the country to promote such measures as they think will enable us to remain neutral even though this means giving up what have always been regarded as privileges of neutrals. The interest in the amendment introduced in Congress to require a referendum on a declaration of war save in case of actual invasion is an example of the strength of the feeling that war must be avoided.

ARMAMENT VERSUS DISARMAMENT

The president of an American university, a former Rhodes scholar who has retained his interest in events abroad, said recently that the peace societies of this country were doing all they could to get us into war. He thought that their efforts to preserve peace were more than wasted; for, instead of hitting the god of war at which they were aiming, they were permitting the backfire from their peace guns to kill the dove of peace. At about the same time the President of the United States, in asking for money to build a bigger navy and stronger army, said he had done all he could to persuade the nations to reduce armaments, but that there was no use in shutting our eyes to the truth; we must have a navy second to none. Many pacifists, both in this country and abroad, declare that the whole problem of armaments is an endless chain, every link of which is exactly alike. Each nation builds because other nations build, and all are equally guilty. Each country is under obligation to bring about disarmament by disarming, and in this way to make it easy for others to do so.

Satisfied and Dissatisfied Nations. Irrespective of one's point of view, one must recognize that the problem of disarmament is rendered much more difficult of solution because there are some large nations without adequate resources. If every nation were well satisfied with its possessions, it would probably be safe for all to disarm, since each would have little reason for taking what others have. Since, however, there are nations that are decidedly dissatisfied with the distribution of resources, the assumption that every nation is ready to keep the peace if all other nations do so does not impress those in charge of our foreign policy and military establishment. Nor are our leaders inclined to expect much of collective security. The nations, such as Italy and Japan, which defied the League of Nations and made war on fellow members against the League Covenant, and the experience of England, which leaned rather heavily

on collective security only to find that Italy had armed sufficiently to defy her, have strengthened the hands of those who wish the United States to equip itself with larger and larger armaments. The Washington Limitation of Arms Conference did by treaty result in decreasing the navy race between 1922 and 1932, and the London Conference of 1930 extended the truce five years more. The London Conference of 1936, however, resulted in an agreement between only three countries – the United States, Great Britain, and France; and even that agreement provided an easy exit. Its pocketbook is now the chief check on any nation which wishes to increase its armaments.

In spite of disarmament conferences under the auspices of the League of Nations and private discussions between various nations, armaments get bigger and bigger year by year. The yearly cost even before the outbreak of the recent European war was estimated at some $17,000,000,000 for the world. The cost of American armament has reached some billion and a half dollars a year. This does not include the half billion dollars or more which is spent for pensions, relief to veterans, hospitalization, and other measures connected with the personnel of past wars. Nor does it include the much larger sums which are needed to pay interest on war debts, to say nothing of retiring those debts.

The Defense Program. When the European and Asiatic wars continued to spread and the world outlook became more menacing, the United States in 1940 initiated an unprecedented program of national defense. It passed its first peacetime selective service act. Selectees by the hundreds of thousands were called for a period of training. Great training camps were built. The size of the personnel of the regular army and navy was increased sharply. Facilities for manufacturing munitions were expanded rapidly. Tanks, armored cars, aircraft, naval vessels, guns, and other types of equipment for modern methods of warfare were turned out in immense quantities. Naval bases in the Atlantic and Caribbean from Newfoundland to South America were acquired from Great Britain and heavily fortified. Fortifications in the Pacific from Alaska to the Samoan Islands were strengthened. Congress passed the Lend-Lease Bill authorizing the President to lend or lease vast quantities of war materials to any country when he thought that such action would contribute to national defense. In spite of sharp increase in taxes, heavy borrowing was necessary. To finance this huge defense program the limit of the national debt was raised to sixty-five billion dollars.

What Shall We Defend? Since the United States is the only first-class military power in the western hemisphere, the navy has been looked upon as our chief line of defense. So long as that is powerful enough to prevent a hostile fleet from attacking our shores or landing an army at some strategic point, we feel secure. We have two long coastlines, and their defense is no easy task. We have also the problem of defending the Panama Canal, Hawaii, Alaska, the Philippines, and other outlying possessions, not to mention our extensive overseas trade. Our military policy, unfortunately, has never been based on a very definite conception of what we are to protect. A navy which is competent to defend continental United States, exclusive of Alaska, might be inadequate to defend outlying possessions or overseas commerce. A navy competent to do all three might not be powerful enough to protect American citizens and property in China or other countries if it had to encounter a first-class hostile fleet while doing so. It has been suggested that the American people should decide just what they mean to defend when they talk of national defense. Having done that, they would be in a position to let military men say what amount and type of armaments are suited to the task. In a democracy it would seem that both the foreign policy and the broad military objectives growing out of it should be dictated by the people, leaving it to the diplomats and the military authorities to carry out effectively the policies which the people have determined.

QUESTIONS

1. What is economic imperialism? Trace its growth.
2. What is the interrelationship of the Monroe Doctrine and Pan-Americanism at present? How, if at all, would you readjust their interrelationship?
3. Would a strict observance of the open door policy in China be the best policy for the Chinese? Is there now any legitimate reason for foreign concessions in China?
4. To what extent is Japan accurate in describing its policy in China as an Oriental Monroe Doctrine?
5. Is the League of Nations an agency of world peace or a menace to world peace?
6. What should be the leading features of a league of nations?
7. Does the World Court promote justice between nations? Why or why not? If it does promote justice, should all nations be members of it?

8. Why have nearly all attempts to reduce armaments failed?
9. Criticize the neutrality legislation of the United States.
10. What do you believe should be the leading points in the foreign policy of the United States?

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The Roosevelts' Interpretations (continued). The "good neighbor" policy found positive expression at the Havana Conference in 1940. At that conference the neighbors of the western hemisphere marked out a "neutrality zone" of three hundred miles around the Americas and notified the warring nations of Europe that the spread of war to this hemisphere or warlike action within this zone would cause the countries of the western world, individually or jointly, to "act in a manner required for its defense or the defense of the continent." This agreement, together with growing economic coöperation between the United States and Central and South America, strengthens the Monroe Doctrine as a positive and multilateral policy of western hemisphere solidarity. Its enforcement was vitalized by the acquisition of naval bases from Great Britain in exchange for "overage" destroyers in 1941, and its total effect was shown in the voluntary collaboration of the American republics in taking Axis merchant vessels in American ports under "protective custody" in 1941, with the alleged motive of preventing sabotage and damage to American harbors by the scuttling of these vessels by their own crews.

PART VIII

The Government and Economic Welfare

CHAPTER XXVIII

Commerce–Domestic and Foreign

EVERY nation in historic times has been dependent on commerce for much of its prosperity. Little wonder, then, that attention to commerce has bulked large in governmental policies. Governments have long kept their eyes on traders, giving their own merchants a helping hand and frequently placing obstacles in the way of traders from foreign countries. Government participation or interference in large commercial ventures has been constantly increasing, particularly since the rise of the great commercial classes in the seventeenth and eighteenth centuries. Economic imperialism, which is dependent on government support of private commercial undertakings, is but the fuller growth of a tendency that has been developing for many generations.

WHAT ARE INTERSTATE AND FOREIGN COMMERCE?

Commerce and government have been very closely connected in the United States. We have seen that some colonial governments originated in the charters of commercial companies,[1] and that the Alexandria Conference and the Annapolis Convention, which paved the way for the Constitutional Convention of 1787, met to settle commercial difficulties.[2] We have seen also that important restrictions were imposed on the newly created power of Congress to regulate interstate and foreign commerce.[3] These restrictions have not, however, seriously hampered the federal government in its efforts to promote the commerce of the country. At every stage the development of the United States has advanced with the development of its commerce, which is becoming increasingly interstate and foreign.

Until recently, people were interested in commerce chiefly for its own sake, and the national government used the commerce clause of the Constitution primarily to promote commerce. Today, however, it is using that clause to promote public health, reduce child labor,

[1] Pages 3–4. [2] Pages 31–32. [3] Page 212.

set minimum wages, shorten hours of labor, promote collective bargaining in industry, and accomplish other social purposes that it wishes to achieve irrespective of their effect on commerce. In fact, there are indications that the commerce clause is now regarded by social reformers chiefly as an agency of economic or social betterment rather than as an aid to business; in other words, it is employed as an agency for socializing business. This seems to have been the point of view of President Franklin D. Roosevelt when he appointed Harry Hopkins, a professional social worker, as Secretary of Commerce.

The present conflict over the power of the federal government to control commerce is not an entirely new phenomenon. South Carolina's Ordinance of Nullification in 1832 indicates how bitter and far-reaching the conflict over the federal government's authority in this field has been. Those who have been or are likely to be affected adversely by the use of this authority for social purposes are seeking to reduce it to a minimum, while those who believe they will benefit by its broader use are working for its extension. The relatively new factor in the present situation is the desire to achieve indirectly, through the commerce power, ends which the federal government does not have authority to achieve directly.

Since the federal government's power over interstate and foreign commerce is being used for a variety of purposes, the scope of federal control is of great importance.

What, then, is meant by "commerce"? In the case of *Gibbons v. Ogden*,[1] Chief Justice Marshall said that "commerce is intercourse." This definition is so broad that further analysis is necessary. In a case coming before the Supreme Court in 1877 the scope of commerce was extended to include practically every subject which logically might fall within the field. The court said: "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the gov-

[1] *Gibbons v. Ogden*, 9 Wheaton (1824).

ernment of the business to which they relate, at all times and under all circumstances." [1]

Stockyard owners declared their activities were intrastate. The Supreme Court, however, held that the stockyards were but a "throat" through which the current of commerce flowed, and the transactions which occurred there could not be separated from that movement. The sales at the stockyards, therefore, were not merely local transactions. They did not stop the flow of commerce, but merely changed the private interests in the subject of the current.[2] The Grain Futures Act of 1922 was upheld by the Supreme Court when it held that transactions on the Chicago Board of Trade were a constantly recurring burden and obstruction to commerce, in spite of the fact that of themselves they were not interstate commerce.

Is Manufacturing Commerce? Even before the beginning of the present century, attempts were made to include manufacturing under commerce. If commerce were defined to include manufacturing, then the national government would have little difficulty in extending its control over all types of business and professional life. The Supreme Court was called upon in 1895 to decide whether manufacturing should be included within the scope of congressional control over commerce.[3] The court declared that manufacturing is a change of form while commerce involves a change of place. Thus industry is not commerce. As a matter of practice, however, the distinction is growing less and less important. Manufacturing involves the transportation of raw materials and the marketing of the finished products.

The most thoroughgoing attempts to stretch the commerce clause of the Constitution were made during and after the depression of the 1930's. In enacting the National Industrial Recovery Act, Congress declared that its policy was "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of coöperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and

[1] *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1 (1877).

[2] *Stafford v. Wallace*, 258 U. S. 495 (1922).

[3] *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895).

supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

The act provided that, upon application by one or more trade or industrial groups, the President might approve a code of fair competition for the trade or industry represented if he found (1) that such groups imposed no inequitable restrictions on admission to membership therein and were truly representative of the trade or industry, and (2) that the code was not designed to promote monopolies or to eliminate or oppress small enterprises and would not operate to discriminate against them, and would tend to effectuate the policy of the law. As a condition of his approval of a code, the President might impose requirements for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and might provide exceptions to and exemptions from the provisions of the code if, in his discretion, he thought them necessary to achieve the policy incorporated in the law.

Schechter Case. The Schechter Corporation operated a poultry slaughterhouse. It bought live poultry in New York City and Philadelphia. Much of the poultry had been brought to market through interstate channels. The corporation carried the poultry by truck to its place of business in Brooklyn. It sold to retailers, slaughtering before delivery. The corporation was indicted, charged with violating and conspiring to violate the Code of Fair Competition for the Live-Poultry Industry. It, in turn, raised three objections to the code: (1) delegation of legislative power; (2) interference with intrastate commerce; (3) violation of due process.

Conviction of the corporation in the lower courts was set aside by the Supreme Court, which held that the N. I. R. A. constituted an absolute, affirmative grant of legislative power to the President, and that it gave the President "virtually unfettered" discretion. It also held that, apart from its invalidity as a delegation of legislative power, the act when applied to the slaughtering of poultry went beyond the commerce power of Congress and was invalid on that score. The corporation's operations took place after the poultry had ended its interstate transportation. They had, therefore, at most only an indirect effect on interstate commerce. An indirect effect, the court

held, was not sufficient to justify interference by Congress. It would not permit the national government to ignore the distinction between commerce and production.[1]

Guffey Coal Act. The distinction between commerce and production was emphasized again in connection with the decision on the Guffey Coal Act. This act, passed in 1935, attempted to establish minimum and maximum prices, maximum hours, and minimum wages, the right of labor to organize and engage in collective bargaining, and adjudication of disputes by a labor board in the mining of coal. A tax was levied on coal, but producers who complied with the code were allowed a drawback of ninety per cent of the tax. The Supreme Court held that "the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining and the Labor Board and its powers, primarily falls upon production and not upon commerce." The labor provisions, the court went on to say, could not be sustained because of any direct effect on interstate commerce. The tax imposed by the law was a penalty rather than a tax, in the eyes of the court. Both the labor provisions and the tax were declared unconstitutional.[2]

National Labor Relations Act Upheld. The Supreme Court restated, if it did not actually broaden, its definition of commerce in 1937 when it upheld the National Labor Relations Act. It pointed out that the congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect the commerce from burdens and obstructions, Congress cannot be denied the power to exercise the control. It declared that labor relations in the steel industry have such a vital effect on interstate commerce that Congress may regulate them. This decision seems to bring the great mass industries under federal regulation, even though much of their activity is manufacturing.[3]

[1] *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

[2] *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

[3] See pages 642–645 for further discussion of the National Labor Relations Act.

Broad Field of Commerce. The various definitions of commerce by the Supreme Court show that the field of commerce is very broad. It includes more than actual buying and selling. It includes the transportation of goods and persons. It includes messages sent by various means. It includes the relationship of the various factors engaged in it to one another and to the public. Safety, the quality of goods, fraudulent sales, and many other items fall within this field, as interpreted by the Supreme Court. In this chapter we discuss the power of Congress over commerce, and the regulation of buying and selling. In the next we shall discuss transportation and communication. In later chapters we shall touch on additional features, such as safety and labor relations.

WHAT IS REGULATION?

Purposes of and Demand for Regulation. Chief Justice Taft stated in 1924 that to regulate commerce means to foster, to protect, to control, and to promote the growth and insure the safety of commerce.[1] Chief Justice Hughes in 1930 gave an almost identical definition when he said that the power to regulate commerce includes the power "to adopt measures to promote its growth and insure its safety, to foster, protect, control, and restrain."[2]

Thus regulation may assume various forms, some of them mild and some more severe. Often the regulatory activity of Congress is the cause of bitter criticism; yet the process of regulation is constantly expanded. Some critics look upon regulation as socialistic, while others consider it weak and often ineffective.

The question may be raised: What is the purpose of regulation? Is it for the protection and promotion of business? Is it for the selfish benefit of the government? Or is it for the promotion of the general welfare, and especially for the benefit of the consuming public?

The steady expansion of the commerce power of the national government has meant a change from the individualistic philosophy of *laissez faire* toward a national policy of collectivism. While it is true that the individualistic philosophy was workable when business was carried on in a small local and intimate circle, that situation no longer exists. Mass production and big business have taken the place of this simple plan, and with the change has come a change in the

[1] *Dayton v. United States*, 263 U. S. 456 (1924).

[2] *Texas & New Orleans Ry. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930).

attitude toward government protection and regulation. Even though business still protests against "interference" on the part of government, that protest is weakened because business itself demands protection from the government. The interstate and foreign characteristics of trade and commerce are becoming more and more important. Not only is Congress able to apply the commerce clause to an increasing number of activities, but the application of this constitutional power is necessary.

Congressional authority in this regard has to do with the regulation of commerce (1) with the Indian tribes, (2) with foreign nations, and (3) among the several states. The regulation of commerce with the Indian tribes, which was of considerable importance in the early history of the country, has now become almost a dead letter. Foreign and interstate commerce are the all-important fields of congressional action in modern times.

Regulation of Foreign Commerce. Congressional authority over foreign commerce is exclusive and practically unrestricted. Congress exerts an even wider power over foreign commerce than over interstate commerce. Congressional control over foreign commerce is reenforced by congressional authority over the whole subject of foreign relations. Indeed, it is often difficult to distinguish between the control of foreign commerce and the control of foreign relations *per se.*

The power of Congress to regulate foreign commerce includes practically every act having to do with movements across international boundary lines. In the exercise of this power Congress has enacted laws authorizing embargoes, it has imposed tonnage duties, it has passed various navigation and steamship inspection laws, it has encouraged the development of a merchant marine and stimulated foreign trade, it has imposed protective tariffs, and it has set up detailed restrictions on immigration.

Regulation of Interstate Commerce. Of even greater significance, in that it has been one of the chief vehicles of national expansion, is the power of Congress to regulate interstate commerce. Under the Constitution, any commercial transaction which has its origin with a single state and which is completed within that state is a matter exclusively for the state. But whenever such a transaction crosses a state boundary it becomes a matter of interstate commerce, and thus subject to national regulation. In recent years there has been a widening of the scope of national control of commerce, as is logical since

commerce is becoming more and more a matter of interstate transactions. The field of intrastate commerce has been narrowed while the scope of interstate commerce has been constantly broadened.[1] It is substantially correct to say that if commerce in any way, whether directly or indirectly, affects transactions involving more than one state, that commerce is interstate. For example, the shipment of goods by railroad between two cities in the same state becomes interstate commerce if at any point the railroad crosses a state boundary line. Not only are such goods in interstate commerce while in actual shipment, but they are not subject to state regulation until the package in which they are shipped has been broken and the goods are commingled with the ordinary property of citizens of the state.[2]

The authority of Congress to regulate interstate commerce extends not only to all forms of transportation between states but to persons and corporations engaged in transporting articles or persons from state to state. Under the commerce power Congress may regulate the relations between employers and employees of concerns engaged in interstate commerce, and may even regulate the number of hours of daily labor of such employees and the compensation allowed them if they are injured in the course of their employment.

ILLEGAL RESTRAINT OF TRADE

Rise of Trusts. Late in the nineteenth century trusts were springing up on every side. The rapid industrial development of the latter half of that century had set the stage for great combinations of capital. Business men were not slow to take advantage of conditions. The Standard Oil Company (1879), the American Cottonseed Oil Trust (1885), the National Lead Trust (1887), the Sugar Refineries Company (1887), the National Cordage Association (1887), the Whiskey Trust (1887), and others were soon in the field.

No one knew how far the movement would go, but the possibility of giant concerns controlling the greater part of American business life was anything but reassuring. The practices of some of the trusts added to the apprehension. Their cutthroat competition drove many

[1] The states, however, have not lost all authority even over interstate commerce. In matters of health, safety, and protection of property they have considerable power. When South Carolina, for instance, regulated the weight and width of motor vehicles, the Supreme Court held that even interstate carriers were bound by the regulations. *Highway Department v. Barnwell Bros.*, 303 U. S. 177 (1938).

[2] *Brown v. Maryland*, 12 Wheaton 419 (1827).

smaller concerns into bankruptcy. In many cases little regard was shown for the consumer. Their success in bribing and browbeating public officials caused great alarm for the welfare of democratic institutions. Few movements in our history have aroused so much resentment and fear.

State Control. Some of the state governments were quick to take action against the trusts. New York revoked the charter of the North River Sugar Refining Company.[1] Ohio declared the trust agreement of Standard Oil of Ohio illegal.[2] The company thereupon dissolved the trustee agreement and divided among those who had held the trustee certificates the stock of the twenty concerns included in the agreement. Each former holder of certificates was given shares in each of the twenty concerns. The twenty concerns were then controlled as a unit because they had the same owners.

Trustee Agreement. The first trusts were organized by trustee agreements among members. The states had little difficulty in stopping this kind of organization. Under the common law, agreements in restraint of trade were void. Although the making of such agreements was not a crime which could be punished, the agreements could not be enforced in the courts. Some concerns were also charged with exceeding the rights granted them in their charters.

After the sugar-refining, oil, and several other trusts had been beaten in the courts, big business quickly shifted its legal position. In some cases competing concerns consolidated to form one big concern. In others, a new corporation would buy up a controlling interest in the various concerns and thus control by means of a holding company. In some instances the same individuals would be elected directors of various concerns, and control would be maintained through the interlocking directorate. In some, an understanding would be arrived at without specific legal or official organizational unity. The effect of these changes was to make prosecution far more difficult, even when a state wished to prosecute.

Some States Favored Trusts. Some states apparently were not eager to prosecute big concerns. In fact, a few gave charters so liberally that officials of other states charged them with creating business organizations which plundered other states at the very time that they were paying heavy taxes to the few states which let them

[1] *People v. North River Sugar Refining Co.*, 121 New York 582 (1890).

[2] 49 Ohio Stat. 137 (1892). See also *State v. Nebraska Drilling Co.*, 29 Nebraska 700 (1890).

have liberal terms of incorporation. New Jersey led the way by encouraging the formation of holding companies. The oil interests, beaten in Ohio, incorporated in New Jersey as the Standard Oil Company – a holding company. The sugar-refining interests, which had been beaten in New York, organized in New Jersey as the American Sugar Refining Company. Soon Delaware and West Virginia, which did not mean to let New Jersey get all the tax money which the holding companies paid to the states in which they were incorporated, were tempting large combinations to incorporate in them by offering extremely liberal charters.

Agitation against the trusts increased, particularly in the non-industrial states. Anti-trust laws quickly made their appearance in many states, and eventually in most of them. They were, however, very difficult to enforce, particularly when the concern was incorporated in another state.

Sherman Anti-trust Law. It soon became evident that only the national government could effectively prevent monopolies which were operating across state lines. In answer to popular demand, the Sherman Anti-trust Law was passed in 1890. By its terms:

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, was illegal. Every person who made such a contract or engaged in any such combination or conspiracy was guilty of a misdemeanor.

(2) Every person who monopolized, or attempted to monopolize, or combined or conspired with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign countries was guilty of a misdemeanor.

(3) Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or the District of Columbia, or in restraint of trade or commerce between a territory and any state or foreign nation, was illegal.

Penalty for violation of any one of the provisions was a fine of not more than five thousand dollars, or imprisonment for not more than one year, or both.

The federal circuit courts were given jurisdiction and federal district attorneys were given power to institute proceedings in equity to restrain violations. The property involved in a conspiracy in re-

straint of trade might be seized and condemned. The party injured by a company in restraint of trade might sue the offender for three times the damage which he had suffered.

New Combinations. The law did not put a stop to large business combinations; for some years they flourished unchecked. Many new concerns, including the American Tobacco Company, the United States Rubber Company, and the General Electric Company, were organized after the passage of the act. The new concerns were organized as holding companies or mergers rather than as a group of trustees, as the earlier trusts had been. The degree of control in their respective fields, however, was as great as the group of trustees had been able to achieve.

Prosecutions. In spite of the rapid growth of big business, it was five years after the passage of the Sherman Act before a case arising under it reached the Supreme Court. This was the well-known Sugar Trust Case.[1] The American Sugar Refining Company, incorporated in New Jersey, had owned about two-thirds of the sugar-refining business of the United States prior to 1892. Most of the other third was in the hands of four Pennsylvania refineries. In 1892 the New Jersey concern bought the Pennsylvania companies. It now had ninety-eight per cent of the sugar-refining business of the entire country. The government rested its case on the fact that the several manufacturing plants had been acquired, rather than on the ground that the corporation was actually restraining trade. In fact, it brought suit against the Pennsylvania concerns for selling out, rather than against the American Sugar Refining Company. The court held that the government had not shown any violation of the Sherman Act. Manufacturing activities, the court said, were not interstate commerce. While the government may have lost this suit because it rested its case on extent of ownership rather than on actual restraint of trade, its loss greatly encouraged those who desired to form large concerns.

Addyston Pipe Case. Soon other types of cases came before the Supreme Court. Most of the iron pipe manufacturers of the United States agreed not to compete in bidding on contracts. The country was divided into sections, and each company was permitted to supply all orders in its section. Unless a prospective buyer would pay the price set by the manufacturer in his territory, he could go with-

[1] *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895).

out iron pipe. A unanimous decision of the Supreme Court in the Addyston Pipe Case declared the agreement illegal.[1]

The Railroad Field. The Supreme Court very early upheld the Sherman Act in the railroad field. The Trans-Missouri Freight Association held that the act was meant to prohibit only unreasonable restraint of trade. The court, however, held that the act made no distinction between reasonable and unreasonable restraint.[2] Both kinds were illegal. It was not until 1911 that this view was rejected by the court. Early in the twentieth century the court went even further in the railroad field and declared a railroad holding company illegal when its effect would be to restrain trade.[3] Railroads and other means of transportation, however, have been covered by special laws.

Industrial Concerns. The Addyston Pipe Case involved an agreement between different concerns. Two decades passed before the Sherman Act was successfully used against industrial mergers and holding concerns. In 1911 the Supreme Court found the Standard Oil Company and the American Tobacco Company guilty under the act. Manufacturers, the court held, may violate the law when their combination affects commodities which enter interstate commerce.[4] In these cases and that of the Terminal Association of St. Louis (1912), the court made a distinction between reasonable and unreasonable combinations.[5] Each case had to be decided on the basis of the purpose of the organizers and the results which flowed from its activities. The application of "the rule of reason" caused the court to refuse to hold the United States Steel Corporation guilty in a suit brought before it at the close of the World War. It held that mere size or the existence of unexerted power was no offense under the anti-trust laws.[6]

Restraint by Labor. The Sherman Act was also being used in the field of organized labor. Labor unions, as well as business men, might conspire to restrain trade. The court held that the law covered any illegal means which restrained interstate commerce.[7] The

[1] *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211 (1899).
[2] *United States v. Freight Association*, 166 U. S. 290 (1897).
[3] *Northern Securities Co. v. United States*, 193 U. S. 197 (1904).
[4] *Standard Oil Co. v. United States*, 221 U. S. 1 (1911); *American Tobacco Co. v. United States*, 221 U. S. 106 (1911).
[5] *United States v. Terminal Association of St. Louis*, 224 U. S. 383 (1912).
[6] *United States v. United States Steel Corp.*, 251 U. S. 417 (1920).
[7] *Loewe v. Lawler*, 208 U. S. 274 (1908); *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418 (1911).

Clayton Act of 1914, however, removed labor organizations partly if not wholly from the operation of the Sherman and other anti-trust laws. In 1939 and 1940, however, the national government brought charges against a number of labor groups for alleged restraint of trade. Both conservative and radical labor leaders bitterly denounced the government for this action, claiming immunity under the Clayton Act.

Clayton Act. The Sherman Act was supplemented in 1914 by the Clayton Act, which was designed to plug some of the holes in the Sherman Act. It tried to be more specific than the earlier law. It declared price discriminations are unlawful when the tendency or effect of such discriminations may be to lessen competition or to create a monopoly. Price differences were permitted when based on grade, on quality or quantity sold, or on cost of selling or transportation. They were also permitted when " made in good faith to meet competition." Exclusive selling and leasing contracts which substantially lessen competition were illegal. Holding companies and mergers were prohibited if their tendency or effect was substantially to lessen competition, restrain commerce, or create a monopoly. Interlocking directorates were restricted. Individual directors, officers, and agents of the offending corporation were made punishable if they authorized, ordered, or themselves did things prohibited by the anti-trust laws.

Labor, Agricultural, Horticultural, and Export Exemptions. The Clayton Act declared that nothing contained in the anti-trust laws should be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations " instituted for the purposes of mutual help, and not having capital stock or conducted for profit." Nothing in the laws should be construed to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects of those organizations. Neither the organizations nor their members should be held illegal combinations or conspiracies in restraint of trade under the anti-trust laws. The Supreme Court has held, nevertheless, that producers and distributors of agricultural products are not entirely immune from the anti-trust laws.

Another exemption from the anti-trust laws was provided by the Export Trade Act of 1918, which removed from the provisions of the anti-trust laws associations for foreign trade which were formed by American exporters. Still another exception was the Agricultural

Exemption Act of 1922, which permits farm, dairy, and other agricultural associations to be formed for the purpose of marketing such products.

National Industrial Recovery Act. Reference has already been made to the National Industrial Recovery Act and its attempt to set up codes of fair competition. One purpose of the act was to permit business concerns to limit competition by codes which should be set up and maintained under government supervision. If concerns lived up to the codes, presumably they would not be prosecuted in matters covered by the codes, even though the code provisions were contrary to the anti-trust laws. No attempt, however, was made in the codes to cover all matters dealt with by those laws.

Chain Stores. With the return of better times, the government stiffened its anti-trust attitude. In 1936 Congress passed the Robinson-Patman Chain Store Act, designed to protect independent stores from competition with the chains. It prohibits fake discounts and rebates to the chains. Discounts for quantity purchases are allowed, but these are under the supervision of the Federal Trade Commission.

Suits were brought against petroleum companies, motion picture concerns, and other groups for alleged monopoly. In 1938 Congress created a temporary national economic committee to study the effect of concentration of economic power and of government policies upon prices, unemployment, and related matters.

ORGANIZING AGAINST MONOPOLY

Policies do not put themselves into effect, nor do laws enforce themselves. Unless individuals and organizations support policies and laws, they remain a dead letter. The lukewarmness, if not outright laxity, of Presidents Harrison, Cleveland, and McKinley toward the enforcement of the Sherman Anti-trust Act was an important factor in its ineffectiveness during the first decade of its existence. When Theodore Roosevelt became President the number of prosecutions increased rapidly. The government was badly handicapped, however, by lack of information on which to base its anti-trust policy. In 1903 it created the Bureau of Corporations to gather information. In 1914 this bureau was replaced by the Federal Trade Commission, an independent agency. This commission and the Interstate Commerce Commission, which will be discussed in the next

chapter, have been the main federal agencies for regulation of commerce.

Work of the Federal Trade Commission. The purpose of the Federal Trade Commission is to prevent unfair commercial competition and to collect and publish information on economic phases of domestic industry and foreign trade. To this end it engages in a wide range of activities. It receives and issues complaints, carries on investigations, conducts hearings, and issues cease-and-desist orders where violation of the law has been proved.[1] It prevents price discrimination, tying contracts which bind purchasers to use goods of one concern only, stock acquisition where it might tend toward a monopoly in that line of commerce, and interlocking directorates. It holds conferences on trade practices.

REGULATING SECURITY AND COMMODITY MARKETS

The United States has been slow to regulate security and commodity markets. It took the position that buyers and sellers were essentially on a level of equality and it was the obligation of each party to look out for his own interest. The national government did forbid the use of the mails to defraud, and the states had laws against fraudulent sales. They also had some laws dealing with local stock and commodity exchanges. For the most part, however, the stock and commodity exchanges were allowed to do as they pleased until the change of national administrations during the depression.

The losses occasioned by the depression strengthened the hands of those who wanted regulation of markets. Some leading financiers were called before committees of inquiry in Washington, and widespread publicity was given to their testimony. President Roosevelt then asked for a law which would put the burden of telling the whole truth on the seller. To the ancient rule of the market place, "Let the purchaser beware," the President asked that Congress add "Let the seller also beware."

Securities Acts of 1933 and 1934. In response to this request Congress passed the Securities Act of 1933. A year later the law was modified by the Securities Exchange Act of 1934. When a security is registered on an exchange, if the registration statement contains an untrue statement of material fact or omits a material fact, the buyer

[1] *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112 (1937).

may sue every person who signs the registration statement. The corporation which issues the securities, its directors, underwriters, accountants, and others are held responsible for untrue statements. After a concern has issued an operations statement covering twelve months, the buyer, to get damages, must prove that he relied on an untrue registration statement. Underwriters, directors, and other officers are not liable for mistakes made by experts if they prove there was no reason to believe that the statements were untrue.

The chief purpose of the law was to secure information for investors. The government does not suggest that securities are sound; it merely requires complete disclosure of facts. It does not guarantee investors against loss. It makes intelligent buying easier but in no way removes the buyer's responsibility for careful scrutiny and evaluation.

The Securities Exchange Act of 1934 provides for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices. In explaining the need for regulation the law says:

> Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several states by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve system.
>
> National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the federal government is put to such great expense as to burden the national credit.

Securities and Exchange Commission. The 1934 law set up a Securities and Exchange Commission of five members, not more than three of whom may be members of the same political party. The members are appointed by the President, with the consent of the Senate, for a five-year term. The purpose of the commission is to administer the Securities Exchange Act of 1934 and the Public Utility Act of 1935. Its functions are divided into three groups:

(1) The supervision of registration of security issues and the suppression of fraudulent practices in the sale of securities under the act of 1933. This act gives the commission authority to compel a full and fair disclosure of material facts regarding securities publicly offered and sold in interstate commerce or through the mails, and to prevent fraud in the sale of securities. The registration statements covering securities to be sold must be filed on forms approved by the commission. The statements cover specified information, financial statements, and exhibits. Exhibits include the form of the prospectus proposed for use in selling the security. A registration statement becomes effective twenty days after filing. Until the statement is in effect, a security may not be offered or sold to the public in interstate commerce or through the mails by issuers, underwriters, or dealers. Certain securities, however, are exempt by law from these requirements. A prospectus giving important facts about an issue must be delivered to the prospective purchaser.

(2) The supervision and regulation of transactions and trading in outstanding securities both on stock exchanges and in the over-the-counter markets, as provided in the Securities Exchange Act of 1934. This act tries to eliminate abuses in the securities markets. It prohibits manipulation of the market by means of wash sales, matched orders, false statements, or other means which give the impression of false activity in a security or a change in price. It provides for regulation, through the commission, of puts, calls, straddles, or other options or privileges. Short selling is also closely guarded. It tries to make available to the public sufficient up-to-date information concerning the management and financial conditions of corporations whose securities are traded in the securities markets to enable the investor to act intelligently in making or retaining investments and in exercising his rights as a security holder. The transactions of directors, other officers, and principal stockholders in the shares of their listed companies are published from time to time.

Constant watch is kept of the activities of security markets. Over-the-counter markets are regulated through registration and control of over-the-counter brokers and dealers. A 1938 law forbids brokers and dealers to make use of the mails and other means of interstate commerce to deal in securities except on a national securities exchange. Any association of brokers or dealers may be registered with the commission as a national securities association or as an affiliated securities association by filing a registration statement with the commission and meeting other requirements. The rules of an association are expected to protect investors and the public interest. An association may, with the approval of the commission, severely discipline members.

(3) The regulation of public utility holding companies under the Public Utility Act of 1935. This act is discussed on pages 578–579.

Regional offices of the commission have been set up to conduct trading, accounting, and legal investigations, and to serve the investing public, registrants, legal firms, and investment houses in complying with the law.

Control of Credit. The part of the Securities Exchange Act of 1934 which is designed to prevent a disproportionate amount of credit resources from being used in security transactions is administered by the Board of Governors of the Federal Reserve system. The board regulates the amount of margin which may be extended to customers in connection with securities. It also regulates the character of loans to brokers and dealers. Subject to exceptions, the latter are forbidden to borrow from persons other than members of the Federal Reserve system or banks subject to the jurisdiction of the Board of Governors of that system.

Commodity Markets. Regulation of security exchanges was hardly under way before the President and Congress turned their attention to the commodity markets. The prices of commodities went up and down too rapidly to please the lawmakers and others. The result was the Commodity Exchange Act, which placed under supervision of the national government all trading in grain, cotton, mill feed, butter, egg, Irish potato, and rice futures on commodity exchanges which the Secretary of Agriculture should designate as grain markets.

The Commodity Exchange Administration was created to administer the act. It engages in continuous and systematic observance of futures trading and speculative activity in commodities over which it

has jurisdiction with a view to: (1) preventing manipulation, corners, and excessive speculation which cause unreasonable and unnatural price fluctuations; (2) preventing the dissemination of false or misleading crop and market information affecting prices; (3) preventing cheating, fraud, and deceit in connection with the execution of customers' orders; (4) insuring proper treatment and handling by commission firms of moneys belonging to their customers; (5) preventing bucketing and fictitious transactions; (6) compelling registration of futures commission merchants and floor brokers handling orders for others.

The administration compiles daily reports of grain futures transactions in all markets. It also makes other general observations to prevent manipulation. It compiles and gives to the public and Congress information resulting from investigations and studies of contract market operations. It coöperates with other government agencies in making investigations of commodities, commodity products, and by-products, including supply and demand, cost to the consumer, and handling and transportation charges.

ELECTRICITY AND GAS

Local control. Until 1935 the sale of electricity and gas was chiefly under local and state control. Public utilities in local communities operated under franchise. The terms of its franchise regulated each public utility. There was frequent controversy over rates, types of service, and other matters. Often these controversies were fought out in the courts. In many cases they were decided in a back room conference between the public utility representative and the leader of the local political machine. It is nearly impossible for the local authorities to get information that will enable them to make accurate estimates of a reasonable rate.

Municipal ownership and the threat of such ownership of electric and gas utilities play an important part in control. Constant comparison of rates and services is made between publicly owned and privately owned systems. The possibility that it may be taken over by a municipality is an incentive to the private concern to render superior service.

State control. The unsatisfactory nature of local control led state after state to set up a public service commission. All states except Delaware now have one. This commission regulates the intrastate transmission and sale of electricity and gas. It can figure with a sat-

isfactory degree of accuracy the cost of providing electricity where it is generated locally, or of gas where it is manufactured within the state. When, however, electricity is brought in from a great generator situated perhaps at a distant waterfall, or when gas is piped in from a distant natural gas field, state utility commissions find it difficult to judge what is a reasonable rate. This has been the more difficult because of inadequate appropriations to finance investigations. The amount spent by a state on its public utility commission is negligible compared to the amount a great utility concern is ready to expend to get favorable treatment by it. These commissions often find themselves under very strong pressure from political machines to " go easy " on the utilities. On the other hand voters, irrespective of the justice of existing rates, often threaten public officials with defeat if they do not lower rates. The pressure of public utility concerns on the one hand and of voters on the other, with the political machine taking part on one side or the other, makes the position of the commission anything but pleasant.

Holding Companies. The problem of public control has been rendered more difficult on account of the vast interlocking systems of holding companies which have been organized in this industry. Sectional holding companies have been gathered into holding companies for still wider areas. Above these were erected still other holding companies. The process continued until the overwhelming majority of operating concerns of the entire nation were controlled by no more holding companies than could be numbered on the fingers of two hands, with a finger or two to spare.

National Control. In 1935 the national government entered the arena against the public utility holding company. The Public Utility Act of that year attempts to do away with " unnecessary " holding companies and to regulate others. The declared purpose of the act was to provide a greater degree of protection for investors and consumers. The drop in prices of public utility securities seems to prove, however, that the real purpose was to benefit consumers, irrespective of its effect on investors. The law provides for a full and fair disclosure of the corporate structure of holding company systems. It applies only to electric and gas systems.

The administration of the act is in the hands of the Securities and Exchange Commission. Its duties are to eliminate uneconomical holding company structures; supervise security transactions by holding companies and subsidiaries; supervise acquisitions of securities,

utility assets, and other interests by holding companies and their subsidiaries; supervise dividends, proxies, and intercompany loans; and supervise service, sales, and construction contracts. The great majority of holding companies refused to register under the act until the Supreme Court decided they must do so.[1]

Public Power Plants. Great pressure has been exerted by the national government on private utility concerns in some regions by the construction of giant generating plants on the Columbia, Colorado, Tennessee, and other rivers. Electricity generated at the Grand Coulee, Boulder, Norris, and other government dams is a constant reminder of government competition. The threat by the government to build transmission lines over a wide territory and sell directly to consumers has been a club over the heads of the privately owned utility concerns. The issue has been vigorously fought out in the courts.

Rural Electrification. The work of the Rural Electrification Administration, which is endeavoring to carry electric energy into the rural districts, has also spurred some concerns to meet this threat to their future expansion. When the R. E. A. was started in 1935, only ten per cent of the farms in the United States had electricity. By 1940 twenty-five per cent had it. At the latter date the R. E. A. alone had 180,000 miles of lines in service. Some state public service commissions are trying to stop private concerns from hurriedly extending lines to forestall the R. E. A.

INTRASTATE TRADE

The control of trade within each state remains in the hands of that state unless it so vitally affects the commerce between states that the national government has jurisdiction. This control includes fair trade as well as other practices.[2]

State Commissions. The state public utility commissions which were mentioned in connection with electricity and gas exercise state control over other forms of public utilities, including railroads and street railways. Some states have also been active in preventing fraudulent sales. In general, the courts have held that one state cannot exclude products from another state, but may regulate the transportation and sale of those products in the interest of public health

[1] *Electric Bond and Share Co. v. Securities and Exchange Commission*, 303 U. S. 419 (1938).

[2] *Old Dearborn Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936).

or to prevent fraud.[1] The national government may assist individual states to maintain standards by preventing the bringing in of certain classes of goods. The interstate shipment, for sale, of liquor into dry states has long been forbidden. Prison-made goods may not be shipped into a state and sold contrary to its laws.[2] It has been suggested that the same principle might be used to control child labor. If goods made with child labor could not be sold in states which forbid child labor, the curtailment of market might cause many concerns to cease to employ children.

State Regulations May Be Void. If the state regulation of intrastate traffic discriminates against goods coming in from other states, the regulation may be void. When Texas lowered freight rates on local freight in order to give several Texas cities an advantage over Shreveport, Louisiana, as rates from Louisiana to Texas cities were higher, the Supreme Court forced return to the original rate.[3] The Interstate Commerce Commission may require intrastate rates to be raised if this is necessary to give railroads a fair return on their property.[4] The Supreme Court has held, however, that until the national government acts the states are free to set local rates, even though these give an advantage to intrastate points.[5]

THE TARIFF

The tariff restricts foreign commerce. It decreases tremendously the amount of goods which would flow from country to country. In spite of this retarding influence on commerce, we have maintained a tariff throughout our history. In fact, the general trend for three-quarters of a century has been toward higher tariffs.

During the first half of our history the tariff was valued as a source of revenue. Its success in this respect will be discussed in Chapter XXXIV. After the Civil War the tariff was used more and more to ward off competition. In some cases the protection may have been needed to build up certain industries. In others it simply enabled concerns to pile up larger profits by freeing them from the necessity of meeting competition. About the beginning of the twentieth cen-

[1] *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898), and *Plumley v. Massachusetts*, 155 U. S. 461 (1895).

[2] *Kentucky Whip and Collar Co. v. Illinois Central R. R. Co.*, 299 U. S. 334 (1937).

[3] *Shreveport Case*, 234 U. S. 342 (1914).

[4] *Wisconsin v. C. B. and Q. R. R.*, 257 U. S. 563 (1922).

[5] *Minnesota Rate Cases*, 231 U. S. 352 (1913).

tury, agriculture received protection from the increasingly severe competition of Canada, Australia, South Africa, and other new countries.

Formulating a Policy. No serious attempt was made until recently to formulate a tariff policy. Each concern, industry, or section of the country got all the protection it could from Congress, and it was not always scrupulous about means. Recently, however, attempts have been made to formulate a policy based on the difference in cost of producing goods in this country and abroad. Whenever an industry in the United States is not in a position to produce a goods as cheaply as it can be produced in another country, the duty might be raised to meet the competition. On the other hand, if our producers under a tariff law had the advantage in producing an article, the duty might be lowered to prevent overcharging the consumer. It has been difficult to apply this principle, since costs of production are constantly changing. The difficulty was especially great when Congress levied an inflexible rate which was imposed until a new one was made.

The Tariff Commission. To make the tariff more scientific and more flexible two important steps have been taken. In 1916 Congress created the Tariff Commission. Its first duty is to investigate and report on tariff matters. The information may be used in levying the original rates by Congress, or in making adjustments later. The commission's investigations and reports cover a wide range of topics. One of its chief duties consists in investigating the difference in production costs of similar articles manufactured in the United States and abroad. It reports its findings to the President, who may change the rate of duty, in accordance with the findings, to the extent of a fifty per cent increase or decrease in the existing rate. The President cannot act except on the basis of the report; on the other hand, he is not required to act because of it. A considerable number of rates have been changed. This principle of flexibility was first introduced in the Fordney-McCumber Act of 1922.

Reciprocal Trade Agreements. The flexibility principle also underlies the Trade Agreements Act of 1934. This act permits the President to negotiate, without ratification by the Senate, trade treaties with foreign countries, by which existing duties may be lowered as much as fifty per cent in return for concessions by foreign countries. Some Senators and others have denied the constitutionality of such treaties since they are not ratified by the Senate, but the adminis-

trative branch of the government has not been influenced by constitutional objections to them. Machinery has been set up to assist in the making of these treaties. The Committee for Reciprocity Information has been created for the purpose of hearing the views of agriculture, industry, commerce, and the general public on the subject of reciprocal trade agreements and tariff concessions. As the agreements do not have to be ratified by the Senate, they can be put into operation quickly. Agreements have been made with Cuba, Canada, France, Brazil, Great Britain, and many other countries.

QUESTIONS

1. Define *commerce, interstate commerce,* and *regulate.*
2. Is the need for more control by the federal government any justification for broadening the definition of "interstate commerce"?
3. What changing emphasis in the legislative treatment of big business can you detect?
4. Is it fair to exempt labor and farm organizations from the provisions of the anti-trust laws?
5. Trace and criticize judicial interpretation of anti-trust laws.
6. What methods are used by the Federal Trade Commission to arrive at decisions and enforce orders?
7. Make a comparison of the trade of two leading commercial countries.
8. Describe the work of the United States Bureau of Foreign and Domestic Commerce.
9. Criticize the regulation of security markets; of commodity markets.
10. Evaluate the control of electric and gas utilities by local governments; by state governments; by the federal government.
11. Are reciprocal tariff agreements an advance or a retrogression in tariff policy?

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CHAPTER XXIX

Transportation and Communication

LENGTHENING LINES AND LARGER UNITS OF CONTROL

THE village or small city was once the chief center of transportation and communication. It served the agricultural region which surrounded it. On foot, by wagon, or in river boat, men carried merchandise and messages between the local center and outlying districts. The roads which served the community were short. Carriers of messages did not have far to go. Today lines of transportation and communication are so long as to appear endless. Whole countries are but small units in the great world-wide systems. Villages and small cities which were once centers of trade and travel are scarcely dots on the maps of communication and transportation. Trains do not stop at the smaller ones. Airplanes fly over without so much as a glance downward. Pipe lines pass beneath or around. The great termini are generally hundreds, if not thousands, of miles apart.

Inadequacy of Local Control. The lengthening lines of transportation and communication cross political boundaries. One boards a train, steamer, bus, airplane, or dirigible in New York and alights in Miami, New Orleans, San Francisco, Montreal, Liverpool, Buenos Aires, or Berlin. Even state boundaries are no more than lines on the map to the transcontinental traveler. These lengthening lines have made local control less and less adequate. The railroad which extends across fifty counties and passes through a hundred towns cannot be controlled by any one of them. The airplane line extending from New York to Los Angeles cannot be regulated by any state over which it passes. So with the telephone, telegraph, bus line, pipe line, and other means of talk and trade. Recognizing the futility of purely local supervision, the states and the national government have been exercising more and more control over both transportation and communication. The national government has done this

under its constitutional power to regulate domestic and foreign commerce.[1]

GOVERNMENT ASSISTANCE

The government has exerted a dual influence on transportation. It has helped its agencies on the one hand and controlled them on the other. Sometimes the purpose of the control has been to aid the agencies, but more often it has been to protect the public.

Highways. In recent years governments have built and maintained most of the highways. Although toll bridges are still found, for the most part roads are free. Free roads facilitate commerce. Before the days of the gasoline tax, their cost was borne by the taxpayers rather than by those who used the road.[2] More than a century ago the national government built the national turnpike from Cumberland, Maryland, to the Middle West, but it took little interest in highway construction and maintenance until the automobile made long trips a common occurrence. Since 1916, however, it has been giving aid to the states. Before a state could participate in federal aid it was required to establish a highway department adequate to coöperate in the administration of the improvements provided. It was also required to pay at least fifty per cent of the cost. The Federal Highway Act of 1921 added the requirement that the Secretary of Agriculture and the state highway departments jointly should designate a system of important interstate and intercounty roads limited to seven per cent of the country's total road mileage to constitute the federal-aid highway system, upon which all future federal appropriations should be expended. This system now includes some 224,000 miles of road, of which 134,000 have been improved to a considerable extent, and most of the remainder to some extent, with federal funds. Congress forbade federal funds to be used to pay for right of way and property damage costs.

Railroads. The greatest help given to the railroads was the immense grants of land they received from the national government. Sometimes the land was given directly to the roads; sometimes it was given to the states and then passed on to the railroads. Altogether some 200,000,000 acres found their way from the public do-

[1] See pages 560–566.

[2] In some states, users of gasoline do more than pay for roads. After part of the gasoline tax receipts has been used to pay the entire cost of highways, the rest is put into the general fund and used for other than highway expenses.

main into the hands of the railroads as a gift from the government. Millions of dollars were also given.

Waterways. The national government continues to aid waterways. Although most of the canals were built by state governments, natural waterways and the craft which use them have been chiefly the care of the national government. It has spent hundreds of millions of dollars improving rivers and harbors, and in maintaining the lighthouse service.

The Inland Waterways Corporation was organized in 1924 to promote, encourage, and develop water transportation. It supervises government-owned barge lines and provides necessary supplies and equipment for them. Through joint rates with railroads, it serves forty-two states. It pays its own way without appropriations from Congress.

Subsidy payment for carrying mail has been one of the main sources of federal aid to both water and air transportation. Since our merchant marine has been unable to compete successfully with that of foreign nations, the government has subsidized United States lines by paying more for carrying mail than was necessary. In 1936 the government adopted the policy of giving an outright subsidy. This seemed better than the indirect method of subsidizing by means of mail contracts. The government has also aided our merchant marine by lending money at very low rates for building and operating ships.

In 1936 the United States Maritime Commission replaced the United States Shipping Board Merchant Fleet Corporation.[1] Not more than three of the commission's five members may be of the same political party. The Merchant Marine Act, in creating the commission, declared the following policy:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States, and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States in so far as may

[1] 49 Stat. 1985.

be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

The commission is required to adopt a long-range program for replacements and additions to the American merchant fleet. It must coöperate closely with the navy department to insure speedy adaptation of the merchant fleet to national defense requirements. It is authorized to make the following investigations: the routes and lines from ports in the United States to foreign markets; the required types of vessels, including express-liner or super-liner vessels to be employed in such services; the frequency of sailings; the relative cost of construction and of operation of comparable vessels in the United States and in foreign countries; the extent and character of the governmental aid granted by foreign governments to their merchant marine; the shipyards in the United States; the application of the shipping acts to aircraft engaged in foreign commerce; new designs, new methods of construction, and new types of equipment for vessels; the promotion of foreign trade on American vessels; and intercoastal and inland water transportation, including their relation to transportation by land and air.

The commission is also authorized to investigate discriminatory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from the foreign port to the United States port, and recommend to Congress measures by which the discrimination may be corrected.

Airways. Government aid to aviation has taken several forms. Many local governments have constructed airports, but the most substantial aid has been given by the national government, which establishes, operates, and maintains airways and aids to air navigation, such as intermediate landing fields, beacon lights, and radio directional communication; compiles flight checks and publishes air-navigation maps; establishes and enforces rules and regulations governing the competency of airmen and airworthiness of aircraft; and promulgates and enforces air traffic rules and other regulations nec-

essary to the public safety. Furthermore, through its research and development work it increases the safety and reliability of aircraft, engines, and accessories. It is a clearing house for matters pertaining to civil aeronautics. But for the government's liberal treatment of air mail carriers, progress in aviation would have been slower.

TYPES AND AGENCIES OF HIGHWAY CONTROL

Local, state, and federal agencies for highway transportation are generally of two kinds: those which help build and maintain the roads, and those which enforce certain regulations with respect to them. Each village, town, city, and county has its street or road department, which may consist of a single permanent official who hires such help as he needs from time to time, or of a well-organized group of departmental officials. Since road-building is a highly specialized science, counties and the larger cities are coming more and more to hire engineers who have made the building and maintenance of roads a life work. The government may do its own work or assign it by contract to the lowest bidder. The state's highway building and maintenance is carried on by its highway department under the direction of a highway commissioner or commissioners. The department may do its own building and maintenance or let it out to contractors.

Uniform Traffic Code. Motor vehicles have made control of the highway important from the standpoint both of business and of safety. Traffic needs to move promptly and smoothly; yet it must move without danger to occupants of vehicles and to pedestrians. Some states require applicants to pass a test before receiving a license to operate a motor vehicle; others do not. In some localities the police are strict in enforcing laws requiring careful driving; in others they are not. One of our greatest needs at present is a uniform traffic code throughout the country. Some states have already adopted the code suggested by the nation-wide conference on safety, but other states have not yet seen fit to make the code into law.

Public Roads Administration. The chief federal agency for administering highways was the Bureau of Public Roads, created as a branch of the United States Department of Agriculture in 1893. In 1939 it was transferred to the Federal Works Agency under the name, Public Roads Administration. From its foundation until 1912 its only functions were investigation and education. In coöperation

with a small group of scientifically minded state highway departments it laid the foundation of modern highway construction. When it was created in 1893 there were but two state highway departments — those newly created in New Jersey and Massachusetts. After a brief and limited career of direct road-building, the bureau was directed by the Federal Aid Road Act of 1916 to coöperate with the states in a larger program. The administration administers the regular federal-aid funds, those for the construction of forest roads, and emergency appropriations for road construction. It also supervises the construction of national park roads for the National Park Service. The Civilian Conservation Corps coöperates in some of these fields. Much of its work is done in conjunction with state highway departments. The administration maintains district offices. These and state representatives enable it to maintain close contact with the various states. Research into highway design, construction, transportation, and the economics of highways constitutes an important part of the administration's work.

Motor Carrier Act. The Motor Carrier Act of 1935 established federal regulation of motor carriers engaged in interstate and foreign trade. The act required the Interstate Commerce Commission to regulate common, contract, and private carriers by motor vehicle. The commission is also empowered, following hearings, to prescribe rates, charges, regulations, and practices for motor carriers. It may compel carriers to supply full information. It may investigate violations of criminal and penal provisions of the act and request the Attorney-General to prosecute violations. The Motor Carrier Act is of great significance for the railroads as well as for the public, for it makes it more difficult for motor vehicles to compete with railroads by low standards and unfair practices.

CONTROL OF INTERSTATE RAILROADS

For a long time the commerce clause of the Constitution was valued as a curb on the states [1] rather than as a source of federal action. When, however, the Granger movement began about 1870 to agitate for railroad regulation, many people came to feel that the national government ought to make use of its power. In 1886 the United

[1] When New York, for instance, gave two inventors a monopoly of steam navigation in that state, the Supreme Court decided a state might not grant a monopoly if it affected interstate trade, as that monopoly did. See *Gibbons v. Ogden*, 9 Wheaton 1 (1824) and *Brown v. Maryland*, 12 Wheaton 419 (1827).

States Supreme Court held that states could not fix rates for interstate traffic.[1] This was a power which had been delegated exclusively to the national government.

Interstate Commerce Act. In 1887 Congress yielded to the demand for regulation and passed the Interstate Commerce Act for the control of railroads. This act forbade discrimination between persons, places, and commodities. Such discriminations had been a common abuse before federal regulation. Railroad officials guilty of rate discrimination could be fined and imprisoned. The act required that rates must be just and reasonable, to both the public and the railroads. If they were not just and reasonable to the public, damages might be recovered by the injured party. The commission might set both maximum and minimum rates. Maximum rates are to protect the public and the minimum to protect competitors of the railroad from unfair competition. Rates must be made public. Pooling was prohibited.

Interstate Commerce Commission. The act also established the Interstate Commerce Commission, now consisting of eleven members appointed by the President, and charged it with the duty of enforcing the interstate commerce law. For some years enforcement proved difficult. Subsequent legislation, however, gave the commission a much wider jurisdiction and strengthened its powers of enforcement.

The Hepburn Act of 1906 and amendments provided that orders of the commission would become effective within such reasonable time as the commission should prescribe, and would remain in force until its further order or for a specified time. The order might be suspended, modified, or set aside by the commission. It might also be suspended or set aside by the courts. Jurisdiction over express companies, pipe lines except for water and gas, and sleeping car companies was given to the commission by this act.

The Mann-Elkins Act of 1910 gave the commission jurisdiction over telegraph and telephone lines. This jurisdiction, however, was transferred to the Communications Commission when that body was created in 1934. The Panama Act of 1912 increased the Interstate Commerce Commission's authority over combined rail-and-water transportation.

The Esch Car Service Act of 1917 and the Transportation Act of 1920 gave the commission extensive jurisdiction over the use, con-

[1] *Wabash v. Illinois*, 118 U. S. 557 (1886).

trol, supply, movement, exchange, and return of locomotives, cars, and other vehicles. The commission, in fact, has extensive control over equipment, including the authority to compel railroads to adopt that which the commission considers advisable for safety, comfort, and convenience of passengers. It also has extensive control over the number of trains, schedule of stops, personnel, and other items vitally affecting service to the public. The commission likewise has authority over the routing of traffic over common carriers by railroads.

The commission's approval is necessary for the issuance of railroad securities and of securities of motor vehicle common and contract carriers where value exceeds $500,000. Its consent must be had before additions to railroads can be made or old lines abandoned. It passes upon consolidations and mergers of railroad properties, express companies, and motor carriers. It has power to obtain complete information from railroad, motor, and other carriers as to the way in which they conduct their business. It is given access to all records, accounts, and memoranda kept by the carriers over which it has jurisdiction.

UNITED STATES MARITIME COMMISSION

Rates and traffic aspects of common carriers by water in foreign and domestic commerce are regulated by the United States Maritime Commission.[1] Its powers over transportation by water are similar to that of the Interstate Commerce Commission over transportation by land. The Maritime Commission must incorporate, in contracts authorized by the Merchant Marine Act, minimum manning scales and minimum wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving operating-differential subsidy.

CIVIL AERONAUTICS AUTHORITY

For more than a decade the national government controlled aviation through the Bureau of Air Commerce. In 1938 it set up the Civil Aeronautics Authority and gave it control of civil aviation. The authority was directed to keep in mind the present and future needs of our foreign and domestic commerce, of the postal service, and of the

[1] The Interstate Commerce Commission, however, has control over carriers by water where there are joint rail and water routes and where railroads own water carriers.

national defense. Much of its administrative work is in the hands of an administrator.

The authority issues, modifies, and revokes certificates to domestic air carriers. It also issues, modifies, and revokes permits to foreign air carriers. Rates and fares must be filed with the authority, and it has power to reject any that are contrary to law. Rates must be "just and reasonable." Rebates are prohibited. Service and equipment of each air carrier must be safe and adequate. Unjust discrimination between persons, ports, or commodities is prohibited. The authority sets rates and the maximum load for air mail. It has power to inspect accounts and properties of air carriers and may prohibit proposed mergers, interlocking relationships, and pooling agreements. The Air Safety Board within the authority makes and enforces many safety regulations.

The Civil Aeronautics Act of 1938 which established the authority is a comprehensive attempt to unify the government's efforts to promote and control civil aviation. It recognizes aviation as an essential part of our system of transportation.

COMMUNICATION COMMISSIONS

Federal Commission. The Federal Communications Commission, created in 1934, regulates interstate and foreign communications by wire and radio. It supervises the transmission of writing, signs, signals, pictures, and sounds of every kind by wire, cable, and radio. Regulation extends to facilities, apparatus, and services.

State Commissions. States have set up public service commissions for the regulation of intrastate transportation, communication, and other public services. These commissions have power to fix rates, determine conditions of service, and regulate the capital structure of public service concerns. Their findings, however, are subject to review by the courts. The recent tendency has been to give state public service commissions greater authority over the public service relations of local communities.

THE POST OFFICE

An intercolonial postal system had existed prior to the Revolution. The Articles of Confederation, recognizing the advantages of a public system, gave to the central government the exclusive right to establish and regulate post offices, charging rates sufficient to defray expenses. When the Constitution was framed it empowered Con-

gress "to establish post offices and post roads." The new government took over at once the system which had existed under the Articles of Confederation.

The postal system has grown until today there are 44,000 post offices. It does a business of more than four billions of dollars a year. Its activities were expanded in 1911 to include postal savings, and in 1913 to include parcel post.

Ownership. The government's relationship to the post office is different from its relationship to the other agencies of transportation and communication. Most of the agencies are only regulated; the post office is owned and operated. In the one case, the government simply sees that private agencies do or do not do certain things. In the other, the government assumes entire responsibility. It must plan and execute the entire venture.

Fraud. The post office is an important factor in the prevention of fraud. A large proportion of those who make money by dishonest methods would like to use the mails to defraud. This, however, is against the law. The fear of detection prevents many fraudulent concerns and unscrupulous individuals from attempting to use the mails. Many others are detected and convicted.

Political Control. Although the carrying of mail is essentially a business activity, the post office department is still politically controlled. It has more spoils of office to dispense than any other department. That is why the national chairman of the victorious party is so often made Postmaster-General. Although political control has been lessened by putting many postal employees under civil service, politics still play a part, to the detriment of the department.

DIFFICULT PROBLEMS

Rate-making. One of the most difficult problems that face the government in its attempt to deal with agencies of transportation and communication is rate-making. The law prescribes that rates on public utilities shall be reasonable. But what is a reasonable rate? The answer to that question involves the valuation of the property of the agency, the rate of profit permissible, and many other factors. Should railroads be permitted to charge whatever the traffic will bear, adjusting each classification to the rate which will yield the highest net revenue? Apparently the Interstate Commerce Commission thought not when in 1936 it ordered railroads, in spite of the fact that most of them were losing money, to reduce their coach fares

to two cents a mile and Pullman fares to three cents, on the ground that the higher rates were unreasonable.

Valuation. No satisfactory principle of valuation of railroads and other public utilities has been found. The principle of original cost has many advocates. They say that if railroad investors are permitted to make a reasonable return on their investment they have no cause to complain. Original cost, however, is very difficult to determine. Some of the cost has been paid in stock rather than in money, so that no exact measurement of money cost can be made. Besides, this principle takes no account of changing conditions, including price levels and interest rates.

The principle of prudent investment, suggested by Justice Brandeis, would eliminate from original cost any amounts due to fraud or extravagance. Under this principle, the public would not reimburse the roads for the sums paid to scheming promoters who saddled the securities on to the investing public.

The par value and market value of a public utility's securities are sometimes used. Par value frequently bears little relationship to the original cost or to the present value of the investment. Market value is dependent on earnings, but earnings are largely dependent on the rate policy of the regulating authority.

Present cost of reproduction has many advocates. This principle might result in frequent changes in rates. When costs are high, this principle would bring large revenues to utilities and high rates to customers. When costs are low, the opposite would be true. The Supreme Court in 1929 held that reproduction costs must be taken into consideration, although it did not assign this as the sole consideration.[1]

Whether one accepts the principle of original cost or reproduction cost, the cost could hardly be determined with any degree of accuracy.[2]

Monopoly or Competitive Business? Is the railroad a monopoly? When the Interstate Commerce Commission was established, rail-

[1] For views of the Supreme Court on valuation, see *Smyth v. Ames*, 169 U. S. 466 (1898) and *St. Louis and O'Fallon Ry. v. Interstate Commerce Commission*, 279 U. S. 461 (1929).

[2] Congress in 1913 by the Valuation Act attempted to find out both the original cost and the reproduction cost of railroads. The Interstate Commerce Commission spent a decade and a half on the study, but the wide swings in prices made the task of getting anything like accurate results especially difficult. See *47th Annual Report of the Interstate Commerce Commission*, December 31, 1933.

roads were highly monopolistic. For many communities they were the only means of transportation to the outside world. The Interstate Commerce Commission still treats railroads as monopolies, but the private automobile, bus, truck, and airplane have tended to make them more competitive. Many people think railroad rate should not be subject to governmental control, believing that competition would take care of the rate problem.

Consolidation and Coördination. The consolidation and coördination of railroads has also proved a difficult problem. The Transportation Act of 1920 provided for consolidation into a few great systems. The task proved too much for the Interstate Commerce Commission, to which it was assigned, and little consolidation was carried out. A Coördinator of Transportation held office from 1933 to 1936, but his work was more of an emergency nature. The government has been loath to let the railroads effect economies lest men be thrown out of work. An agreement was finally reached whereby the railroads paid to each employee a dismissal wage based upon length of service and amount of wage previous to dismissal.

The Franchise. The franchise has been a difficult problem for local governments. A street railway concern would be given the exclusive right to run street cars; then the concern would use its preferred position to influence the government to permit exorbitant rates. On the other hand, as financial difficulties of street railways arose, with less profitable business, the popularity of low fares caused many politicians to refuse to increase fares sufficiently to permit a reasonable return.

For the most part, the problems of transportation and communication now facing the government are business problems. The great need is to treat them as such, rather than as the football of politics.

QUESTIONS

1. What relationship exists between political boundaries and transportation and communication?
2. Trace federal aid to highway transportation.
3. Report on the regulation of one of the following: highway transportation; railroad transportation; water transportation; airway transportation.
4. What are the main difficulties of railroads at present? Suggest a way of dealing with each.
5. Should railways be treated as primarily competitive or monopolistic enterprises?

6. What principle of valuation of public utilities do you favor? Attempt to show its superiority to other principles.
7. Describe the control of international communication.
8. Tell the story of the American merchant marine.
9. What evils have arisen out of the franchise? How may these evils be reduced?

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CHAPTER XXX

Money, Credit, and Banking

FEW economic institutions have developed in such close relationship to government as money and banks. Even in the days when *laissez faire* was the prevailing economic theory, governments found it necessary to take an active interest in these institutions. As society became more complex and the money economy attained a dominant position, governments extended their control more widely in the monetary and banking fields. Recently in the United States the belief that the national government ought to and will eventually own and control all commercial banks seems to be increasing.

BEGINNINGS OF MONEY IN THE UNITED STATES

When the federal government was organized in 1789, monetary difficulties were fresh in the minds of the American leaders. The Spanish and other coins and the various colonial products used as money by the early colonists had been far from satisfactory as a medium of exchange. The paper money issued by the colonies before the Revolution and by the states and the Continental Congress later had proved even more unsatisfactory. The merchant class, particularly, was anxious for a sound and adequate money. It was in answer to a strongly felt need that the new government established its monetary system in 1792.

The Constitution gives the federal government very great monetary powers. It declares that Congress shall have power "to coin money, regulate the value thereof, and foreign coin, and fix the standard of weights and measures," and "to provide for the punishment of counterfeiting the securities and current coin of the United States." It also forbids states to coin money, emit bills of credit, or make anything but gold and silver coin a tender of debts.

Bimetallism and Gresham's Law. The system established by the new government was bimetallism; that is, it was a system that used two metals – gold and silver – as the legal standard of the country.

The law of 1792 provided that the gold dollar should contain 24.75 grains of pure gold and the silver dollar 371.25 grains of pure silver. There were fifteen times as much silver as gold in a dollar. The weight of the silver was placed at fifteen times the weight of the gold because the market price of silver was about fifteen times that of gold. Gold and silver dollars were to be made of equal value as money. Each kind was to be made legal tender — that is, each must be accepted in payment for debt.

Shortly after this law was passed, gold increased in value; it came to be worth fifteen and one-half times as much as silver. Instead of 24.75 grains of gold being worth only as much as 371.25 grains of silver, it was worth 383.63 grains of silver. Since the gold in a gold dollar was worth more as metal than the silver in a silver dollar, people ceased to use gold as money. It was more profitable to exchange the gold in a dollar as metal for 383.63 grains of silver, use 371.25 grains of silver to coin a silver dollar, and sell the remaining 12.38 grains to a silversmith. In this way gold disappeared from circulation.

The principle illustrated by this change is known as Gresham's law. The law states that, when two kinds of money circulate concurrently in a nation, the one which is worth more as money than as metal will tend to drive the other out of circulation. Since the two kinds of money are equally good in exchange, people will naturally pay their debts with the one which they can get more cheaply.

In 1834 the government tried to get gold back into circulation by reducing the gold dollar to 23.22 grains of pure gold without changing the weight of the silver dollar. This made the new mint ratio approximately 16 to 1. The market ratio, however, in the years following was about 15½ to 1. This time silver disappeared from circulation for the same reason that gold had disappeared after the first coinage law.

Greenbacks. During the Civil War the federal government issued a large number of United States notes known as greenbacks. These were made legal tender and circulated as money. It was expected that the government would redeem them in specie, but for a time it was unable to do so. Since there was serious doubt about the government's redeeming them, the value of these paper dollars sank toward the end of the war to approximately one-third of their face value in specie. Nearly three dollars in paper money were required in exchange for one dollar in gold. Since it was cheaper to

pay with paper money, neither gold nor silver remained in circulation except for subsidiary silver coins, the weight of which had been reduced a decade earlier so that they would continue to circulate.

Legal Tender Cases. Some people did not accept the paper money without a struggle. They refused to take it in payment for debt. The controversy soon found its way into the courts and was settled by the Legal Tender Cases. In the case of *Hepburn v. Griswold,*[1] decided in 1870, the Supreme Court held that Congress did not have power to make paper money legal tender for debts contracted prior to the passage of the legal tender law. The next year, in the case of *Knox v. Lee,*[2] the court reversed itself by declaring that Congress did have such power. In *Julliard v. Greenman,*[3] decided in 1884, it upheld the right of Congress to issue paper money under three powers – the powers to coin money, to borrow money, and to make war.

TRIUMPH OF THE GOLD STANDARD

For some years after the Civil War depreciated currency was the common standard, as the government would not redeem it in specie. It fluctuated in value with faith in the government's ability and willingness to pay, though not so violently as during the war. In 1879 the Treasury resumed specie payment and the greenbacks were at par.

Greenback Party. The resumption of specie payment was very unpopular with many people. In fact, four years before the resumption took place the Greenback party had been formed to prevent resumption and to increase the number of greenbacks. The fight for "cheap money" continued vigorously as debtors, agriculturists, and others who wished to raise prices thought it might be done by less dependence on gold.

Silver Advocates. The price of silver fell rapidly during the last quarter of the nineteenth century. By 1878 the ratio of gold to silver was more than 25 to 1, and before the end of the century it had risen to 35 to 1. Many of the "cheap money" advocates now sought the free and unlimited coinage of silver to achieve their ends. The silver-mining districts of the West joined in the clamor for coinage of silver dollars. Under the Bland-Allison Act some 378,000,000 dollars were coined between 1878 and 1890, the duration of the act. The

[1] *Hepburn v. Griswold,* 8 Wallace 603 (1870).
[2] *Knox v. Lee,* 12 Wallace 457 (1871).
[3] *Julliard v. Greenman,* 110 U. S. 421 (1884).

climax of the agitation was reached in the Bryan free silver campaign of 1896. After the triumph of the gold standard advocates in that election the protests of their opponents became weaker and weaker.

Gold Standard. The gold standard movement was aided by events in other countries. England, the first country to adopt a single gold standard, had done so in 1816. Although most other leading countries continued bimetallism or the silver standard until the fourth quarter of the nineteenth century, by the close of the century France, Germany, the Scandinavian countries, Austria-Hungary, Russia, Japan, and most other commercial countries had accepted the single gold standard.

In 1900 Congress passed the Gold Standard Act which declared gold to be the standard of value for the United States. It directed the Secretary of the Treasury to maintain all other forms at parity with gold. This law simply recognized a fact, for gold had been the real standard since the price of silver had fallen several decades earlier.

Devaluation. Substitutes for the gold standard had been discussed, but the supremacy of that standard was not seriously challenged until the depression caused us to stop specie payments in 1933. A few months later we devalued the dollar to 13.71 grains of pure gold – 59.6 per cent of its former content.

When the government in 1933 required all gold and gold certificates to be presented to the Treasury for redemption in paper money, the problem of payment of debts became acute. Congress at once declared all coins and currencies of the United States to be legal tender for all debts, public and private, even though there was a clause in public or private bonds declaring them to be payable in gold. Since a paper dollar was no longer worth as much as the gold in a gold dollar, suits were brought to recover the difference between gold and the paper dollars tendered in payment, in the hope that the law setting aside the gold clause would be annulled. The Supreme Court, however, held that private issuers of gold clause bonds might pay them off in paper dollars the same in amount as the gold dollars mentioned in the bond.[1] It declared that the gold contract was really a contract for payment of money rather than of gold. The cases under consideration differed from the Legal

[1] *Norman v. Baltimore & Ohio R. R. Co.*, 294 U. S. 240 (1935); *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324 (1937).

Tender Cases after the Civil War in that there were two kinds of money – gold coin and legal tender paper money – in existence when the Legal Tender Cases were decided; hence the one contracted for might be demanded. In 1933 gold had been taken out of circulation, and could therefore not be demanded. The court went on to say that the gold clause was inimical to the public interest because of the great number of contracts containing this clause, which, if the right to demand gold were permitted, would cause gold to be hoarded and to leave the country – which was what Congress was trying to prevent. The power of Congress to establish a monetary system and regulate currency, the court declared, could not be interfered with by a gold clause.

The Supreme Court also held that holders of United States gold bonds could not recover damages or receive in legal tender currency more than the face value of the bonds.[1] It acknowledged that Congress could not invalidate the terms of its own obligations; hence the Joint Resolution of June 5, 1933, was invalid so far as it overrode the gold clause in government bonds. The holder of the gold bond, however, could recover no more than the loss he suffered. The real question involved, then, was: How much loss did holders of government gold bonds suffer? Congress had legally restrained the use of gold coin. The purchasing power of the dollar was the important consideration. Since the holder of the gold bond could not show that he had suffered any loss in buying power, he had not suffered actual loss and could not recover.[2]

Something for Silver. During the depression, more and more pressure was brought to force the government "to do something for silver." The pressure was most insistent from the silver-mining sections of the West but was supported by many who thought a silver policy would help raise prices. The President in December, 1933, announced that for four years the government would accept for coinage at least 24,421,410 ounces of newly mined silver each year at a price approximately fifty per cent higher than the open market price at the time. The following year Congress authorized the issuance of silver certificates based on unpledged silver in the Treas-

[1] *Perry v. United States*, 294 U. S. 330 (1935).

[2] The Supreme Court has also declared void the optional clause permitting a bondholder to demand payment in any of a number of foreign currencies. The issuers of the bonds may pay in the currency of the United States. *Bethlehem Steel Co. v. Anglo-Continentale Treuhand*, 307 U. S. 265 (1939); *Guaranty Trust Co. v. Henwood*, 307 U. S. 247 (1939).

ury. The Silver Purchase Act of 1934 declared it to be the policy of the government to increase the proportion of silver to gold in our monetary stocks until one-fourth of the monetary stocks should be represented by silver. The Secretary of the Treasury was authorized to buy silver abroad as well as newly mined silver at home. On August 9, 1934, the government nationalized silver by requiring that all silver, with some exceptions, be delivered to the government within ninety days. Silver certificates are issued against this silver.

CURRENCY

Mention has been made of the paper money of the colonists and of that issued by the Continental Congress – a currency which depreciated rapidly. The federal government was slow to experiment with paper money, but it issued Treasury notes to finance the War of 1812 and to supply a circulating medium during and shortly after the panic of 1837. These federal experiments were successful.

State Banks and Their Notes. Most of the paper money in circulation during the first half of the nineteenth century was issued by state banks. Some of the states were very lax in their banking laws, and many banks were loath to exercise due restraint in the issuance of bank notes. The result was that currency was in the greatest confusion.[1] People could seldom have a very clear idea of the soundness of the notes in circulation – especially if they lived far from the bank of issue. The notes ranged all the way from those that were thoroughly sound to those that were of no value at all. Under the circumstances it was inevitable that the greatest uncertainty should rule. The average citizen was never sure, when he received a fraction of the value printed on the note, that the amount was appropriate.

State Corporations and Their Notes. Means were found of circumventing the constitutional provision that states might not issue bills of credit. Corporations chartered and owned by the states would issue notes payable to the bearer. Under the leadership of Chief Justice Roger B. Taney, a strong states' rights man, the Supreme Court decided in the case of *Briscoe v. Bank of Kentucky* that these corporations might issue circulating notes even though the state owned a little stock of the issuing corporation.[2]

[1] The currency issued by the First and Second United States Banks was a pleasing exception to the questionable nature of currency generally. For a treatment of these banks see pages 606–607.

[2] *Briscoe v. Bank of Kentucky*, 11 Peters 257 (1837).

Tax on State Banks. After the system of national banks was established during the Civil War, the banks chartered by the states were required to pay a tax of ten per cent on any bank notes they might issue. This tax made it so unprofitable for state banks to issue bank notes that henceforth the bank note field was reserved for the national banks chartered by the federal government. State banks tried in vain to get this tax declared unconstitutional. The Supreme Court held in the case of *Veazie Bank v. Fenno* [1] that Congress had authority to tax the notes of local banks in spite of the fact that states had granted note privileges to such banks. The congressional power over currency was sufficient to permit Congress to protect the currency.

National Bank Notes. Unlike the notes of the state banks which had been based on various kinds of securities, the national bank notes were backed by a single kind of security – United States bonds. Any national bank by depositing United States bonds with the United States Treasury might issue bank notes up to ninety per cent of their market or par value, whichever was lower. Later the bank was permitted to issue them to the full par value of the bonds.

Greenbacks. United States notes, known as greenbacks, issued at the time of the Civil War, were an important currency during the latter half of the century. They continue to circulate.

Silver and Gold Certificates. Later in the century large amounts of silver certificates and gold certificates were issued. The Bland-Allison Act of 1878 required the Secretary of the Treasury to purchase each month from $2,000,000 to $4,000,000 worth of silver bullion and coin it into standard dollars. The Sherman Act of 1890 required the Secretary of the Treasury to purchase 4,500,000 ounces of fine silver each month as long as the market ratio between silver and gold should be less favorable to silver than the mint ratio. The silver was to be paid for by Treasury notes. These were to be redeemable in coin and to be full legal tender. Each certificate is really a receipt for silver or gold deposited in the United States Treasury. The only reason for using the receipt instead of the metal is convenience. Some United States Treasury notes were also issued before the close of the century.

Federal Reserve Currency. With the coming of the Federal Reserve system in 1914 Federal Reserve bank notes and Federal Re-

[1] Veazie Bank v. Fenno, 8 Wallace 533 (1869).

serve notes were created. The amount of Federal Reserve notes soon became far greater than all other currency combined. The Federal Reserve bank notes were expected to replace, at least in part, the national bank notes.

At present Federal Reserve notes, United States notes, and silver certificates are the only forms of currency in active circulation. Other forms are retired as soon as they return from circulation.

CURRENCY INFLATION

Currency is never worth more than the confidence which supports it. The confidence may be due to the fact that government bonds, mortgages, or other securities are behind the currency. It may be due to the ability of the government, by using its tax power, to get enough wealth to make good its desire to keep its currency at parity with its standard metal dollar. It may in times of prosperity and great business activity be based in part on the current need for large amounts of money.

When confidence in currency wanes, currency inflation takes place. Gold or other metal standard money is driven from circulation. As people lose faith, more and more currency must be given in exchange for commodities. Discontent of the people with rising prices may cause the government to reduce the amount of the currency, thus restoring confidence and lowering prices. Governments, however, have often taken the apparently easier course of printing more currency and using it instead of heavier taxation to pay public bills. When this is done, the currency is likely to become entirely worthless, as the German currency did after the close of the World War.

BANK CREDIT AND DEPOSIT CURRENCY

Checks. We seldom pay for large purchases or settle large bills with actual money; we use a check. Checks are used so widely, in fact, that far more wealth is transferred by them than by actual money. Because checks, bank drafts, and money orders are based on deposits, they are known as deposit currency.

Bank Reserves. The amount of bank credit which may be based on deposits is strictly limited by law in the United States, although most foreign countries leave this to the judgment of bankers. The government does not permit a bank to lend out all money deposited. For a long time, banks in New York and Chicago were required to

keep 13 per cent reserve against the credit based on demand deposit accounts. In other large cities the reserve was 10 per cent, and in smaller places 7 per cent. In 1937 the Board of Governors, to guard against undue expansion of bank credit, raised the requirements to 26, 20, and 14 per cent, respectively, the maximum permitted by Congress. A few months later, a sharp decline in business caused the Board of Governors to reduce them. It may reduce requirements at will, but not below the long-time 13, 10, and 7 per cent. The reserve requirement on time deposits is now 6 per cent for all classes of cities. In the absence of regulation, banks would be tempted to extend their credit unduly, since the credit which is extended yields interest. The temptations in prosperous times are especially great, as business needs large sums and the risks are least when business is most prosperous. Probably the greatest evil of banking during the pre-depression years was the excessive use of bank credit for speculation. The sudden contraction of credit when the depression broke was disastrous to business and to thousands of banks.

BEGINNING OF BANKING IN THE UNITED STATES

State Banks. For more than half a century after the United States became a nation, all banks except two were state banks — that is, were chartered by states rather than by the federal government.

The number of state banks increased rapidly after the War of 1812, and by 1840 there were approximately nine hundred. Hard times in the early 1840's killed more than two hundred of these, but by the outbreak of the Civil War in 1861 there were sixteen hundred. The establishment of national banks during and immediately after that war reduced the number to something like 250, but the number increased rapidly during the last quarter of the century.

The quality of the banks varied a great deal from state to state. A few states, particularly in the northeastern part of the country, had strict laws and rather conservative banking. In these states authorities were careful to keep adequate reserves against deposits and bank notes. This was particularly true in the more important financial centers.

In many states, particularly in the West and South, governments were slow to regulate banking adequately, and banking methods were unsound. In prosperous times, credit was extended unwisely. Wildcat banking became common. When hard times commenced

and credit contracted, a great many banks were unable to meet their obligations, and failed. Merchants and other business men recognized the need of stronger banks, but the doctrine of *laissez faire* was so strong that the people generally were reluctant to let the government exercise stricter control. They preferred to treat banks more as they did hardware stores or millinery shops — as private concerns to run their business as they saw fit. Even during the latter part of the nineteenth century and the earlier part of the twentieth, some states permitted banks to lend money on questionable security and to engage in other unsound practices.

United States Banks. The need of a strong bank was recognized by Alexander Hamilton at the time the federal government was organized. This need was met by the establishment of the First United States Bank in 1791. Thomas Jefferson, a member of the President's cabinet, urged Washington to veto the bill by which Congress sought to charter the bank. He believed that, since the Constitution made no mention of the right of the federal government to establish banks, such power was reserved to the states. Hamilton, Secretary of the Treasury, laid great stress on the implied powers of the Constitution. By doing this he was able, in spite of Jefferson's influence, to persuade the President to sign the bill. This difference of opinion concerning the bank was one of the reasons for Jefferson's withdrawal from the cabinet.

At the time there were only four state banks in existence — the Bank of North America in Pennsylvania, and the Banks of New York, Massachusetts, and Maryland. The federal government bought part of the stock of the First United States Bank, but much of it was owned by individuals and business concerns. From a business point of view the bank was quite successful, but some of the lawmakers, particularly the Jeffersonians, did not like it, and refused to renew its charter when it expired in 1811.

Finances were in such bad condition after the War of 1812 that Congress established the Second United States Bank. Its charter was issued for a period of twenty years. When this bank refused to pay the tax which Maryland attempted to lay on all paper money issued by it in that state, the controversy was taken to the Supreme Court. In the case of *McCulloch v. Maryland,* decided in 1819, the tax was declared unconstitutional.[1] The court used this case as an occasion to discuss the right of the federal government to establish

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

a bank. It held that this right existed because the government chose the bank as a means of making effective certain financial powers granted in the Constitution. This decision gave judicial sanction to the doctrine of implied powers of the national government.

The Second United States Bank was successful, as the first had been, but it incurred the dislike of Jackson and his friends. Through their efforts a renewal of the charter was refused, and the bank came to an end in 1836.

The Civil War and National Banks. During the Civil War the federal government, through the National Banking Act, provided for the establishment of national banks — largely to provide a market for government bonds. Each bank might issue bank notes, provided it deposited United States bonds in the Treasury as collateral. These banks were privately owned but supervised by the federal government. Each bank and its branches, if any, stood alone, without legal connection with other banks.

Postal Savings Banks. To encourage thrift the national government in 1911 established a system of postal savings banks. Postmasters act as fiscal agents of the system. Each post office receives and pays deposits. The amount each person may deposit is strictly limited. Although the interest rate on deposits is but two per cent, the great degree of security might tempt large depositors to place more in the postal savings fund than the government would care to handle.

THE FEDERAL RESERVE SYSTEM

In 1913 the Federal Reserve Act brought significant modifications in the national banking system. As stated in the preamble, the act was passed: "to provide for the establishment of Federal Reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes." The Federal Reserve system consists of the Board of Governors, which supervises the system, an advisory council to the board, an open market committee, twelve Federal Reserve banks, and member banks which include all national banks and such state banks as have joined the system.

Branch banking is likely to become an increasingly important feature of our national banking system. National banks, in states which permit state banks to establish branches, may also establish branches.

This recent feature is similar to the Canadian system of branch banking.

The national banks before the establishment of the Federal Reserve system were much more independent of governmental control than at present. Under the Roosevelt administration the federal control has been extended considerably beyond that provided by the original Federal Reserve Act.

Board of Governors. The national government now has a strong voice in determining the policy of the Federal Reserve system. The President appoints, with the consent of the Senate, each of the seven members of the Board of Governors. The powers of the Board of Governors are very extensive. The board may: (1) review and determine discount rates charged by Federal Reserve banks on their discounts and advances; (2) make examination of Federal Reserve banks, require statements and reports from them, require the establishment or discontinuance of branches, supervise the issue and retirement of Federal Reserve notes, and exercise special supervision over all relationships and transactions of Federal Reserve banks with foreign banks; (3) regulate the amount of credit that may be extended on securities registered on a national exchange; (4) pass on the admission of state banks to the Federal Reserve system and the termination of such membership, and receive reports from the state member banks; (5) limit the rate of interest that may be paid by member banks on time and savings deposits; (6) remove officers and directors of member banks for continued violations or other unsound practices; (7) suspend member banks from the use of credit facilities of the Federal Reserve system if they make undue use of bank credit for speculation or other purpose not consistent with sound credit conditions; (8) change the requirements as to reserves to be maintained by member banks against deposits.

The Board of Governors of the Federal Reserve system appoints three of the nine directors of each Federal Reserve bank. Moreover, the chief executive officer and first vice-president of each Federal Reserve bank can be appointed only with the consent of the Board of Governors.

The seven members of the Board of Governors constitute a majority of the members of the open market committee of twelve. No Federal Reserve bank may engage or decline to engage in open market operations save under the direction and regulations of this committee. The law provides that all open market operations shall

be conducted with a view to accommodating commerce and business and with regard to their bearing on the general credit situation of the country. Since many state banks enter the Federal Reserve system, the policy of the national government is highly influential in state as well as national banking affairs. The government is the most important customer of the banks and lender to them. In this way considerable pressure can be brought to bear on them, both collectively and individually.

Guarantee of Bank Deposits. In 1933 the Federal Deposit Insurance Corporation was created. Its chief purpose is to insure the deposits of all banks which are entitled to the benefits of insurance under the national law. All member banks of the Federal Reserve system must accept the insurance plan. Others may do so with the approval of the corporation's board of directors. Any bank which is not a member of the Federal Reserve system may terminate its insurance upon notice at any time, but the existing deposits continue to be insured two years thereafter. The corporation provides insurance for the deposits of each depositor to the extent of $5,000. The insurance extends to deposits of every kind, including regular commercial deposits, time deposits, savings deposits, and trust funds awaiting investment. No distinction is made between public and private deposits. An insurance reserve is provided through an annual assessment, at the rate of one-twelfth of one per cent upon the average deposits, less authorized deductions, of each insured bank. Bankers, generally, were opposed to the establishment of the guarantee of deposits. They maintained that it penalized good banks, as all banks are assessed to pay for losses.

CREDIT FOR THE HOME OWNER

As the depression deepened, more and more people found it difficult to finance homes. Neither the Federal Reserve system, nor agricultural credit, nor state banking system proved adequate to their needs. In 1932 the federal home loan bank system was created. Its chief purpose was to furnish reserve credit for home-financing institutions, state and federal. It made loans to building and loan associations, coöperative and savings banks, and insurance companies.

The system consists of twelve regional home loan banks. It regulates the rate of interest paid by home owners. No member institution may charge more than the maximum legal rate of interest or

lawful contract rate specified by state laws. In states where there are no maximum rates the charges must not exceed eight per cent.

The system is supervised by the Federal Home Loan Bank Board somewhat as the Federal Reserve system is supervised by the Board of Governors of that system.

CREDIT FOR THE FARMER

The creation of credit under the Federal Reserve system was of special interest to business men. It had been in operation but a short time before plans were under way to increase credit facilities in rural districts.

Farm Loan and Agricultural Credits Acts. The Federal Farm Loan Act of 1916 provided for federal land banks, national farm loan associations, and joint stock land banks. As in the case of the Federal Reserve system, the country was divided into twelve districts with a federal land bank in each district. The farm loan banks loaned money on mortgages to national farm loan associations. The farmers, in turn, were loaned money on mortgages running from five to forty years.

Farmers frequently needed money for relatively short periods to raise or move crops or stock. The Agricultural Credits Act of 1923 created intermediate credit banks and national agricultural credit associations. These permit people in rural sections to borrow money on crops or livestock for periods ranging from six months to three years.

Agricultural Marketing Act. In 1929 the Agricultural Marketing Act provided half a billion dollars from which the Federal Farm Board loaned immense sums to coöperative associations and stabilization corporations, but failed to make even a good beginning at holding prices stable.

The Reconstruction Finance Corporation, established in 1932, organized regional agricultural credit associations which loaned immense sums. The following year the Farm Relief Act provided for additional loans. A few months later the Commodity Credit Corporation was created to deal in agricultural commodities, to lend or borrow money on them, and to encourage reduction of farm acreage. Immense sums have been loaned by this corporation on cotton, corn, wheat, wool, tobacco, butter, and other commodities.

Farm Mortgage Corporation. In 1934 the Federal Farm Mortgage Corporation was created. Its chief function is to aid in financing the lending operations of the federal land banks and the land

bank commissioner. It is authorized to issue and have outstanding a total of not more than $2,000,000,000 bonds. Its bonds are fully guaranteed by the government as to payment of both principal and interest.

Farm Credit Administration. The greater part of the agricultural credit facilities are now included in the Farm Credit Administration. Its purpose is "to provide a complete and coördinated credit system for agriculture by making available to farmers long-term and short-term credit." It includes in its make-up the twelve federal land banks, making long-term first mortgage loans to farmers; the twelve federal intermediate credit banks that discount short-term agricultural and livestock paper, make loans on the security of such paper, and make direct loans to coöperative marketing and purchasing associations; the twelve production credit corporations which supervise and furnish a part of the capital for local production credit associations providing short-term credit for production and general agricultural purposes; one central bank for coöperatives and twelve district banks for coöperatives, which provide credit for farmers' cooperative purchasing and marketing organizations.

In the reorganization of 1939, the Farm Credit Administration, the Commodity Credit Corporation, and the Federal Farm Mortgage Corporation were placed in the Department of Agriculture rather than in the newly-created Federal Loan Agency.

THE RECONSTRUCTION FINANCE CORPORATION AND MISCELLANEOUS AGENCIES

The Reconstruction Finance Corporation. The Reconstruction Finance Corporation was a child of the depression. Its chief purpose was to prevent the failure of business concerns by lending money to tide them over the depression. Where financial houses were unable or afraid to assist for fear of financial loss, the government might lend a helping hand. Recently the Reconstruction Finance Corporation has been trying to force interest rates down and to get banks to lend more freely to business. It has entered competition with banks, not to make money, but to get them to pursue policies more in line with the national administration. When, for instance, private banking interests wanted to charge the Great Northern Railway a million-dollar fee and other sums to finance a $100,000,000 bond issue, provided the bonds bore five per cent interest, the Reconstruction Finance Corporation offered to underwrite the issue without charge and permit the road to pay but four per cent

on the bonds. The Reconstruction Finance Corporation has been, in fact, a kind of super-bank, using government funds.

Other Agencies. A very large number of the governmental agencies are engaged in some form of banking activity. In January, 1937, government corporations and lending agencies had total assets of $11,573,677,731. Of this, $3,132,529,143 belonged to institutions entirely financed by the government and $8,441,148,588 to institutions under government control in which the government had some proprietary interest. The assets consisted of preferred stocks, other securities, accounts receivable, working capital, loans, and other forms of investment. The loans had been granted by thirty-one agencies.[1]

QUESTIONS

1. Why have governments so great an interest in money, credit, and banking?
2. What were the main steps in the history of money and banking in the United States prior to 1932?
3. What monetary changes have taken place since 1932?
4. What are the strong features of banking in the United States? The weak features?
5. What have been the main inflationary factors since 1920?
6. What connection is there between prices and the quantity of money?
7. Criticize the recent silver policy of the United States.
8. Why has paper money often proved disastrous?
9. Suggest a substitute for the gold standard.
10. Describe and evaluate banking in one foreign country.
11. Show how international currency controls work.
12. Should the national government exert more extensive control over credit?
13. Has the government been too lenient in its credit policy toward home owners? Toward farmers?

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CHAPTER XXXI

Land Conservation and Agriculture

EARLY TRENDS OF GOVERNMENT ACTION

EARLY government action went a long way toward setting the patterns according to which present conservation and agricultural patterns have been cast. Its land policy, *laissez faire* policy as to natural resources, and early aid to agriculture have affected the development of agriculture in many ways.

Land Policy. Colonial companies, proprietors, and governments gave the land or sold it on amazingly easy terms to those who had the courage to take it from the Indian and hold it against the Spanish and French. When the colonies became states, this easy land policy was continued; the states gave to the settlers or sold to them for a few cents per acre vast stretches of valuable land with all that grew on or lay beneath the surface. When the national government came into possession of the Northwest Territory, the Louisiana Territory, Florida, and other sections it pursued the same generous policy which the states had followed, selling for a dollar or two an acre the best land the settlers could find. Under the Homestead Act of 1862 it even gave land to anyone who would occupy and improve it.

This easy land policy increased the number of people going into agriculture and the amount of produce flowing from their farms. Strange as it may seem, the very surpluses of farm crops which have caused the government so much trouble in recent years are largely an outgrowth of its own liberal land policy.

Exploitation of Natural Resources. There were no strings tied to the land which the government gave or sold to the settlers. They might cultivate a little of the virgin soil and let the rest wash into the nearest river and out into the ocean. They might burn the timber to get it out of the way of the plow, or take half of it for lumber and let the other half rot where it fell. They might cut down a virgin forest and let the land lie idle until undergrowth made it unsuitable

for commercial timber or cultivation. They might leave half the mineral in the mine. They might destroy wild game so rapidly that there was little left for those who used it for food or hunted it for fun. All these things the settlers did, in the profligate waste of natural resources.

Aid to Agriculture. In the same year that the Homestead Act was passed (1862), Congress passed another act which has profoundly affected agriculture. The Morrill Act gave to the states thirty thousand acres of public land for each Representative they had in Congress. This land was to be used for the establishment of schools of agriculture and mechanical arts, and many of the great agricultural colleges of the country were founded under this grant, as we shall see.[1] These colleges have made for scientific farming and greater productivity. The states themselves have also spent large sums derived from other sources on agriculture. Together the national government and the state governments have set up experiment stations and other aids. The Hatch Act of 1887 had provided generously for these stations.

The three early lines of action — an easy land policy, *laissez faire* with respect to resources, and provision for agricultural education — have tended to increase production. The former two have also tended to deplete resources.

LINES OF CONSERVATION

Beginnings at conservation have been made along many lines by both the national government and the state governments.

Soil Conservation. Perhaps the most pressing need of all is soil conservation. This is true in spite of the fact that we now have overproduction of some crops. It is estimated that unrestrained soil erosion caused by improper land use practices has laid waste, so far as crop use is concerned, 50,000,000 acres of formerly valuable cultivated land. Another 50,000,000 acres have been almost as badly damaged. Another 125,000,000 acres have been stripped of productive topsoil to some extent. At least 200,000 acres are being virtually destroyed each year, and the fertility of a much larger amount is being constantly impaired. The direct annual cost to farmers of the country is estimated to be at least $400,000,000 in soil values lost through erosion. This great loss has stirred the government to vigorous action.

[1] Page 705.

Soil Conservation Service. The Soil Conservation Service of the national government, in close coöperation with the states, is directing a national movement to protect and conserve land from accelerated erosion. Through research and experiment it is developing practical and effective methods of control. It is helping to demonstrate these methods under varying conditions. Erosion experiment stations are in operation in Iowa, Kansas, Missouri, New York, North Carolina, Oklahoma, Pennsylvania, Texas, Washington, and Wisconsin. Demonstrations in practical control are being carried out in coöperation with farmers on selected watershed areas in every major agricultural region of the country where erosion is a serious problem.

Within these demonstration project areas, through coöperation with landowners and operators, the Soil Conservation Service carries out a complete and carefully balanced program of soil protection. In this the various methods of erosion control are applied singly or in combination, according to the peculiar needs and the adaptability of each type of land requiring treatment. The development of such a coördinated program involves consideration of natural land factors such as climate, land slope, soil formation, and vegetation.

There are three main categories of practical measures in the control program: (1) adaptations of thick-growing vegetation to practical farm operations, (2) the use of engineering structures, such as terraces and dams, and (3) the retirement of excessively eroded land from cultivation. No single method can adequately solve the many-sided problem of erosion. All available methods, such as correct cropping and rotation, engineering aids, pasture and forest development, and land retirement, must be welded into a composite program of land treatment. Adjusted to the requirements of different kinds of land as determined by soil, slope, rainfall, and the type of farming, the work on the demonstration areas fits in well with regional and national land-use objectives.

The procedure in demonstration areas involves surveys, coöperative agreements, and field work. Each project area is mapped first from the air. Then it is mapped in detail to show the field layout of every individual farm and the location of fences, wooded areas, streams, and other physical features. With these maps as a basis, field workers of the service and the farmer together draw up practical plans for the stabilization of all eroded areas. These plans,

which may call for a considerable reorganization of farm practices, become the basis for coöperative five-year contracts between the farmers and the government.

Reclamation. For many years the government has been busy on the twofold task of reclamation – draining swamps and irrigating semi-arid regions. Draining swamps is chiefly confined to the eastern half of the United States and has been carried forward by much state as well as some national activity. Irrigation is carried on mainly in the West, with the national government bearing the greater part of the burden. Many of the great irrigation projects are connected with the giant power dams, such as the Boulder Dam and the Grand Coulee Dam.

Forests. The national government and some state governments are now trying hard to undo a part of the damage done by the reckless destroying of our forests. Since four-fifths of the most valuable forest lands are now in private hands, the task is very difficult. The government can do little with the forest lands which are in private hands, except try to educate owners to take better care of them. With its own forest lands, however, it is carrying on a comprehensive program. Regular patrols have been established by the national government and some state and local governments to prevent and put out forest fires. On the national forest ranges drift fences, corrals, and bridges have been built, water supplies developed, roads, trails, and stock driveways constructed, and poisonous plants eradicated. The effort has been made to issue permits only for the number of stock that the amount and condition of the forage justifies.

The rebuilding of forests is going forward at an accelerated rate. The United States Forest Service, the Civilian Conservation Corps, public works groups, and others have been carrying on a great variety of work. In a single year the Forest Service planned and supervised 43,000,000 man-days of work.

The United States Department of Agriculture, through its land policy committee, is meeting the need for coördination and correlation of all land purchase work and is providing unity of action in other than forest land purchase programs for such purchases as wild-life refuges, control of soil erosion, and curtailment of submarginal farming.

Wild Game. Both the national government and state governments are active in the conservation of wild game and their sanctu-

aries.[1] The national government has a great deal of authority in this field, because of the migratory nature of many birds and some animals.[2] Many birds and animals are protected by its treaty with Canada. Many of the states have signed agreements which give greater uniformity in their treatment of some forms of wild life.

Petroleum. Each owner of oil lands likes to draw out as much oil as possible before a pool is depleted by various owners. If one concern puts down a single well and another concern with land of equal size puts down ten wells, the latter is likely to get ten times as much oil as the former, although it owns no more oil land than the other. This condition has caused far too many wells to be drilled. A large proportion of the crude petroleum has been wasted, and much of it and refined products have been sold at cutthroat prices by producers and refiners. In 1933 Congress tried to give the President power to control the petroleum industry through regulation of interstate commerce. The act declared: "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or regulation." The Supreme Court held the law unconstitutional as a delegation of power. The court pointed out that the law simply defined the subject – interstate transportation of "hot oil" – but there was no requirement, no definition of circumstances and conditions in which the transportation is to be allowed.[3] The courts have upheld the right of a state to set the amount of petroleum which may be drawn from the earth, and the right to prorate this amount among various producers. The trouble had been that each state would allow its concerns more than other states thought fair. Interstate agreements have done something to regulate the amount to be produced by each state.

Other Minerals. The government has done little to regulate the amount of other minerals which may be taken from the earth. In general each business concern is free to take what it considers a profitable amount. No agency is doing very much toward adopting a long-time compulsory policy of conservation of these minerals.

[1] See *Regulations Relating to Migratory Birds and Certain Game Mammals*, published by the United States Department of Agriculture.

[2] See *State of Missouri v. Holland*, 252 W. S. 416 (1920).

[3] *Panama Refining Co. v. Ryan*; and *Amazon Petroleum Corp. v. Ryan*, 293 U. S. 388 (1935).

FARM SURPLUS AND ITS CONTROL

Post-War Difficulties. As Europe got on its feet after the World War, foreign markets for our agricultural products fell off. Prices on those products declined. Many farmers who were in debt could not make their crops pay, even without including interest on mortgages. By the millions they turned more insistently to the government for aid, urging that a stronger effort be made to raise prices.

Earlier Acts. Congress passed a number of laws in the interest of agriculture previous to the World War. The Bureau of Markets Act of 1913 created a bureau to advise and aid in marketing agricultural commodities. A year later the Cotton Futures Act set up standards for cotton, control of exchanges where cotton futures were dealt in, and regulations for cotton sales. The Federal Farm Loan Act of 1916 has been discussed.[1] A few weeks after this measure was enacted Congress also passed the Grain Standards Act and the Bonded Warehouse Act. The former brought about greater uniformity in grading grain. The latter regulated bonded warehouse receipts and thus assisted farmers who wished to use them as the basis for loans. During the World War a number of acts were passed to increase production and improve marketing. The Agricultural Exemption Act of 1922 and the Agricultural Credits Act of 1923 have been discussed.[2] The Coöperative Marketing Act of 1926 was to assist coöperatives in solving problems of organization, management, sales policy, financing, and membership relations.

Agricultural Marketing Act. More comprehensive than these earlier acts was the Agricultural Marketing Act of 1929. This furthered education in coöperative marketing. It also provided for studies in land utilization, reduction of acreage of unprofitable marginal lands, and other conditions of overproduction of agricultural commodities. The Federal Farm Board, created by the act, was authorized to advise concerning the prevention of overproduction. The stabilization corporations set up under this law bought great quantities of cotton and wheat to keep prices up. In spite of this program, which resulted in large losses to the government, prices fell rapidly. So long as the large amounts of commodities were overhanging the market, they acted as a threat to prices even while the government refused to sell lest it send prices down still further. Much of the cotton and wheat, after processing, was given to the Red Cross.

[1] Page 610.

[2] Pages 572 and 610.

Agricultural Adjustment Act. Prices of agricultural products continued to fall much faster than the general price level. As a part of its comprehensive relief measures, Congress in 1933 passed the Agricultural Adjustment Act. The policy, as stated in the act, was to maintain such a balance between production and consumption of agricultural commodities, and such marketing conditions, as would reëstablish prices to farmers which would give them purchasing power equivalent to that during the period of 1909–1914. Wheat, cotton, corn, tobacco, rice, barley, rye, cattle, milk and milk products, peanuts, flax, and grain sorghums were included in this and supplementary acts. It empowered the Secretary of Agriculture at his discretion to enter into voluntary agreements with producers for reduction of acreage of production, and for rental or benefit payments in connection therewith. Revenue for making such payments was to be raised by processing taxes effective upon proclamation by the Secretary of Agriculture and subject to adjustment by him. The taxes were to be "at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value." The proceeds of such taxes were specifically appropriated for expenses under the act, such as rentals, benefit payments, and refunds. Under supplementary acts producers of cotton, tobacco, and other commodities were subjected to a heavy tax if they produced more than their allotment.

In declaring the Agricultural Adjustment Act unconstitutional the Supreme Court said that the exaction labeled "processing tax" was in no real sense a tax, in that it was not for the support of government. The act invaded the reserved powers of the states in the field of agriculture. Even though nominally voluntary, the plan was in reality compulsory through the coercion of economic pressure. It would have been invalid, the court added, even though it had been purely voluntary, as the United States cannot expend moneys to purchase action in a field in which it has no authority to act directly.[1]

Conservation. Frustrated in this comprehensive attempt to reduce agricultural surpluses, the executive and legislative branches of the government tried to achieve the same end by way of conservation. Farmers were paid to sow or let their land stay in certain crops which enrich the soil. While soil was getting richer, crops would be getting smaller – at least temporarily.

[1] *United States v. Butler*, 297 U. S. 1 (1936).

Forgetting the experience under the first Agricultural Adjustment Act, Congress passed the Agricultural Adjustment Act of 1938.[1] This act enlarged and strengthened the soil conservation program, authorized loans on commodities, and provided for reduction of crops. Machinery for establishing marketing quotas in tobacco, corn, wheat, cotton, and rice was set up. A referendum to producers, however, was necessary before a market quota became effective. If more than one-third of the producers of any commodity voted against a quota, it did not become effective. If the quota became effective, the national quota was apportioned by states, counties, and individuals. Penalties were provided for producers who exceeded quotas.

This act created the Federal Crop Insurance Corporation in the Department of Agriculture " to promote the national welfare by alleviating the economic distress caused by wheat crop failures due to drought and other causes, by maintaining the purchasing power of farmers, and by providing for stable supplies of wheat for domestic consumption and the orderly flow thereof in interstate commerce." The corporation was authorized to insure producers of wheat against loss in yields of wheat due to unavoidable causes, including drought, flood, hail, winterkill, insect infestation, and others. Premiums may be paid in wheat or its cash equivalent. The act provided for parity payments on corn, wheat, cotton, rice, and tobacco " if and when appropriations are made therefor."

DEBT RELIEF FOR THE FARMER

Frazier-Lemke Act. Mention has been made of the elaborate system of credit and banking for farmers. During the depression these were not sufficient to satisfy farmers and those who spoke for them in government. The Frazier-Lemke Act of 1934 tried to give farmers who were in debt greater relief. It provided that bankrupts, with the consent of mortgagees, might purchase the property at its then appraised value, acquiring immediate possession, and eventual title, with no down payment. The appraised value was to be spread in instalments over a period of six years, carrying interest at one per cent. If creditors refused consent to such purchase, the court should stay all proceedings for a period of five years, during which time the debtor should retain possession of all or any part of his property, under the control of the court, provided he paid a reasonable rental an-

[1] 52 Stat. 31.

nually for that part of the property of which he retained possession. Such rental was to be distributed among secured and unsecured creditors. At the end of five years, or prior thereto, the debtor might pay into the court the appraised price of the property of which he retained possession and proceed to secure full discharge. If the debtor failed to comply with the law, the court might then order sale by trustee.

In declaring it unconstitutional the Supreme Court said that the act took from the mortgagee certain property rights and had thereby violated the Fifth Amendment, which prohibits the taking of property without due process of law.[1]

New Frazier-Lemke Act. In 1935 Congress passed an amended Frazier-Lemke Act. This act provides for a three-year moratorium, during which the mortgagee may not foreclose on the property, provided the farmer lives up to certain conditions laid down by a court of bankruptcy, including the payment of a reasonable rental. If he lives up to the conditions, the farmer may remain on the property three years, unless the court decides on a shorter period. The Supreme Court in upholding the law declared that, in case the farmer is unable at the end of three years to meet the terms of the mortgage, foreclosure may take place. The holder of the mortgage has the right to bid in the property or have it sold at a price which will satisfy his claims against it. The court held that the new act preserved three rights of the mortgagee which had been denied under the older one. These were: (1) the right to retain his claim against the land until it is satisfied, (2) the right to realize on the land by a judiciary public sale, and (3) the right to bid in the property.[2]

GOVERNMENT AGENCIES

State Agencies. There are a large number of government agencies engaged in the promotion or control of conservation and agriculture. Several state governments set up departments of agriculture even before the end of the eighteenth century. All states now have a department of agriculture or other agency to take care of their activity in the field of agriculture. Conservation agencies vary greatly from state to state. The usual plan is for conservation activities to be divided among a number of agencies.

National Agencies. The United States Department of Agricul-

[1] *Louisville Joint Stock Land Bank v. William W. Radford,* 295 U. S. 555 (1935).

[2] *Wright v. Vinton Branch,* 300 U. S. 440 (1937).

ture was established in 1862. Until 1889 it was administered by a Commissioner of Agriculture. In that year its powers and duties were enlarged and the Commissioner became the Secretary of Agriculture with a seat in the President's cabinet. The department now contains the Bureaus of Agricultural Economics, Agricultural Chemistry and Engineering, Animal Industry, Dairy Industry, Entomology and Plant Quarantine, Home Economics, Plant Industry, and the Weather Bureau. It also contains the Agricultural Adjustment Administration, Commodity Exchange Administration, Food and Drug Administration, Forest Service, Office of Experiment Stations, Soil Conservation Service, and many administrative offices. The names of the various bureaus and other agencies indicate the wide range of activities carried on by the department.

The Farm Credit Administration, Farm Mortgage Corporation, Housing Administration, and many other agencies are also active in helping the farmers to solve their problems.

National Conservation. A large number of national agencies have charge of various phases of conservation. Among them are the Bureau of Reclamation, the Division of Grazing, the National Park Service, the Petroleum Conservation Division, and the Geological Survey – all under the Department of the Interior.

County Agricultural Agent. The most important local agency for agriculture, with the possible exception of agricultural courses in high schools, is the county agricultural agent. He is now found in a large proportion of counties, and works under the direction of the state and the national as well as the local government. His work is chiefly promotional and educational. Utilizing the material gathered by the various experiment stations and other agencies, he helps farmers get the most out of their land. He is sometimes important in the field of conservation, too, as he advises how to reduce soil erosion, insect pests, and other enemies of agriculture.

RESEARCH

In the first half of the nineteenth century a few government officials as well as private associations were interested in better methods of agriculture. Chemistry of the soil, better seed, better breeds of stock, and other items were included in their program. Although these early beginnings were the foundation for later development, the great period of agricultural research did not begin until after the World War.

The United States Secretary of Agriculture said recently that sci-

entific research is the principal function of his department, the keystone of its entire structure of functions and services. All its other activities, such as weather and crop reporting, the eradication or control of plant and animal diseases and pests, the administration of regulatory laws, and economic guidance, are the practical expression of research results.

Research has discovered many new uses for farm by-products, the commercial development of which frequently requires large-scale operations for a side demand. Chemical discoveries in refrigeration, in the preservation of fruits and vegetables by heat treatment, and in canning affect types of farming, the geographic distribution of farm enterprises, and the national dietary. Economic research discloses the powers and limitations of controlled marketing and controlled production, and shapes national adjustment policy. Research in livestock diseases, besides directly safeguarding the public health, influences medical thought and medical practice. Discoveries in animal nutrition have a bearing on human nutrition. As technology increases productivity, it compels attention to the distribution of products. The chemical analysis of foods and drugs is the primary means of food and drug law enforcement. Weather studies provide warnings against floods and frosts, and safeguard navigation and aviation.

Single discoveries in science form part of a pattern, the design of which is quite as important as the separate discoveries. After the analysis of problems by separate study, there must be a synthesis of results. Research in the Department of Agriculture, in the agricultural experiment stations, and in land-grant colleges is being conducted with these principles in mind. One great hindrance to the free and full coördination of projects, one that has discouraged certain basic studies, has been the apportionment of research funds item by item, on a bureau basis, for objects sharply particularized. Under this system research has been developed largely to meet emergencies, to throw up quick defenses against animal and plant pests and diseases, to solve specific economic questions, or to develop varieties or strains of plants and livestock suited to particular conditions. While this type of research is valuable, a more fundamental research to establish laws and principles is also needed.

Bankhead-Jones Act. Congress took a step toward remedying this situation in 1935 when it passed the Bankhead-Jones Act which made special provision for basic research in the Department of Agri-

culture, experiment stations, and land-grant colleges. It provides for further development of agricultural extension work. It authorizes the Secretary of Agriculture to conduct scientific, technical, economic, and other research into laws and principles underlying basic problems of agriculture in its broadest aspects. It also authorizes and directs him to conduct research to improve the quality of agricultural commodities, to develop new and improved methods for their production and distribution, and to discover uses for farm products, by-products, and manufactures thereof, and to study the conservation, development, and use of land and water resources for agricultural purposes. Forty per cent of the money allotted to this work is to be spent directly by the Department of Agriculture, and the other sixty per cent by the states, Alaska, Hawaii, and Puerto Rico.

The Bankhead-Jones Act also authorizes appropriations for the further development of coöperative-extension systems in the states and Hawaii. The money is distributed in a manner similar to that governing appropriations under the Smith-Lever Act of 1914, with the exception that the allotment is made on the basis of farm population rather than of rural population, and with the further exception that the states and Hawaii need not match the national funds. The act also authorized increased appropriations for the land-grant colleges.

Fundamental Research. In appropriating funds for basic research in addition to investigations of highly specialized problems, the government has recognized that fundamental research may often be more practical than short-cut research. It cites many examples in support of this conclusion. Experimenters formerly attempted to control certain potato diseases by changing the time of planting the crop, by trying to keep the seed from "running out," and by adopting special methods of cultivation and fertilization. Fundamental research proved finally that filterable viruses could cause disease in plants. This one fundamental discovery furnished the basic knowledge for rational solutions of the problems of many diseases. This is true not only in potatoes and other plants, but in animals and human beings. Permanent solutions of many of these problems have been developed. Certain fundamental studies have disclosed some of the effects of rations derived from various plant sources and have led to exact knowledge about vitamins. This in turn answered many specific farm problems that had perplexed investigators—

such as the real difference in feeding values of white and yellow corn, the value of pasturing livestock, and the value of well-cured hay. Fundamental research into the chemical make-up of fats, sugars, and proteins showed why certain things serve as foods, and to some extent why they are good or poor foods. Investigations in the chemical constitution of proteins revealed that they consist of a small number of comparatively simple substances joined together. These are known as amino acids. Digestion breaks down the proteins into amino acids, which the animal body absorbs and rebuilds into proteins. Therefore the food value of a protein depends upon how easily digestion breaks it down, and into what amino acids it is resolved. It has been shown that some of the amino acids are essential to the health of the animal, while others are not. With this knowledge it becomes possible to define with greater scientific accuracy what is a proper food.

The Bankhead-Jones Act authorizes the study of essential elements in farm adjustment. It thus helps to coördinate research procedures and research findings. The department may now bring the soil chemist, the agronomist, the animal and dairy husbandman, the agricultural engineer, and the economist into a more effective collaboration on various problems. Many problems require the coöperation of chemists, physicists, and bacteriologists before their fundamental nature can be revealed.

The agricultural biological research agencies are now busily engaged in studying everything from the principles of heredity to the application of those principles in the improvement of rice, wheat, corn, sugar cane, cotton, and better breeds of cattle, horses, swine, and sheep. In other research fields agencies are equally active. The possibilities for improvement by way of research are vast indeed.[1]

AGRICULTURE IN POLITICS

We have seen throughout this chapter how vitally the government has affected agriculture. It is equally true, on the other hand, that agriculture vitally affects government. During the latter half of the nineteenth century the farmers were able to get many Granger laws on the statute books of the states. They were not, however, very successful in controlling the national government. Since the World War, things have been different. The " farm bloc " has been

[1] For a fuller discussion of agricultural research see *Yearbook of Agriculture*, 1936.

a political influence with which national leaders have had to reckon at every turn. A large number of the states are still chiefly agricultural, and by controlling the Senators from these states farmers are able to wield an influence far out of proportion to their numbers. Much of the legislation during and after the depression was based on the theory that the farmer was not sharing equally with business classes in the progress of civilization; hence the government must give the farmer parity not only of prices but of opportunity. The size of crops, herds, and droves was decreased to raise prices, even though this meant higher prices to the consumer. Rural electrification, aid to tenant farmers, crop insurance, and a host of other plans put, or nearly put, into operation may have been wise or foolish, in the interest of the community as a whole or of the farming class, but many of them achieved enactment or near-enactment because organized farm groups demanded them. Farm organizations are now very powerful nationally as well as in the state governments of agricultural states.

QUESTIONS

1. What part did the government play in creating the agricultural problems it is now trying to solve?
2. Summarize the conservation policy of the national government or of one state government.
3. What has been done to conserve water power?
4. What has been done to control the production of crude petroleum?
5. Does the economic "law" of supply and demand work as well in agriculture as in industrial production?
6. Should the farmer be shown greater consideration than the home owner in the matter of mortgage moratoriums?
7. Is the American farmer being pampered?
8. Trace the development of agricultural research and experimentation.
9. Criticize the Agricultural Adjustment Act of 1938.
10. Explain the power and judge the wisdom shown by pressure politics of agricultural groups.
11. Suggest a comprehensive agricultural program for the United States.

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CHAPTER XXXII

Labor

EARLY AVOIDANCE OF CONTROL

GREAT BRITAIN. Throughout the greater part of the nineteenth century, the doctrine of *laissez faire* held sway in the field of labor as elsewhere. This was true not only in Great Britain, the country in which the Industrial Revolution had made greatest strides, but also in the United States and other less highly industrialized countries. The conditions under which even small children and women worked in the mines and factories of Great Britain were appalling, and those in other countries were nearly as bad. This was the result in practice of the theory that each adult was free to seek his place in industry, and each employer was free to seek employees at whatever wages and under whatever conditions either was able to get.

The United States. In the United States control of industry in the interest of better labor conditions developed more slowly than in European countries. We were chiefly a rural nation. People on the farms – especially on the frontier – and in the villages were accustomed to take care of themselves, and few persons saw any reason why the laborers in the factories of town and city should not look after their own interest. Moreover, *laissez faire* in government was reënforced by a strong tinge of Puritan discipline. Long hours, hard work, and not too much of this world's goods were effective ways of keeping the devil away. The things which labor is now trying to avoid were once considered good for it – at least by the well-to-do of the community who were most influential in forming public opinion and making laws. Again, the *laissez faire* lack of labor policy never produced its worst effects in the United States, because of the abundance of land on the frontier. In spite of the large influx of immigrant laborers along the Atlantic seaboard seeking work, conditions of free labor in this country continued to be better than conditions in Europe, owing to the drainage of man power to the western farms. Prior to the Civil War the competition of slaves in

vast numbers with free labor would probably have made effective regulation of the latter impossible. Slaves were property and, as such, were under the virtually unrestricted control of their masters. Some states had laws to protect slave labor from the worst aspects of life and work, but such laws were hard to enforce. All these and other factors were so strong a deterrent that very little control of labor was exercised by the government until the closing years of the nineteenth century. Indeed, a decade or two of the twentieth century had passed before many forms of control were in operation.

WHY HAVE LABOR CONTROL?

No well-rounded, consistent policy of labor control has been the basis of the numerous attempts to exercise such control. An evil would crop out here and there, and a reformer would ask that something be done about it. An employer would find his business endangered or his profits threatened, and he would ask for an injunction to restrain labor. Employees would see a chance to gain an advantage by regulation, and would petition the state legislature or Congress for a law to improve their status. The public would begin to grumble about being inconvenienced, and somebody would try to quiet it, or to bring real relief, by some kind of plan.

Reasons for Control. The state of Wisconsin prefaced its unemployment insurance law with the following statement of the reasons for labor control:

> Unemployment in Wisconsin has become an urgent public problem, gravely affecting the health, morals, and welfare of the people of this state. The burden of irregular employment now falls directly and with crushing force on the unemployed worker and his family, and results also in an excessive drain on agencies for private charity and for public relief. The decreased and irregular purchasing power of wage earners in turn vitally affects the livelihood of farmers, merchants, and manufacturers, results in a decreased demand for their products, and thus tends partially to paralyze the economic life of the entire state. In good times and in bad times unemployment is a heavy social cost now paid mainly by wage earners.

This dual purpose – the protection of individual laborers and the protection of the community – is more and more frequently put forth as the reason for control of labor. The tendency in recent years has been to give the community more consideration than was

accorded it a generation or two ago, when the protection of the employer and his property was stressed. Today, by contrast, the activities of the powerful industrial unions connected with the Congress of Industrial Organizations are causing a good many people to ask whether these unions may not be even stronger than most employers in bargaining.

LEGAL OBSTACLES TO CONTROL

State Control. Unlike most foreign countries, the United States has been frustrated in many attempts at labor legislation, because of constitutional difficulties. In the first place, the greater part of such labor control as the Constitution and courts have permitted was vested in the states. The national government might control its own employees or those engaged in interstate commerce. It might swing into action if there were interference with the mails or a threat of monopoly as defined by the various anti-trust acts. These were exceptions, however, to the general rule of state control.

Uncertain Extent of Power. In the second place, no one knew how much power a state might exercise in the labor field. Labor control was generally conceded to be a reserved power of the state, but the courts varied very widely in their views as to the extent of that power.

Liberty of Contract. The original Constitution forbids a state to pass a law impairing the obligation of contracts.[1] The courts have held that the wage contract by which the employee sells his labor is as real a contract as that by which one sells a house or piece of land. The Supreme Court declared: "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality of right is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land." [2] Minimum wage, maximum

[1] Art. I, Sec. 10.

[2] *Adair v. United States*, 208 U. S. 161 (1908). See Pound, Roscoe, "Liberty of Contract," *Yale Law Journal*, vol. 18, pp. 454–487.

hour, yellow dog contract, and other labor laws have been declared unconstitutional on the ground that they interfered with freedom of contract. This interpretation of the right of contract is being criticized with increasing severity. Many liberals are saying that where the bargaining power of two parties is unequal – as is generally true between a single unorganized worker and a large employer – liberty of contract is a legal fiction rather than a fact.

The courts, in passing on labor legislation, have been slow to permit other considerations to outweigh liberty of contract. It is generally recognized, however, that contracts may be set aside under the police power of the state to protect public health or public morals. Some state courts have also held that changing conditions of society and the evolution of employment make a change in the application of principles necessary if there is to be an intelligent administration of government.[1] The real issue in deciding the constitutionality of a labor law is frequently this: Should the right of free contract or the police power of the state be accorded the greater weight? The Supreme Court has gone so far as to say that the state has a right to protect an individual against himself, on the ground that, irrespective of his own recklessness, the state retains an interest in his welfare and the state must suffer when individual health, safety, and welfare are sacrificed or neglected.[2] The tendency recently has been to interpret the police power more liberally than was done even two decades ago, because of the problems arising out of an increasingly complex industrial civilization. The Supreme Court was entirely frank in giving this as the reason for reversing itself when in 1937 it upheld the women's minimum wage law of Washington.[3]

Class Legislation and Due Process of Law. Some labor laws have been declared unconstitutional on the ground that they were examples of the "class legislation" prohibited under the Fourteenth Amendment, which forbids any state to deny to any person within its jurisdiction the equal protection of the law. Still others have been declared unconstitutional under the Fifth Amendment and that part of the Fourteenth which requires that no person shall be deprived of property without due process of law. Due process of law

[1] *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52 (1902); *Ritchie v. Wayman*, 244 Ill. 509, 91 N E 695 (1910).

[2] *Holden v. Hardy*, 169 U. S. 366 (1898).

[3] See page 640.

has frequently been interpreted as action by the courts rather than by the legislative or executive branch of the government.

Children. Scrutinizing the matter more closely, we find that the justification for control varies with the group regulated. The control of child labor is justified on the ground that children are, in a special sense, wards of the state. Since the judgment of children is immature and their bargaining power weak, the state must share with parents responsibility for the influences to which children are subjected.

Women. A limited control of conditions affecting women who work outside the home has a twofold justification. It is exercised in part because women are not physically able to stand as much exertion as men, and in part because strain or the lowered vitality of women is likely to affect unborn children adversely. Regulations, therefore, often require that women be allowed to work seated if the nature of the task permits, or that they be given rest periods at stated intervals. The amount of protection permitted women by the courts varies from state to state.

Men. In general the courts have held that there is less legal justification for controlling the labor of men than for controlling that of women. Men have been allowed more liberty to make their own labor contracts, with which the government must be slow to interfere. The hours of trainmen could be shortened by government action, because long hours increased danger to the public on account of accidents.[1] Hours of men in industry and trades might be limited by law because of the hazard to workers of breathing dust during long hours.[2] Workers in compressed air must be given shorter hours in the interest of their own health. These are, however, exceptional cases. It has been much harder to convince the courts that long hours are as harmful to men as they are to children and women. There has been no very great popular demand for shorter hours, except on the part of laborers themselves.

Roundabout Methods. Sometimes the government tries to achieve in a roundabout way what it does not have power to accomplish directly. After the Supreme Court had declared the codes which had been set up under the N. R. A. unconstitutional, Congress in 1936 passed the Walsh-Healy Act, which requires government supply

[1] For the Adamson eight-hour law for trainmen see *United States Laws*, 1916, C. 436.

[2] *Holden v. Hardy*, 169 U. S. 366 (1898).

contracts to contain certain maximum hour, minimum wage, child labor, safety, and health regulations. It was hoped that business concerns would adopt these standards for the privilege of bidding on government contracts. The Secretary of Labor was assigned the duty of promulgating the standards and supervising their enforcement. The Public Contracts Board holds hearings to determine minimum wages, the imposition of penalties, and other quasi-judicial matters arising under the act.

CHILD LABOR

A century ago there was very little restriction on the labor of children. The cotton-spinning factories which were established early in the nineteenth century used many young children. A child old enough to pick up trash, stand before a textile machine and tie threads, or dip a candle was welcomed in factory and domestic industry. Many children under ten years of age were employed in factories, domestic industry, and on the farm. The hours were frequently from sunrise to sunset. Before the Civil War a few states had child labor laws, but they were not well enforced.

After the Civil War, bureaus were set up by the states to collect labor statistics and enforce labor laws. By calling attention to very young children working long hours, and frequently under very bad conditions, reformers slowly aroused public opinion. Laws to limit the length of the working day for young children began to make their appearance. In 1870 the Census included facts on child labor for the first time. The Census of 1880 showed that child labor was on the increase. This aroused public opinion still further.

Present State Regulation. The movement to prohibit child labor grew steadily until today it is restricted or prohibited in every state. All states, except Wyoming, have set a minimum age for children in at least some industries. In eight states the minimum age is sixteen years; in four it is fifteen; in thirty-five it is fourteen. Some have higher age limits for dangerous occupations. Some states forbid children to work in factories at any time; others forbid them to work at any occupation during school hours. Some require employment certificates for minors under eighteen years. Some have an eight-hour day for minors under eighteen. Some prohibit night work for minors.

Our educational standards are a great help in reducing child labor. Compulsory school attendance keeps many children out of the ranks

of the employed, as they cannot be in school and factory at the same time.

National Attempts at Regulation. The first national act against child labor was the Keating-Owen Act of 1916.[1] This law prohibited the shipment in interstate or foreign commerce of goods produced in mines, quarries, factories, manufacturing establishments, mills, canneries, and workshops in which children were employed in violation of certain age and hour standards. By a five-to-four decision the Supreme Court declared the law unconstitutional on the ground that Congress had exceeded its constitutional power to regulate interstate commerce.[2] This was reversed in 1941.

In 1919 Congress levied a tax of ten per cent on the annual net profits of any mill, cannery, workshop, factory, manufacturing establishment, mine, or quarry employing children in violation of the age and hour standards used in the act of 1916.[3] After being in effect three years this act was declared unconstitutional. The Supreme Court held that Congress may not, under the guise of a tax which is on the face of it a penalty, regulate a matter within the reserved rights of the states.[4]

In 1924 Congress submitted to the states for ratification the following amendment:

> SECTION 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.
>
> SECTION 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

This proposed amendment has been ratified by nearly two-thirds of the states. Most of those ratifying have done so since the onset of the depression, but the movement to ratify has slowed down so decidedly that the prospect of obtaining the necessary three-fourths is not bright.

In 1933 the N. R. A. codes set sixteen years as the minimum age for industrial employment. In some dangerous occupations the age limit was eighteen. As a result of these codes, child labor in indus-

[1] 39 Stat. 675, Ch. 432.
[2] *Hammer v. Dagenhart*, 247 U. S. 251 (1918).
[3] 40 Stat. 1138.
[4] *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

try virtually disappeared. When the National Industrial Recovery Act was declared unconstitutional, the trend was reversed and the number of child laborers increased.

The Fair Labor Standards Act of 1938[1] forbade any producer, manufacturer, or dealer to ship or deliver for shipment in interstate or foreign commerce any goods made with "oppressive child labor." The act defined "oppressive child labor" as that of children under the age of sixteen who were not working for their parents or for a person standing in the place of their parents. Even these, however, may not employ children in manufacturing or mining. In dangerous occupations children under eighteen may not work.

HOURS AND WAGES

Hours of Children. The first law in the United States regulating hours of work was the Massachusetts law of 1842, which established ten hours as the maximum length of time children under twelve might work in factories. A few states followed suit, but regulation was very ineffective during the nineteenth century. During the twentieth century much shorter hours have become common. Enforcement, too, is much better.

Hours of Women. Prior to the Civil War much agitation for shorter hours for women was carried on by labor groups. The movement was chiefly for a ten-hour day, as women frequently were working twelve or more hours. The movement resulted in the ten-hour law of 1847 in New Hampshire and similar laws in several other states. These earlier laws, however, did not include those employees who signed a contract to work longer hours, and employers generally made employees sign such contracts or lose their positions.

Toward the close of the nineteenth century more enforceable laws were made. The movement was retarded, however, by the decision of the Illinois Supreme Court in 1895 when it declared the eight-hour law of that state unconstitutional on the ground that it deprived women of the privilege of working as long as they wished to work. In 1908 the Supreme Court of the United States upheld the Oregon ten-hour law for women. This gave an impetus to the regulation of hours for women, and within two decades nearly every state limited either the daily or the weekly hours. Some have established an eight-hour day and a forty-four-hour week, but some still permit a ten-hour day or longer. Many states cover only certain occupations.

[1] 52 Stat. 1060.

At present only four states – Alabama, Florida, Iowa, and West Virginia – have no law regulating the working hours of women, although the only prohibition in Indiana is that women may not work at night in manufacturing.

National Industrial Recovery Act. About half the women who work outside the home were covered by the codes set up under the National Industrial Recovery Act. The principle of the basic eight-hour day and forty-hour week was established in about seven-tenths of the more important codes.

In addition to regulating the number of hours daily or weekly, slightly more than half the states require breaks in employment periods. Nineteen of these limit the number of days that a woman may work in succession. Usually one day of rest in seven is required. Twenty states require that time be given for meals or rest, for periods varying from fifteen minutes to one hour. Some require this interval after a fixed number of hours, usually five or six.

Sixteen states prohibit night work for women in certain occupations or industries. Some forbid employment in certain occupations. Mining, messenger service, pool-room activities, the cleaning of moving machinery, the handling of certain explosives or poisons, the lifting of heavy weights, and coke oven work are some of the forms of work which are closed to women in some states. Several states require a specified period of unemployment before and after childbirth. A few states provide in general terms that women must not be employed under conditions which are injurious.[1]

One-third of the states regulate home work. Some prohibit such work, except for members of the immediate family. Some require cleanliness, adequate lighting and ventilating, and freedom from infectious and contagious diseases.

Hours of Men. The chief regulation of the hours for men has been accomplished in connection with the work of public employees, those working on government contracts, and those in dangerous occupations. The national government and many state governments have provided by law for a shorter work-day for their employees than that which prevails in private industry. As these laws include only public employees, their constitutionality can scarcely be chal-

[1] Kansas, *Revised Statutes*, 1923, ch. 44, sec. 640; Michigan, *Compiled Laws*, 1929, sec. 8497; North Dakota, *Compiled Laws*, Supplement, 1913–1925, sec. 396 b 3; Oregon, *Code*, 1930, vol. 3, secs. 49–315; Washington, *Remington's Revised Statutes*, 1931, sec. 7624; Wisconsin, *Statutes*, 1935, sec. 103.05.

lenged. The propriety and constitutionality of the laws regulating hours of persons working on government contracts has been more open to question. For some years the prevailing daily and weekly numbers of hours were eight and forty-eight. There were, however, certain classes, such as firemen and policemen, who might work longer.

Mention has already been made of the fact that the Walsh-Healy Act required government supply contracts to contain certain maximum hour, minimum wage, and other stipulations. The forty-hour maximum established under this act embarrassed the government as well as industry, for the steel concerns at first refused to bid on government contracts. At this juncture the large steel concerns adopted a forty-hour week for non-government as well as government contracts. They were then free to bid on the government work.

Many states, as we have said, regulate hours of men in occupations where long hours endanger the public or bring special hazards to the workers. The right to regulate hours of men in occupations which do not have special hazards has been harder to establish than the right to regulate the hours of women. A ten-hour law for bakers in New York was declared unconstitutional by the Supreme Court of the United States in 1905.[1] In 1917 the court reversed itself and upheld the Oregon ten-hour law.[2] The Supreme Court has not yet passed on the constitutionality of an eight-hour day for men.

The main legal principles involved in hours for men are the right of freedom of contract, on the one hand, and the police power, on the other. We have seen that the right of liberty of contract has been interpreted as the right of workers to sell their labor. How many hours of it may they sell? As much as they please, provided they do not conflict with the right of the state to use its police power to protect its citizens. Just what number of hours a day or a week measures the dividing line between action which is justified under right of contract and action which warrants exercise of police power, the judgment of the courts must decide.

The Fair Labor Standards Act of 1938 established maximum hours for employees engaged in interstate and foreign commerce and in the production of goods for such commerce. After two years the maximum work week becomes forty hours, with compensation for overtime. Those engaged in agriculture, retailing, the professions, fishing, the handling of agricultural or horticultural commodities

[1] *Lochner v. New York*, 198 U. S. 45 (1905).
[2] *Bunting v. Oregon*, 243 U. S. 426 (1917).

within the area of their production, most forms of transportation, and a few other activities are exempt from the provisions of the law. Exemptions also apply to learners and certain handicapped classes.

Minimum Wages for Women and Children. One-third of the states now have minimum wage laws for women and children. Some of these laws cover all occupations; others include only those specified in the act. The earlier laws were usually based on the principle of a living wage. Some provided for a fixed rate per week such as $8 or $9. Some established a board to set a rate after investigation. Under the board plan, the rate was flexible; it might vary from industry to industry, and be changed from year to year. Most of the recent laws are based on a standard bill which does not attempt to fix a living wage irrespective of the nature of the work done or the value of the services rendered. States with this type of law include Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, New York, and Ohio. The first step under this type of law is the investigation by an administrative commission of the wages paid in an occupation or industry. If it is found that a considerable number of women and minors are receiving wages that are oppressive, unreasonable, and less than the value of the services rendered, a wage board is appointed to determine and recommend a wage commensurate with the value of the services rendered. The board is composed of representatives of employees, employers, and the public. After public hearings and approval of the report of the wage board by the commissioner of labor, a directory order is issued by him. For a certain period the only penalty for non-compliance is newspaper publicity. If the employer persists in his refusal to obey the order, the commissioner of labor, after further public hearings, may make the order mandatory. The employer is then subject to fine or imprisonment if he disobeys. This type of law bases minimum wages on a fair value of services rather than on the cost of living, as the earlier laws had done.

In an evenly divided decision the Supreme Court in 1917 upheld the constitutionality of the Oregon minimum wage law.[1] The supreme courts of five other states have followed this decision. In 1923 the Supreme Court declared a minimum wage law of the District of Columbia unconstitutional, so far as women were concerned.[2] In succeeding years it also declared other similar laws unconstitutional, and this checked their spread.

[1] *Statler v. O'Hara*, 243 U. S. 629 (1917).
[2] *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

In 1937 the Supreme Court reversed itself by upholding the minimum wage law of the state of Washington.[1] It justified its reversal of opinion on the ground that recent economic changes have given a new significance to the minimum wage question. The state has a right to require a wage high enough to protect health and morals. The community is not bound, the court said, to provide what is in effect a subsidy for unconscionable employers. The community may direct its lawmaking power to correct the abuse that springs from selfish disregard of the public interest.

The Fair Labor Standards Act of 1938 established minimum wages for the same persons as are covered by the maximum hour provisions of this law. The minimum began at twenty-five cents and by 1945 will reach forty cents an hour with such exemptions as shall be set by the administrator of the Wage and Hour Division of the Department of Labor.

CONTROLLING INDUSTRIAL WARFARE AND COLLECTIVE BARGAINING

Labor unions were once unlawful, because they were considered "conspiracies" and organizations "in restraint of trade," both of which were banned by the common law. Membership in a union made the workman liable for prosecution on a criminal charge. By the middle of the nineteenth century, however, the unions were free of the former charges. The courts turned their attention to the means employed in industrial warfare rather than to the fact of membership to determine whether a union and its members were guilty of crime.[2]

The legality of the weapons employed by groups of employees and by employers has received very different interpretations in various courts. Certain tendencies, however, can be noted.

Strikes and Picketing. Strikes are generally held to be legal if their method is peaceful and entails no coercion. But what is coercion? Mass picketing has often been held coercion, even when no actual threats were made against the employer or those who wish to work for him.[3] The employer was free to bring in strike-breakers from other states, as well as from his own state, until the Byrne Act prohibited the bringing of strike-breakers across state lines.

In 1937 the sit-down strike spread like wildfire over the country.

[1] 3 *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937).

[2] *Commonwealth v. Hunt*, 4 Metcalf, Mass. 111 (1842).

[3] *American Steel Foundries Co. v. Tri-City Trades Council*, 257 U. S. 184 (1921).

Many of the strikers defied the officers to put them off the property where they had formerly worked. In some cases they finally left peacefully; in others they were ejected; in still others they stayed until an agreement had been reached. Many government officials and others became alarmed. Some states quickly passed laws specifically outlawing such strikes. Congress also passed a resolution condemning them and the policy of espionage practiced by some employers.

Boycott. The boycott has generally been held legal where it includes only the aggrieved party. Persons who have a real or imaginary cause of complaint may refuse to deal with the offender. Frequently, too, the courts have held that they may peacefully persuade a third party to refuse to patronize the offender. It is, however, unlawful to coerce a third party to withhold patronage.[1]

Black List. The black list, by which an employer tries to keep a former employee from obtaining employment with other concerns, has been declared illegal, but use of it is difficult to prevent.

Yellow Dog Contracts. The yellow dog contract, by which an employee or an applicant for a job agrees not to join a labor union, has been prohibited by some states and by the national government in the fields over which it has jurisdiction.

The Injunction. The injunction, which came into use in industrial warfare near the close of the nineteenth century, has been widely used – chiefly by employers. It is an order by the court to do or not to do something. A person who disobeys the order is guilty of contempt of court and, unless special legislation exists to the contrary, may be punished by the judge who issued the injunction, without trial. The purpose of the injunction is to prevent irreparable injury. Since an employer could scarcely expect to collect from strikers sufficient damages to repay heavy losses, courts have been liberal in granting injunctions. In some cases a union has been ordered not to strike, and union officials have been punished for ordering members to disobey the court.[2] Organized labor has fought [3]

[1] *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921).

[2] *In re Debs*, 158 U. S. 564 (1895).

[3] The Norris-LaGuardia Labor Injunction Act of 1932 forbids a federal court to issue injunctions in labor disputes until it has heard both sides to the controversy. The court may not forbid a strike. The act provides trial by jury for offenses happening outside the presence of the court. Right of appeal is preserved. Officers of associations are no longer responsible for lawlessness of members. A number of states have similar laws.

the use of injunction bitterly, and the national government and some state governments limit its use in labor disputes.

Variety of Voluntary Means. The state governments and the national government have been active in trying to adjust industrial disputes and promote collective bargaining. They have set up machinery for conciliation, mediation, voluntary arbitration, and compulsory arbitration. The provisions for settling industrial disputes and the machinery for handling them vary greatly from state to state. For the most part they are voluntary.

Kansas Court of Industrial Relations. In 1920 Kansas established its Court of Industrial Relations with compulsory jurisdiction over disputes arising in industries "affected with the public interest." In addition to public utilities these included the manufacture of food products, the manufacture of clothing and wearing apparel, the mining of fuel, and the transportation of food products and articles entering into wearing apparel or fuel. The declared purpose of the act was to preserve the public peace, protect the public health, prevent industrial strife, disorder, and waste, and secure regular and orderly conduct of the business directly affecting the living conditions of the people. Strikes, picketing, boycotts, and similar acts were prohibited. The employer might not discharge an employee for calling the attention of the court to the controversies or testifying before it. Both sides were bound by the decisions of the court. The compulsory provisions of the act as applied to industries other than public utilities were declared unconstitutional by the Supreme Court.[1]

National Efforts. The national government, through its Conciliation Service, has long been using its good offices to bring disputants voluntarily to settle disputes. It has also set up voluntary and compulsory boards of arbitration for the railroads. It provided for collective bargaining in the National Industrial Recovery Act.

The most important venture of the national government into the field of collective bargaining is the National Labor Relations Act of 1935, which has been called the Magna Charta of labor.[2] This law declared that the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife which obstruct commerce. It said further that the inequality

[1] *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522 (1923).
[2] 49 Stat. 449.

of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association, substantially burdens the flow of commerce and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing stabilization of competitive wage rates and working conditions within and between industries.

The policy of the United States is to eliminate the causes of certain substantial obstructions to the free flow of commerce, and to mitigate these obstructions when they have occurred, by encouraging the practice and procedure of collective bargaining, assuring to workers full freedom of association and protecting their right to designate representatives of their own choosing.[1]

This law created the National Labor Relations Board to administer the act. The board consists of three members appointed by the President with the consent of the Senate. The members may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

The law declares that employees shall have the right of self-organization; they may form, join, or assist labor organizations, bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. By the terms of the law it would be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the right of collective bargaining; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; (3) to encourage or discourage membership in any labor organization by discriminating in regard to hire or tenure of employment or any term or condition of employment; (4) to discharge or otherwise discriminate against an employee because he

[1] Professor Sumner Slichter has declared that the problem of making the National Labor Relations Act work may be defined as that of (1) introducing civil rights into industry, and (2) fixing the price of labor in such a manner as to increase the national income — or, at least, so as not to retard it. He also points out that the compulsory policy represented by this law followed the failure of three voluntary efforts: those of the National Civic Federation, 1898–1902, the Industrial Conference Committee of President Wilson, 1919, and Section 7a of the National Industrial Recovery Act, 1933. Sumner H. Slichter, "The Changing Character of American Industrial Relations," *American Economic Review*, vol. 29, no. 1, part 2 (Mar., 1939), pp. 121–137.

has filed charges or given testimony under the act; (5) to refuse to bargain collectively with the representatives of his employees.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes are to be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. The board decides whether the appropriate unit shall be the employer unit, craft unit, plant unit, or some subdivision thereof.

The board has authority to prevent any person from engaging in any unfair labor practice affecting commerce. After a hearing it may issue a cease-and-desist order against the offending employer. It may order the reinstatement of employees with or without pay. The board may petition federal courts for enforcement of its orders. It is given access to all necessary records and has the right to subpoena witnesses.

The Supreme Court upheld the law in cases against the Associated Press and various manufacturing concerns as well as in the field of transportation.[1] Industrial warfare, even in a manufacturing concern, may be sufficient to obstruct interstate commerce. The question was one of degree of influence on interstate commerce. The influence of labor practice on interstate commerce must not be found everywhere, for that would ignore the federal system. The court pointed out that in the Schechter Case [2] the effect was not so immediate and direct as under the cases which it considered in upholding the National Labor Relations Law. Later, the court held that the power of the federal government and the provisions of the National Labor Relations Act extend to labor relations of public utilities engaged in supplying electric energy, gas, and steam even where the business and activities are wholly within a state, and intrastate service for intrastate business is vast and preponderant, if part of the service, important in itself, is to railroads, telegraphs, and telephones

[1] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Newport News Co. v. Schauffler*, 303 U. S. 54 (1938); *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261 (1938); *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453 (1938).

[2] See above, pages 562–563.

in interstate commerce which would be affected if service were cut off.[1] The labor relations of many public utilities which had considered themselves intrastate were now under federal control.

SOCIAL INSURANCE

Workmen's Compensation. Before the Social Security Act of 1935 was passed, the chief form of social insurance in the United States was workmen's compensation, which still ranks in importance even with the plans of social security set up under the law of 1935. The national government and all states except Arkansas and Mississippi have such plans. In most states the compensation law does not include agricultural employees, casual laborers, or domestic servants. In some states it is optional with employers and employees. In others it is required.

Workmen's compensation provides payment in case of accidental injury. The injury may result in temporary disability, permanent disability, or death. In some states occupational diseases are included. The injured workman – or his heirs if he is killed – receives a certain sum each week or month. Expenses connected with the illness are also included. The amount of benefit depends largely on the seriousness of the injury. Permanent disability and death yield greater payment than temporary disability. Eyes, ears, fingers, legs, and other parts of the body have their compensation, which varies according to rates which have been worked out in advance. The cost of the compensation is borne by the employer. He must insure or provide assurance that he is able to finance payments from his own resources. Workmen's compensation is universally regarded as a great improvement over the system of employers' liability laws which it is displacing.

Social Security Act. The Social Security Act of 1935 provided for unemployment compensation, old-age assistance and old-age benefits, security for children, aid to the blind, extension of public health services, and vocational rehabilitation. The Social Security Board of three members appointed by the President with the consent of the Senate was created to administer the act. In this chapter we shall discuss unemployment compensation and old-age benefits.

[1] *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197 (1939).

Unemployment Compensation. The first important public unemployment compensation in the United States was that provided by the Wisconsin law of 1932, the first benefits under which were paid in 1936. It was soon followed by laws in a few other states. The state laws differ considerably in detail. The amended Wisconsin law includes employers of eight or more persons, while the New York law includes employers of four or more persons. In Wisconsin the waiting period before receiving compensation is two weeks; in New York it is three weeks. In Wisconsin separate accounts are set up for each employer to induce him to reduce unemployment to a minimum. As an employer builds a reserve fund, his rate of payment decreases. If the fund reaches a certain amount, payments cease until the amount falls. Many states, on the other hand, use one reserve fund.

The benefit rate in many states is fifty per cent of wages or salary, with a minimum of $5 a week and a maximum of $15. In many states the tax to support the system is the same as the national tax under the Social Security Act. The cost of the unemployment compensation is paid by the employer. Care is taken to prevent his shifting it to employees. The New York law states: "No agreement by an employee to pay any portion of the payment made by his employer for the purpose of providing benefits required by this article, shall be valid, and no employer shall make a deduction for such purpose from the wages or salary of any employee."

With several state unemployment compensation systems already set up and others in prospect, the national government provided for such compensation in the National Security Act. The act did not set up any unemployment compensation system. Instead it invited the states to set up systems suited to local needs.

A pay-roll tax which now amounts to three per cent of pay-roll is levied on employers of eight or more persons for twenty weeks or more. Agricultural labor, domestic service in a private home, certain maritime employment, service in the employ of the United States government or state governments, or their instrumentalities or political subdivisions, service performed for certain close relatives, and service for religious, charitable, scientific, literary, and educational institutions of a non-profit nature are excepted from this tax. Each employer may credit against this tax, up to ninety per cent thereof, his contributions to a state unemployment compensation fund established in accordance with a state unemployment com-

pensation fund which has been approved by the Social Security Board. The board may not approve a state system unless it conforms to certain principles laid down in the act. The national tax brings money into the Treasury for the general purposes of the national government. The pay-roll tax applies to employers in all states, including those that do not set up an unemployment compensation system, but no compensation is assured workers in a state until that state has approved the Social Security Act.

Old-Age Benefits. Under the old-age benefits plan regular benefits are paid to qualified individuals out of an old-age reserve account set up in the national Treasury. Under the original act a qualified individual was one who was at least sixty-five years of age, who had received total wages from employment after December 31, 1936, and before attaining sixty-five years of age, of not less than $2,000, and who had been employed in some five different calendar years after December 31, 1936, before attaining the age of sixty-five years. As a result of a rising sentiment for old-age payments, the act was amended so that regular benefits began in 1940.

The wages on which benefits are based do not include wages received for agricultural labor, domestic service in a private home, casual labor, service on a common carrier or on a vessel documented under the laws of the United States or any foreign country, service for the national, state, or local government, and non-profit literary, religious, scientific, charitable, and educational organizations. That part of an individual's remuneration in excess of $3,000 a year from each employer is not counted as wages under the national law.

A qualified individual is entitled to benefits from the day he reaches sixty-five until his death. The benefits will be paid at regular stated intervals. The monthly rate of benefit is the total of the following per cents of average wages paid: 40 per cent of the first $50 and 10 per cent of the remainder, plus an addition of 1 per cent of this already arrived at total for each year of coverage. The minimum monthly payment is $10 and the maximum $85. The benefits received by any individual are reduced by the amount of one month's benefit for each calendar month in which the qualified individual receives wages for regular employment after reaching the age of sixty-five. Survivors' benefits are paid to surviving widows and orphans or aged dependent parents of deceased workers. This program is administered by the Bureau of Old-Age and Survivors Insurance without state participation in administrative responsibility.

The old-age benefits plan is supported by two taxes – an income tax on employees and an excise tax on employers. Each tax is an amount equal to certain percentages of wages. The percentage amount began at one per cent in 1937 and was expected to rise gradually to three per cent beginning January 1, 1949, but the rise has been delayed. The tax on employees is to be deducted by employers when wages are paid. The plan includes all employers in the occupations covered, not just those with eight or more employees as under the unemployment compensation plan.[1]

THE ADMINISTRATION OF LABOR LAW

Most of the early labor laws were poorly administered. In many cases no special machinery was set up for their enforcement. Public opinion was indifferent. As a result the laws largely broke down in practice. By their very nature many labor laws are hard to enforce. They deal with technical matters which cannot be judged save by those who have studied them long enough to become experts in the field. A large proportion of the officials administering these laws have been politicians or their friends – persons more interested in jobs than in labor and its problems. Moreover, economic changes increase difficulties and cause laws passed by the state legislatures and Congress to become out of date quickly.

It was customary formerly to create a large number of separate and more or less independent boards to administer labor laws. This is still true in the national government, although many activities are centered in the Department of Labor. It also continues to be true of some states. There is a tendency, however, for the various agencies of a state to be gathered into an industrial commission. Some states now have such a commission of experienced, efficient administrators.

LABOR AND POLITICS

Labor is becoming more and more politics-conscious. It is turning to government to get what it wants, and is engaging in pressure politics. This is causing candidates and officials to keep an eye open to what organized labor wants. There is a labor bloc in Congress and in the state legislatures of many industrialized states. Some politically minded labor leaders are trying to organize a Labor party

[1] A report by the International Labor Office on older workers in the United States and Europe is summarized in *Monthly Labor Review*, vol. 48 (Feb., 1939), pp. 257–269.

or a Farmer-Labor party; others are swinging labor's support to the major party which is more likely to meet labor's demands. They even go so far as to tell an administration which they helped to put into office that they expect it to take sides in helping them to win industrial battles against employers.

QUESTIONS

1. Justify or condemn a policy of government control in the field of labor.
2. What deficiencies — real or alleged — in state regulation of child labor caused the national government to begin regulation?
3. What types of agencies are now used in the administration of labor law?
4. What are the main features of workmen's compensation legislation?
5. What part in systems of unemployment insurance is played by state governments? What part by the national government?
6. Criticize the interpretation of one field of labor law by the Supreme Court of the United States.
7. In what way has labor taken part in politics?
8. Do you believe that government control of employer-employee relations will prove helpful or harmful to labor in the long run?

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CHAPTER XXXIII

Our Vocations — Their Regulation and Promotion

REASONS FOR REGULATION

GOVERNMENT regulates some vocations much more rigidly than others. Some callings are regulated because, if unregulated, they would endanger the public. Others are regulated because, if unregulated, they would endanger those who work at them. Still others are regulated for both of these reasons. Doctors, lawyers, teachers, barbers, plumbers, engineers, chauffeurs, airline pilots, and others are required to have licenses as evidence that they are competent to do satisfactorily the work they profess to be able to do. In this way the government tries to prevent dangerous or fraudulent service. It no longer permits the blacksmith to extract teeth — at least it does not permit him to charge for doing so. Neighborly Aunt Susie may give members of her own family almost any medicine she chooses, and may get her neighbors to follow her advice in matters of health, but unless she passes a state board examination in medicine she may not receive pay for her advice, regardless of how expert she may be; nor may she mix or sell medicine without a pharmacist's license.

While the number of vocations for which a license is required varies widely in the different states, the tendency has been to increase regulation. In some localities or even entire states, certain regulations are loosely enforced; nevertheless such requirements as exist have been an important factor in raising professional and occupational standards and improving quality of service. We have seen that, in railroading and other vocations where long hours might endanger the public, the government has set maximum hours. Similarly, more and more states are regulating certain vocations that they may be less dangerous to those who follow them. Since some twenty-five thousand fatal accidents, three-quarters of a million other serious ones, and three or four million minor ones occur every year in

American industry, citizens and governments have been forced to give attention to making many vocations safer for those who work in them.

TYPES OF REGULATION

The government sets no special standards for persons engaged in domestic service, such as housemaids, janitors, and cooks; nor for persons employed in personal service, such as tailors, dressmakers, and painters; nor for clerical workers, such as stenographers and bookkeepers. The service of each is performed subject to a contract between an employer and an employee. The contract must be made according to law, however; so even in these vocations there is a legal requirement.

Private Regulation. Workers in unionized vocations are subject to numerous union regulations. Many labor unions undertake to restrict the number of apprentices in order to lessen future competition of numbers. They have rules on hours of work and maximum output which must not be exceeded under penalty. They try to enforce collective bargaining, to establish the closed shop, and to suppress the use of strike-breakers or scab workers. They have their own walking delegates to inspect work and working conditions, and to regiment their members.

Some of the professions exercise over members a group control that augments public control. Physicians, dentists, pharmacists, opticians, and lawyers, to mention a few, through their associations formulate a set of standards or a code of professional ethics. If a member violates the code, the association ostracizes and even expels him and furnishes evidence to the public authorities for the purpose of having his license to practice revoked.

Public Regulation. The authority of the public, exercised by the government, subjects the professions to much stronger regulation than is exerted through a professional code backed by association action. In general, the more vital the public interest in a profession the stricter the regulation.

The public demands that a physician study anatomy, physiology, and medicine before being allowed to practice, so that he can diagnose a disease correctly and prescribe the right remedy. A surgeon must know the human body and have the skill that makes him a safe practitioner. The pharmacist must know how to compound medical prescriptions; a nurse how to care for a sick patient; a dentist

how to care for the teeth; an oculist how to treat the eyes. Lack of knowledge or a mistake on the part of any one of these persons might cause great suffering and perhaps death. Health has become a vital public matter. A plumber must know how to install plumbing in a safe and sanitary way; an architect how to plan a building for safety; an engineer how to erect a bridge that will carry the traffic. A lawyer must know enough law to advise his client wisely and conduct a lawsuit skillfully. A teacher must have sufficient education to teach youth properly. So with other professions.

The operations of several types of business may be of such a character as to require regulation by the government. A private business corporation may become a monopoly or trust and crush competitors and the people. The sale of real estate or of stocks and bonds may develop fraudulent practices. Public utilities may render poor service and overcharge. Banking and insurance companies which handle large sums of money for other people may violate their trust if not strictly regulated.

It is the vital interest of the public in them that justifies government regulation of professional and business vocations. Sometimes it is extremely difficult to know what is "in the public interest." At the present time the independent dentists of some states are carrying on a vigorous campaign to prevent dentists from advertising. The "chain dentists," with offices in many cities, by using the radio or newspaper advertisements, have been taking patients away from the independents. The independents say that advertising is unprofessional in dentistry; that an unseemly scramble for patients tends to lower standards and hurt service to the public. Friends of the chain dentists maintain that the independents are trying to acquire a monopoly of dentistry so that they can charge any price they see fit, use equipment which is out of date, and lower quality of work, since there would be no competition to force them to keep striving for improvement.

METHODS OF PUBLIC CONTROL

Control of the Professions. The state extends the privilege of engaging in a profession on condition that designated requirements are met. State legislatures, in order to uphold and improve the standards of the professions and to protect the public against unskillful, incompetent, and unscrupulous practitioners, have prescribed general rules for admission to the profession and have estab-

lished boards to examine applicants and to issue licenses or certificates to practice. Teachers are usually granted certificates by the state superintendent of education or the state board of education.

The members of a given profession usually suggest to the legislatures proper standards for eligibility. Applicants for admission must have taken a specified number of years of training in a certain grade of educational institution and have passed a thorough examination set by the licensing authority or presented evidence of successful practice of the profession for a given number of years.

Control of Business. There was little regulation of business so long as agriculture was the chief occupation. The industrialization of the country and the growth of the corporation as the chief form of organization inaugurated state control of business.

The state exercises regulatory power over corporations in various ways. It grants the corporation its charter, which sets forth the form of corporate government, outlines the methods of conducting business, and enumerates the rights of stockholders. Formerly charters were granted by special acts of the state legislature. Now they are granted by the secretary of state or a commissioner, in conformity with the state constitution and general corporation laws of the state, to any group of persons that can qualify. This does not end the state's control, however. The supervising authority requires reports at stated times about the amount of business done, the value of the corporation's property within the state, gross profits and net profits. In this way compliance with the law is secured. Some corporations that sell their stock and bonds to the public are regulated by securities laws which are sometimes called blue sky laws. A state securities commission makes a careful investigation and either rejects the offer to sell securities in the state or, finding everything satisfactory, authorizes the offering of the securities to the people. These laws and their careful administration aim to protect the public against fraud; they do not guarantee the soundness of the investment. We have seen in Chapter XXVIII that this is also true of the national laws and their administration by the Securities and Exchange Commission.

There are certain forms of business, such as banking, insurance, and public utilities, that have a particular interest to the public. They are required to do their business under the corporate form because this gives the state a better continuing control. Banks are required to have a certain capitalization; the liability of stockholders

is fixed, the forms of investment that may be permitted are indicated, and the nature and amount of loans are specified. There is usually a state superintendent of banks who without warning makes examinations of the accounts to insure compliance with the laws. On the basis of these examinations a bank may be closed or a receiver put in charge. About a dozen western states passed laws guaranteeing bank deposits. These laws did not work well, but the national government is now doing the same thing with seeming success.

Insurance is regulated in much the same way as banks. Kansas has gone so far as to regulate the premiums that can be charged for fire insurance. Some states require insurance companies to make deposits for the protection of policyholders.

Since public utilities are natural monopolies, competition cannot apply to them. Therefore they are minutely regulated by law. At first railroad commissions were given inadequate powers. Some public utilities commissions were once advisory; now such commissions, which supervise railroads, motor buses, warehouses, and gas and electric companies, have a great deal of power. In some states the commissioners regulate both private and municipal plants. The commission may declare utility company rates unreasonable and fix the rates themselves. Valuations and rate-fixing are highly technical and require the services of experts. The commission's findings of facts is usually accepted by the courts.

Control of Public Employees. The government – national, state, and local – employs millions of persons. Government employees are the agents of the public; in a sense they are hired servants. Persons entering the military and naval service must pass rigid physical examinations, and after entering they are under rigid discipline and control. Elective officers must meet the qualifications that are prescribed in constitutions and statutes. Appointive officers are in either the unclassified or the classified civil service. The spoils system applies to the former, but the duties in many branches of it are now such that the public in some communities insists upon a fairly high grade of preparation and service. The public demands coerce both the candidates and the appointing power. The persons in this service must also satisfy their superiors as they are subject to dismissal at any time.

The classified civil service – national, state, and municipal – sets examinations to test fitness, and the appointing authorities must select from the preferred list of persons who have passed the tests.

Many technical experts are found in the classified service. The service in many departments is becoming truly professionalized. An employee cannot get on the permanent list until he has served a period of probation with a satisfactory record. Promotions in the service are based on efficiency ratings. A person in the classified service can be removed for cause after notice and hearing.

CONTROL FOR ALL

The preceding treatment shows that practically all vocations are regulated and controlled in some way – some by a contract, some by general terms which are fixed by law, some by internal group control, some by the government. The methods of regulation for certain professions include supervision by commissions or boards to set standards of admission, test the fitness of candidates, and issue licenses or certificates to practice, which may be revoked for cause.

Certain businesses as well as the professions sustain a peculiar relation to the public. Some of these must do business as corporations. These must secure charters or licenses which are revokable for cause. They are supervised by commissions or superintendents, and are subject to inspection and examination. They must make detailed reports and sometimes must furnish bonds for faithful compliance with the law. Sometimes their service charges are fixed by law or by the supervising commissions.

The various regulations show clearly that a vocation is not entirely a private, personal matter. Service is a public concern and in consequence is regulated and controlled by external authority.

GUIDANCE AND VOCATIONAL EDUCATION

Educational and Vocational Guidance. It is often difficult for young people to choose a vocation wisely. Educational guidance, vocational guidance, and vocational education all aim to help individuals to discover the callings for which they are especially well suited by reason of heredity and training. Educational guidance assists the student in junior high school, senior high school, and college to select the particular courses which best suit his or her need. A school's guidance program is sometimes administered by a director of guidance, and sometimes by the dean of women or men. Often the responsibility is centered largely in the principal or president; in other places it is distributed among the faculty. The most progressive schools use various aptitude tests to discover what kinds

of things the student can do best. Educational guidance is broader than vocational guidance, for educational choices have significance for the whole of life – for leisure as well as work.

Vocational guidance helps students find the vocations for which they are best suited. Like educational guidance, it studies the various qualities of each student. It learns the ways in which students differ. It also studies the qualities needed in each vocation. Having studied the qualities of students and the qualities which are desirable for each vocation, it tries to guide each student into the vocation which is most in need of the qualities he possesses. In an increasing number of junior and senior high schools, Vocations has become a required course for all students. A wise choice is important for society as well as for the student; hence the school, in doing all it can to aid students to make wise choices, is rendering a great service to the students, to the business and professional fields, and to society at large.

Vocational Education. When the colonists came to America, apprenticeship was one of the main forms of labor. A boy or youth would begin working with and for a skilled workman. Wages would be very low, but the apprentice looked forward to the time when he would be a master craftsman. Professions, too, were learned by going into the office of an established doctor, lawyer, or member of some other profession.

As apprenticeship declined, schools here and there took up the work of training for vocations. Manual labor colleges, manual training high schools, and mechanical institutes laid foundations on which a person could build when he took up a vocation. During those earlier years, however, the greater part of our skilled labor came from Europe. Immigrants practiced here the trades they had learned in their native lands.

The greatest single event in the history of vocational education was the Smith-Hughes Act of 1917. The World War caused such a decline in the number of skilled laborers coming to the United States that the shortage of such labor became acute. The Smith-Hughes Act provided funds for the support of education in agriculture, trades and industries, and home-making. The aid was given on condition that each state should also spend money for the type of education which received national funds. Encouraged by the national offer of assistance, the states quickly set up vocational schools in large number. Special courses in the subjects included in the act were

also established in high schools throughout the country. Many continuation, part-time, and extension school courses and programs are now functioning either under or outside of the act as a result of the stimulus given by it. For many years the act was administered by the Federal Board of Vocational Education, but it is now administered by the Office of Education. Each state has a director of vocational education and a staff of supervisors for each field of vocational education. State supervisors, teacher trainers, and local supervisors are required to meet certain minimum standards as to qualifications wherever national funds are used for their salaries.

Vocational education is not confined to the school. After the World War an extensive program for rehabilitation work for disabled veterans was undertaken by the national government in coöperation with the states. Coöperation is continuing. Many special classes for adults who are not disabled have also been organized. A very helpful program of vocational education has been made a part of the training of the Civilian Conservation Corps.

QUESTIONS

1. Report on vocational standards of one state.
2. What appear to be the best ways of measuring vocational qualifications?
3. Compare the efficiency of various methods of enforcing vocational laws and regulations.
4. Is it unprofessional for a member of a profession to report a fellow member to the authorities for unprofessional conduct?
5. Should public employees be permitted to join labor unions?
6. What have been the most pronounced production trends in the United States since 1870?
7. What are present trends in vocational guidance?
8. What are present trends in vocational education?

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CHAPTER XXXIV

Public Revenue—Spending and Getting It

THE URGE TO SPEND

PUBLIC officials generally feel a strong urge to spend. This urge springs from a number of sources, one of which is the pressure of persons and groups interested in worthy causes. On every side there are things which need doing. The consciousness of need is especially strong with public-spirited, conscientious citizens. These clamor for benefits for themselves and their community. In the local community each section wants better streets, sanitation, or lighting. One group desires more education; another more public health work; another better fire or police protection; another more money to celebrate the Fourth of July. In the state, each town or city is calling for state money or improvements at state expense. Unable or unwilling to build or maintain a road wholly at local expense, it asks the state to foot at least a part of the bills.

The national government is besieged with patronage seekers from each state and many organized groups. The richer sections of the country complain that they pay far more than their share of the taxes and should have a larger patronage. The poorer sections claim they must have far more money to spend than can be raised by state and local taxation. The farmer, the laborer, the consumer, the educator, and hosts of others think the national government should improve their position at the expense of the general taxpayer.

The party leaders delight in large patronage. Part of it may find its way into their own pockets. A much larger portion goes into the pockets of their followers. The party leader knows that many of his followers will be loyal only so long as he is able to deliver the spoils. To protect his position he desires free spending. This is true even though no graft or outright corruption is involved. In communities where the political machine is out for all it can get, without regard to honesty, there is no limit to the amount the party would like to spend.

There is a great deal of difference between spending one's own money and that of someone else. An official who is very economical with his own resources may be a veritable spendthrift with the money of the public. Since he does not have to earn the sums he disburses, he does not resist the urge to spend.

The Unorganized Taxpayer. The taxpayer is usually unorganized. He may really prefer a more economical government, but instead of fighting for it he customarily takes his dissatisfaction out in private grumbling. In some communities, however, taxpayers' associations are very much alive. The mounting tax burden and declining incomes during the depression have spurred them into action.

Millions of people with low incomes or none at all think they do not pay taxes, or that the indirect taxes which they do pay are negligible compared to the patronage or public benefits which flow to them in one way or another. Some, indeed, take a real delight in seeing the well-to-do, and especially "the big fellows," taxed. The politician is always tempted to woo the votes of these non-conscious taxpayers by spending large sums.

THE TREND OF COSTS

The trend of government costs has been sharply upward. For short periods the costs of some of our governments have been downward, but most of the time federal, state, and local costs have mounted higher and higher.

National Government. Early in the twentieth century the entire cost of the federal government was about three-quarters of a billion dollars a year; today it is close to eight billions. To be sure, a large proportion of the present expenditure is labeled "special" or "emergency" expenditure, but there is no assurance that it will be greatly reduced in good times.

State Governments. The cost of state governments also has increased with great rapidity. As late as the outbreak of the World War the cost of all state governments was half a billion dollars – an amount that was considered an immense sum; today the states are spending three billions. This represents a rise of five hundred per cent in a single generation. Population and national wealth have increased at only a fraction of this rate.

Local Governments. Local expenses have risen less rapidly in recent years than national and state expenses. The increase was pronounced in the decade following the World War. During the

depression of 1929–1936, however, the expenses of local governments actually decreased, contrary to the trend in nation and state. This was due in part to the fact that the national and state governments came to the aid of the local governments. As the local communities recovered from the depression, the trend turned upward again. The combined expenditure of all local governments is now about six billion dollars.

Causes of Trend. The upward trend in government costs is due in part to the World War and the depression; these left tremendous debts to be taken care of and deficiencies to be made up. The increased activity of the government in economic and social fields is the other major cause of the upward trend. Transportation, conservation, health, education, recreation, and many other services have grown so rapidly that very large outlays are necessary to support them.

DEBTS AND THEIR REPAYMENT

Debts, like costs, have increased by leaps and bounds. In 1913 the government owed less than $60 a family; today it owes more than $1,100 a family.

National Debt. At the beginning of the World War our national government was the envy of foreign governments. The Civil War debt had been reduced so much that it was scarcely noticeable. The Spanish-American War debt was small. The cost of building the Panama Canal was being taken care of by canal tolls or the general tax fund. In short, the national government owed but one billion dollars when the World War commenced; when it ended, the government owed twenty-five times that sum.

During the prosperous decade which followed the war, nine billion dollars were sliced off the national public debt, and we were congratulating ourselves on the prospect of its rapid reduction to a minimum. The depression, readjustments, and national defense, however, reversed the trend and raised the debt from sixteen to some sixty billions — by far the highest in our history.

State and Local Debts. In 1912 the states owed somewhat less than $350,000,000. Their debts now amount to some $2,500,000,000. This increase has been due in part to unusual expenses connected with the war and the depression, but normal times also have seen an accumulation of debts. Local debts have mounted correspondingly. Together the state and local governments now owe close to $20,000,000,000.

Long-term Loans. The main method of long-term borrowing is the issuance of government bonds. These generally bear a lower rate of interest than corporation bonds. This is due in part to the belief that they are safer. It is also due in part to the tax-exempt feature of many government bonds.[1]

Defaulting. The depression proved, however, that some government bonds are far from safe. In fact, thousands of local governments defaulted on some or all of their bonds when the depression came. Some local governments tried to escape their obligations by declaring themselves bankrupt. The national government coöperated by passing the Municipal "Bankruptcy" Act of 1934,[2] which authorized municipalities and other political subdivisions of states, specifically including improvement districts, to readjust their indebtedness by petition to a federal district court. The petition must contain a plan approved by creditors holding a certain percentage of the district's obligations. If, after a hearing, the court finds that the plan is equitable, is not unduly discriminatory, and is accepted by creditors holding two-thirds of the indebtedness of the district, it is to be confirmed, whereupon it becomes binding upon the district and all creditors, secured or unsecured.

The Supreme Court declared the act unconstitutional. It said that, assuming that the act was adequately related to the general subject of bankruptcies, the bankruptcy power of Congress, like the power of taxation, must be considered as limited by the doctrine of non-interference with state sovereignty; and that Congress could not, under the decisions, have imposed a tax on the bonds of the improvement district in question. Further, if the bankruptcy power can be extended to voluntary proceedings involving political subdivisions, it might be extended to states and to involuntary proceedings, and in such cases approval of a readjustment might amount to an interference with contract obligations. A state may not, by itself, impair the obligation of a contract, nor may it accomplish that end by granting consent to Congress to do so, for it may not surrender any sovereignty essential to its proper functioning.[3] This decision, in effect, tells local governments that they must get out of debt through higher taxes, if necessary, rather than by repudiation of debts.

Short-term Loans. The national government borrows much of its

[1] *Weston v. Charleston*, 2 Peters 449 (1829).

[2] 48 Stat. 798.

[3] *Ashton v. Cameron County Water Improvement District*, No. 1, 298 U. S. 513 (1936).

short-term money by means of Treasury notes. These may run for a few weeks only or for several years. When interest rates are low the government sometimes pays less than one per cent on such short-term paper. State and local governments, too, may borrow on short-term paper. In fact, many governments borrow regularly in anticipation of taxes.

Provision for Meeting Loans. The national government makes no special provision for meeting a long-term loan. When the bonds become due, it either pays them off with cash from current taxes or it issues new securities to replace the old. State and local governments now tend to make special provision for long-term loans. Sometimes these are met by a sinking fund. A certain amount from current revenue is set aside each year. When the bonds fall due a sum sufficient to meet them is then available to redeem them. Serial bonds are being used more widely. By paying each part as it falls due, the entire amount is redeemed without the whole having to be redeemed at any one time.

PUBLIC CREDIT

Because the credit of the national government has been excellent in season and out of season, there has been a tendency to overlook the impairment of the credit of some state and local governments. When a state or local government fails to pay interest when due, or to meet a maturing loan, banks and citizens become wary. They know it is costly and difficult to enforce payments in the courts. They know, too, that pressure on the government for payment may make them unpopular with both the politicians and the public. Under such circumstances the government may be unable to float a desired loan, or to do so it may have to pay interest rates that are higher than those charged to governments which have met their obligations regularly.

Power of Congress to Appropriate Money. The Constitution grants to Congress exclusive control over the authorization of expenditures by the national government. No money can be drawn from the Treasury except with the approval of Congress. The Constitution states that Congress may collect revenue to "pay the debts and provide for the defense and general welfare of the United States," and that "no money shall be drawn from the Treasury but in consequence of appropriations made by law."[1] One of the most

[1] Art. I, Sec. 8, Cl. 1, and Sec. 9, Cl. 7.

important tasks before Congress is that of making the huge appropriations for the needs of the various governmental agencies and services. Ordinarily appropriations are made in one of three different forms: (1) annual appropriations; (2) permanent appropriations which are made for certain more or less definite needs but which remain available until the entire amount is expended; (3) permanent annual appropriations which do not require an annual vote of Congress but rest upon laws relating to certain fundamental functions of government which might be classed as fixed, such as payment of debts and of the salaries of certain officials.

The power of Congress over appropriations is complete except for the constitutional limitation that no appropriation for the army shall be made for a longer term than two years. The obligation of providing for the common defense and general welfare has led Congress to appropriate money for almost every conceivable purpose. In the exercise of this wide power Congress has not developed any particular appropriation policy or financial plan. Rather, appropriations have been made according to the needs of the moment; and the amount in each case has been determined by the popular interest and public necessity which existed at the time the appropriation was made. Thus Congress has appropriated large sums for relief in times of floods or other major economic emergencies. It has power to add to the merchant marine when that is desirable, and it has made huge appropriations for public works.

In addition to these purposes which are apparently national in scope, Congress has adopted the practice of giving subsidies to the states for such purposes as health, roads, education, and social welfare. It appears that Congress may appropriate money for a particular function whether or not it has authority to legislate on the matter. Thus Congress appropriated money for the welfare and hygiene of mothers and infants according to the terms of the Sheppard-Towner Act. In this case the Supreme Court sustained the action of Congress; but later, when Congress appropriated money for the purpose of regulating agricultural production, under the terms of the Agricultural Adjustment Act, the same court ruled that Congress does not have this power since such regulation is an encroachment upon the reserved powers of the states.[1]

In spite of the adverse ruling of the Supreme Court in the A. A. A. Cases, there has been a tendency in recent years for Congress to ex-

[1] *United States v. Butler*, 297 U. S. 1 (1936).

pand its power of appropriation and give more and more money to the states for certain designated purposes. Apparently the grant-in-aid principle has become an accepted practice and a legal power of Congress. It is not likely that the government of the United States will take a backward step in this regard.

The right of the national government to make loans to municipalities for the purpose of building municipal utility plants which would compete with existing privately owned systems has been questioned. The Supreme Court, however, has been reluctant to forbid such loans.[1]

Haphazard Appropriation Methods. For many years appropriation bills in Congress were framed and reported on the basis of estimates submitted by the Secretary of the Treasury to the committee in the House which prepared revenue measures. Little by little, however, appropriations came to be provided for in separate bills presented by other committees, which were set up for the purpose of considering legislation on new subjects as they developed. This resulted in a most unsatisfactory system of handling appropriations and meant that there was no possible way to make appropriations and revenue balance. Thus the result was inevitably an increased national debt.

This haphazard method of preparing and enacting appropriation bills also led to logrolling and to pork-barrel legislation. The national Treasury came to be looked upon as a pork barrel, and each congressman had no other alternative than to get all he could for his constituents. To accomplish their purposes congressmen joined forces, on the principle of "You help me get mine and I will help you get yours." In very few cases did either the congressmen or their constituents think of the pork with any sense of shame. One member of Congress from a southern state made the remark: "Every time one of these Yankees gets a ham, I'm going to do my best to get a hog."[2] While modern budgeting has somewhat improved the situation, the odor of pork is still evident in Congress, and logrolling is looked upon as "honest" legislative trading.[3]

The Budget. Finally in 1921, as a result of agitation over a period of several years, Congress enacted the first national budget law.

[1] *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); *Duke Power Co. v. Greenwood County*, 302 U. S. 485 (1938).

[2] Quoted by Milbur, G., in *Harper's*, Nov. 1932, pp. 669–682.

[3] See Beard, *American Leviathan*, pp. 178–179, for an excellent discussion of logrolling and pork-barrel legislation.

There had been considerable pressure prior to this date for such a reform. This undoubtedly was promoted by the tremendous increase in national expenditures as a result of the World War and the agitation resulting from studies of such agencies as President Taft's Economy and Efficiency Commission and the budget acts of the Wilson administration. The United States fought the World War without a budget, but it has found it impossible to pay the bill without some attention to budgetary procedure.

The first national budget law passed by Congress, in 1919–1920, was vetoed by President Wilson because one of its clauses limited the President's power of appointment by withholding the power of removal. Shortly after Harding became President, Congress passed and the President approved another budget law, which set up two important bureaus – the General Accounting Office and the Bureau of the Budget.[1] The chief purpose of each of these agencies is to save the taxpayers money by economy in planning for the expenditures, by properly spending funds already appropriated, and by increased efficiency in financial procedure.

The Bureau of the Budget, presided over by a director appointed by the President, is entrusted with the task of estimating government expenditures and reporting this estimate to the President, who transmits the director's summary, with accompanying documents, to Congress. The budget shows among other things: (1) the probable expenditures of each agency for the ensuing year, (2) the probable receipts for the ensuing year, (3) both expenses and receipts for the last fiscal year, (4) estimates of probable expenses and receipts for the present year, and (5) probable balances of unused appropriations together with a detailed statement of the condition of the Treasury, the public debt, and such other matters as are needed to give a complete financial picture of the government.

In the preparation of the budget the Bureau of the Budget secures from the various agencies detailed estimates of their needs. These estimates are considered by the bureau and may be revised by it. After final revision of these estimates, together with supporting data of expenditures for the last fiscal year and estimates for the present year, the bureau prepares a final draft of the budget and submits it to the President for transmittal to Congress. It will be observed that the President is the final authority for the budget before it is presented for congressional action. At every step his financial policy

[1] 42 Stat. 20.

is of prime importance, and he may have the bureau change the request for any agency of the government in any manner consistent with his financial policy. The President transmits the estimates of the Bureau of the Budget as his own. No other estimates are legal. The law forbids departments or agencies of the government from appearing before Congress in an attempt to have their estimates raised, unless a request for such action is made by either house of Congress.

The Bureau of the Budget has not been able to render the assistance to the President which was expected of it. Since its establishment, it has been inadequately financed and considerably undermanned. It has been unable to make the investigations and the continuous research into the operations of the various agencies of the government which it should, and thus has failed to develop as an effective staff agency designed to assist the chief executive in exercising an over-all control of administration.[1]

The typical United States budget differs from that used in most other countries of the world in that our budget is of the allotment rather than the lump sum type. In other words, a United States budget is a detailed budget appropriating money for specific agencies and leaving little discretion to administrative authorities to distribute the funds. In England, Parliament is usually content to vote a lump sum to any agency and allow that agency to distribute the money as it sees fit. In a very real sense, then, the power of Congress over expenditures in the United States is exercised through a much more careful and detailed method of regulation than is used elsewhere. In this way Congress maintains an exceptionally close supervision over administration. By specific allotments of money it may cut off an activity and leave it without support or it may make an activity more effective through an increased appropriation.

In spite of the fact that the Bureau of the Budget was transferred from the Treasury Department to the Executive Office of the President, that department assumes a leading role in legislation. Every proposal for an expenditure of funds is examined with care by the Treasury, and departments are informed as to whether or not a proposed scheme, regardless of the direct expenditures involved, is financially feasible.

[1] *Report of the President's Committee on Administrative Management*, pp. 15–20.

State Budgets. Before the introduction of state budgets, financial conditions in the states were as bad as they had ever been in the national government. Various committees would suggest the amount to be spent for the purposes of the bills they sponsored. Sometimes heads of departments would send their estimates directly to the legislature. Sometimes a mass of bills would be passed without any thought of the total amount appropriated. There was no balance. Some items secured far too large appropriations, others received allotments that were not large enough. It was nobody's business to keep the total appropriations within reasonable limits. Few tried seriously to do so. It was out of such waste that the state budget movement was born.

The first state budget was set up just a decade before the national budget. Other states soon fell in line. It is now regarded as essential in all states. The budget differs widely from state to state. The one thing aimed at is the centering of responsibility. The tendency is to place more responsibility on the governor; in fact, he has some part in budget-making in nearly all states. In some he is the leading figure; in others he is only a member of a committee which has charge of preparing the budget.

Local Budgets. Many cities have adopted progressive methods of budget-making. In a majority the budget is made by a committee of the council; in others the mayor alone prepares the budget. Towns, too, are improving their budget-making, along with other features of finance. Counties have been slower than other units to introduce effective budgets, but an increasing number are adopting good systems. The county board or commission plays an important part in the preparation of the county budget.

ACCOUNTING AND AUDITING

National Accounting. The act which created the national budget also created the General Accounting Office. Its duty is to obtain, independently of the various spending and collecting agencies of the government, the uniform settlement and adjustment of all claims and accounts in which the United States is concerned, either as debtor or as creditor. It contains the Comptroller-General's office, and is under his direction.

The Comptroller-General prescribes the forms, systems, and procedure for appropriations by various departments and establish-

ments. He is responsible for the work formerly done by auditors. He must settle and adjust, independently of the executive departments, all claims and demands in which the United States is concerned, either as creditor or as debtor. He must report to Congress all those who are delinquent in rendering accounts. When asked to do so, he must give an advance decision upon any question involving payment by the government.

The Comptroller-General does more than audit and advise. All warrants, even when authorized by law and signed by the Secretary of the Treasury, are invalid until countersigned by or in the name of the Comptroller-General. This official's power to withhold approval of bills has sometimes been an annoyance to heads of departments and even to the President, as he has refused to approve bills which the administration wished paid. Since he is appointed for a period of fifteen years and can be removed only by Congress, he is largely freed from fear of executive displeasure.

The President's Committee on Administrative Management, which made its report in 1937, recommended that the Comptroller-General be reduced to the position of Auditor-General, performing only post-auditing functions, and that the Bureau of the Budget and the Treasury Department be given complete authority in the matter of pre-audits and in prescribing and supervising accounting systems, forms, and procedures.[1] Students of government are generally of the opinion that post-auditing and pre-auditing functions should be separated, although the Brookings Institution, in its reports of 1937 for the Select Committee to Investigate Agencies of the Government, demanded that the status quo be maintained.[2]

State and Local Accounting. The states have not set up an accounting office or officer with such extensive powers as those enjoyed by the Comptroller-General of the United States. They do, however, provide for auditing state accounts. Many states, moreover, are now auditing the accounts of local governments with the same care which they use in auditing their own accounts. Some states prescribe the form in which local governments must keep their accounts. In some, the state auditor or other state official has authority to disapprove certain financial acts by local authorities.

[1] *Report of the President's Committee on Administrative Management*, pp. 15–20.

[2] *Report of the Select Committee to Investigate the Executive Agencies of the Government*, No. 5, pp. 103–110.

TAXING POWER AND ITS LEGAL LIMITATION

The Power of Congress to Tax. One of the chief weaknesses of the Articles of Confederation was the fact that the national government did not possess the power of taxation.[1] Today it would be absurd to suggest that any government, however small, could exist without this important power. Very appropriately, in the long list of powers given Congress in Section 8 of Article I of the Constitution, the power "to lay and collect taxes, duties, imposts, and excises" is given first place.

Limitations on the Taxing Power of Congress. The power conferred by Section 8, considered alone, appears to be quite comprehensive. But a further examination of the powers and limitations of Congress discloses the fact that several important restrictions have been placed upon its taxing power. Among the limitations is the requirement that taxes be levied only "to pay the debts and provide for the common defense and general welfare of the United States."[2]

General Welfare. While there is little difficulty as to the scope of the first two purposes, the meaning of "general welfare" has been a subject of controversy since the beginning. Generally the requirement has been interpreted to mean that money raised by taxation may be appropriated only for public as distinguished from private purposes. Thus, if Congress is convinced that any public purpose will be promoted by the levying of a tax, it possesses the power to take such action, and its judgment is final. In such cases there is no legal limit to the taxes that Congress may impose. In general Congress has taken a broad point of view in taxing for the general welfare. Among the objects included in the scope of "general welfare" are the population, the protection of seals whose skins are used only by the wealthy, the maintenance of national parks, the construction of the Panama Canal, and the erection of monuments and memorials to departed statesmen.

Direct Taxes. Another limitation placed on the taxing power of Congress is the requirement that direct taxes shall be apportioned among the states according to population.[3] Under this constitutional provision Congress first determines the total amount of taxes to be raised by direct taxes. Each state's quota is then fixed according to its population, and is assessed upon the property of the individual

[1] Fiske, J., *The Critical Period.*
[2] Art. I, Sec. 8, Cl. 1.
[3] Art. I, Sec. 2, Cl. 3.

citizens. In the levying of direct taxes under this constitutional limitation the exact meaning of the term "indirect taxes" has long been a matter of controversy. The phrase is not defined in the Constitution, and its legal meaning is the result of decisions by the Supreme Court. Prior to 1895 the court defined direct taxes to include only poll taxes and taxes on real estate.[1] Direct taxes of this type have been levied on only five occasions in the history of the United States, the last being in 1861, when Congress placed a tax of twenty million dollars on lands, improvements, and dwelling houses.

In 1862 Congress imposed a tax on incomes, which was not apportioned among the states according to population, but was made to apply uniformly to all classes affected. In 1880 the Supreme Court, holding to earlier decisions on the question of direct taxation, declared the tax constitutional.[2] Before the decision was rendered, however, Congress had repealed the tax. Nothing was done to restore the income tax until 1894, when, after pressure from the Populists, Congress levied another income tax law.[3] In spite of the fact that this tax was essentially the same as the tax of 1862, the Supreme Court, reversing precedents of long standing, interpreted "direct taxes" to include taxes on incomes derived from all kinds of property. In order to be constitutional, the tax had to be apportioned according to population. Suffice it to say, the law was held unconstitutional.[4]

The severe criticism of the court for its decision and the subsequent political campaigns based partially on this issue led Congress to take action to secure a constitutional amendment. In 1909 it approved and referred to the states the Sixteenth Amendment, which became effective in 1913. Since then, Congress has been able to "lay and collect taxes on incomes from whatever sources derived, without apportionment among the several states." The taxation of incomes has thus become a permanent part of the fiscal policy of the United States.

Uniformity of Indirect Taxes. A large part of the national revenue has always come from indirect taxes. In the levying of such taxes the Constitution imposes a further limitation on the powers of Con-

[1] *Hylton, v. United States,* 3 Dallas 171 (1794); *Veazie Bank v. Fenno,* 8 Wallace 533 (1869).

[2] *Springer v. United States,* 102 U. S. 586 (1880).

[3] Dunbar, C. F., "The New Income Tax," *Quarterly Journal of Economics,* vol. 9 (Oct., 1894), pp. 26–46.

[4] *Pollock v. Farmer's Loan and Trust Co.,* 158 U. S. 601 (1895).

gress in that it requires that "all duties, imposts, and excises shall be uniform throughout the United States."[1] This does not prevent the tax burden from falling more heavily on one section of the country than on others, but it does mean that the tax rate on a certain commodity shall be uniform in all states. The requirement of uniformity does not apply to goods entering this country from island possessions. Under decisions of the Supreme Court, Congress is free to impose whatever duties it deems wise on imports from insular dependencies.[2]

Other Limitations. In addition to the restrictions on the national taxing power explained above, there are other important limitations imposed by the Constitution and the courts which have the effect of limiting the powers of Congress in this regard. Among these restrictions are (1) the constitutional requirement which prevents Congress from laying duties on exports, (2) the implied limitation, based on the nature of the federal union and supported by decisions of the Supreme Court, that prevents Congress from taxing property or instrumentalities of the states and local units,[3] and (3) the ruling of the Supreme Court that Congress cannot use its taxing power merely to regulate matters which have been reserved to the states.[4] With respect to instrumentalities, the recent position of the Supreme Court seems to be that the taxation is illegal only if it might influence the work of the instrumentality. It has held that the salaries of the employees of the Port Authority of New York and the receipts from athletic contests at state universities are subject to federal taxation.[5] It has also held that independent contractors on federal jobs may be taxed by state governments.[6] In connection with the last point, however, there are exceptions to the rule, and certain tendencies which possibly indicate that the court may become more liberal in the future. The Harrison Narcotic Law is a case in point.

Excepting the limitation on the taxing power as explained in the foregoing discussion, Congress is free to tax any and all objects likely to produce revenue, and is absolutely unrestricted in determining

[1] Art. I, Sec. 8, Cl. 1.

[2] *Dawes v. Bidwell*, 182 U. S. 244 (1901); *Dooley v. United States*, 182 U. S. 222 (1901).

[3] *Collector v. Day*, 11 Wallace 113 (1870).

[4] *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

[5] *Helvering v. Gerhardt*, 304 U. S. 405 (1938); *Allen v. Regents*, 304 U. S. 439 (1938).

[6] *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Silas Mason v. Tax Commission*, 302 U. S. 186 (1937).

the rate of taxation and the amount of revenue to be raised from any of its legal sources. Thus the remedy for excessive taxation does not rest with the courts, but rather with the electorate.

Can the Power of Taxation be Used to Regulate? Possibly the most important problem concerning the power of Congress to tax involves those measures which, although tax laws in form, aim only incidentally to produce revenue, but are designed primarily to regulate business. In the passage of such measures, Congress has at times gone so far as to destroy or prohibit certain types of business operation. We have seen that Congress at the close of the Civil War imposed a tax of ten per cent on the notes of state banks.[1] This was done in order to give the national banks a monopoly of the business of issuing bank notes. State bank notes were taxed out of existence, and the action of Congress was upheld by the Supreme Court, on the ground that Congress has a right to levy a tax as a means of making effective a definite delegation of power – in this case the power of coinage.[2] The question, however, is not settled by decisions on cases of this type.

Further, the question may be raised: Is a tax constitutional when it is not clearly a revenue measure or a means of making effective some definite delegation of power? This question came up in 1902 in connection with the taxation of oleomargarine, in 1912 with the tax upon the manufacture of poisonous matches, in 1914 with the narcotic drug laws, and in 1919 with the law proposing to lay a special income tax on persons or corporations employing children under sixteen years of age. It will be remembered that the court upheld the oleomargarine and narcotic laws as revenue measures,[3] refusing to question the motives of the legislative body. In the case of child labor, however, it made the legislative motive the real test of the law, seeing it as an attempt to regulate by means of taxation a subject normally falling to the states; hence the measure was held not to be a valid exercise of the taxing power of Congress.[4]

The States. In placing great taxing power in the hands of the national government the states did not mean to reduce their own. They gave up the right to levy import and export duties, but they retained the right to levy the various other forms of taxes, and they

[1] Page 603.

[2] *Veazie Bank v. Fenno*, 8 Wallace 533 (1869).

[3] *McCray v. United States*, 195 U. S. 27 (1904); *United States v. Doremus*, 249 U. S. 86 (1919); *Negio v. United States*, 276 U. S. 332 (1928).

[4] *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

can use those forms to any extent short of confiscation. In 1939 the Supreme Court reversed earlier decisions and permitted states to tax the salaries of federal employees.[1]

There is a great difference between the earlier powers of taxation possessed by the states and those possessed by the present state governments. During the early years the power of taxation was badly used by many legislatures, and money was squandered on unwise ventures. This caused the people to put into the constitutions strict regulations as to the maximum tax which may be levied. The form of restriction varies from state to state. Sometimes the maximum amount is stated as a total number of dollars; sometimes it is expressed in dollars per capita; sometimes it is a per cent of total valuation. The purpose behind the various methods is the same – to tie the hands of the tax-gatherer, that he may not be free to take an unlimited amount from the people.

Local Governments. The kinds of taxes used by local governments are determined by state law. The main taxes are those on real estate and on personal property. The city or village council, town board of selectmen, or county board commonly sets the tax rate after the budget has been approved and the property assessed. The maximum rate is established either by the state constitution or by the state legislature. A considerable part of local revenue is derived from public utilities, such as water and electricity. Some cities provide these at cost; others use them as an important source of revenue.

SOURCES OF REVENUE

Taxes. Nearly all national revenue comes from taxes, including the tariff. Nearly all state revenue comes from taxes. The greater part of local revenue comes from taxes, although some cities lean heavily on public industries.

Public Lands. Public lands have been given away or sold cheaply. They have never contributed much to the income of government. Even the fabulously rich soil, forests, and minerals of the Louisiana Purchase passed into private hands without contributing substantially to the upkeep of governments. In recent years the government has been leasing rather than giving away mineral land, but this policy was begun long after most of the most valuable sections had passed out of the government's hands.

[1] *Graves v. New York*, 306 U. S. 466 (1939); *State Tax Commission v. Van Cott*, 306 U. S. 511 (1939).

Public Industries. While public industries – water, gas, electricity, street railways, and others – are an important source of revenue in some cities, these industries are frequently run at or below cost in the interest of the consumer.

KINDS OF TAXES

Since most revenue comes from taxes of one kind or another, a study of raising revenue is chiefly a study of taxation. There are several viewpoints from which one may answer the question: What is a good tax? From the viewpoint of the individual, a good tax is one which does not fall on him; as someone has said, it is one which is paid by the other fellow. From the viewpoint of the community, a good tax is one which raises sufficient revenue to meet expenses with the least burden on the community. Such a tax would probably conform to certain requirements suggested long ago by Adam Smith. It would be levied according to the ability to pay of those who pay it. Its amount would be certain and known. It would be levied in the manner most convenient for those who are taxed. It would be so contrived that there would be the least possible waste in collecting it. From the viewpoint of the professional politician a good tax is one which brings in much revenue without losing many votes for him.

Consumption and Sales Taxes. Consumption taxes are widely used as a source of revenue. The best known of these are the tariff, the gasoline tax, and the taxes on liquors and cigarettes. Consumption taxes are widened to include more articles during periods of emergency. Many of the internal taxes are levied by state governments as well as by the national government.

The tariff yielded nearly all the revenue of the national government prior to the Civil War, and half of it in the period between that war and 1913, when the Sixteenth Amendment was passed. Since the World War it has seldom yielded more than fifteen per cent of the revenue of the national government. The tariff is recognized as a poor tax, since the revenue to the government is small compared to the increased burden on the consumer.

Sales taxes are closely related to consumption taxes. About half the states levy a general sales tax. The rate is usually from one to three per cent of the retail price. Sometimes certain necessities such as food, cheaper grades of clothing, and medicines are not included under the sales tax. The collection of a sales tax on goods which

have been shipped across state lines has been assailed as illegal interference with interstate commerce. The Supreme Court, however, has upheld such a tax in New York City in spite of the fact that out-of-town customers were exempt from it. So long as the tax was to increase revenue rather than to regulate commerce it did not constitute a burden on interstate commerce.

Property Taxes. Property taxes, including the general property tax, are the main reliance of a majority of states and local governments. The general property tax is one which taxes all forms of property – both real and personal – at the same or nearly the same rate. Some states have ceased to use it for state purposes. They may secure a large part of the state revenue from income and business taxes, letting the local governments get most of their revenue from a tax on land and buildings. A strong cross current is now evident in property taxes. Many economists are asking for heavier taxes on land, and some states are reducing taxes on home owners.

Income Taxes. Since 1913, when the Sixteenth Amendment was passed, the personal income tax has borne a large part of the tax load of the national government. The provisions of the tax have varied a great deal from time to time. The following are its main provisions at present:

A single person, or a married person not living with husband or wife, may claim an exemption of $800. The head of a family may claim an exemption of $2,000. An additional credit of $400 may be claimed for each person under eighteen years of age or incapable of self-support because mentally or physically defective. On income above the exemption a levy of 4 per cent is made, irrespective of the size of the income. Then a surtax is added, beginning at $4,000 of taxable income. The surtax rate is 4 per cent on taxable incomes between $4,000 and $6,000. The surtax rate rises step by step until it reaches 75 per cent for all incomes of $5,000,000 or more. Thus a person with taxable income of $4,000 to $6,000 would pay 8 per cent on the amount in excess of $4,000. A person with income in excess of $5,000,000 would pay 79 per cent on the amount in excess of $5,000,000. For the purpose of the normal tax a deduction of 10 per cent of net income up to $14,000 is allowed. The percentage of capital gains to which the income tax applies varies according to the length of time during which the property was owned.

Many states had used the personal income tax long before the Sixteenth Amendment was added to the national Constitution. By the

close of the nineteenth century one-third of the states had tried it, but without great success. During the present century more satisfactory laws have been passed, and this form of tax is now employed in a majority of the states. It provides revenue for state purposes chiefly, but a few states share it with local governments.

Business Taxes. Profits of business concerns, like the income of individuals, have become a target for the tax-gatherer. Indeed, profit taxes and personal income taxes have produced more than fifty per cent of the revenue of the national government during some prosperous years. The national government levies a heavy graduated tax on the net profit of business concerns. It is graduated to favor the small concern.

In 1936 the national government for the first time levied a special tax on undistributed profits. The purpose of this tax was to force concerns to pay to stockholders a larger proportion of current income. Many concerns immediately began paying out in dividends a larger proportion of income than they had been accustomed to do. This tax was declared a strong deterrent to business and, after earlier modification, was repealed in 1939.

The kinds of business taxes levied by the states, and even by local governments, are legion. Some are for the privilege of being incorporated. Some are on gross sales; [1] others are on net sales. Some are for engaging in a particular business, such as running a liquor store or a pool-room. Some are to achieve a social purpose other than the raising of revenue. The chain store tax of many states is of this class. Its constitutionality has been sustained.[2]

License Taxes. Many state and local governments also have various license taxes, although these are often levied to regulate conduct rather than to raise revenue, as in the case of automobile, marriage, and hunting licenses.

Estate and Inheritance Taxes. Estate and inheritance taxes yield heavy revenue. They differ in that the estate tax is paid by the estate of the one who has died, and the inheritance tax is paid by those who inherit. The national government levies an estate tax. Most of the states levy an inheritance tax. A few states levy both taxes.

[1] The Supreme Court, however, has held unconstitutional a tax where sale is measured by gross receipts of taxpayer from his business of marketing fruit shipped from his state to places of sale in other states and foreign countries. *Gwin, White, and Prince v. Henneford*, 305 U. S. 434 (1939).

[2] *Tax Commissioners v. Jackson*, 283 U. S. 527 (1931); *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1937).

The rates vary from one to forty per cent. The rates on inheritance taxes are usually lower for near relatives than for others, and for those who inherit small sums than for those who inherit large amounts. Gift taxes are levied to prevent persons from avoiding estate and inheritance taxes by giving away property before death.

Other Taxes. Even the numerous taxes we have discussed do not exhaust the list. There are various assessments for special services such as building a sidewalk or laying a gas main past one's property. There are various fees – from the one paid at the medical clinic to the one paid for a passport. There is even a severance tax, which one pays for taking petroleum, sulphur, or other natural resource from the earth.

INTERRELATION OF NATIONAL, STATE, AND LOCAL CONTROL

The various revenue controls touch and limit one another at every turn. Since the national government takes far more than half the income of persons with large incomes, it is obvious that the state income tax collector must be satisfied with a smaller amount. Obviously, too, the national estate and state inheritance taxes must be adjusted to one another, unless the policy of our governments toward inheritances is changed. The national government has met this problem squarely by allowing a large exemption from its estate tax in those states which have a heavy inheritance or estate tax. When there is a conflict between national and state tax requirements, the Supreme Court has held that the national requirement takes precedence over that of the state.[1]

QUESTIONS

1. Why do taxpayers have so little success in lowering taxes?
2. Trace the trends in costs of the national, state, and local governments.
3. Justify or condemn the rising public debt.
4. Can a government be bankrupt so long as it has not used its taxing power as fully as possible?
5. What factors influence the credit standing of a government?
6. Compare the process of budget-making in state and local governments.
7. Compare the taxing powers of the national, state, and local governments.
8. What limitations have the states placed on taxation?

[1] *County of Spokane, Washington, v. United States,* 279 U. S. 80 (1929).

9. What are the economic effects of public expenditures?
10. Compare the economic effects of various kinds of taxes.
11. Compare the political effects of various kinds of taxes.

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PART IX

The Government and Social Welfare

CHAPTER XXXV

The Family



WHY GOVERNMENTAL CONTROL?

If a man and woman choose to live together as husband and wife, why is it not their own business – and theirs alone? Is not marriage an inalienable right? If so, why do not the parties to it have complete freedom in laying down its conditions? Or, if there must be control, why should this not be through custom or religion? If marriage is simply a custom, why not let the mores control through public opinion? If it is simply a sacrament of the church or some other kind of religious act, why not leave its regulation to religion?

The modern government bases its right and duty to control marriage on social utility. The reproduction of the race, the rearing and training of the young, the vitality of the population, the transmission of property, social morality, and many other social and economic problems are affected so vitally by marriage that the government claims the right to control it.

A STATE RESPONSIBILITY

The Constitution does not mention marriage or the family; hence their control remains chiefly a state function. Many activities of the national government, to be sure, affect the family. The greater income tax exemption for husband and wife than for two unmarried persons; the activities of the Women's Bureau, the Children's Bureau, the Bureau of Home Economics, and other federal agencies; federal grants to states for maternity, infancy welfare work, domestic science education, and some other purposes, have all influenced family life. Still, the direct control of the family has been left in the hands of the states.

Local Participation. Although states have kept much of their power over the family in their own hands, some of their laws are administered by local authorities. Marriage licenses are generally issued by the local governments, and marriages may be performed

by local magistrates. The recording of marriages, births, and deaths is also a local function. Offenses of one member of the family against another are handled by the local police. Domestic relations trials, too, generally originate in the local or in the circuit courts.

MARRIAGE

Civil Contract. From the viewpoint of the state, marriage is a civil contract. Although states permit the ceremony to be performed by clergymen, this does not change the nature of the contract. The two parties to it make it voluntarily and are bound by it. Society's interest in the contract, however, is so important that all states hedge it about with restrictions. It cannot, for instance, be terminated legally by mutual consent of the parties to it, although in the United States and other western countries the movement has been in that direction.

All the states require that marriage shall be monogamous, but the other regulations concerning it differ widely from state to state.

Age at Marriage. To make the marriage contract, the parties must have reached the ages prescribed by law. Nearly all states have a minimum age of eighteen for women and twenty-one for men, although a few states permit marriage at a lower age. With the consent of parent or guardian, a person may marry younger. Colorado, Idaho, Mississippi, New Jersey, and Rhode Island still make use of the common law, which has a minimum age of twelve for girls and fourteen for boys. The prevailing age in states not using the common law is fourteen for women and sixteen for men, although New Hampshire has a lower age, and a few states have a higher one. In nearly all states the court may, in extreme circumstance, permit marriage below the minimum age.

One of the severest criticisms against the marriage laws of most states is the early age at which marriage is permitted. Childbearing at early ages is a severe tax on the vitality of the mother. The inexperience of the mother is also dangerous, and is probably one of the causes of the high death rate of children with very young mothers.

Mental and Physical Fitness. The states have assumed that the lowest grades of the feeble-minded cannot make the marriage contract. Some of them have also assumed that these grades have no right to burden posterity with their progeny, and have prescribed segregation of the sexes in some instances and sterilization in others. The states have sterilized more than 20,000 defectives, most of whom

were mental cases. California has sterilized far more than any other state. In upholding the right of Virginia to compel sterilization [1] of a feeble-minded woman whose mother and grandmother had been feeble-minded, Justice Holmes, speaking for the Supreme Court, said that three generations of feeble-mindedness were enough. The upper grades of the feeble-minded have generally been subjected to no such restriction as the lower grades. For the most part they are still free to marry and have children. Hence, if a moron appears at the office of the official who issues marriage licenses, he usually gets the license. Unless the person applying for a license has been declared feeble-minded by the courts, the official is not free to withhold the license.

Some states require evidence of physical fitness before a license is issued. This requirement is designed chiefly to prevent people with venereal disease from marrying. The Illinois law reads as follows:

> All persons desiring to marry shall within fifteen (15) days prior to the issuance of a license to marry, be examined by any duly licensed physician as to the existence or non-existence in such person of any venereal disease, and it shall be unlawful for the county clerk of any court to issue a license to marry to any person who fails to present for filing with such county clerk a certificate setting forth that such person is free from venereal diseases as nearly as can be determined by a thorough physical examination, and attached thereto laboratory reports of microscopical examination for the gonococcus for gonorrhea and the blood Wassermann test or Kahn test for syphilis. Such laboratory examination shall upon the request of any physician in the state be made free of charge by either the State Department of Public Health or the Health Department of cities, villages, and incorporated towns maintaining Health Departments. The certificate required herein shall be filed with the application for license to marry and shall read as follows, to-wit:
>
> I, (Name of Physician) _____ being a physician, legally licensed to practice in the State of _____ (my credentials being filed in the office of _____ in the City of _____ County of _____ State of _____ _____) do certify that I did on the _____ day of _____ 19____ make a thorough examination of _____ and considered the result of a microscopical examination for gono-

[1] *Carrie Buck v. Bell, Superintendent*, 274 U. S. 200 (1927).

cocci and a Wassermann or Kahn test for syphilis, which was made at my request (strike out the test or tests which were not made) and believe _____ to be free from all venereal diseases.

_____

SIGNATURE OF PHYSICIAN

Any county clerk who shall unlawfully issue a license to marry to any person who fails to present for filing the certificate provided for in this act or who shall refuse to issue a license to marry to any person legally capable of contracting a marriage who presents for filing the certificate provided for in this act, or any physician who shall knowingly and wilfully make any false statement in the certificate, or any party or parties having knowledge of any matter relating or pertaining to the examination of any applicant for license to marry, who shall disclose the same, or any portion thereof, except as may be required by law, shall upon proof thereof be punished by a fine of not less than $100.00 nor more than $500.00 for each and every offense.

Any person who shall obtain any license to marry contrary to the provisions of this section, shall, upon conviction thereof, be punished by a fine of not less than $100.00 or by imprisonment in the county jail for not less than three (3) months or by both such fine and imprisonment.

Any license to marry hereunder, shall be void thirty (30) days after the date thereof.[1]

Period of Waiting. Hasty marriages are likely to be unsuccessful. Some progress has been made in preventing these by requiring a period of waiting. More than half the states require such a period between the request for and the granting of the license, or between the issuance of the license and the marriage. The period is usually five days, although one state prescribes a three-day period. Even the short period of three or five days is sufficient to allow some couples to change their minds. Sometimes the waiting period prevents the marriage altogether. Or it may cause a postponement to a more suitable time. In cases of emergency, courts generally have power to waive the three-day period.

Self-support. It has been suggested that the state ought to refuse a marriage license to those who are not able to support a family. Since such marriages mean a very low plane of living or an added burden on charity, or both, the state might prevent such marriages

[1] Illinois House Bill No. 114, 60th General Assembly (1937).

on the ground of social utility. No doubt it would be very difficult to enforce such a law. Common law marriages might be substituted in many cases. In others, illegitimacy and prostitution would probably result.

Since non-residents are permitted by many states to get marriage licenses, the strict marriage laws of one state may be easily defeated by a motor trip to an adjoining one.

LEGAL STATUS OF THE WIFE

Patriarchal influences have been strong in the United States as in most other countries. In our early history the legal personality of the wife was merged in that of her husband. Her legal status was decidedly lower than that of unmarried women. This low legal status was manifested in many ways. In general, the wife could not own property. She could not make a contract. She could not bequeath property. She had no voice in the choice of domicile, nor in the guardianship of her children.

During the nineteenth century the legal status of wives was greatly improved, and the improvement has continued during the present century. In many states the legal status of the wife is now nearly equal to that of the husband. In others there are still significant restrictions. All states now permit wives to own property and make wills, but many of them still restrict a wife's right to make contracts, choose domicile, and participate in the guardianship of her children.

DIVORCE [1]

Can the marriage contract be terminated? South Carolina says, "No"; it refuses to grant divorce on any ground. Other states say, "Yes."

The grounds on which divorces are granted differ widely from state to state. Some states permit divorces only on a few grounds. Others grant them for a great variety of causes. The list of grounds includes desertion, cruelty, non-support, adultery, insanity, impotency, drunkenness, bigamy, loathsome disease, felony, venereal disease, incompatibility, and others. Altogether some forty grounds are found on the statute books, although no state includes anything

[1] Divorce is but one of many marital difficulties regulated by law. For a treatment of the law of various difficulties see Bradway, J. S., "Some Domestic Relations Laws that Counsellors in Marital Difficulties Need to Know," *Social Forces*, vol. 17 (Oct., 1938), pp. 83–89.

like all of them. Desertion and cruelty result in more divorces than all other causes combined. The ground mentioned in court, however, may have no connection with the actual cause. If one party wants a divorce, any ground on which the court will grant it is likely to be pressed into service.

States in which it is easy to obtain divorces have become a Mecca for divorce-minded persons from other states. Indeed, several states seem to have liberalized their laws for the purpose of obtaining divorce business. The period of residence necessary to obtain citizenship has been cut in several of them to a few weeks. Six weeks in Nevada or sixty days in Arkansas, and a person from Maine, Florida, or a less distant state is ready to ask for a divorce, although Arkansas compels an applicant to wait another thirty days before the divorce is actually granted. Some states require that a specified number of months must elapse between the approval of a petition for divorce and the actual granting of the divorce.

The ease with which divorces may be obtained in many states is one cause of the rapidly mounting divorce rate. The yearly total of divorces in the United States did not reach the 100,000 mark until 1914. It has risen above 200,000 in a single year.

Interstate Relations. Since the Constitution provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," there is no way in which one state can interfere with the divorce policy of another. Once a person has become a citizen of a state – on terms acceptable to that state – he is free to avail himself of its divorce policy. When a resident of one state goes to another for a few weeks or months and returns with a divorce, a few courts refuse to recognize the divorce on the ground that the person never became a legal resident of the state in which the divorce was granted. This situation creates a great deal of uncertainty, for the right to remarry and changed property rights are denied in the jurisdiction of the court making this decision while existing elsewhere.

Many people believe we should have a uniform divorce law. Since it is apparently impossible for the various states to agree on the terms of such a law, doubtless the only way to attain it would be by giving Congress power to make divorce laws. There seems, however, to be little popular demand to give this power to the national government. Indeed, some of those who are most anxious to stop the ease with which divorces may be obtained in some states are the least anxious

to give the national government power to regulate divorce and other matters concerning the family.

A few marriages are terminated by annulment. This may be done when fraud has been practiced in bringing about the marriage.

FAMILY COURTS

Full-fledged family courts are as yet more an ideal than a reality; however, rapid progress toward them has been made during the last quarter of a century. A full-fledged family court would deal with all cases involving family relationships. It would also have jurisdiction over all cases of juvenile delinquency, whether the offense was committed in or outside the home. In other words, it would handle all cases now tried in courts of domestic relations and juvenile courts.

Many state and local governments have set up courts that combine these functions in various ways. Some have courts which try juveniles and handle certain types of domestic relations cases. Others have courts which handle divorce and certain other types of domestic relations cases, but not juvenile cases. Only in rare instances are there courts which handle all types of cases arising in the family.

As a rule, the newer types of courts are far less formal than the older courts. They try to be more sympathetic, to pay more attention to questions of personality than the regular courts have been accustomed to do. There is a friendliness about them that we do not commonly associate with the courtroom. The judge and other officials use more persuasion and less compulsion.

In an ordinary criminal case there is a contest between government and the accused. In an ordinary civil suit there is a contest between two parties, each trying to gain a decision over the other. In many domestic relations cases, on the other hand, the parties concerned have come or been brought to court only because they have failed to find elsewhere a solution to their family problems.

Another ground on which family courts have been praised is that they permit specialization. The court officials, dealing with the same type of case time and again, become experts in it.

BIRTH CONTROL

During the early days of this republic, people had little interest in birth control. The apparently boundless resources spread out across the continent afforded plenty for all. Until children were old enough to go farther west and get a farm of their own, they could

help at home. Soon after the Civil War, New York passed a law which classed contraceptive materials and information as obscene. Several years later, Congress prohibited the mailing of any drug, device, or printed matter for the purpose of preventing conception. One state after another fell into line. All states save two had laws against birth control.

The prohibition of birth control information and devices has been defended on the ground that the practice is obscene; that it would increase sexual laxness among unmarried people by reducing the likelihood of children; that it threatens the extinction of the race; that it promotes selfishness; that it is irreligious. As is the case with other controversial subjects, much of the discussion of the matter is charged with sentiment and emotion. In contrast to the situation in the United States, the anti-birth-control laws of foreign countries have a specific and immediate relation to the national welfare. The severe French law of 1920 and the Italian law of 1925 were motivated by the desire of those nations for more soldiers to defend the homeland or fight for more territory.

The birth control movement in this country appears to be making headway. A few of the states permit information to be given more freely. Although repeated attempts to induce Congress to allow the movement to use the mails fully have not borne fruit, there are evidences that the government is not pushing its prohibition with the greatest possible vigor.

NEGLECTED AND DEPENDENT CHILDREN

It is a far cry from the days when parents in some countries had power of life and death over children to the present protective attitude of the state. Beginning with the unborn child, the state acts as a kind of over-guardian until the child reaches legal maturity at twenty-one. It provides a twofold protection to prevent neglect. On the one hand, the parent is not permitted to injure the child by physical violence. On the other hand, the parent must not neglect to provide certain necessities for the child's well-being. The harmful act, whether of commission or omission, is a criminal offense, punishable under the law.

Formerly the law was slow to deal with negligent parents. Neighbors disliked to report them to the police or take them into court. Nowadays they may telephone the Society for the Prevention of Cruelty to Children. The first of these societies was founded in

New York in 1875. The societies coöperate with the court – in fact, many courts depend on them for information and advice. A few states are putting their treatment of neglected and dependent children on a scientific, effective basis. They attempt to iron out the difficulties in a home where a child has been neglected, and are not so prone as formerly to break up a family by seeking a foster home for the children.

The State as Parent. In case the parents of needy children are dead or unknown, the state assumes the obligation of parent. It sees that a home is provided at public expense. In some cases the home is a large or small institution. In others the children are placed in private families who receive pay from the state. If parents are too poor to provide for their children, the state contributes toward their support.

The great care taken by the more progressive states to keep dependent children with members of their own families reveals the government's appreciation of the benefits derived from the ties of kinship which bind the members of a family to one another. The following digest of the Massachusetts law for aid to dependent children shows this appreciation and the safeguards thrown about the administration of laws within this field.

The law includes orphans, homeless children, and every other needy child under the age of sixteen who has been deprived of parental support or care by reason of the death, continued absence from home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt in a place of residence maintained by one or more of such relatives as his or their own home. The board of public welfare of every town shall aid every parent in properly bringing up, in his or her own home, each dependent child if such parent is fit to bring up such child. The aid shall be sufficient to enable the parent to bring up the child properly in the parent's home. This law does not permit any public official to take charge of a child over the objection of father or mother, or person standing in the relationship of parent, except pursuant to a proper court order.

Before aiding any parent, the local board of public welfare shall have determined that the parent is fit to bring up the child and that the other members of the household and the surroundings of the home are such as to make for good character, and that aid from the

board is necessary to enable the parent to bring up the child properly. The board shall make an immediate and careful investigation, to ascertain the resources of the family and the ability of its other members, if any, to work or otherwise contribute to its support, the existence of relatives able to assist the family, and individuals, societies, or agencies who may be interested therein. The board shall take all lawful means to compel all persons bound to support such parent and such child to support them, and to enforce any other legal rights for their benefit. It shall press all members of the family who are able to work, other than such parent and such child, to secure work. It shall try to secure work for them. It shall secure all aid which can be secured from relatives, organizations, or individuals. A detailed statement of expenses shall be rendered to the state department.

A member of the local board of public welfare, or its agent, shall visit at least once in every three months, at their homes or other places where they may be living, all parents and dependent children who are being aided financially or otherwise by the board, and after each visit shall make and keep on file as a part of its official records a detailed statement of the condition of each home and family and shall report all other data which may assist in determining the wisdom of the measures taken and the advisability of their continuance. The local board shall at least once a year reconsider the case of each parent with whom it is dealing, and enter its determination with the reason therefor on its official records.

The state department of public welfare shall supervise the work done and the measures taken by the boards of public welfare of the several towns with respect to families aided and service given. To this end it may make such rules of administration as it deems necessary and may visit and inspect any families which are aided, and shall have access to any records or other data kept by local boards or their representatives, and may require the production of books and papers and the testimony of witnesses under oath. The state department shall make annual reports to the state legislature and such reports to the federal Social Security Board as may be necessary to secure federal aid to the state.

In respect to all sums disbursed for aid the town, after approval of the bills by the state department, shall be reimbursed to the extent of moneys received by the state from the national government for dependent children and also by the state for one-third of the total

disbursement.[1] All money received for dependent children by the state from the national government shall be paid to cities and towns.

Any person aggrieved by the failure of any town to render adequate aid has the right of appeal to a board composed of the state supervisor of mother's aid, the state director of the division of aid and relief, the commissioner of public welfare, and a member of the advisory board of the state department of public welfare designated by the commissioner. This appeal board shall make a thorough investigation and shall have authority to act upon appeals in relation to (1) the matter of denial of aid by the local board of public welfare, (2) the matter of a change in the amount of aid given, (3) the matter of withdrawal of aid. In all cases of appeal an opportunity for a fair hearing shall be provided by the appeal board. All decisions of this board shall be binding upon the local board of public welfare and shall be complied with by the local board. Aid shall not be subject to trustee process, and no assignment thereof shall be valid.

Federal Aid. The Federal Social Security Act of 1935 provided federal aid for dependent children and for maternal and child welfare. This aid is given on condition that the states coöperate by providing their share of the cost.

ILLEGITIMACY

Illegitimate children were once legal outcasts. Little effort was made to locate the father and make him shoulder responsibility for support. Some states actually forbade inquiry to determine who the father was. As a rule, illegitimate children did not inherit from their parents. The parents might be ever so wealthy, but the fact that a child was born out of wedlock meant that he could not participate with legitimate children in the family property.

Some states are now giving the illegitimate child fairer treatment. Greater care is taken to locate the father, and to see that he gives support. Several states make the procreation of an illegitimate child a criminal offense, for which the father can be extradited and punished. This reduces the number of fathers who shirk their responsibility by leaving the state where the child is born. Most states permit illegitimate children to inherit from their mother; some also

[1] Since the national government pays one-third, and the state one-third, the local government, in this state, pays but one-third. Sums in excess of $18 per month for the first child and $12 for each additional child in the same family may not be counted in determining federal aid.

permit inheritance from the father. In 1923 a Uniform Illegitimacy Act was drafted, but so far only a few states have enacted it into law.

TRAINING FOR MARRIAGE AND PARENTHOOD

Marriage and parenthood are fundamental to social well-being; yet the states provide very little direct preparation for them. Young people learn a little about them in the civics class of the secondary school. Students may elect in a state university a course on the family. In a few universities they may even find a course on preparation for marriage. The state department of health may issue a pamphlet on some aspect of child care. But this is about all the direct help the government gives to persons contemplating marriage and the bringing of young citizens into the world.

The meagerness of public offerings in this field does not mean that nothing can be done. Family guidance clinics, parent education, and other desirable services are appearing under private auspices. These services, however, are neither very widespread nor very thoroughly understood. It would seem that the government could render the family invaluable aid by providing sources of information and advice on matters concerning which we are now guided by hearsay – if, indeed, we are guided at all; too often we are misguided by the ignorant, the mischievous, or the quack.

HOUSING

A family's health, safety, comfort, and convenience are largely dependent on the kind of house in which it lives. Even personality is molded in no small measure by physical surroundings, and none of these is more influential than the home. Unattractive homes frequently cause children to seek more agreeable surroundings elsewhere, thus leading to delinquency and the weakening of family ties.

In spite of the profound effect of housing on family life and other vital matters, until very recently government in the United States had done very little to improve it. This is all the more surprising since a large proportion of the houses in this country are in deplorable condition and since European governments have set an example of large-scale public participation in housing.

Tenement House Laws. Some state governments have been pioneering in public improvement of houses. New York in 1901 passed the first important tenement house law. It set certain standards which prevented conditions from getting worse and provided for im-

provement as new houses were built – especially if the new displaced the old. This and similar laws in other states were passed chiefly in an effort to improve health and increase safety. They generally prescribe the percentage of the available area which a building may occupy, the amount of window space for rooms of a certain size, and other items affecting ventilation and sunlight.

Limited-Dividend Corporations. To encourage better housing, many states have provided for limited-dividend corporations.[1] In return for certain privileges such as loan of money at low rates of interest and freedom from taxation, the limited-dividend corporations agree to confine return on their investments to a modest rate of interest – usually six per cent. In some states these corporations have been given the power of eminent domain. Administrative supervision is highly centralized, being a function of state boards especially set up for housing or boards already existing which are concerned with other housing matters. Rent scales are generally set by the state authorities.

Housing Authority Laws. Housing authority laws which provide for the establishment of state or local housing authorities had been enacted in thirty-eight states by 1939. These authorities are public bodies which are not run for profit; in many cases, in fact, they operate on only a partially self-liquidating basis. Many states permit them in special areas only – that is, the larger cities. The states differ greatly with respect to population of area included. In Michigan, housing authorities are confined to municipalities in counties of 500,000 or more population, whereas in Tennessee a municipality of 2,000 or more population may set up such an authority. Local administration is provided in approximately half the states. All states permit the use of eminent domain.[2]

Great stimulus has been given to the housing authority laws by the United States Housing Authority, which was set up under the United States Housing Act of 1937 to assist state and local governments in getting rid of unsafe and insanitary housing conditions, to remedy the acute shortage of decent, safe, and sanitary dwellings

[1] In 1939 the following states had limited-dividend laws: Arkansas, California, Delaware, Florida, Illinois, Kansas, Massachusetts, New Jersey, New York, North Carolina, Ohio, South Carolina, Texas, and Virginia. The corporations organized under these laws are private, except in New York, where public corporations also are permitted.

[2] Schoenfeld, M. H., "State Housing Legislation at the End of 1936," *Monthly Labor Review*, vol. 44 (Feb., 1937), pp. 386–396.

for families with low incomes, and to reduce unemployment. It makes loans to public housing agencies to assist in the development, acquisition, or administration of low-rent housing or slum-clearance projects. Loans may be for a maximum period of sixty years and up to ninety per cent of the cost of a project. The authority has power to make annual contributions to assist in achieving and maintaining the low-rent character of the project. Capital grants to the extent of twenty-five per cent of the cost of a project may be made in lieu of annual contributions. In certain cases an additional fifteen per cent may be made for payment of labor to reduce unemployment.

Housing Activities of the National Government. Although the national government built a few houses for industrial workers during the World War, its chief effort in the field of housing originated during the depression. The Reconstruction Finance Corporation and the National Industrial Recovery Act gave some aid. In 1933 the Housing Division was organized in the Public Works Administration to promote the program of low-cost housing and slum-clearance projects with a view to providing low-rent housing for lower income groups for which fit accommodations were not then available, and to relieve unemployment in the building trades and allied industries. It has engaged in a demonstration program of low-rental, large-scale housing projects in urban centers. The Bureau of Agricultural Engineering gave increased attention to housing in rural districts. Its comprehensive survey showed that more than $6,500,000,000 would be required to put rural homes in good condition. It published literature on plans for farm homes and encouraged the building of rural homes.

In 1934 the Federal Housing Administration was established and assigned a twofold function:

(1) It administered a short-term modernization program. It insured lending institutions, such as building and loan associations, against losses suffered on account of loans made for the purpose of repairing, improving, or modernizing real property up to ten per cent of the aggregate amount of such loans made by each such lending institution. Under this program about one and one-half million modernization notes were insured, with a value of more than half a billion dollars.

(2) The Federal Housing Administration administers a long-term mortgage insurance program which is carried out by means of a mutual fund operated by the administrator. He is authorized to insure

first-mortgage loans by approved lending institutions. The mutual mortgage insurance fund for the payment of such insurance is accumulated through mortgage insurance premiums paid by the mortgagors. The purpose of the mortgage insurance program is to effect a substantial reduction in mortgage interest rates, a system of uniform mortgage lending and appraisal practices throughout the country, and a check upon catastrophic declines in real estate values during times of acute depression.

Provision is made for the incorporation of national mortgage associations with power to buy and sell first mortgages and to issue to the public debentures secured by insured mortgages held in their portfolios. These associations are private corporations operating under federal charters, and are under the direct supervision and control of the administrator.

The administrator may also insure mortgages upon low-cost housing projects undertaken by federal, state, municipal, and other public agencies, and by private limited-dividend corporations. The administration itself has no authority to make mortgage loans — it is only an insurer. Mortgages on houses not exceeding $6,000 may be insured up to an amount equal to ninety per cent of the appraised value of the houses. The amount of any mortgage must not be more than $16,000.

The United States Housing Authority, discussed in the previous section, has been particularly active in slum clearance. Upon the termination of the Housing Division of the Public Works Administration, the authority took over the fifty-one low-rent housing projects initiated by the Housing Division and began leasing them to local housing authorities for management and operation.

Private Investors Frightened. Public efforts to obtain better housing always scare private investors and are likely to retard private construction. The actual number of houses built by public and semi-public agencies is not large; hence, the competition from them is not serious so far as actual rental space is concerned. Since one purpose of the building, however, is to force rents down, private investors become apprehensive about returns on their investments. This may cause them to delay repairs on old houses and to put off the construction of new ones.

Public Regulation Necessary. The wisdom of government participation in building homes is more open to question than the regulation of private construction under tenement house laws. Such reg-

ulation has proved of inestimable value. It is one of the most important necessities of modern civilization.

QUESTIONS

1. What is the best type of education for marriage? By whom should it be given? Answer the same questions for parenthood.
2. Compare legal requirements for marriage in the various states.
3. Have separate courts of domestic relations justified their existence?
4. What are the recent trends in birth control legislation?
5. What advantages have small foster homes over large institutions for orphans?
6. Trace government aid to housing.

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CHAPTER XXXVI

The School

SHOULD SCHOOLS BE PUBLIC?

FROM the days when the first settlers put foot on this continent down to the present time some people have objected to the education of all the people. They have felt that only certain classes, races, nationalities, or sects should be educated. Or they have objected to one person or family being forced to pay for the support of another's children. The objection to universal education, then, had a twofold basis; it reflected a disinclination to put increased power in the hands of certain groups and a disinclination to pay taxes.

The first step toward public schools was the awakening to the need of universal education. Until this realization was strong, there was little incentive for the public to make the sacrifice entailed in taxation to support an educational system.

Religious Motive. The belief in universal education had a multiple origin. In the Puritan colonies, where the belief first manifested itself strongly, the motive was strongly religious. The Massachusetts law of 1647 declared:

> It being one chief object of that old deluder, Satan, to keep men from the knowledge of the Scriptures, as in former times by keeping them in an unknown tongue, so in these latter times by persuading from the use of tongues that so at least the true sense and meaning of the original might be clouded by false glosses of saint-seeming deceivers, that learning may not be buried in the grave of our fathers in the church and commonwealth, the Lord assisting our endeavors —
>
> It is therefore ordered, that every township in this jurisdiction, after the Lord hath increased them to the number of fifty householders, shall then forthwith appoint one within their town to teach all such children as shall resort to him to write and read, whose wages shall be paid either by the parents or masters of such children, or by the inhabitants in general, by way of supply, as the

> major part of those that order the prudentials of the town shall appoint; provided, those that send their children be not oppressed by paying much more than they can have them taught for in other towns; and it is further ordered, that where any town shall increase to the number of one hundred families or householders they shall set up a grammar school, the master thereof being able to instruct youth so far as they may be fitted for the university.

A town that neglected to obey the law for a year was fined. The fine went to the support of the school for the following year.

Cultural and Civic Motive. Even in colonial times, however, the motive looking toward universal education was in part cultural and civic. There was danger that the pioneers pushing westward into the forests would forget the culture they and their parents had brought from Europe. Many of the immigrants had been men of some education. It seemed a tragedy for the new country to lose the benefit of this heritage. The danger was all the greater because so few books had been brought in. The need of knowing the new laws injected a strong civic motive into education. This motive was present before universal suffrage and democracy were even roseate dreams.

Democratic Motive. The great incentive for universal education and the public school came from the progress of the idea of democracy. Washington, Jefferson, and others among our national founders saw clearly that political intelligence was the safeguard of the new republic. In order to achieve wise policies and carry them out, the people must coöperate with constructive leaders rather than with demagogues. In order to achieve this political intelligence, widespread education was necessary.

Since education would be a benefit to the community as well as to the educated individuals themselves, an educational obligation rested on the whole of society. It must encourage the spread of education and bear the cost of at least a substantial part of the educational program.

When Jacksonian democracy arose, with its emphasis on the equality of man and the right of all to participate freely in affairs of government, the democratic idea soon made itself felt in social life as well as in politics. Since each individual was as good as any other, each had as much right as any to share the social benefits arising from education. Class education was foreign to the democratic ideas which gained strength rapidly during the first half of the nine-

teenth century. When the Negro gained his citizenship at the close of the Civil War, his right to share in public education was recognized.

RISE OF PUBLIC SCHOOL SYSTEMS

Public school systems began at widely varying times in different parts of the country. For a long time, moreover, so-called public schools depended in part on private as well as on public financial support. The greater number of the colonists were relatively poor. They were loath to tax themselves. In many places the rate bill system was used. Under this system a parent paid a certain sum for each child he sent to school.

New England. Public, or more accurately semi-public, schools first made their appearance on a widespread scale in New England. As early as the middle of the seventeenth century, schools supported partly or wholly by taxation began to appear in town after town. Most of the New England colonial governments required that these be provided.

Middle and Southern Colonies. The colony of New York also gave some public money to the support of education as early as the seventeenth century, but the other middle colonies, like those farther south, scarcely made a beginning in public education before the nineteenth century.

Middle West. The public school movement in the Middle West really originated in the gift of public lands from the national government. Beginning in the first decade of the nineteenth century, the national government made handsome gifts of land for education as each new state was admitted to the Union. Each township was given one – later two and finally four – of its thirty-six sections for education. States were also given two entire townships for a state university. The former laid the foundation of the elementary school, and about the beginning of the second quarter of the nineteenth century state-wide systems of elementary education were laid in Ohio, Illinois, Indiana, Michigan, and other states.

Federal Grants. The gift of two townships for a state university stimulated the movement for higher education and by 1825 several state universities had been founded in the Middle West. About the same time, state universities were being established in Virginia, North Carolina, and other southern states.

High School. The public high school, in most places, got a later start than the elementary school and the state university. During colonial times the Latin school had been the chief means of secondary education. About the time of the Revolution, however, the academy began to displace the Latin school. The academy, which charged tuition, flourished until the middle of the nineteenth century. Like the Latin school, it prepared for college.

In 1821 Boston established the English Classical School for boys who were not going to college. This was a first step in the direction of the public high school. By the middle of the century the public high school movement was in full swing. The public high school differed from the academy in that it did not charge tuition and in many cases did not aim primarily to prepare for college.

Training of Teachers. State normal schools for the training of teachers began to be established before the middle of the nineteenth century. The first public normal school was established in 1839, and by 1850 nine states had one or more of them. The period of training in the first normal schools was usually short. During the twentieth century a large number of normal schools have been changed to teachers colleges with a four-year curriculum. Some give graduate work. Some cities as well as the states also maintain teachers colleges or other teacher-training institutions. State universities, as well as many private ones, have departments of education for the training of teachers.

THE LEGAL BASIS OF EDUCATIONAL FUNCTIONS

Division of Function. The Constitution is silent on the matter of education and the school. This means that most of the important powers with respect to education have been retained by the states. Under its authority to provide for the common defense, the national government maintains the Military Academy at West Point and the Naval Academy at Annapolis. It also maintains many schools for Indians, and a few special schools, including a university for Negroes, a college for the deaf, and schools for disabled veterans. These are but isolated exceptions which emphasize the fact that education remains with the states.

Vast State Powers. Since the local units of government are creatures of the state, the vast educational powers retained by the states may be exercised by the state government or delegated to the local

units. The division between state and local function varies considerably from state to state. Each state may confer upon or withdraw from the local governments any educational functions that it sees fit.

Considerable difference of opinion existed in earlier generations as to the legal limits of educational powers. Even some of those who upheld the right of the state to establish elementary education denied that it had a right to maintain public high schools or higher institutions of learning. Since the Kalamazoo Case the legal opposition to public support of high schools has been small. The decision in this case, given by the Michigan Supreme Court in 1872, stressed the legal appropriateness of the high school as a part of a public school system.

State Powers Are Not Unlimited. Although the state has vast powers in educational matters, its powers are not unlimited. The state's claim to unlimited power over private schools was successfully challenged in the Dartmouth College Case of 1819.[1] The legislature of New Hampshire, from which Dartmouth College had received its charter, attempted to make fundamental changes in the charter without the consent of the trustees. The college alleged that the changes violated the contract which had been made between it and the state at the time the charter had been given. The Supreme Court of the United States, after a long delay, sustained the contention of the college. This case, argued for the college by Daniel Webster, has been very influential in establishing collegiate freedom from political control.

More than a century after the Dartmouth College Case, the state of Oregon tried to do away with private elementary schools. In 1922 it required all children over eight and under sixteen years of age who had not completed the eighth grade to attend a public school during the entire term. This law was declared unconstitutional by the Supreme Court.[2] The state has power to compel a child to be educated, to require that certain subjects must be taught, and to fix certain standards of instruction. It does not, however, have power to deprive parents of the privilege of sending their children to private schools, provided these schools meet required standards. The Supreme Court also declared unconstitutional a law of Nebraska which forbade the teaching of a foreign language to a child who had not

[1] 4 Wheaton, 518 (1819).
[2] *Pierce v. Sisters of the Holy Name*, 268 U. S. 510 (1925).

passed the eighth grade.[1] The supreme court of Tennessee, on the other hand, in 1927 upheld the constitutionality of a state law forbidding the teaching of evolution in the public schools.[2]

FEDERAL AID

Morrill Act. Mention has been made of the large gifts of public lands to townships for common schools and to states for state universities. Later measures have extended federal aid still further. The Morrill Act of 1862 designated generous tracts of land to provide at least one college of agriculture and mechanical arts for each state. The states were to share according to the number of their Senators and Congressmen. Additional land was added to the original grant until nearly eleven million acres had been given away. This act proved a great stimulus to education in agriculture and the mechanical arts.

Smith-Hughes Act. The Smith-Hughes Vocational Education Act of 1917 initiated one of the most important federal aids. This act provides for financial assistance to the states for vocational education in agriculture, trades, industries, home economics, and commercial subjects. To obtain assistance under this act, a state must appropriate an amount for the same purpose equal to that given by the federal government. It must also maintain certain standards which are subject to review by the federal officials. The aid consists largely in paying salaries of teachers, supervisors and directors, and in preparing teachers of vocational subjects.

Office of Education. The Office of Education, in the Federal Security Agency, although it has no compulsory jurisdiction over state and local school systems, is continuously exerting considerable influence on education in the United States through its research and publicity activities. It directs educational surveys and collects and disseminates information on education in the United States and in foreign countries. It advises state, county, and municipal school officers as to the administration and improvement of educational facilities. It makes surveys when requested to do so by state or local officials. It administers the acts for promotion of vocational education. It administers the laws which promote vocational rehabilita-

[1] Meyer v. Nebraska, 262 U. S. 390 (1922).

[2] Scopes v. State, 150 Tennessee 105. This was the famous Scopes Case in which criminal charges were brought against a teacher, John Scopes, for teaching evolution. William Jennings Bryan, Clarence Darrow, and other anti-evolutionists and evolutionists took part in the trial.

tion of disabled persons, studying problems of training for and placement in suitable and gainful occupations. It publishes and distributes numerous documents pertaining to education and furnishes many special booklets to schools. It also supervises the administration of funds appropriated for land-grant colleges.

EDUCATIONAL ACTIVITIES OF LOCAL GOVERNMENTS

Until recently, elementary and secondary education have been chiefly local. Within broad lines laid down by the state, each local government has run its schools about as it pleased. This is particularly true of cities. Local governments generally decide on the number and kind of schools. They provide equipment and, if they wish to do so, a term longer than the minimum required by the state. They select and dismiss teachers, supervisors, and other members of the local school system. They provide as much and as varied nonschool education as they see fit. They raise part of the revenue for the support of education. Many local governments select textbooks and provide them without charge.

Local Organization. The local unit of government in active charge of education varies greatly from state to state. In New England and several other states in the northern and eastern sections of the country, education is in the hands of towns and cities. In other states, especially in the southeastern section of the country, the county has charge of schools, particularly in rural districts. Some states with county control permit the larger cities to manage their own schools. In about half the states the schools are in charge of a small subdivision of the county. This small subdivision plan, known as the "district system," is generally considered the least desirable. In numerous districts educational leadership is poor and financial support of education meager. Too frequently a teacher is chosen from the most influential family regardless of fitness for the position. Fortunately the consolidated school district is uniting many of the small districts.

Local governments, or their school districts, have a school board or school committee, the members of which are generally elected by popular vote, although they are sometimes appointed by the mayor. They seldom receive a salary. This board usually has a great deal of authority. It generally chooses the chief executive officer, the superintendent of schools, although county superintendents are often elected by the people. It usually appoints and dismisses teachers.

It purchases supplies. It represents the local community in nearly all educational matters except those it delegates to the superintendent or other executive officers.

INCREASING ACTIVITY OF THE STATES

Public education differs widely from state to state, but there are some duties which are performed by nearly all state governments. The tendency is for state governments to raise the standards of education and to supervise local governments more fully to see that they comply with the standards. Several states, including North Carolina and New Hampshire, have gone far toward centralizing their educational systems.

Terms and Ages. States require that schools shall be kept open a minimum number of months, and that all children between certain ages shall attend full time unless they are physically or mentally incapable of doing so, or unless they are receiving education from other agencies. The tendency is for the age limit to be extended. In three states the maximum age up to which a child is required to attend full-time school, unless exempt for work or other legal reason, is fourteen years; in one state fifteen years; in thirty states and the District of Columbia sixteen years; in seven states seventeen years; and in seven states eighteen years.

Attendance at continuation schools is required under various circumstances and with specified exemptions, up to sixteen years of age, in fourteen states; up to seventeen years of age in two states; and up to eighteen years of age in ten states and in another state if required by the board of education. No provision is made for part-time continuation school attendance in twenty-one states and the District of Columbia.[1] In many cases permission to leave school is conditioned on the pupil's having finished a certain grade.

Textbooks and Teachers. Many states, through a textbook commission, choose elementary and secondary textbooks for the entire state or for rural schools only. Many require that teachers in some or all such schools shall be certified by the state. This certification may be on the basis of examination or the taking of a certain number and kind of courses in a higher institution of learning. The tendency is to raise the certification requirements.

Oath of Allegiance. Some states, in their zeal to keep radicalism

[1] United States Children's Bureau, *Summary of State Laws Affecting the Employment of Minors in Factories and Stores.*

out of the schools, are requiring all teachers to take an oath that they will uphold the Constitution and will not teach certain things.

Teacher-Training Standards. States are also raising standards of teacher-training schools. Formerly the two-year normal school was the prevailing type of public teacher-training institution. The two- and three-year normal schools are now being replaced by four-year teachers colleges. In addition, graduate work is being offered at more and more of these colleges. The state universities are also strengthening their departments of education. The increase in library facilities in normal school and college is permitting a breadth and depth of cultural attainment impossible in earlier days.

State Superintendent and Board of Education. Each state has a superintendent of public instruction or commissioner of education as its chief executive officer in the field of education. He generally has considerable authority over some state institutions, but most of his function in relation to local schools is advisory. Sometimes he is elected by popular vote; sometimes he is appointed. Many states have a board of education; in most states its work is advisory.

Financial Assistance to Local Communities. State governments spend a great deal of money on education; in fact, education costs them more than any other service. In addition to paying for state schools, state governments contribute heavily to the maintenance of local education. While many rich urban communities have little trouble in providing for education, the great majority of rural schools find it difficult or even impossible to finance an adequate educational program. This is particularly deplorable since rural families, on the average, have more children of school age than urban families. Educational leaders are working to secure a more desirable distribution of funds between rural and urban areas. Personnel, as well as equipment, in rural sections is vitally affected by financial conditions. A survey by a committee of the National Education Association has revealed the following conditions among rural teachers.[1]

1. Although the professional qualifications of rural teachers are by no means ideal, they are high enough to justify larger salaries, on the average, than these teachers now receive.
2. A majority of rural teachers have family responsibilities.
3. Home ownership is not common among them.
4. Their housing facilities as a group are inadequate.

[1] *Research Bulletin*, vol. 17 (Jan., 1939), pp. 41–46.

5. In spite of the importance of automobiles in rural areas, a substantial proportion of rural teachers are without them.

6. Many rural teachers lack adequate facilities for cultural and professional improvement during the school year.

7. They generally devote more time to work than to rest or recreational activities during the summer vacation.

8. The salary situation among rural teachers as a group is unsatisfactory.

9. Generally speaking, conditions among rural teachers are less satisfactory in the open-country districts than in the town districts. They are least adequate in the one-teacher schools.

10. Better financing of rural schools should be accompanied by further improvement in the selection and training of teachers for these schools.

VARIETY OF PUBLIC EDUCATION

Vertical and Horizontal Expansion. Public education continues to expand both vertically and horizontally. Vertically, it has moved up until graduate study beyond the four-year college course is provided in the state universities. Horizontally, public education now provides for all classes of people – for the normal and for those afflicted by blindness, lameness, mental deficiency, and other handicaps. It includes various trade schools as well as the academic subjects. It provides much preventive work in the field of health. Facilities for recreation have increased rapidly. It provides for the alien as well as the native-born. More and more adult, as well as child and youth education, is being offered. In many schools military training is given.

Non-school Education. Public education is now much wider than the studies offered in the public school. Public libraries are becoming vigorous educational stimuli. They are finding means of letting the community know what they have to offer. They are the center of extension programs, courses of lectures, and other agencies in education of the public. Public forums are increasing rapidly. An immense amount of educational literature is distributed by national, state, and local governments.

THE SCHOOL AND POLITICS

"Keep the school out of politics." This has long been a slogan. It has been widely approved by those interested in the welfare of

the schools; it has also been endorsed by public opinion. Unfortunately, however, the slogan has failed to keep the school free from political control and corruption. To the professional politician all public money is the spoils of victory. No activity is sacred to him. His motive is to obtain as many positions for his friends or party members as possible, and to let contracts to those who return to the politician a part of the price received. In some communities political allegiance is a factor in securing an administrative or teaching position. Where politicians cannot dictate to the school authorities, they may cut educational appropriations in order to allot more money to the departments which can be controlled. In many cases, politicians use sectarian and racial prejudice to get or maintain influence in matters of education. They can do much toward destroying the effectiveness of the school.

QUESTIONS

1. Compare the more influential educational theories.
2. What types of civic education are now provided?
3. Should the government have power to require all children of school age to attend a public school? Would it be wise to use this power if it did have it?
4. How has the national government aided education?
5. What phases of education are stressed in teacher training institutions?
6. Trace the development of the junior college movement and evaluate the junior college.
7. Criticize recent curriculum trends.
8. How can the influence of professional politicians in the schools be reduced?

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CHAPTER XXXVII

Recreation

THE PUBLIC'S STAKE IN RECREATION

DESIRABLE recreation is one of the most effective preventives of social ills. It builds better community health and in this way not only eliminates much suffering and other undesirable physical results of illness but also reduces the great economic loss due to sickness and to the cost of caring for it. By reducing sickness it also reduces poverty, which is a heavy burden on society at all times. Furthermore, wholesome recreation lessens crime among juveniles and adults by offering substitutes for antisocial activity and for drunkenness and other forms of vicious pleasures which sap vitality and destroy personality.

Undesirable recreation, on the other hand, has just the opposite effect. It is one of the worst enemies of society.

The public has a great stake in recreation, especially in our great and crowded cities with their strain on personality. No longer can society safely let people find recreation as best they can. The social dangers of such a course are too great. For this reason all progressive governments — national, state, and local — are beginning to give much thought and care to the problem of providing suitable recreation for as many citizens as possible. The Constitution does not mention recreation; accordingly, no specific powers over it have been surrendered to the national government. However, some forms of recreation are closely related to certain forms of property owned by the national and state governments; hence these governments are in a favorable position to provide leisure-time activities for the public. Much recreation, too, can be provided by local governments under educational authority granted by state governments.

THE NATIONAL GOVERNMENT'S CONTRIBUTION

National Parks. The national government's greatest contribution to recreation is our national parks. The National Park Service now

exercises administrative supervision over twenty-five national parks, one national historical park, sixty-eight national monuments, eleven national military parks, eleven national cemeteries, ten battlefield sites, four miscellaneous memorials, eight memorial projects, and all public parks in the District of Columbia. Some of the national parks are of enormous size. Yellowstone in Wyoming and Montana has an area of 3,348 square miles, Mt. McKinley in Alaska 2,645 square miles, Glacier in Montana 1,534 square miles, Yosemite in California 1,125 square miles, and Grand Canyon in Arizona 958 square miles. Other large national parks are Sequoia, Mount Rainier, Crater Lake, and Rocky Mountain.

The national parks offer many kinds of recreational and educational opportunities. The responsive inhabitant of a crowded city who finds himself in Yellowstone, Grand Canyon, or some other park where nature is magnificent receives the thrill of a lifetime. Here are countless miles of mountain and wilderness trails and many forms of wild animals, wild flowers, and rare trees. A great national park is more refreshing than almost any other environment.

Highways. The aid given by the national government in building and maintaining highways is of incalculable value to the motorist in search of recreation. The park, the fields, the great outdoors, the ball game, the show, and other favorite places or forms of recreation would be begging for patrons if motorists had to drive over the "highways" which were common during the early years of the present century.

Migratory Birds and Animals. In recent years the national government has fostered recreation through the protection of migratory fowls and wild game, even outside its own parks. It has encouraged the states to maintain stricter laws for the protection of wild game for the hunter and for the nature lover. It has made treaties with Canada concerning migratory birds. The national government has also stocked navigable streams with millions of fish which have in turn laid eggs to produce still larger numbers of fish for sportsmen throughout the country.

Censorship of the Mails and Radio. The national government exercises a form of supervision over recreation through censorship of the mail. The circulation of many types of obscene materials — books, papers, leaflets, for example — which are meant for the leisure hours of the general public is checked because such materials may not be sent through the mail. Through the Federal Communica-

tions Commission the national government licenses and regulates radio stations. It has not, however, played a very extensive part in the supervision of radio programs.

ACTIVITIES OF STATE GOVERNMENTS

State governments are taking a more active part in providing recreation than they formerly did, although no state has a fully developed program which seems adequate to present-day needs.

Parks. Many states are developing public parks, parkways, playgrounds, beaches, camp sites, and forests, which provide suitable recreation especially for those who live in great industrial cities. The forms of recreation available in parks are becoming more and more varied. New York has seventy parks which extend, in the words of Governor Herbert Lehman, "from the mighty Niagara in the west to the seaside parks of Long Island, and from the wooded fastnesses of the Adirondacks to the beautiful glens of Finger Lake Region and the Southern Tier." In the Long Island section alone, the state provides for the following forms of recreation: picnicking, playground activities, golf, sound bathing, surf bathing, bay bathing, fresh-water bathing, boating, fishing, tennis, horseback riding, and camping.

Forests. State forests may prove to be as valuable for recreation purposes as for the production of timber. Care is being taken to develop forest reserves as recreational centers and educate the public to play in them. The state forests of Pennsylvania embrace 1,647,968 acres in which the state has leased, for periods of not more than ten years, thousands of camp sites for health, educational, or recreational purposes. Many of the campers have built log cabins on the plots they have leased. The following suggestions for state forest camp site users, made by the Department of Forestry of that state, are typical of recommendations and regulations issued by the more progressive authorities:

1. When a camp site has been leased for the use of a group of people, the group should organize and adopt a set of by-laws for the guidance of the camp. The experience of the Department indicates that the membership of a camp should be limited to a maximum of fifteen, in order that the camp organization may function harmoniously and efficiently.
2. Payment of the camp dues should be so arranged that the camp treasurer or secretary shall be able to pay the annual lease

rental when it is due. The lease provides that the rental shall be paid in advance.

3. It is suggested that when post pillars are used for building foundations, or when rustic porches are constructed, such hardwoods as chestnut or oak be used. Do not use short-lived species, such as aspen or birch, as they are subject to dry rot and will require early replacement. Stone or cement foundation piers, though slightly more expensive, are more permanent and are preferable.

4. It is expected that in some isolated sections of the State Forests it may be necessary to insure camp buildings and their contents. If this is not done, then the camp valuables should be removed to some other place for safekeeping when the camp is unoccupied. For protection from fire, all chimneys should be protected with adequate spark screens. Permanent campers, as well as transient tenters, must take every precaution against setting the woods afire.

5. Before erecting your building, be sure that your building plans have been approved by this Department, and that you are building on the location designated by the District Forester.

6. Be good citizens and sportsmen, and keep in mind that owing to the greatly increased use of the State Forests it is necessary that the Department lay down rules and regulations that will insure the greatest use of the State Forests to the greatest number of people. Let the Department of Forests and Waters know how the State Forests can be of greater service to you and your friends.[1]

Wild Life. States have been giving more and more attention to wild game and bird life. Wild game particularly has been protected, on account of its economic value as a food supply. Some sections of the country draw largely on supplies of fish and small and even large game during certain seasons. The tendency now is to stress also the recreational value of wild game and birds. Hunters and fishermen still love their sport, but not more so than nature lovers delight in acquaintance with wild life. The number of nature lovers who find recreation in studying wild life is increasing rapidly. The schools are playing an important part in developing this love of nature.

Some states are pointing out the value of birds for recreation as well as for insect eradication. At a very small cost much valuable information is being given. Texas introduces its illustrated *Brief*

[1] *State Forest Camp Sites*, pp. 9, 10. Pamphlet by Pennsylvania Department of Forests and Waters.

Studies in Texas Bird Life with this appreciative statement: "Birds have an aesthetic and an economic value far beyond the appreciation accorded them by people generally. Happily, with the extension of knowledge, the finer things about birds are becoming more and more apparent to young and old alike, and there is an increasing demand for a study of the subject." The conservation of wild life is engaging the attention of school teachers and students throughout the state, and the Game Department receives many calls for literature on this subject for use in the schools. Approximately seven hundred species and subspecies are found in Texas alone. Accepting the estimate of a member of the United States Biological Survey that, on every acre of ground, birds destroy an average of ten cents' worth of insects annually, the saving in Texas alone would be nearly $17,000,000 as there are 167,934,720 acres of land in that state.

The improved means of transportation discussed in an earlier chapter provide one of the greatest aids to recreation. People not only find driving a pleasure, but good roads make it easy to reach desirable places of recreation.

Prisons. The authorities of Sing Sing Prison in New York, in approving football at that institution, have appreciatively mentioned the following points:

1. The inmate spectators showed as much enthusiasm and interest as the average spectators at the outside college games, and possibly more. Their conduct was far superior to that of most of the spectators accompanying the visiting teams.

2. The inmate team received adverse decisions without complaint or argument. In this respect it compared favorably with the best disciplined college teams.

3. With few exceptions the outside spectators showed no more than the usual partisanship that is expected from rooters accompanying visiting teams.

4. It was the unanimous opinion of the officials that the games were of great benefit to the inmates. The players by their manner on the field had shown their regard for good sportsmanship and clean competition. They had seen the results of team work for a common good cause and had likewise seen the results of lack of team work and individual opinion as opposed to joint opinion. The inmates, both players and non-players, had obtained a topic of interest which had made them think and talk in terms of "we" for a common cause rather than in terms of "I."

5. Not one of the officials had a single suggestion to make to improve the action of the inmate team collectively or individually on the field. The players at all times had been courteous to the officials and to their opponents.

Few prison authorities in other places have recognized to the same degree as the officials at Sing Sing the remedial value of recreation in the treatment of prisoners. The experience at Sing Sing is discussed here because it is an admirable illustration of the social utility of wholesome recreation.

Encouragement and Supervision. Many state universities and teachers colleges conduct extension courses; some states have lending libraries; some provide radio programs. State governments also influence recreation greatly through encouragement and supervision of athletics and physical education. The more progressive states suggest programs of athletics and physical education and provide directors to coöperate with local educational authorities in developing suitable activities. They require a certain minimum of physical education in local schools and encourage the provision of a great deal more. Playgrounds and other equipment are required in many local school systems. The state often bears a large part of the cost of local recreational activities in the field of education.

Restrictions. Restrictions on recreational activities vary greatly from state to state. Some states forbid baseball and other forms of amusement on Sunday; some forbid them during the hours of the regular church services. Some states have boards which censor motion pictures; a picture which is condemned may not be shown anywhere in the state. Some states prohibit horse racing and dog racing. Others permit them, but forbid betting on them. Others which permit them regulate the betting by means of the pari-mutuel system, in which the winnings are divided among those who pick the winning horses, minus a definite percentage which goes to the operators of the track. State racing commissions have been set up to deal with racing. There are numerous state laws forbidding various forms of betting, from crap shooting in a back alley to bridge on Fifth Avenue, but many of them receive little support from public opinion or the police.

ACTIVITIES OF LOCAL GOVERNMENTS

Playgrounds. The tendency is for more and more cities and towns to make provision for recreation an important if not a major aim of

local government. A large number of local communities provide public playgrounds. Some are connected with schools, and some are not. Some cities try to provide a playground for every school building, no matter how congested the district around the school may be. Many furnish equipment for a large number of athletic teams. The departments in charge of physical and mental welfare are giving more attention to recreation as a preventive of physical and mental ills, and are encouraging children and adults to engage in outdoor activities as much as possible when the weather is suitable. They are employing more and better-trained playground supervisors.

Year-round and School Activity. Certain cities are giving considerable attention to year-round recreation. They have at least one expert whose business it is to plan for suitable recreation for various types of people at each season of the year. As more recreational equipment is provided for schools, the tendency is for school plants to be kept open throughout the year and in the evening, so that young and old may use them for the many forms of recreation which are now available. Public libraries have greatly increased their facilities in recent years.

Regulation of Amusements. Some towns and cities forbid movies and some other forms of amusement on Sunday, or during certain hours on Sunday. Occasionally they forbid an objectionable book to be sold, an immoral play to be given, or an undesirable movie to be shown. New York City recently closed a whole group of burlesque theatres by refusing to renew their licenses on the ground that the type of performance they gave was detrimental to the public welfare. City censoring is usually good advertising for the banned play or book, and surrounding cities are likely to capitalize on the advertising by selling the book in larger numbers or showing the play or movie to large crowds.

Commercialized amusement has become such a serious threat to wholesome city life that much effort has been put forth to control it. Saloons, gambling dens, disreputable dance halls, houses of prostitution, opium dens, and other forms of amusement still flourish openly in many cities. The local government has constantly to be on the lookout against them. In some cases the state government, acting through the state police or other agency, takes a hand in cleaning up some of the more disreputable features of the vice of a local community, especially where local politicians prevent the local police from taking action.

Responsibility. The responsibility for an adequate recreation program in a city generally rests with the school board, the park board, or an independent playground and recreation committee, although the responsibility may be divided between two or more of these. Each of the three agencies has its champions. Some advantages and disadvantages of each have been summarized by the National Recreation Association.

The School Board. The school board is favored for the following reasons: (1) Much of the value of play is educational. For this reason it would be helpful to have recreation under the control of those who administer the city's education. (2) The school board controls buildings and grounds needed for the recreation program. To an increasing extent school buildings contain recreation facilities. School sites provide playgrounds. (3) The board already has charge of the physical education of the school children, which is becoming increasingly a play-motivated program. (4) The education authorities have a large corps of teachers with the knowledge of education and experience in handling children that are necessary to children's playground workers. The character, education, and ideals of the teachers under the school board are generally on a high plane.

On the other hand, several reasons indicate that the school board may not be the best body for administering a city-wide recreation program. Among them are the following: (1) The average school board is accustomed to think and plan in terms of children. It has given very little attention to the problems of adults, whose activities comprise one-half the recreation program in some cities. Furthermore it has largely concerned itself with what takes place during school hours. The free-time periods — after school, week ends, and vacations — have not been considered a part of its responsibility. (2) The large school budget frequently includes recreation as one of the least essential items — an "extra"; hence the appropriation for recreation is likely to be small. (3) The school board thinks largely in terms of the school plant. It is not accustomed to promote and conduct activities in churches, lodges, parks, and various institutions; yet an adequate recreation program involves coöperation in activities with every group in the city. (4) Although play for children is largely educational, recreation for adults is not necessarily so. Many types of play and recreation suffer from the application of pedagogical methods of leadership or control to which the school board and its employees are accustomed.

The Park Board. The advocates of the control of recreation by the park department point out that many of the facilities essential for the community recreation program, such as playfields, bathing beaches, golf courses, and swimming pools, are owned by park authorities. The construction and maintenance of these properties is an important function of the park department. The department is also accustomed to dealing with and serving large numbers of people. The fact that park budgets are comparatively large and provide funds for securing and operating many outdoor recreation facilities is another reason for park management of recreation.

The following reasons are commonly advanced for not placing recreation under the control of the park board; it should be stated, however, that a change in policy of many park boards during recent years in their attitude toward recreation tends to minimize the force of some of these statements: (1) The work of the park board involves such a wide variety of functions – the construction of roads, bridges, and recreation facilities, the maintenance of street trees and various types of properties, the acquisition of areas, the operation of zoological gardens, museums, refectories, and similar facilities – that only minor attention is likely to be given to the question of recreation leadership. (2) Park boards, like school boards, think in terms of properties under their control. They are not accustomed to promoting activities among private agencies and schools away from park areas. (3) In very few cities have school buildings been turned over to park boards in order that the latter may conduct recreation activities in them. On the other hand, few park boards have adequate indoor facilities. Consequently no indoor program is carried on, or there is a costly duplication of buildings, or the recreation program is conducted by two or more groups. Experience indicates that school boards are less likely to turn over their properties to a park board for recreation use than to an independent recreation commission upon which the schools may have representation.

The Recreation Board. Many recreation workers believe that, because of the wide range of activities which it is necessary for an administrative body to carry on, it is advisable to have a separate recreation board or commission. There is a distinct tendency, therefore, toward the separate recreation board plan – the creation of a board composed of individuals having an appreciation of school and park ideals, who have jurisdiction over recreation activities of the widest scope. The board uses facilities provided by the park, the

school, the street, the dock, or any other municipal board or department, and also special facilities secured for its own use or loaned by private groups. These facilities are utilized in conformity with a city-wide plan designed with special reference to the recreational function and use of these facilities.

Some of the advantages of a recreation board over other city departments as the managing authority of a recreational program have been stated as follows: (1) A recreation board provides a coördinating body on which representation may be secured of all groups whose property must be used in the operation of an economical recreation system. All the resources of all the city departments may be harmoniously utilized. (2) Boards appointed for other purposes are usually already loaded with work. They find it difficult to give recreation interests adequate attention. The members of a recreation board are selected with the thought of recreation in mind; other boards are selected primarily for other purposes. (3) A city recreation program is not confined to any special facilities, ages, localities, or groups. It attempts to help all the people in the city to use their leisure time with the greatest pleasure and profit. (4) It is easier to secure an adequate appropriation for recreation if the question of the appropriation is not confused by being combined with that of a large appropriation for, say, boulevards or industrial education. The recreation interests are likely to be kept more permanently before the community if a separate board with an efficient superintendent of recreation is at work. (5) A separate recreation commission, appointed for the sole purpose of studying recreation needs and meeting these needs, can more readily be held responsible. (6) The problems of recreation in a city are so large and varied as to require all the time and energy the members of an unpaid board can give. The superintendent of recreation in a city needs the hearty support of such a group of public-spirited citizens, able to give careful attention to all the intricate and vital problems involved in a comprehensive municipal recreation system.

The objection most commonly raised to the creation of a playground and recreation commission is that it sets up another city department, thereby adding to the already complicated municipal government.

General Principles. The National Recreation Association points out that, regardless of the form of administration determined upon, the following principles should be followed:

1. All city-owned property suitable for recreation should be made available for the use of the department conducting recreation, under conditions worked out between the recreation authority and the department controlling the property.

2. A commission, committee, or some form of organized group should be appointed to give continuous and collective thought to the leisure-time problems of the entire city and to work out effective means of meeting them. It is advisable for both the school board and the park board to have representation on this group, because the use of school and park property is essential to a successful recreation program. By making the terms of office of the members overlap, so that not more than one or two expire each year, continuity of planning results.

3. A full-time trained recreation executive should be employed to direct the program. Frequently one person is employed to serve as recreation executive and also as supervisor of physical education in the schools or for some other position. This is not desirable; rarely can anyone do justice to community recreation work unless he gives his entire time to it.

4. A definite segregated recreation budget is generally desirable. Many cities have voted a mill tax for recreation purposes. This assures that a comparatively definite amount of money will be available each year. In some states it is possible for cities to vote that a certain percentage of the park or school budget shall be used for recreation.

5. Vital, interested, progressive administration of the public function, community recreation, should be the primary consideration, rather than control of property or administrative convenience. These latter are external and can be sensibly arranged; the former is essential to successful accomplishment of the purpose. The important thing in the administration of recreation work is not so much the exact form of administration – in the last analysis local conditions must determine which is the best group to administer the system – but the degree of coöperation which the governing group and the superintendent of recreation can secure from all city departments having facilities which should be utilized.

THREAT OF COMMERCIALIZED RECREATION TO GOOD GOVERNMENT

Commercialized recreation tends to destroy efficient, decent government. The reason for this is twofold. Many of the most profit-

able forms of amusement – gambling, saloons, opium parlors, prostitution, and others – are against the law. In order to survive, they must get protection from the police. Some forms of commercialized amusements have large amounts of money to spend for this purpose. Recently some undesirable features connected with dog racing were uncovered in one state. Investigation showed that the dog interests were organized nationally and were bringing pressure to bear on legislatures and politicians in many states to obtain favorable terms for their business. They were using some of the millions of dollars made in states where racing was allowed to get more favorable treatment there and to get permission to operate dog tracks in other states.

In some states the horse racing interests keep powerful lobbies. It is very difficult to pass laws which they oppose. Not long ago the liquor interests wanted someone to represent them in their relations with the government. They chose a member of the national committee of the political party which was in control of the government and paid him $100,000 a year with a guarantee of employment for a number of years. The reason for this choice is too obvious to leave any doubt as to the motives of the liquor interests.

With vast resources drawn from the patrons of the various forms of vice, the heads of the vice rings bring great pressure to bear on both major parties. They bribe, they slander, they threaten, they control nominating conventions, they get out the machine vote at elections, they employ shyster lawyers, and in a thousand ways destroy decent government. Probably the greatest debauchery of government by commercialized amusements has occurred in cities. Here organized vice dictates in no uncertain fashion to the police and the politicians.

Occasionally a reformer will arouse the people of a city, and for some weeks or months the patrons use the back door of the dens of vice. Some of the dens may even close for a while. A number of places may be raided and proprietors and patrons be fined or scared. The superintendent of police may assign all police officers and patrolmen to other sections of the city when it is obvious that they are coöperating with lawless proprietors. The state legislature may pass laws to prohibit or regulate vice – and then adjourn for three or four years without having made adequate provision for enforcement of the laws. Sometimes a group of clergymen will coöperate in a local campaign to arouse public sentiment against harmful forms

of amusement or to get members of their congregation to refrain from participating in them. Sometimes a state or national head of a denomination will organize a campaign against undesirable types of movies. Sometimes women's clubs, good citizenship leagues, city improvement associations, and other bodies bring pressure on commercial amusements to clean house, or on the government to make them do so. However, compared to the vigorous, persistent, all-pervasive pressure of organized commercialized recreation, the activity of their opponents seems feeble indeed.

QUESTIONS

1. Criticize the national park system. The park system of one state.
2. What protection of wild game is provided by the United States? By your native state?
3. Make suggestions for improving the administration and supervision of playgrounds.
4. Give an account of the work of the National Recreation Association.
5. Why do many forms of organized vice find it easy to masquerade as recreation?
6. Should public censorship of recreation be increased?
7. Is recreation an inalienable right?

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CHAPTER XXXVIII

Health and Relief

THE NATIONAL GOVERNMENT AND HEALTH

UNTIL recently, the national government has never looked upon health as one of its major interests. The framers of the Constitution did not consider health the "concern of all" in the same sense that money, war, and foreign commerce are. Private health was the concern of individuals; public health was the concern of the states and of the local governments in so far as the states delegated authority in health matters to them. Except in the District of Columbia and the territories and possessions, and to some extent among its own employees, the national government has very little direct compulsory authority in health matters. Indirectly, however, through control of interstate and foreign commerce, immigration, and taxation, the national government can engage in various activities to promote public health. It can grant subsidies to the states for health projects and cooperate with state and local authorities in research and sanitary measures. After the disastrous flood of 1937 when a large part of Louisville had to be quarantined, the work was directed by the United States Public Health Service. The state and local authorities coöperated by making such rulings and ordinances as the national officers considered necessary for the protection of the health of the community.

Bureau of Public Health Service. The Bureau of Public Health Service, under the direction of the Surgeon-General, is the chief national agency through which public health work is administered. Its main function is to prevent the spread of human contagious and infectious diseases. It engages in scientific research at the National Institute of Health and in the field as need for it arises. It publishes the information gathered by research, and distributes it to the public by means of publications, lectures, and correspondence. The Social Security Act authorized the annual expenditure of considerable sums for investigation of disease and problems of sanitation.

The Public Health Service also regulates the manufacture and sale of viruses, toxins, serums, and similar products. It administers foreign quarantine laws and domestic quarantine laws made by the national government. It enforces interstate quarantine regulations. It supervises the medical examination of immigrants. It coöperates with other national government departments in matters of health and sanitation. It also coöperates with state and local authorities in developing and maintaining state, district, county, and municipal health services, and with local agencies in spreading health educational services.

The Service administers hospitalization and out-patient treatment at twenty-six marine hospitals and 131 other relief stations to legal beneficiaries of the national government. It operates the National Leper Home. It administers and directs the operation of two narcotic farms, studying the nature and treatment of drug addiction and the rehabilitation of addicts. It investigates the cause, treatment, and prevention of mental diseases and supplies information concerning them. It provides and supervises medical and psychiatric services to the national penal and correctional institutions which are under the control of the Department of Justice.

Narcotics. The national government has strict laws concerning the importation of narcotics and their transportation across state lines. These laws are hard to enforce on account of the small size of the packages in which such drugs are usually carried or shipped. The duty of investigating, detecting, and preventing violations of the national narcotic laws is assigned to the Bureau of Narcotics. This bureau issues narcotic import and export permits. In coöperation with the Public Health Service it determines the import quota of certain narcotics. In coöperation with the Department of State it helps discharge the international obligations of the United States concerning traffic in narcotic drugs. It keeps in touch with foreign police agencies and coöperates with the states in suppressing narcotic abuses within their borders.

Food and Drugs. The first important national laws regulating the production and sale of food were the Meat Inspection Act and the Federal Food and Drugs Act, both of which were passed in 1906. These acts aimed to prevent the shipment of decayed, adulterated, and misbranded food and drugs in interstate commerce. Although manufacturers and merchants found ways of evading the requirement to some extent, the laws did much to reduce the amount of

unwholesome food and drugs on the market. They were supplemented by the Tea Act, Naval Stores Act, Insecticide Act, Import Milk Act, Caustic Poison Act, Filled Milk Act, and certain amendments to the original Food and Drugs Act.

In 1938 the Food and Drugs Act was replaced by the more comprehensive and strict Federal Food, Drug, and Cosmetic Act.[1] The various clauses of the act provide for action in the case of adulterated or misbranded foods, drugs, cosmetics, medical devices, insecticides, and fungicides by seizure of the illegal product and by prosecution of the responsible shipper. The manufacture as well as the sale of adulterated or misbranded food, drugs, devices, and cosmetics is forbidden. Provision is also made for excluding from the country importations of products which are in violation of law. In 1938 Congress forbade false advertisements to induce purchase in interstate and foreign commerce of food, drugs, devices, or cosmetics. Use of the mails to promote intrastate or other commerce in falsely advertised products was forbidden. While the main purpose of these laws is to protect the consumer, they also protect the honest manufacturer against unfair competition.

STATE GOVERNMENTS AND HEALTH

State governments vary greatly in their provisions for public health. Some have a well-rounded, integrated, and rather efficient system; others have scarcely more than the bare outlines of a comprehensive program which may or may not be efficiently administered as far as it goes. The tendency is toward more and better administered activities. The activities are directed by a department, board, or single commissioner of health. The description given here applies to the more progressive states. Other states have some but not all of the features discussed.

Biological Laboratories. Some states have rather extensive biological laboratories, in which vaccines, serums, and other biologicals are produced. The first state laboratory of this kind was set up by Minnesota in 1890. Nearly all states now distribute biologicals. Something like half manufacture one or more of the biologicals and buy the rest. In many states some or all of the biologicals are distributed without charge.

Diagnostic Laboratories. Nearly all states now have diagnostic laboratories. The first of these were established to combat com-

[1] 52 Stat. 1040.

municable diseases, but they are now used to guard against other diseases as well. They are an important factor in fighting tuberculosis, diphtheria, typhoid fever, pneumonia, rabies, syphilis, gonorrhea, malaria, and other diseases. When a specimen which has been sent by physicians or local boards of health is found positive, the laboratory hurries the information back to the person who sent in the specimen and to the local board of health, that suitable treatment may be given and adequate precaution be taken against spread of the disease. These laboratories also examine samples of water, milk, and other beverages and foods.

General Health and Sanitary Laws. The state health authorities share with the local authorities the administration of the general health and sanitary laws. Many states have pure food and drug laws which apply to intrastate commerce.[1] In some states the administration of health laws is chiefly in the hands of the local authorities save in case of a threatened epidemic or other great emergency. In a number of states, however, the state authorities are responsible for the organization of clinics and for various routine matters, particularly in the rural sections.

The state health authorities also guide the legislatures and local authorities by recommending suitable laws and ordinances in the interest of health – such as housing laws, which have a vital bearing on health. Experts from the department of health assist local authorities in meeting the legal requirements and solving problems which lie outside the legal requirements.

Health Education. Some states carry on an extensive program of health education. Much of this is done through the schools by requiring certain subjects to be taught, certain quarantines to be observed, certain examinations to be made, and other health routines to be followed. Many states offer a number of health services free to students who desire them and obtain their parents' consent to make use of them. Health education activities outside the school are numerous and varied. Hundreds of thousands of leaflets and pamphlets on child welfare, maternal welfare, diet, communicable disease, and other topics are sent out without cost. Lectures are given from the platform and over the radio. Health articles are prepared for newspapers, and in some states a health periodical is published.

[1] For the legal ruling on the point at which food shipped across state lines becomes subject to state health laws, see *Hygrade Provision Co. v. Sherman*, 266 U. S. 497 (1925).

Many kinds of clinics are set up for adults as well as for school and preschool children.

Vital Statistics and Special Hospitals. Some state governments are very active in gathering vital statistics and in requiring local governments and physicians to keep certain health records. A number of states have established hospitals for the treatment and study of tuberculosis, cancer, and other diseases.

Health in Industry. In Chapter XXXIII we saw that states have many laws to prevent occupational diseases and accidents. The requirement of devices to remove poisonous dusts and to protect workers from dangerous machinery, the compulsory provision of fire control apparatus, the prescription of standards of heat, light, ventilation, regulations for the use of compressed air and explosives, and special regulations governing child labor and the employment of women have reduced many industrial hazards.

LOCAL URBAN GOVERNMENTS AND HEALTH

A large part of the burden of public health falls squarely on the shoulders of the local authorities. If the local government is too stingy to provide funds or the local health officials are negligent, the whole public health program is likely to break down. Even those states which provide the greatest degree of centralized control find it difficult to carry out effective programs if the local authorities fail to coöperate. Many cities have a board of health; others have a single commissioner to direct public health activities.

Local urban authorities administer a great variety of health activities – with or without state control. They must provide an adequate supply of pure water, guard against impure food, see that wastes are disposed of without danger to health, carry out many housing regulations, and look after various sanitary matters.

Water and Food. A large proportion of cities and towns now own and operate their own water supply systems. Although the supplying of water is a business, governments usually give little attention to financial returns; they are likely to be satisfied if they can provide a plentiful supply of water at or about at cost. Where a private concern supplies water, local governments generally exercise close supervision. Many cities keep a close watch over food – especially milk and meat – to see that state laws and local ordinances are obeyed, but others are negligent in this matter.

Sewage. Larger cities remove sewage and other forms of waste,

but many of the smaller ones let each family dispose of its own wastes. There are two great dangers from waste. One is that a city may empty it into a body of water from which it or another city draws its supply of drinking water. The other is that the waste may drain from places where it has been emptied, or from outdoor toilets, into wells or other sources of water supply. The more progressive states and local governments carefully regulate the emptying of sewage into bodies of water to make sure that it does not contaminate sources of water supply. They are also doing away with outdoor toilets or carefully regulating their location. It is especially hard, however, to regulate the sections lying just outside the city limits. Since such regions are not subject to city ordinances, and county governments generally exercise less strict control, persons living just beyond the city limits may do unmolested many insanitary things which would not be tolerated on the other side of the city line. This condition is the more regrettable because the sections just outside the city may be nearly as congested as those within.

Contagious Disease and Other Health Menaces. The local health authorities are generally the first to receive reports of a contagious disease. It is their duty to place the sick and those in contact with the sick under quarantine, and to see that the quarantine is enforced. They must also be on the lookout for menaces to health and remove them as promptly as possible.

Health Measures in the Schools. Local health and educational authorities coöperate in carrying out health measures in the schools. An increasing number of clinics have been established in the schools. Many are for special examination of eyes, ears, and teeth, as well as for general physical examinations.

Health Centers. A large number of cities have set up health centers which operate clinics and furnish many other services connected with prenatal care, infant welfare, nutrition, tuberculosis, dental work, bedside nursing, and medical social service.

LOCAL RURAL GOVERNMENTS AND HEALTH

A Neglected Field. Rural health has been badly neglected by governments as well as by individuals and private associations. The per capita expenditure for rural public health is not more than one-sixth of the expenditure in cities; yet it costs as much or more per capita to provide a rural as an urban health program.

The reasons for the neglect of rural public health are many. The

need for public health measures is not so evident in country areas; we are inclined to take it for granted that a family in an isolated district can take care of its own health without danger to the rest of the community. Furthermore, rural people are more individualistic than urban dwellers; consequently they have not been so quick to request or accept community action in handling their problems. Again, because people live far apart in rural areas it has been harder to organize and administer community programs than in sections where people live closer together. Limited financial resources which have done so much to retard rural education have also retarded rural health measures.

Present Improvement. In many rural communities, however, public health work is improving rapidly. A large number of counties employ a full-time health officer. The rural public health nurse is recognized as one of the most valuable county officers. An increasing number of small towns which are unable to employ a full-time health officer are arranging that the county shall perform their public health duties in return for the towns' bearing part of the cost of the county health work.

Better transportation facilities are helping both public and private health work in rural communities. Competent physicians can more easily reach outlying districts, and rural folk can more easily go to clinics, hospitals, and other health agencies. Community buildings offer opportunities and demonstrations in the field of health.

MENTAL HEALTH

Awakening of Interest. Since the complexities and strains of modern industrial civilization are taxing the human mind more and more, governments are awakening to the need of more and better work in the field of mental health. Not many generations ago obstreperous mentally diseased persons were chained or put in a strait jacket and fed like ferocious animals. Those who were more docile received more kindly treatment, but little thought was given to improving the mental condition of the patients or making them more useful to society. Today mentally handicapped persons are treated as wards of society who must be helped as much as possible and made as happy as circumstances will permit. Some states now maintain fine hospitals for the mentally diseased. Others have hospitals capable of giving adequate care to a limited number of pa-

tients, but the institutions are so crowded that the care is wholly inadequate. Other states are very backward in providing for this class of unfortunates. Many cities have special classes for mentally deficient children. Some have child guidance clinics where abnormalities are diagnosed and made the basis of treatment.

Largely in Private Hands. Recent developments in the field of mental hygiene are still more largely in private hands, though public universities, teachers colleges, high schools, and some public clinics are giving training in mental health. The divisions of state departments of public health which deal with mental health and ill health often carry on considerable educational work for the purpose of acquainting the general public with their services and needs. Indirectly governments, through recreation, public relief, and other means of solving individual problems are contributing toward the mental health of citizens, but so far they have not made the fostering of mental health a major feature of their activities. The eugenic measures discussed in the treatment of the family have had a part in reducing the number of the mentally handicapped.[1]

POSSIBILITIES AND PROSPECTS OF FURTHER HEALTH PROGRESS

Islands of Neglect. Dr. Ray Lyman Wilbur, chairman of the Committee on the Costs of Medical Care, said:

> The evidence is conclusive that our people do not yet receive all the benefits that they could from modern medicine. For the rich and the near-rich there is no real problem, since they can command the very best that science has to offer. The indigent and the near-indigent are usually, although by no means universally, given a good grade of service by their local governments. Among the majority of the population, however, there are great islands of untreated or partially treated cases – patients who receive a larger or smaller part of the benefits of present-day skill, but who cannot partake fully of the feast before their eyes. Although it is a principle of far-reaching and, perhaps, of revolutionary significance, I think there are few who would deny that our ultimate objective should be to make these benefits available in full measure to all of the people. We reach in that direction today, but we still fall short.

Possibilities of Progress. There seems little doubt that we can not only provide adequate care for all classes of sick but that we can

[1] See pages 684–686.

prevent a large proportion of most types of sickness. We have been spending year in and year out about one dollar per capita annually for public health work. This is a pitiably small sum compared to the large amounts expended for things which are less valuable than health. We can afford much larger sums for public health work, and there is evidence that communities are ready to approve larger outlays in this field of activity. Increased sums for public health do not necessarily mean large additions to the present cost of health. Some – perhaps much – of the additional cost is likely to be drawn from the sums now being spent for health through private channels. The cost of non-governmental health service is approximately thirty dollars per capita annually. Greater economy in this field would free funds for public health. Better adjustments are beginning to be made in the non-governmental fields as group medicine makes its appearance.

There is now a wide difference between knowledge of the principles of health and health practices in both the public and private fields. Great progress will have been made when the practice is brought more nearly abreast of the knowledge which has been gathered in the various fields of health. Furthermore, valuable new discoveries are constantly being made in health matters, and such studies doubtless will continue indefinitely. The increasing interest in socialized medicine makes it probable that henceforth a greater proportion of people will receive adequate medical care and that new discoveries will more quickly be utilized by the general public. Society is learning how to turn scientific knowledge to the benefit of all the people.

THE NATIONAL GOVERNMENT AND RELIEF

Until the depression of the 1930's, the national government paid no attention to relief, except for several special classes of persons. During the World War it granted some money to the states for disease control. In 1920 it began to assist states in the rehabilitation of civilians. From 1921 to 1929 it aided maternity and infancy welfare work in those states which appropriated funds to supplement the federal funds. It had provided hospitals for veterans and had also promoted rehabilitation work in their behalf.

Advent of the Depression. With the advent of the depression a vigorous fight took place between the advocates and the opponents of the policy that the national government should come to the aid

of state and local governments in caring for their poor. President Hoover strongly urged that the national government keep out of direct relief lest the morale of great numbers of people be broken down and relief degenerate into a political racket – the relief money being used by grafting politicians as bait for votes. Financial assistance might be lent to various institutions, such as banks, railroads, and insurance companies, and public works might be increased; but the national government must not give away money. Assistance to institutions proved insufficient, and by 1932 some loans were being made to individuals.

Billions for Relief. When the Roosevelt administration came into power in 1933 the attitude of the government changed quickly. It began to spend billions for relief in various forms. It gave money to the states for emergency relief work. Much of this, in turn, was passed on to the local governments and spent under their direction. It also gave direct relief to many who were not working. Some state and local governments contributed to the support of private charitable agencies early in the depression, but the national government checked this by insisting that public funds should be spent under public supervision. Even the national government, however, dispensed some relief through the Red Cross.

Allocation of Funds. During the depression the allocation of national relief funds was left largely to the Administrator of Emergency Relief under the general direction of the President. The Social Security Act of 1935, however, specified definite sums for certain purposes.[1] Mention has already been made of the unemployment and old-age provisions of this act. It also provides funds for dependent children, maternity and child health services, crippled children, child welfare, the blind, public health services, and vocational rehabilitation. This relief is in the form of grants-in-aid to the states. Much of it is given on condition that the states contribute one-half or two-thirds of the total spent for a given purpose.

Restrictions. These various grants-in-aid to the states are hedged about with various restrictions in an effort to safeguard them from abuse. In regard to the plan for the aid of dependent children, the law declares:

[1] Various provisions of this act were challenged in the courts but were upheld by the Supreme Court. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937); *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937); *Helvering v. Davis*, 301 U. S. 619 (1937).

A State plan for aid to dependent children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the States; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting to any individual, whose claim with respect to aid to a dependent child is denied, an opportunity for a fair hearing before such State agency; (5) provide such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be necessary for the efficient operation of the plan; and (6) provide that the State agency will make such reports, in such form and containing such information, as the Board may from time to time require, and comply with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports.[1]

Federal Public Works. A large proportion of the federal relief money was spent by the federal government directly on various federal projects in which the state had no part. This work was undertaken to provide employment for the jobless rather than because of any urgent need of public improvements. The government preferred public work to direct relief for all employable persons, despite the greater cost of work relief.

Separating the Unemployed and the Unemployables. During the worst years of the depression, little distinction was made between the unemployed and the unemployables. In 1935, however, President Roosevelt announced that a distinction should be made. The national government would assume responsibility for the unemployed, and the state and local governments would take care of the unemployables. The government continued, however, through the Social Security Act, to help the states finance the relief of unemployables.

Agencies of Administration. The national government has created numerous agencies to administer its relief funds. The Federal Emergency Relief Administration existed from 1933 to 1937 and for several years outranked all relief agencies in the amount of funds expended. The Public Works Administration and the Civil Works

[1] Section 402 of Public Act No. 271, 74th Congress.

Administration were created in 1933. They differed chiefly in that the latter provided regular work at regular wages. Both, however, chose projects which called for large amounts of labor. The Civilian Conservation Corps, which is engaged in emergency conservation work, has existed since 1933 and provides work chiefly for young unmarried men on condition that they allot a portion of their pay to a dependent. The National Youth Administration was created in 1935 to initiate and administer a program primarily for youths in relief families. It tries to find employment in private industry for jobless youths between the ages of sixteen and twenty-five; it provides employment for youths at work-relief projects suited to their abilities and needs; it offers vocational guidance and training or retraining for youths without specific skill; and it extends part-time employment to needy college students and graduates, and to needy primary and high-school students unable to continue their education without aid.

The Works Progress Administration was created in 1935 and authorized to provide relief and relief work on useful projects. It maintains regional field representatives who give advice and instructions to state and district Works Progress Administration offices. The actual operation of the program rests with state and district Works Progress Administration offices, but alleged irregularities are investigated from the central office in Washington. In general, at least ninety-five per cent of the persons employed on projects must have been certified as in need of relief. Projects are originated by state and local public officials and are designed to give a wide variety of jobs. A recent report showed total projects so far selected by state administrators to be divided as follows: 12.3 per cent of the total cost was ordered expended on farm-to-market and other secondary roads; 25.1 per cent for other highways and streets; 11.0 per cent for public buildings; 11.2 per cent for parks and playgrounds; 4.9 per cent for flood control and other conservation work; 9.0 per cent for the construction of electric, water, and sewer systems; 2.6 per cent for sanitation and health projects; 3.0 per cent for airport and other transportation projects; 9.3 per cent for educational, professional, and clerical projects; 8.7 per cent for sewing, canning, and other goods projects; and 2.9 per cent for other miscellaneous projects. State Works Progress Administrators establish, according to occupations, hourly wage rates for persons employed on projects. No one under eighteen years of age, except certain persons under

the National Youth Administration, may be employed on a project. Nor may one be employed whose age or physical condition is such as to make the employment dangerous to his health or safety, or to the safety or health of others. Aliens illegally in the United States shall not be employed. In 1939 the Public Works Administration and the Works Progress Administration were transferred to the newly created Federal Works Agency.

The Veterans Administration, created in 1930, administers all laws relating to relief and other benefits provided by law for former members of the military and naval forces, and to the dependents of deceased veterans. Various other federal agencies, including the Children's Bureau, the Office of Education, and several agricultural bureaus, dispense one or more kinds of federal relief.

The federal government has combined its relief measures with its attempt to reduce surplus farm products overhanging the market. In 1939 it began to give away fifty cents' worth of surplus products for every dollar's worth of groceries purchased by persons who had exchanged their welfare checks for designated stamps. Stamps of one color were accepted at retail stores in exchange for all but a few staples, such as liquor and tobacco. Stamps of a second color were accepted in exchange for surplus commodities only. The government paid the retailers the face value of both kinds of stamps.

STATE GOVERNMENTS AND RELIEF

State governments provided relief much earlier than the national government. More than a century ago many states began to permit or require counties to establish poorhouses or poor farms for their needy. A little later many state institutions were set up to educate or care for the blind, deaf, feeble-minded, insane, and other defective classes, since it was recognized that a single county could not economically provide for the few defectives among its population. Some states, instead of establishing a state institution for a class of defectives, paid a private institution to take care of them or assisted the local governments in providing special care. We have seen that dependent children, also, have received special consideration at the hands of state governments.[1]

Mothers' Aid. Years ago when the father in a very poor family died the mother went to work and the children were taken to the

[1] Pages 690–693.

poorhouse or allowed to shift for themselves as best they could. Many states have come to believe that this traditional procedure is both cruel and inefficient. It is cruel because it separates the members of the family, who may wish to remain together. It is inefficient because the mother is the natural trainer of the child. Nature has given her an advantage over others in the rearing of her own children. To keep the family together most states now grant mothers' aid.

Mothers' aid – often spoken of as "mothers' pensions" – was begun in 1911. It spread so rapidly that by the time the Social Security Act of 1935 was passed all except two states had made provision for it. In many states it was required; but in states where the statute was not mandatory, many local governments neglected to provide such aid. Some state governments helped local governments bear the cost; others did not. The relief is given to mothers of children whose fathers have died, or have deserted them, or have been separated from them by divorce, or are unable to provide for them. It was designed to help mother and children together in the home. Many of the children in homes receiving mothers' aid are dependent. In some states, special boards have been created to administer mothers' aid; in others it is administered by poor relief boards or by the juvenile courts.

Old-Age Assistance. Shortly after the World War some states commenced to provide aid for aged persons in their homes. The number of states with old-age pension systems increased but slowly until the depression, when the number grew rapidly. Usually local governments were permitted, rather than required, to give this form of relief, and many had failed to make provision for it. By the time the Social Security Act was passed about half the states had old-age systems, and by 1938 every state had such a law. Only persons who are in need are eligible to receive aid. The minimum age of those receiving it is not less than sixty-five, nor more than seventy. Before the enactment of the Social Security Act, old-age assistance was a gift from the government – the recipient had made no contribution to build up a fund out of which he would be paid. The laws generally provide for the payment of a definite sum, which, under the influence of the Social Security Act, is seldom more than $40 a month.

State Administration. The states have continued to permit or require local governments to take care of their needy in poorhouses or poor farms, in their own homes, or elsewhere. Some states make

no attempt at state supervision of local poor relief; others have rather strict supervision. For carrying out their relief policies some states have a single state commissioner, others have a welfare board which administers all the welfare work of the state, and still others have separate boards for different forms of relief.

Private Relief. States have both aided and restricted private relief agencies. They have aided them by direct gifts and by according them freedom from taxation. They have restricted them by scrutinizing the attempt of any group to form a corporation with relief privileges. Some states also examine the accounts of private relief agencies.

THE LOCAL GOVERNMENT AND RELIEF

The Local Poorhouse or Poor Farm. The local government has always been the chief public relief agency in the United States. The colonists brought with them the ideas embodied in the English Poor Law. Conditions in this country, too, tended to magnify the importance of local government as an administrative agency. The towns and cities of New England, a few cities outside New England, the townships in some of the middle western states, and the counties in the South all established poorhouses or poor farms. Until recent years these institutions were a catch-all for all classes of the poor — dependent children, the needy aged, the feeble-minded, the blind, the sick, vagrants, and any others who were unable to make a living. In some cases people were in the poorhouse because they were too lazy to make a living. With the removal of various special groups, the inmates of the poorhouses are much alike. The field of usefulness for local public homes is narrowing to provision of medical and nursing care to chronically ill and destitute persons. It seems probable that almshouses will eventually be transformed into county and district hospitals; a few have already accomplished the change.[1] Delaware, a state with only three counties, has done away with all county poorhouses and transferred to a newly created State Welfare Home all persons who cannot be taken care of by other forms of local relief. In other states, too, some almshouses are being closed and former inmates either transferred to home relief or larger institutions.

Local almshouses are for the most part not well adapted for the tasks they are expected to perform. They have so few inmates that

[1] *Social Work Yearbook* (1937), p. 105.

proper treatment cannot be economically given. This is particularly true of medical care, for the cost of an adequate staff of doctors, nurses, and other personnel and of desirable equipment is very high per inmate. Most almshouses are deficient in equipment. This condition not only fails to provide comfort; it jeopardizes health and safety. Furthermore, many superintendents or keepers of the almshouses are political appointees; thus the inmates suffer from unfit personnel nearly or quite as much as from insufficient or defective equipment. In some states the problem is being met by the substitution of district almshouses supported by several counties, and of a trained, professionalized personnel for local political appointees. Unfortunately the states with the merit system for relief workers are still a minority.

Administration of Local Relief. In some states the local relief institutions are controlled separately, the superintendent or keeper of each being accountable to the county board or county commissioners. In other states a county welfare board — paid or unpaid — directs the relief work of the entire county. Sometimes the board supervises the institutions directly; in other places a superintendent is selected to supervise them under the general direction of the board.

Although the local government is still the most important factor in relief work, the tendency is toward more state help and control. The national government, too, by insisting on certain standards as the price of aid, is influencing the quality as well as the quantity of relief work.

QUESTIONS

1. What are the outstanding developments in the history of public health? In the development of public relief?
2. What health activities are carried on by the national government?
3. How does the state government carry out its public health program?
4. How are the counties organized for public health work? What types of work are they stressing?
5. What part do municipalities play in public health?
6. How does society control the mentally deficient?
7. Trace federal relief during the depression of 1929–1936.
8. Give an account of the part played by the state in the administration and supervision of public relief.
9. Report on mothers' aid or old-age assistance.
10. To what extent do you consider socialized medicine desirable?
11. Suggest a principle to guide in making the appropriate division be-

tween federal, state, and local fields of public health activity. Does the same principle hold for relief?

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CHAPTER XXXIX

Crime

Disrespect for Law. It is a disturbing fact that a spirit of lawlessness is widespread in the United States today. Even many law-abiding citizens often have little sense of "the majesty of the law." This attitude makes effective enforcement of the law almost impossible, for effective enforcement depends on a strong public sentiment for it. Where there is a lack of respect for the law, those whose incomes are increased by violations of it can readily put strong pressure on law-enforcing agencies to "ease up" – and they do. Under such circumstances gambling halls, vice resorts, and other illegal institutions operate nearly as freely as legitimate businesses.

It is unfortunate also that, in many communities, there is a rather general suspicion that the police are largely corrupt – letting the guilty escape on orders from "the higher-ups" and trying to save face by being excessively strict with offenders who do not have special protection. This attitude may not be justified, but it exists and it reduces coöperation between the public and the law-enforcing agencies. The widespread use of "third degree" methods has also hurt the reputation of the police. In fact, suspects and even proved criminals not infrequently receive a bigger share of public sympathy than the agencies which are meting out punishment.

Laxness of Enforcing Agencies. Proof abounds that in a large number of cities professional criminals are in league with corrupt politicians. The politician protects the criminals and is recompensed with funds gathered in lawless pursuits. Armed robbers, gangsters, and racketeers, as well as less dangerous criminals, pay for protection. A recent survey of some 750,000 crimes in more than 1,400 cities showed that in three-fourths of the cases the criminals were not even discovered, much less brought to justice. Even after a criminal is convicted, corruption frequently accompanies him to prison and obtains a parole or pardon for him long before there is any justification for his mingling with society again. Too often re-

lease from prison before the end of the term set by the court is obtained through political influence rather than good behavior.

Criminals Anticipate Leniency. The inertia of the public and the laxness of law enforcement have led those who have been willing to break the law to expect lenient treatment. Many criminals acted on this assumption and found it correct; accordingly they became bolder. Other persons joined the criminal ranks. Finally, organized gangs terrorized a number of cities. If they are to be eradicated, the full strength of our law-enforcing agencies – national, state, and local – will have to be marshaled against them; and these agencies must be backed by strong public opinion.

JURISDICTION AND ORGANIZATION OF LAW-ENFORCING AGENCIES

The National Government. The national government has authority to deal with crime only within the fields marked out by the Constitution. If diverse citizenship or a federal question such as abridging the privileges of citizens or depriving a person of life, liberty, or property without due process of law is involved, the federal courts may take cognizance of matters arising under state law; but with these exceptions the national government may deal only with crimes arising under national laws.

The national government from the very beginning made it a crime to do certain things, and broadened the list of crimes as the years passed. Smuggling, making false tax returns, counterfeiting, interfering with the mails, piracy, and illicit traffic in drugs, for example, have long been forbidden by national law, and punishment has been meted out to violators of the prohibitions dealing with these matters.

The office of Attorney-General and later the Department of Justice were established to prosecute criminals as well as to represent the government in civil cases. The Secret Service of the Treasury Department was created to protect the President and to investigate thefts of national property and violations of various national laws. The office of Chief Inspector of the Post Office Department was set up to deal with depredations upon the mails, forgery of money orders, the mailing of letters of extortion, tampering with the mails, and various other violations of the postal laws.

The national government early provided courts to try persons accused of violating national laws, and erected penitentiaries to confine those who might be sentenced. Until recently, however, it did not assume any responsibility for the prevention of crime or the de-

tection of criminals. When the national government did begin an active campaign to catch criminals who transported stolen automobiles and other stolen property across state lines, and to send to the penitentiary for income tax violations notorious gangsters who had violated state law with impunity, state enforcement was greatly strengthened. Again, when it passed a severe law against transporting kidnapped persons across state lines and threw its full strength into enforcing this law, kidnapping almost disappeared.

The Federal Bureau of Investigation in the Department of Justice now has general charge of the investigation of offenses against national laws, except counterfeiting, illicit traffic in narcotics, and some other matters. Its G-men in recent years have won nation-wide admiration because of their success in pursuing and capturing even the most desperate criminals. Its laboratory for the detection and prosecution of criminals is a model for those of the states. Physics and chemistry are used to discover any clue left by the offender and to locate him. The bureau has even set up a school in which state and local officers from various parts of the country may receive training in the latest methods for combating crime.

The Department of Justice is the nation's most important clearing house of identification and information. It publishes a list of crimes known to the police, and of persons who have been charged with crime. This information is made the basis of state and local, as well as federal, action. The correctional institutions of the national government include the reformatories and penitentiaries. A parole board of these members, appointed by the Attorney-General, has authority to grant and revoke paroles of federal prisoners. A pardon attorney considers and makes recommendations concerning applications of federal prisoners for executive clemency.

The State. The activity of the state in the field of crime is similar to that of the national government. It makes laws concerning matters over which it has jurisdiction. It authorizes local governments to set up machinery for catching criminals. It has established state police systems or traffic patrols which assist in apprehending criminals in addition to performing other duties. It also provides for the trial of suspects and for their treatment after conviction.

Since the state legislates on many more matters than the national government, it has to deal with a much larger number of criminals. Methods of dealing with crime vary greatly from state to state. Some states are still handling the problem much as they did a cen-

tury ago; others are using some of the most progressive measures. The states also vary greatly in their measures for the prevention of crime.

Local Activity. Local governments, although they make and enforce ordinances, are chiefly concerned with the enforcement of state laws and the prevention of their violation. For this purpose counties have sheriffs and deputy sheriffs; cities and towns have police; villages have constables. The sheriff is generally chosen by popular vote and is responsible to the people only, while the police are usually appointed and are responsible to the officer appointing them. Most counties have a jail or lockup in which to keep prisoners who are awaiting trial and those who are serving short sentences. Sometimes several counties keep one jail in common. In the eastern part of the country some counties maintain a penitentiary. Cities, towns, and some villages have jails, workhouses, or other places of detention.

Inferior personnel is one of the main weaknesses of local law enforcement agencies. Countless local governments choose police and sheriffs on the basis of politics or friendship, with little regard for fitness. Some cities give civil service protection to their officers, but many do not. In many cases, these local officials are not equipped for the work required of them. In the smaller cities and rural communities particularly, law enforcement officers receive little or no training in service. There are some exceptions, but local law enforcement officers generally are inferior to those of the national government and the states.

PROGRESSIVE PENOLOGY

Penology is becoming more scientific. It is trying to learn more about criminals and the effect of various kinds of treatment on various types of criminals. It is also attempting to define the legitimate objects of treatment and to apply such measures as will best achieve the desired objectives.

Personality of Criminals. The personality of criminals is now receiving much attention. Progressive penologists realize that criminals differ as widely as law-abiding people. Personality conditions the effect of any proposed treatment. Recognizing this, progressive students of criminology study the health, mentality, moral status, social status, family history, life history, and associates of criminals, since these and various other factors form a part of personality or

influence its development. Some states require a mental examination of persons charged with serious crimes. A number send convicted criminals to a clinic where psychologists, psychiatrists, sociologists, and other specialists have a voice in deciding the type of treatment to be applied.

Progressive prisons try to rebuild personality. They attempt to get inmates to see that society is not their enemy. They spend much time on education – both general and special. The general education is designed to broaden mental outlook; the special teaches some trade or profession in order that ex-prisoners may find it easier to secure work. Suitable work and recreation are provided. Physical conditions that need correction receive treatment.

Classification and Segregation.[1] The older unclassified prisons which housed all types of offenders – the first offender and the habitual criminal, the child and the adult, the feeble-minded and the intelligent, the tramp and the gangster – are disappearing, although there are still some states that have done little toward establishing special prisons for various classes of criminals. Classification and segregation enable each class to get the type of treatment it needs. They also remove the injustices and dangers that result from keeping young persons and first offenders in prison with habitual criminals. Since most prisoners do not try to escape, many prisons are now being built without the walls and bars that were characteristic of most large prisons in former times. On the other hand, each state needs at least one prison that affords the public maximum security against dangerous criminals who may attempt to escape. Penal farms are becoming more popular, especially as farm work is more agreeable and healthful during certain seasons than work in the average prison factory or workshop.

Probation. Sometimes the convict, instead of going to prison, is put on probation – that is, placed in charge of a probation officer. The probation officer reports to the court on the behavior of probationers. Young people and first offenders are the most likely to be put on probation. Three-fourths of the states, as well as the national government, have established probation systems. Many states direct local governments to set up a system, but give no further assistance. Other states supervise the local probation officers. This

[1] Segregation of the accused precedes conviction. There is a general tendency to extend the jurisdiction of juvenile courts as to both age and offense. See Alper, B. S., "Teen-Age Offenses and Offenders," *American Sociological Review*, vol. 4 (Apr., 1939), pp. 167–172.

is done sometimes through a director of probation, sometimes through a probation commission, and sometimes through the state department of public welfare. Where the local government has full responsibility, the effectiveness of the work varies greatly from city to city, or county to county, even within the same state. Where there is state supervision, more uniform results are secured, but even in this case the success of the system depends to a considerable extent on the integrity and efficiency of the state officials. In nearly all states the local probation officers are appointed locally.

Parole. The belief of prison officials that a prisoner is ready for parole is supposed to be the reason why the parole board permits a prisoner to spend the latter part of his term away from prison. Parole exists in nearly every state, but differs very widely between them.

There are three important functions connected with parole – the preparation, selection, and supervision of parolees. Each of these requires skilled, conscientious administration. Unfortunately, few states have insisted on either skill or conscientiousness in officials charged with the administration of paroles. Little or no specific preparation for parole is given the prospective parolee in many states. The determining factor in the selection of parolees is often the "pull" the prisoner has with politicians or his ability to employ a "parole attorney" to present his case.

In some states there is no supervision of the parolees. In others supervision is by correspondence only. In others it is the responsibility of local administrative officers or of a state parole board. At one extreme are those states which give little attention to their parole systems; at the other are those, including New York, New Jersey, Illinois, Minnesota, and California, that are trying to build efficient systems.

If the parole system could be made to operate effectively, it would be a great contribution toward the solution of the problem of crime. The following are some of the more important points included in the American Parole Association's *Declaration of Principles:*

1. Parole is not a reward for being a good prisoner. It is a period of supervision and readjustment from the extraordinary and artificial life of the institution to normal life in the community. Preparation for it should begin the moment the offender reaches the institution by giving specific instruction in regard to the offender's obligations and opportunities while on parole.

2. Recognizing that the life led by offenders in institutions affects

parole beneficially or harmfully, the American Parole Association endorses the *Declaration of Principles* of the American Prison Association.[1]

3. A careful study of the needs and personalities of individual offenders and the use of all available resources in such fields as medicine, education, religion, psychology and psychiatry, recreation, vocational training, and social work should be made to reeducate and rehabilitate. In the development of all parole plans, the prisoner must be an active agent. He should be frequently consulted about these plans.

4. In choosing the time most suitable for a prisoner's release upon parole, consideration should be given to the following questions: Has the institution accomplished all that it can for him? Is the offender's state of mind and attitude toward his own difficulties and problems such that further residence will be harmful or beneficial? Does a suitable environment await him on the outside?

5. Careful preparation of the environment into which the offender is to go is a prerequisite to release and an essential of competent supervision. This requires wholesome living conditions in the offender's own family or elsewhere, a neighborhood in which the prospects of successful readjustment are fair, and opportunities for either work or school, if needed.

6. The parole officer should be an active field agent. He should visit the parolee in his own home and should know his habits, who his associates are, under what conditions he is working, and how he spends his leisure time.

Pardon. The power to pardon exists to prevent injustice. A person may have received too severe a sentence, or it may be evident after a portion of a sentence has been served that the prisoner is ready to take his place in society. In practice, however, pardon is often used to defeat the ends of justice. Like parole, it is frequently granted to those who have strong political connections. Too often a confirmed criminal is released to prey on society while far more deserving persons remain in prison for want of friends to obtain their release. In many states the governor has sole power of pardon for those who have broken state law. In some states the governor may

[1] These principles, thirty-seven in number, include such progressive measures as non-political administrative officers, education, industrial training, religious instruction, gaining the good-will of prisoners, use of moral forces, progressive classification, and obtaining work for discharged prisoners.

not pardon without the consent of a board of pardons or a similar body. The pardon may be absolute or conditional.

CONTROLLING FACTORS WHICH PROMOTE CRIME

At the beginning of this chapter it was pointed out that the inertia of the public, the laxness of enforcing agencies, and the anticipation by criminals of lenient treatment foster an increase of crime. There are also many other factors which show a high positive correlation with crime. No doubt even a partial removal of these factors would result in a substantial decrease in antisocial activity.

Mental Defectiveness and Disease. A considerable proportion of criminals are feeble-minded or mentally diseased – so large a proportion, in fact, that we may be sure abnormal mentality is a significant contributory factor in crime. Whatever reduces mental abnormality will help to reduce crime. The eugenic measures in effect in some states, if used widely, will cut down the number of feeble-minded persons, as heredity is an important cause of feeble-mindedness. It is probable, too, that they would do something to decrease the number of the mentally diseased. Eugenic measures, by reducing the classes in which syphilis is common, would also do something to reduce mental deficiency, as much mental deficiency is due to this disease.

Harmful Influences. Broken homes, lack of religious and moral training, ignorance, residence in congested downtown districts of cities, unwholesome recreation, undesirable books and movies, intoxicating liquor, the use of habit-forming drugs, association with criminals, poverty, industrial conflict, easy means of obtaining dangerous weapons, and juvenile delinquency are all harmful influences in modern life. Fortunately there is no one of these causes of crime that the government cannot partially control either directly or indirectly. Many of them can be nearly or entirely wiped out by widespread, consistent, vigorous, and permanent action. The government is not helpless in the face of crime, as some would have us believe. If it persistently and intelligently attacks the causes of crime, and if it is supported by a wholesome public opinion, it is reasonable to suppose that in a comparatively short time our crime record will compare favorably with the records of other countries.

Prevention. The Society for the Prevention of Crime has issued a list of suggestions to remove the fundamental causes of crime and strengthen the powers of the police department and the courts in

apprehending criminals. These suggestions include, among others, the following recommendations:

1. The sale of firearms should be prohibited, except by and through some central agency in the nature of a licensing authority.

2. A five-sixths jury verdict should be permitted, except in capital cases.

3. There should be a substantial elimination of most of the present jury exemptions and a stricter enforcement of the law against interference with jury service.

4. Provision should be made for notification of the police when convicts are released from a state prison.

5. Provision should be made for placing on a defendant riding in an automobile the burden of overcoming the presumption of possession of firearms when they are found in the automobile.

6. The district attorney should be permitted to comment on the failure of a defendant to testify.

7. Interstate crime compacts which simplify extradition and provide for uniform extradition laws should be approved. Peace officers of one state should be permitted to pursue criminals in other states. Each state should accept warrants and other process for arrest from other states. Joint criminal bureaus of identification should be established. Provision should be made for interstate rendition of witnesses.

8. There should be coöperation between state and federal authorities on crime control. There should be coöperation by citizens in promptly reporting to police and prosecuting officials violations of criminal law, and protection should be provided them in doing this.

9. The district attorney's office should be removed from the realm of politics by making the office appointive instead of elective.

10. There should be coöperation by parents, civic organizations, churches, public and private schools and colleges, in a program which would provide instruction and recreation tending to prevent crime.

Children and Youth. Since a large proportion of our worst adult criminals were once juvenile delinquents, it is believed that the solution of child welfare and youth welfare problems would help to reduce crime. Accordingly, much attention is being given to the needs of children and youth. Although much of this effort is being put forth by private organizations, such as the Boy Scouts, Girl

Scouts, Big Brothers, Big Sisters, and other character-forming, good citizenship groups, the government is beginning to show considerable interest in crime prevention among the young. The Crime Prevention Bureau which New York City set up in its Police Department in 1930, the Crime Prevention Division of the Berkeley Police Department, and similar organizations show that enforcement officers have learned that it is better to prevent crime than to deal with offenders after a crime has been committed.[1] These prevention groups locate sources of juvenile delinquencies and remove them. They try to train younger people, particularly, in the principles of good citizenship. They also endeavor to lead groups of young people to wholesome recreation. They help those old enough to work to find jobs.

QUESTIONS

1. How can society secure greater psychic solidarity against lawbreakers?
2. Compare national, state, and local agencies of law enforcement.
3. Discuss police training and equipment.
4. Compare types of prisons and reformatories in the United States.
5. How can society strengthen probation and parole systems?
6. What are the causes of crime?
7. How is juvenile delinquency related to crime?
8. What are the social determinants of juvenile delinquency?
9. What is meant by the expression, "crime is contagious"?

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[1] Good accounts of the New York Crime Prevention Bureau and the Berkeley Crime Prevention Division are given in Glueck, S. and E., *Crime Prevention*, chs. 12–13. The philosophy and principles of crime prevention are discussed on pp. 1–22 of the same work.

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CHAPTER XL

Immigration and Assimilation

MANY voices are raised in the name of humanity to ask for kindlier treatment of aliens, and in the name of nationality to ask for wiser treatment of all immigrants. "The helpless 'alien' in their midst is shunned and subjected to social, economic, and political discrimination in most countries, and robbed, imprisoned, insulted, and abused in the totalitarian states." [1] Our treatment of naturalized citizens has been characterized chiefly by neglect which has wrecked the lives of many immigrants, intensified social and economic problems, and increased social pathology.

OUR NATIONAL IMMIGRATION POLICY

The framers of the Constitution, without giving much attention to the matter, laid the immigration problem squarely in the lap of the national government. The power over foreign commerce includes the carrying and regulation of people as well as goods. Even without this specific grant of power, the national government might control immigration through the exercise of its sovereign powers.[2] Since immigrants may move freely from state to state, national control of immigration is the desirable form.

Although the national government had complete power over immigration it was slow to use it. The Alien Act of 1798, requiring a fourteen years' residence for naturalization and allowing the President to expel from the country without the formality of a trial any alien he thought dangerous, was a political trick of the Federalists rather than an expression of immigration policy. Even the more systematic agitation of labor leaders and religious zealots about 1850 against the coming of large numbers of certain immigrant groups failed to make an impression on the free and easy attitude of Congress. Employers wanted laborers, landowners wanted buyers or

[1] Ostrolenk, B., *Annals* of the American Academy of Political and Social Science, vol. 103 (May, 1939), p. 194.

[2] *Chinese Exclusion Cases*, 130 U. S. 581 (1889).

tenants, the new states of the West wanted inhabitants; so the door was left wide open until after the Civil War to all who cared to enter. The national government did not, however, make a special effort to attract immigrants as some foreign governments have done.

Beginning of Restriction. During the latter half of the nineteenth century the immigration of individuals with certain physical, mental, or moral deficiencies was restricted along with that of anarchists, Chinese laborers, people who were likely to become public charges because of their poverty, and contract laborers. The Literacy Test Law of 1917 required that persons seeking entrance must be able to read some language. It was not until after the World War, however, that any attempt was made to limit the total number of immigrants.

Quota Laws. The quota laws of the post-war period represent a fundamental change of policy. They are an acknowledgment that we no longer consider ourselves capable of absorbing all the immigrants coming to our shores. The law of 1924, which replaced the law of 1921, divides foreign countries into three groups. The countries of the Western Hemisphere may send immigrants as freely as before. People of the Asiatic countries, at the other extreme, are excluded entirely, save for temporary residents such as students and merchants. Other countries are permitted a quota based on the number of people in the United States in 1920 who came from or traced their ancestry to each. Each quota country, however, is allowed a minimum of 100 immigrants. The total number of immigrants permitted from all quota countries is approximately 154,000.

The quota laws were promptly followed by a decided drop in the number of immigrants entering the country, and there is little doubt that these laws have reduced the total number of immigrants, although they led to markedly increased immigration from Canada and Mexico for some years. The law of 1921, which based quotas on the number of foreign-born people in the United States in 1910, had favored the countries of southern and eastern Europe. The law of 1924, by using the national origins principle, reverses this policy and gives the nations of northern and western Europe the largest quotas. Thus Great Britain and Ireland may send 83,574 and Germany 25,957 of the 154,000 persons allowed under the quota laws, leaving considerably less than one-third of the total quota for all the other quota countries combined.

Restriction of Mexicans and Quota for Japanese. There is a

rather widespread demand for two additional changes in our immigration laws. One is that Mexican immigration be reduced by means of a quota similar to that which applies to European countries. Advocates of the change point out that the Mexicans who have come to the United States in greatest numbers have been the peons. These have a very low standard of living. They have also flooded the labor market and consequently have forced wages down. Mexico, however, would keenly resent being singled out as the one country in the Western Hemisphere to which the quota laws were applied. Perhaps the international friction arising from the change would be more injurious to our national interests than the presence of considerable numbers of peons.

The other widespread demand is that we should allow the Japanese a quota. The Japanese are extremely sensitive about their exclusion from the United States, as they think it reflects on their character. So few persons in our population are of Japanese extraction that even if they were allowed a quota on the same basis as the European countries they would be able to send only about one hundred immigrants a year. The question has been asked whether it would not be wiser to admit this small number than to incur the continued hostility of Japan. The same is probably true of China and other Asiatic countries. Perhaps in no case would the quota of an Asiatic country exceed one hundred, which is the minimum allowed each quota country irrespective of the number of people it has sent to the United States.

Emigration. The problem of the foreign-born in the United States has been relieved considerably in recent years by the fact that emigration has exceeded immigration. Furthermore, the death rate of the foreign-born is high. These two facts have resulted in a smaller foreign-born population each year.

Resentment over Exclusion. One undesirable feature of our policy of exclusion has been the resentment it has aroused even in the countries with quotas. So long as we kept out only certain undesirable individuals, little complaint was heard, for it was generally recognized that a country has the right to protect itself against undesirables. When, however, we began to exclude simply to reduce numbers, people abroad and some at home began to question the justice of our policy. The resentment seems to be keenest in the thickly populated countries, such as Italy and Japan. In defense of our attitude it may be said that we owe it to ourselves, and perhaps

to the world as well, to protect our democratic institutions and our standard of living, even though this may mean less opportunity for others to share our blessings with us. It has been suggested also that birth control may prove a more effective means than immigration to relieve population pressure abroad.

"THE VANISHING ALIEN"

Our aliens have been decreasing so rapidly in recent years that we have begun to speak of them as a vanishing element in our population. In some years, for every new alien there is a decrease of ten or more. The decrease is due to death, departure,[1] naturalization, and derivative citizenship.[2]

One qualification of these figures must be made, however. They do not take into consideration the aliens who have entered illegally. There is no way of estimating with any degree of accuracy the number of such persons. Recent estimates by immigration authorities generally place it anywhere from 100,000 to several hundred thousand. Three elements which make it appear that there are not, as has sometimes been alleged, millions of aliens illegally in the United States are cited by Acting Commissioner Edward J. Shaughnessy: [3] (1) A law was passed in 1929 providing that any alien who had entered the United States prior to June 3, 1921, had continuously resided here since that time, and was a person of good character, but in whose case no record of admission for lawful residence could be found, might be given an immigration record of permanent admission as of the time he alleged he entered the United States prior to June 3, 1921. This law made it so easy for an alien illegally here to have a record of permanent admission created for him, thereby putting him in a position to proceed to citizenship with its advantages, that it would be reasonable to expect that a large proportion of such persons would take advantage of the law. In the seven years following the enactment of the law, however, only 65,581 aliens registered. (2) Approximately sixty-three per cent of the aliens who are apprehended in deportation proceedings have resided in the United States for a period of less than three years. This indicates

[1] During each of the four years, 1932–1935, more aliens left than entered the United States.

[2] Minors derive citizenship through the naturalization of their parents. Before 1922 wives derived citizenship through the naturalization of their husbands.

[3] Address before the National Council on Naturalization and Citizenship, April 2, 1937.

that a large proportion of aliens illegally here are apprehended within a short time after entry. (3) A bona fide alien seaman is given sixty days' landing privilege within which to reship foreign. Perhaps 250,000 aliens a year enter ports as seamen. Since comparatively few changes take place in alien crews, it seems certain that the proportion of seamen who desert is extremely small. Immigration authorities estimate that not more than five hundred seamen a year desert their ships and remain here. Alien seamen, therefore, do not swell to any great extent the number of aliens in our population.

Our alien population decreased in the decade 1920–1930 from 7,430,809 to 6,284,613, or fifteen per cent. The rate of decrease has been accelerated since then; immigration authorities estimate that the decrease has been about 3,000,000 during the period 1930–1939.

ADMINISTRATION OF IMMIGRATION

Visa Division of the Department of State. The laws relating to the admission, exclusion, and deportation of aliens are administered by the Immigration and Naturalization Service of the Department of Justice, although it is assisted abroad by the Department of State. Visas have been issued since 1924. They must be obtained abroad by the immigrant and are a guarantee that the quota of the immigrant's country has not been filled, so that if he passes the examinations at the port of entry he will not be excluded. In recent years preliminary examinations have been given abroad; these have greatly decreased rejections at the port of entry. The work of the Visa Division of the Department of State includes the interpretation of immigration laws and regulations for the guidance of consular officers, the maintenance of uniform examination standards at American consular offices, the determination of non-quota or preference status for certain alien relatives of American citizens, the granting of waivers of crew-list visas, and the issuance of diplomatic visas to foreign diplomatic and consular officers in the United States. Contact is maintained with congressional immigration committees and other government agencies in similar work.

Immigration and Naturalization Service. The Immigration and Naturalization Service, under the direction of a commissioner, maintains a considerable number of representatives at ports of entry to examine persons seeking residence here. It also maintains a border patrol to keep immigrants from entering illegally. Once in the

country the immigrant is largely free from regulation by the national government. Power of regulation for the most part then passes into the hands of the states. Attempts at regulation by the national government have been declared unconstitutional.[1]

Deportation. The national government has the power to deport aliens who have come to this country illegally and those it considers undesirable. In 1917 the Commissioner-General was given power to deport anarchists and some other objectionable persons. Certain types of radicals and those committing certain crimes have been ordered deported. During the hysteria of the post-war period hundreds of persons were hurriedly put on board ship and returned to Russia and other countries. Deportations are made by the immigration authorities rather than by the courts. Although an alien may appeal to the courts, in only a few cases have the courts stopped deportations. Since aliens are not citizens, they do not in all matters have as full legal protection as citizens.

New Authority Sought. The Immigration and Naturalization Service is urging that its authority be enlarged in two directions. On the one hand it desires power to deport many criminal aliens not now subject to deportation, and on the other hand it would like authority to permit aliens of good character who are here in technical violation of the law to remain, particularly when members of their families are American citizens and deportation would amount to making public charges of these dependent relatives until they are old enough to be self-sustaining.

In support of these proposed changes, the Service cites the following example, dealing with alien A and alien B. Alien A is a person who has been in the United States some fifteen years and has spent a great proportion of that time in jail or other penal institutions. However, he was not sentenced within five years after his entry to imprisonment for a year or more for a crime involving moral turpitude, nor has he during his fifteen-year period of residence been sentenced on more than one occasion to a period of one year or more for crimes involving moral turpitude. He is, nevertheless, a confirmed criminal, a social menace, and clearly should be deported. Yet because of the extreme technicalities of existing law concerning the expulsion of criminals he cannot be deported.

Alien B entered the United States in the latter part of 1929 as a non-immigrant international trader. As an international trader it

[1] *Keller and Ullman v. United States*, 213 U. S. 138 (1909).

was necessary for him to conduct a business involving a preponderance of international trade. But in the course of time the business developed in such a manner that he eventually found himself a domestic merchant. He therefore failed to maintain his status as a non-immigrant international trader and automatically became subject to deportation. He is a man of excellent character and in the years which have elapsed since his entry in 1929 he has acquired an American family dependent upon him.

Under the law, the Service must deport B and cannot deport A, although it is clear that B is a far more desirable person than A. If the changes the Service desires are made, aliens like B would be permitted to remain in this country on two conditions. In the first place, they must be found to be not deportable under laws relating to the deportation of the radical classes, criminals, and immoral classes. In the second place, they must either have lived in the United States continuously for not less than ten years or have lived here at least one year and have living in this country a near relative who was lawfully admitted or is a citizen.

In pressing for additional power to deport criminal aliens, the Service has in mind four particular classes: (1) Persons who have been convicted of violating state narcotic laws, provided that they are not merely addicts. The law now permits only persons who are convicted under the national narcotic laws to be deported. (2) Those aliens who, after the passage of the proposed act, are convicted in the United States and imprisoned, within five years of the institution of deportation proceedings against them. At present the Service can deport only alien criminals who have been convicted within five years after entry of a crime involving moral turpitude and sentenced to a year or more, or who, without regard to length of residence, have on more than one occasion been so convicted and sentenced. (3) Smugglers of aliens. (4) Aliens convicted of the crime of possessing or carrying concealed or dangerous weapons. This change would permit the deportation of many alien racketeers and gangsters. It is estimated that there are now in this country some 20,000 alien habitual criminals who should be deported.

ASSIMILATION

Very little government activity to Americanize or assimilate adult immigrants was carried on prior to the World War. The school was expected to coöperate with private institutions in aiding the

community to assimilate the children of foreign-born parents. The assimilation of adults was left almost wholly to the private organizations and individual contacts. Many racial groups had their own organizations which helped the newcomers to become better acquainted with conditions in this country. The press, the library, the churches, recreational agencies, and other institutions were the chief means by which aliens who were so inclined became more fully a part of American life.

During the World War the country became excited about "hyphenated Americans" – aliens and naturalized citizens who were ignorant of or disloyal to American institutions. A loud demand was made that they should be integrated more fully into American life. Classes for the foreign-born were organized, and propaganda agencies of many kinds set to work. Patriotic and near-patriotic organizations took the lead in demanding that "un-American" activities cease. The foreign-born were told how fine democracy – especially our American brand – was. When this teaching was supplemented at the close of the war by deportations of certain alien radicals, considerable fear was aroused among the foreign-born. This first phase of our assimilation work made both immigrants and excitable native-born citizens uncomfortable. The results were meager compared to the noise and bustle connected with the movement.

Changing Emphasis. As the excitement and hysteria of the war and post-war periods subsided, the assimilation movement became quieter and more effective. Greater care was taken to understand the immigrant's culture and use our knowledge of it to get him to modify it sufficiently to fit into our own. National, state, and local leaders have been affected by the change of emphasis. The results of our attempts at assimilation, however, still leave much to be desired. The Lower East Side of New York City, for example, which has long been the center of very active assimilation efforts, is nevertheless dominated by a sense of isolation from American life and by a strong factional feeling.[1]

Role of the National Government. The national government, which has the sole authority over the admission, exclusion, and deportation of immigrants, has played a very minor role in their assimilation. It has set certain standards for naturalization, but these, as formerly interpreted by the courts, were extremely low. The only

[1] Beer, E. S., "The Americanization of Manhattan's Lower East Side," *Social Forces*, vol. 15 (Mar., 1937), p. 414.

educational requirements specifically set up by the naturalization law are that the alien applicant shall be able to speak English, and that he sign the petition for naturalization in his own handwriting. The applicant is required, however, to show that during the period of at least five years immediately preceding his petition for citizenship he has been attached to the principles of the Constitution of the United States, and he must take an oath to support and defend it. Most courts have taken the position that the requirements concerning the Constitution presuppose some knowledge of that document; hence they have required the candidate for citizenship to answer questions on it. Until recently the examinations were largely perfunctory and of a routine nature. The questions were standardized and the candidate often memorized answers without the slightest idea of their meaning. In many cases, if the order of the questions was reversed the candidate would give answers which had no relation to the questions. The quality of the examination depended on the pleasure of the presiding judge. Inasmuch as the national government set up no schools to train aliens in American citizenship, and since most state and local governments had very meager or no facilities for training them, the courts in general were inclined to be lenient with candidates for naturalization.

Awakening Interest and the Citizenship Program. In recent years a strong demand has arisen for something better. The Immigration and Naturalization Service has adopted a citizenship program more in keeping with the spirit of the naturalization law than earlier practice had been. The program is dependent chiefly on the state and local governments for its execution; yet the influence of the Service on these agents has been considerable. The program lays stress upon good moral character and the applicant's attitude toward his home, family, neighbors, and community, the agencies of government, and the public welfare, rather than upon mere technical knowledge of detailed facts concerning government. It also provides for instruction in the basic principles of the Constitution and government of the United States which affords a guide to the nature of the questioning to be expected from the examiners. In support of the program, the Service has had prepared a *Textbook on Citizenship Training* which it distributes without charge to declarants or petitioners for naturalization. This work deals with our language, community life, history, and government and discusses such basic principles as the American interpretation of freedom and equality,

the supremacy of law, democratic government, the Constitution as a living document, the Constitution as a charter of human rights, government protection of the individual, and the source and beneficiaries of government.

Some Problems. Some of the most important and persistent practical problems arising out of the citizenship program, as reported by the Immigration and Naturalization Service, are: (1) the difficulty experienced by teachers in obtaining appropriate materials; (2) the lack of sustained interest in class attendance; (3) the consideration to be given to students beyond middle age who have special difficulties; (4) the attitude of naturalization courts in granting citizenship to aliens who have failed to attend citizenship classes; (5) the respective functions of the educator and the naturalization examiner; (6) the variation in standards as represented by the naturalization examiner's test and the educator's ideal; (7) the advisability of accepting public-school certificates as evidence of educational qualifications; and (8) appropriate ceremonies for dignifying citizenship.

The Service is aiding in the solution of these problems. In furtherance of alien education it makes available to state and local authorities assisting in its citizenship program the names and addresses of applicants for naturalization as soon as they have filed their declarations of intention or petitions for naturalization in the courts. The law provides that these names may be provided for educational purposes, but they must be carefully safeguarded to prevent their being released for commercial or other unauthorized uses. Some citizenship teachers have adopted the practice of calling personally upon the applicants and enrolling them in their classes. Other communities have persons who are regularly employed by the educational system to make these contacts. Written invitations are used in some places. It is especially important that the declarant, the alien who still has two years and ninety days before he can appear in court, should be enrolled and receive the benefit of the citizenship class over that period.

Accomplishments. The Service reports the following actual or potential accomplishments of the citizenship program: (1) A definite program containing sound and important objectives has been adopted in the field of education of the foreign-born for citizenship. (2) This program will permit greater uniformity and fairness in the type of educational examinations of applicants for naturalization, all naturalization examiners being governed by the same general in-

structions. (3) There has been splendid coöperation with the Immigration and Naturalization Service on the part of educators and school systems, the courts, the social service groups, and other agencies interested in the better preparation of applicants for naturalization. This is being reflected in higher standards of citizenship participation. (4) The close association of the various groups which are fundamentally concerned with this type of education and the frank exchange of viewpoint and helpful criticism give high promise of even greater progress for the future.

State Activity. Some states require local governments to set up adult classes for aliens. Some permit cities to employ visiting teachers who go into the homes of the foreign-born and either assist the members of the family there or invite them to Americanization classes. The Home Teaching Law of California provides:

> Boards of school trustees, or city boards of education of any school district may employ teachers to be known as "home teachers" not exceeding one such teacher for every five hundred units of average daily attendance in the elementary or high schools of the district as shown by the report of the county superintendent of schools for the next preceding school year.
>
> It shall be the duty of the home teacher to work in the homes of the pupils, instructing children and adults in matters relating to school attendance and preparation therefor; also in sanitation, in the English language, in household duties, such as purchase, preparation, and use of food and clothing, and in the fundamental principles of the American system of government and the rights and duties of citizenship.[1]

The California law also provides classes in English for adults who need such instruction, and classes in both citizenship and English for persons eighteen to twenty-one years of age. Boards of education may establish such schools voluntarily. If they fail to do so, special classes in English must be established upon application of twenty or more persons above the age of twenty-one, residing in a high school district, who cannot speak, read, or write the English language to a degree of proficiency equal to that required for the completion of the sixth grade of the elementary schools of the state. Special evening classes in citizenship must be maintained in each high school district in which there are living, within a radius of

[1] California School Code, sections 3.530 and 3.531.

three miles of any high school, twenty or more persons over eighteen and under twenty-one years of age who expect to remain in the district for a period of two or more months, who are not in attendance for at least four sixty-minute hours per week upon regular full-time public or private day schools or suitable part-time classes.

California also requires each county clerk to furnish to the superintendent of schools each month the names and addresses of all persons filing their declaration of intention to become citizens of the United States or their petitions for naturalization. The declarants and petitioners are assisted in acquiring information and attitudes looking toward a satisfactory fulfilment of the duties of citizenship.

Most of the states have left the local governments to bear the cost of the classes and home work for aliens. Some, however, assume at least half the cost of this education. The Massachusetts Adult Alien Law says:

> The department [of Education], with the coöperation of any town applying therefor, may provide for such instruction in the use of English for adults unable to speak, read or write the same, and in the fundamental principles of government and other subjects adapted to fit for American citizenship as shall jointly be approved by the local school committee and the department. Schools and classes established therefor may be held in public school buildings, in industrial establishments or in such other places as may be approved in like manner. Teachers and supervisors employed therein by a town shall be chosen and their compensation fixed by the school committee, subject to the approval of the department.
>
> At the expiration of each school year, and on approval by the department, the commonwealth shall pay to every town providing such instruction in conjunction with the department, one half the amount expended for supervision and instruction by such town for said year.

Nebraska tried to hasten assimilation by forbidding the teaching of a foreign language to children who had not passed the eighth grade, but this law was declared unconstitutional by the Supreme Court.[1]

Some state governments have developed rather active state programs of Americanization in their effort to assimilate the foreign-born. New York, Massachusetts, California, Illinois, Connecticut,

[1] *R. T. Meyer v. Nebraska*, 262 U. S. 390 (1922).

Oregon, Delaware, and a few other states have been carrying on progressive work in this field. The more active states employ a full-time director of adult alien education and assistants who are in constant touch with the various local communities where considerable numbers of foreign-born people live, arousing interest and advising progressive methods of reaching and assimilating them. Pamphlets and leaflets are prepared and distributed. The directors spend considerable time speaking at various types of meetings in the effort to bridge the gap which in varying degrees separates the native-born from those who have come to us from foreign lands. Some states have prepared readers, civics texts, outlines, guide books, teachers' manuals, and other materials for use in adult schools.

While the states are trying to win the good will of aliens with assimilation activities, they are doing something to alienate them by restrictions on employment. All states have laws which exclude aliens from some occupations; some states exclude them from more than a score. Many states do not permit them to be public school teachers, doctors, pharmacists, lawyers, architects, or public employees.

Local Governments. Although the national government and some state governments have played an important part in assimilation, the chief government activity in this field has centered in the local community and been conducted by the local authorities. All the large cities and many small ones maintain classes for adult aliens. Perhaps the most important factor in assimilation is the class teacher. Often the feeling of friendliness which develops between the teacher and members of the class seems to be the gateway through which the immigrant enters more fully into an appreciation of American ideals and achieves an eagerness to participate in community life. On the basis of this friendship and such interest as the teacher and other persons are able to arouse, community loyalties are developed and information concerning the country's language, history, government, and other institutions is given. The task is usually difficult because the background and abilities of the members of the class differ widely, and the quality of the work done in the classes and the results achieved differ greatly from city to city and class to class.

QUESTIONS

1. Defend or condemn uncontrolled immigration.
2. What are the present restrictions on immigration?
3. Compare various immigrant groups and their contributions to American life.
4. Is the deportation of aliens unfair to the countries to which they are deported?
5. Give an account of the Immigration and Naturalization Service.
6. What is the status of minority people in the United States?
7. What various types of activities are included in Americanization work?
8. Suggest means of achieving a better integration of the cultures of various immigrant groups.

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CHAPTER XLI

Civic Planning[1]

NEED OF PLANNING

Variety of Civic Elements to Be Considered in Comprehensive Planning. In modern society there is a vast variety of civic elements which must be coördinated and made to function harmoniously if the public welfare is to be served. The achievement of this adjustment is the purpose of civic planning. Even a single large city includes a bewildering variety of elements. Civic planning must consider not only the topography, location, climate, soil, environs, social and economic life, history, and probable future development of a city, but also the many types of life that are found within it. The city includes many kinds of business houses – factories, the warehouses of wholesalers, the shops of retailers and tradespeople, the offices of bankers and professional men. It includes various types of residences – the modest dwellings of the poor, the more pretentious homes of the rich, and apartments great and small. It also has various cultural and recreational institutions – schools, churches, youth organizations, charities, health centers, libraries, museums, theaters, moving picture houses, broadcasting studios, parks and playgrounds. It includes an increasing number of public utilities and several government buildings. Effective planning must deal with all these and regulate the activities associated with them in such a way as to enrich civic life.

Bad Results of Laissez Faire. Under our policy of *laissez faire,* individuals and business concerns once did as they pleased with their own property, whether their neighbors liked it or not, and whether the civic results were good or bad. For example, a man might build a residence on a vacant lot in a clean, quiet section of the city. Before long someone might erect on one side a tall factory

[1] For a fuller discussion of the legal aspects of civic planning see Young, J. S., "City Planning and Restrictions on the Use of Property," *Minnesota Law Review,* vol. 9, pp. 518–541, 593–637.

that would pour smoke over his house all day and rob him of most of the sunlight; while on the other side a livery stable in earlier years or a garage or machine shop in more recent times might be put up and prove as objectionable as the factory. When the owner decided to move, he was likely to find that others were as reluctant to come into the neighborhood as he was anxious to get away from it. Consequently he had to sell his house for much less than it cost him. Countless districts have been ruined for residential purposes by the intrusion of factories, livery stables, lumber yards, junk piles, and other unwelcome elements. Health has been endangered, comfort and tranquillity have been destroyed, and property values have been lowered.

Less often, residences have encroached upon business districts, and factories have been unable to obtain needed public improvements such as adequate sidings, terminals, streets, and sewage systems capable of carrying off industrial wastes. Storehouses or branch factories must then be located at a distance. Under such conditions residents try to make the district fit their needs while business concerns attempt to adapt it to the requirements of the various industries that center in it. As a result the district is satisfactory for neither industry nor residence. Moreover, there is constant friction which makes it impossible to adjust the interests of each side to those of the other.

Failure of Early Methods of Regulation. Before the days of civic planning there was no effective method of curbing the selfish person who was willing to destroy the happiness and values of a neighborhood to serve his own ends. Public opinion, restrictions in deeds, control by large real estate concerns, uncorrelated official activity, and condemnation under the power of eminent domain had been used, but without great success.

Public opinion is unable to control undesirable elements in a city because it cannot penalize the offenders. The factory owner sells to customers at a distance and may hire employees from the other side of the city. The junk dealer gathers junk from all parts of the city and sells to a distant merchant. Both may feel that they can afford to be indifferent to the opinion they create in the district about the factory or junk pile since it does not affect sales.

Some benefits have been obtained by restrictions in deeds, especially when residential districts are in the developmental stage, but only meager results have been secured by this method after such

districts have been built up. The reason for this is not far to seek. Private owners are seldom able to agree on restrictions after buildings are once erected. Benefits by agreement usually run for a limited term, say fifteen to twenty-five years. Even though a majority of the lots during this period have been built upon according to agreement, some lots are likely to remain vacant — especially corner lots. When restrictions lapse, apartment houses or even more undesirable types of buildings may be erected, thus making the district far less attractive as a residence area. Or properties may be allowed, as the restrictions expire, to deteriorate until they are valueless; the land may then be used without great loss for apartment and business houses. Occasionally, to prevent restrictive agreements from being broken, neighbors take their cases to court. Such controversies and lawsuits are costly and disturb good feeling.

Even perpetual restrictions have proved troublesome. Some students of the subject believe they are less effective than restrictions for fixed terms, since courts may hold that they have lapsed on account of a change in the neighborhood. Restrictions in deeds have not been used to regulate the building of skyscrapers, to check the invasion of industry in the business section, or to stabilize large land areas well adapted to different uses. In spite of their defects, contract restrictions have been of great service to cities as a supplement to other forms of control. They are still useful, but are ineffective for long-time protection to carry out a comprehensive plan since they cannot be adjusted readily enough to meet promptly the changing needs of a city.

Control by a large proprietor or a real estate concern may be effective provided the title remains in the hands of the original owner. A single proprietor, however, seldom owns a large enough section of a built-up part of a city to control an entire neighborhood, and real estate concerns rarely keep the title to a whole neighborhood of dwellings in their hands indefinitely. They build houses with the expectation of selling them quickly at a profit.

Uncorrelated official activities have seldom resulted in a well-rounded program. Sometimes large powers have been given officers, boards, or departments to fix fire limits, to require safety provisions, and to prevent offensive uses of buildings or segregate buildings of a nuisance or near-nuisance type to certain localities. If, however, these officers are not rather closely guided and regulated by law they may use poor judgment and their acts may result

in favoritism or gross discrimination. This method has failed to accomplish thoroughgoing results.

The cost in time and in money of assessing benefits and damages when property is taken makes exercise of the right of eminent domain an unsatisfactory solution of the problem of curbing private selfishness unless it is supplemented by other means. It has often led to obstructive methods, specious claims, and endless litigation. Every city is either growing or changing in other ways. If it were zoned by exercise of the right of eminent domain it would be fixed in such a rigid mold that it could not meet changing conditions satisfactorily. The individuals who most need the protection of government restrictions are frequently those most reluctant to demand the use of eminent domain.

City Planning Needed. The method that comes nearest to safeguarding a city's development and to achieving conditions which benefit the inhabitants as a whole is city planning. Yet city planning has never taken hold of the imagination of citizens in the way that proposals for a new system of water works, a street railway system, or a park have done. It has been more popular with experts than with public opinion. Yet in the long run, the public would gain more than special groups through adequate planning. The same is doubtless true of state, regional, and national planning, although these larger forms of planning are even newer than city planning and we know less about them.

HISTORY OF CIVIC PLANNING

City Planning. Although most city planning in the United States has been done since the closing years of the nineteenth century, city planning dates from very early times. Babylon, Nineveh, Rhodes, Cyrene, Alexandria, Athens, Rome, and other ancient cities were partially planned. City planning languished during the Dark Ages; indeed, conditions were worse then than in earlier times. Most of the medieval cities were very deficient from the viewpoint of health, comfort, convenience, and beauty, but the commercial cities of Italy and the Hanseatic region benefited from definite plans in the fifteenth century. The revival of learning during the sixteenth and seventeenth centuries renewed interest in planning, and some improvements were made.

London, after the great fire of 1666, was partially planned; the objections of landowners prevented the adoption of a thoroughgoing

plan. In this country, Philadelphia and Washington were the best examples of early planning. Washington was planned by Pierre Charles L'Enfant, who was favored by the fact that he was developing a new city in a wilderness rather than attempting to revamp a city which had already been built.

About 1870 the city planning movement began to make definite headway in Europe. Paris, Vienna, and other cities achieved great improvements. The movement spread to South America, with the result that some of the Latin-American cities are very beautiful. In 1891 Pennsylvania passed a general planning act, but the United States was slower than many countries in adopting city planning. It was not until 1907 that the first city planning commission was set up – in Hartford. We have, however, been making very rapid progress recently. In the period since the World War, city planning has become an important profession. At first the movement was chiefly concerned with beautification – with the provision of broad boulevards, more trees, prettier parks, lovelier shrubbery, and more imposing public buildings. The Chicago plan was a striking attempt at beautification. While city planning still strives to achieve greater beauty, it is giving more and more attention to the everyday life of the people – to developing conditions that will mean more comfort in the home, more efficiency in business, and greater health, safety, and enjoyment everywhere.

In January, 1937, there were 1,073 town or city planning boards in the United States. Of these, 933 were official and 84 unofficial; the status of 56 others was not revealed by the survey. In addition there were 128 zoning boards and 515 cities without planning or zoning boards which have adopted some kind of zoning ordinance. This makes the total number of cities with a record of planning or zoning progress 1,716. There were 506 metropolitan and county planning agencies. Of these, 316 were official and 171 unofficial; the character of 6 was not stated, and the sole function of 13 was zoning.[1]

Metropolitan planning, formerly spoken of as regional planning, had its origin in the period immediately following the World War; thus it is much younger than city planning. State, interstate regional, and national planning are of very recent growth – mostly since 1933. In a sense they are children of the depression; yet they give evidence of permanent vitality.

State Planning. State planning for the most part was established

[1] National Resources Committee, *Circular X*, p. 4.

at the suggestion of the National Planning Board and with financial assistance and professional guidance from the national government. Forty-six states now have state planning boards. The activity of the boards varies greatly from state to state. Public works programs, land planning, transportation, housing, population studies, recreation, the conservation of natural resources, the distribution of industry, water resources, fiscal programing, and governmental reorganization are some of the matters to which they give attention.[1]

Regional Planning. Certain great regions are beginning to be conscious of their community of interests. Some of these are organizing regional planning bodies to make and carry out regional plans. Some are distinctly creatures of the national government, such as the Tennessee Valley Authority. Others, such as the Ohio Valley Regional Planning Commission, the Pacific Northwest Regional Planning Commission, and the New England Regional Planning Commission, are local organizations.

National Planning. The national attempt to plan comprehensively was begun in 1933 when the National Planning Board was appointed by the Administrator of Public Works. The function of the board was to advise and assist the Administrator in the preparation of the comprehensive program of public works required by the National Industrial Recovery Act.

The board began to work along three lines: it advised the Administrator of Public Works on the progress and program of public works; it stimulated state, city, and regional planning; it coördinated federal planning activities and began a research program on the nature of planning – particularly the planning of public works. It tried to stimulate long-range as well as temporary planning of public works. Direct assistance was given to state and interstate planning boards.

The name of the National Planning Board was changed in 1934 to National Resources Board and a year later to National Resources Committee. In 1939 this committee and the Federal Employment Stabilization Office were transferred to the Executive Office of the President and consolidated to form the National Resources Planning Board.

The National Resources Planning Board of five members appointed by the President and working under his direction and su-

[1] For a fuller report on state planning see *Circular X* of the National Resources Committee.

pervision is chiefly an advisory body. Unlike the earlier committee, its members receive compensation – $50 a day for time actually spent on the work of the board. It gathers data concerning mineral, land, water, and other natural resources and transmits them with recommendations to the President. It also consults and coöperates with various national, state, and local agencies. Technical consultants have been appointed by the committee to advise and assist state and regional agencies in collecting and analyzing data and in formulating plans for state and regional development. While the committee has given much time to larger geographical units, it has also been making studies to determine the role of the urban community in the national economy. It is trying to isolate the problems of urbanism and to formulate policies and programs to aid in metropolitan planning.[1]

METHODS OF OBTAINING PUBLIC PROPERTY

Much of the property most vitally connected with civic planning is public property. Only by government ownership of such property can certain public interests be properly taken care of. The city or other local government gets property for public purposes by dedication, prescription, purchase or agreement, and exercise of the right of eminent domain.

Dedication. Dedication is the giving of land for public purposes. Acquisition of lands by dedication is employed mostly when promoters of land sales in a new subdivision give lands to the public, especially for streets. Land obtained by dedication may be used for public streets, public buildings, markets, sewers, parks, squares, and commons. The essential feature of dedication is that it shall be for the use of the public at large. Dedications are of two kinds – statutory and common law. The first must be express, but a common law dedication may be either express or implied. The intent of the owner is the essential element of a dedication and must be manifested by his acts and declarations. Generally speaking, acceptance on the part of the public is necessary to complete dedication.

Prescription. Rights in land for a public use may be acquired by prescription – that is, by public use for so long a period that rights

[1] For a fuller account of national planning see *National Resources Board* (a report of that board dated December, 1934) and National Planning Board, *Final Report, 1933–1934.*

pass to the public. The use must be continuous and have the acquiescence of the owner.

Agreement or Purchase. In the older sections of a city the chief method of acquiring property is by agreement or purchase. The purchase is often made in the open market. By this method the regular rules of contract are followed. Frequently private owners demand exorbitant prices. In this event the city offers prices fixed by its own experts. If the offer is declined, resort is had to condemnation under eminent domain. Even under eminent domain the cost of the property is often much greater than circumstances justify, because of the disposition of officials to be generous with the public's money.

Eminent Domain. All cities in the United States have been delegated power to take private property for public purposes provided fair compensation is made. There are definite proceedings for condemning and taking property under the right of eminent domain in the United States: (1) Notice of the city's intention to take private property must be given the owner. (2) A public hearing must be held to give opportunity for protesting. (3) A plan and notice of takings must be filed in a place provided by law. (4) The former owner must have opportunity to enter suit for damages if he so desires. (5) Experts give testimony in case of controversy, and amounts allowed depend upon the judgment of the court.

Other local units of government, such as the county, township, town, and village, may also obtain possession of property for public purposes. They, too, have been delegated varying powers by the states. In giving local governments the power to acquire property, the states have not deprived themselves of that power; they acquire property by the same means themselves.[1] The national government sometimes has run into constitutional difficulties in trying to acquire property for certain public purposes.

CONTROL AND PROTECTION OF PUBLIC PROPERTY

Private Restrictions Protecting Public Property. Real estate salesmen who are developing a new section sometimes interpose obstacles to city planning. Considerable coöperation, however, is being secured from them at the present time because they realize the pecuniary advantages that come from comprehensive planning. The

[1] *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937).

real estate operator, usually acting in his own interest for profits, frequently places restrictions upon the purchaser in the deed of conveyance. These operate as protections to public as well as private property. They usually relate to businesses classified as nuisances, or are regulations concerning barns and garages, fences, walls, or setbacks. Sometimes they require approval of plans and specifications of buildings, and of locations and grading plans, by the real estate company. Such restrictions often run for twenty-five years. They are haphazard, spasmodic, difficult to enforce, and often unintelligent. They cannot protect the new development from smoke, noise, or other nuisances from surrounding neighborhoods. In a word, they cannot be depended upon to carry out a comprehensive city plan.

Advertising on Public Property. The fee of streets, parks, and public buildings is owned by the government; consequently the government has power to protect them against disfigurement and improper use, and can regulate as well as prevent all forms of advertising. Since a park is "a piece of ground enclosed for purposes of pleasure, exercise, amusement or ornament,"[1] a park commissioner whose statutory duty it is "to maintain the beauty and utility of all such parks, squares, and public places as are situated within his jurisdiction" has no authority to allow advertisements on a park fence, because this amounts to perversion of the property of the park.[2] It has been held that a city has no power to grant a right to exhibit advertisements upon a fence enclosing a public building.[3] City authorities will not be restrained from tearing down billboards or signs on sheds erected over sidewalks.[4]

Outdoor advertising may be on public property or be so located on private property as to be visible from the public property. Advertising on public property is relatively easy to control. It is usually found on the stations and vehicles of transportation companies. If the government owns the fee of the streets used by these companies, public control is complete for two reasons: (1) the franchise to engage in the business of public transportation does not include the right to sell advertising space; (2) no corporation or other person may advertise on public property without public permission. Advertising on private property that impairs public prop-

[1] *Perrin v. New York Central R. R. Co.*, 36 N. Y. 120 (1867).
[2] *Thompkins v. Pallas*, 47 Misc. 309, 95 N. Y. S. 875 (1905).
[3] *MacNamara v. Willcox*, 73 App. Div. 451, 77 N. Y. S. 294 (1902).
[4] *Sullivan Advertising Co. v. New York*, 61 Misc. 425, 113 N. Y. S. 893 (1908).

erty is more difficult to control. It is not feasible to use either the police power or the power of eminent domain; but a system of graduated taxation might be employed both for raising revenue and for regulation.

Regulating Parks and Street Uses. The city may designate the kinds of traffic to be allowed on certain streets and boulevards and in public parks. Hence it can exclude heavy traffic from parks and certain streets, reserving them for pleasure driving and light vehicles. Roadbeds suitable for pleasure and light vehicles may be very different from those suitable for heavy traffic. To deny the right of the government to recognize this distinction would work great hardships on the public.

Converting a street from heavy traffic use to pleasure use only does not deprive former users of their property without due process of law. The New York Court of Appeals has held that a city which owns the fee of a street holds it in trust for public purposes. It may grant rights therein which do not impair the public easement or it may refrain from granting them, for the public convenience. The court went on to say that the city could prevent the coach company that brought suit from carrying gaudy tobacco advertisements on the exterior of its coaches when its franchise was for carrying passengers only.[1] This decision rests on the ground that the city owns the fee of streets and therefore has the power to prevent vans or vehicles from carrying exaggerated advertising that would attract crowds and cause traffic congestion.

Franchises of Public Utility Corporations. The power of the government to grant franchises to public utility corporations affords one of the best ways of protecting public property in carrying out a comprehensive plan. The service required cannot safely be left to private individuals, but is usually granted to public utility corporations, whose business is said to be affected with a public interest and therefore is subject to public control. Public utility corporations may be controlled: (1) through the conditions stipulated for securing the charter; (2) through the requirements for amending the charter; (3) through regulating rates and services; (4) through granting a charter to a competing corporation; (5) through government competition; (6) through the government's taking over the rights and property of the corporation and furnishing the utility —

[1] *Fifth Avenue Coach Co. v. City of New York*, 194 N. Y. 19, 86 N. E. 824 (1909).

that is, through the government's superseding the public utility corporation. Public utility corporations bear such an intimate relation to the development of a community that they can wreck the best plan if not publicly controlled. This is especially true of the transportation corporation.

The methods of control just outlined apply particularly to the transportation corporation. Companies furnishing transportation must do business under the corporate form. The power of a local government to grant and amend charters comes from the state. This carries with it public requirements as to the conditions in accordance with which the business must be conducted, such as location of route, kind of tracks and crossings, kind of cars, frequency of service, fair rates, etc. No additional privileges may be granted the corporation except by public authorities. These additions may be conditioned upon compliance with public plans and demands. It was early decided by the Supreme Court of the United States that a charter is a contract and cannot be impaired.[1] In accordance with a suggestion made by Justice Story at the time the Dartmouth College Case was decided, there is now frequently inserted in the charter a reservation of the right to alter or amend the charter or to purchase and recover the business. When these reservations are inserted they become a part of the contract. An additional continuing control is exercised under the police power, which cannot be granted away in a charter.[2]

The government's control over rates and facilities bears an important relation to the civic plan, especially in connection with the prevention of congestion and the development of suburbs. Stockholders in public utility corporations are not entitled to unreasonably high dividends. On the other hand, the government cannot fix rates that are confiscatory as these would conflict with the state constitution and the Fourteenth Amendment of the federal Constitution. In respect to municipal utilities, service at cost and a flat rate for the whole city are now much favored. Rates might fluctuate but dividends would remain fixed. A flat rate is supposed to prevent congestion and materially assist in developing a comprehensive plan. A transportation charter is usually supposed to be monopolistic. If,

[1] *Dartmouth College v. Woodward*, 4 Wheaton 518 (1819); Dillon, *Municipal Corporations*, vol. 3, sec. 1306 and cases cited.

[2] For modifications of the doctrine of the Dartmouth College Case see *Boston Beer Co. v. Massachusetts*, 97 U. S. 25 (1877); *Stone v. Mississippi*, 101 U. S. 814 (1879).

however, the government becomes dissatisfied with the service and rates of an existing corporation, it may usually grant a franchise to a competing company. It may enter into competition by itself furnishing the utility under a reservation to purchase. It may also, under the right of eminent domain, take the franchise and property and furnish the utility itself or lease it under stringent operating conditions.

Eminent Domain. The most generally used and the most effective method of protecting public property is exercise of the right of eminent domain. This power is invoked in regulating the height of structures bordering on streets, boulevards, and parks; in establishing building lines or setbacks; and finally, in zoning and excess condemnation.

In 1898 Massachusetts passed a statute limiting, with compensation, the height of private buildings around Copley Square in Boston. In upholding the constitutionality of this exercise of eminent domain, the supreme judicial court of Massachusetts said it added to the public rights in light and air and in the view over adjacent land. These rights were in the nature of an easement created by the statute and annexed to the park. The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, were being enlarged and extended with the progress of the people in education and refinement. Many things which a century earlier had been luxuries or were altogether unknown had become necessaries.[1]

A setback is a front building line behind the street line, beyond which an abutter cannot erect buildings, though he may use the land for all other purposes. In establishing such a line the city condemns the land, under the right of eminent domain, and pays the abutter the value of the building line easement. Under some ordinances nothing can be built beyond this line. Frequently, to save expense, buildings erected before the establishment of the building line and projecting beyond it are allowed to stand but they must not be renewed or substantially repaired; they are finally condemned when they are few in number or of small value.

The building line has for its main purposes: (1) to increase pri-

[1] 174 Mass. 476, 55 N. E. 77 (1899). For other cases see *United States v. Gettysburg Electric Railway Co.*, 160 U. S. 668 (1896); *Bunvan v. Commissioners of Palisades Interstate Park*, 167 App. Div. 457, 153 N. Y. S. 622 (1915).

vacy; (2) to improve the general appearance of the street as a whole; (3) to impart a general air of spaciousness; (4) to increase the amount of greenery; (5) to make available the space that will be needed when the street must be widened. It is especially serviceable in suburban districts.

In laying out a new street a city may at the beginning take land wide enough for future needs and allow the abutter on each side to use strips for narrow lawns, or it may lay out a street broad enough for present uses and impose a setback on abutters so that it will not have to pay for buildings when the street is widened. Either course reduces waste, avoids unnecessary expense for the destruction of buildings, and allows the abutters the use of the condemned strips for some time. As the residence street changes to one of stores and apartment houses, the setbacks, especially at corners, help to reduce collisions in this age of automobiles. As safety campaigns progress, the public comes to value them more and more highly.

The widening of traffic streets in the central business section, after the street has been intensively improved with buildings, is sometimes imperative. Usually it is enormously expensive. Great saving can be made by establishing a building line under the provisions of which the buildings that project beyond the line may not be renewed or substantially repaired. The city can then take these old buildings when their value is small. This is a slow but economical method of securing the land needed for street widening.

The constitutionality of a setback is questioned under the police power but is unquestioned under the power of eminent domain. Under the latter the interest in the extra land is condemned for a street use. The legislature has decided to take an easement in land instead of the title, and the legislature is the judge of which to take.

Zoning and excess condemnation are liberal and enlarged exercises of the power of eminent domain. They are new applications of this power and are being urged as proper methods of broadening the law to meet the needs of civic planning. Their emergence is evidence of a departure from the earlier narrow, visionless conception of the complete purposes of eminent domain.

Zoning condemnation is the taking, with compensation, of an entire district. It is complete and independent condemnation for a special purpose such as the elimination of slums. When a district is selected for condemnation, both the land and the buildings are condemned. The buildings are destroyed and the land is thrown into

a common mass. The land for public uses is withdrawn and the part intended for private uses is resold after it has been replanned. This must be done under the power of eminent domain and not under the police power, because the cost is too great to be borne by private owners.

A few states have passed statutes authorizing cities, for the purpose of raising the level of low land and securing proper drainage, to condemn, reconstruct, and resell an entire district. Massachusetts in 1867 authorized the city of Boston to condemn, replan, and resell the Back Bay district, which became the best residential section of Boston. The statute was upheld as constitutional by both the supreme court of Massachusetts and the Supreme Court of the United States.[1]

Excess condemnation, in essence, is taking more property than is necessary for the precise, narrow purpose of the public improvement. The excess property so taken may be used in any way that is conducive to the public interest, or it may be sold for private use, usually subject to restrictions calculated to promote the larger purpose of the main improvement. In brief, it is incidental to another and main condemnation.[2]

This method of taking private property has been used extensively and with much success in other countries. Montreal, Halifax, Toronto, and other cities have employed it. Because of early unfriendly decisions of the courts in the United States, little was done with it until the present century. After many states had found regulation difficult because of limitations in state constitutions, some, including Massachusetts, Wisconsin, Ohio, New York, and Rhode Island, amended their constitutions to make more extensive regulation possible.

Excess condemnation is most frequently used for cutting a new street or widening an old one, but it may be employed to carry out almost any public improvement, such as the erection of a municipal building or the provision of playgrounds and public parks. Regardless of the kind of improvement to be added, some of the following results may be expected from the improvement. First, the adjoining land is almost sure to increase in value. This increased

[1] *Dengley v. Boston*, 100 Mass. 594 (1868); *Sweet v. Rechel*, 159 U. S. 380 (1895).

[2] For good treatments of this subject see Cushman, R. E., *Excess Condemnation* (1917); Report of Chicago Bureau of Efficiency, *Excess Condemnation* (1918).

value is produced by the city's improvement and not by the local landowner. The construction of the street and the taking of the extra land to resell should be regarded as one business enterprise. If the city does not get the increment of the value and apply it to the making of the improvement the cost will be increased.[1] Secondly, the cutting of a street, especially if it be diagonal, always leaves remnants on each side of it not large enough for independent improvement. These remnants, unless taken by excess condemnation, shut off the land back of them from the street and prevent development. The result is that values shrink and the city loses revenue from local assessments and general taxes. A third effect may be that without excess condemnation the use to which the adjacent land is put may defeat the objects of the public improvement, or at least impair these objects because the street may be bordered by a row of cheap unsightly houses, a solid row of tall buildings, or buildings poorly located.

ZONING UNDER THE POLICE POWER

Government Restrictions on Use of Private Property. The police power can be invoked for the purpose of placing salutary restrictions on the use of private property. When this is done, the government need not compensate for consequences which private owners consider undesirable. The Supreme Court of the United States has declared: "All rights are held subject to the police power of a state and if the public safety and the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience."[2]

Replotting. Replotting is the obliteration of one set of divisions and the substitution of a new subdivision of building land. Many cities in the United States are surrounded by a fringe or ring of suburban additions poorly planned and oftentimes not articulating properly with the older and better-planned parts of the city. The replotting of such districts offers many problems. Areas devastated by fire, flood, or earthquake can be carefully replotted at small ex-

[1] In addition to excess condemnation, there are other methods of appropriating the increment of value resulting from the improvement. The common method in this country is to levy local assessments up to the cost of the improvement. It may be accomplished by an increment tax, in general use in several foreign countries.

[2] *Boston Beer Company v. Massachusetts*, 97 U. S. 25 (1877).

pense, but the replotting of badly planned but highly improved districts is costly.

In any case of replotting, public interest demands healthful dwellings, convenient stores and factories, and economical, stabilized real estate development. It is essential that replotting should be publicly supervised. Sometimes private parties, realizing the advantages of expert replotting, voluntarily submit to having their land thrown into a common mass and replotted and their share returned to them. Usually owners do not see the advantages of public supervision; therefore resort must be had to compulsion.

Building Lines. As a prelude to zoning proper, a brief consideration may be given to building line restrictions under the police power. The building line or setback as a protection to public property has already been treated from the standpoint of eminent domain.[1] When private property is properly restricted a correct building line has distinct advantages. It helps to reduce collisions in crowded sections; it allows space for lawns in front of buildings; it increases light and air for the community as a whole; it raises and stabilizes land values; it makes a district more pleasant and healthful for residence purposes.

Some years ago a number of decisions against the constitutionality of building lines established under the police power without compensation were rendered, but these were handed down prior to the advent of zoning as a part of a comprehensive plan. Later decisions have supported the view that the police power may be used for establishing a building line.[2] Under the early restrictions, the owner was required to leave a given part of his land open irrespective of the size and shape of the lot – a condition which frequently worked great hardship. The restriction sometimes placed unequal burdens upon the owners of lots of different sizes and shapes. The new building line, as a part of a comprehensive plan, attempts to distribute the burdens in such a way that there will be a minimum of inequality. Sometimes a board of appeals is provided to equalize the effects of the restriction.

Origin of Zoning. The meaning of zoning has now been crystallized; it includes restrictions on the height, area, and uses of different kinds of structures. It originated in France. It was devel-

[1] Pages 781–782.

[2] *Eubank v. Richmond*, 110 Va. 749, 63 S. E. 376 (1916); Town of Windsor v. *Whitney*, 95 Conn. 357, 111 Atl. 354 (1920).

oped in Germany during the last decade of the nineteenth century and later. Numerous sporadic attempts at block or small residential district zoning were made in the United States during the latter years of the nineteenth and the early years of the twentieth century. At the present time zoning ordinances usually cover the entire territory of a municipality, dividing it into districts in each of which uniform regulations are provided for height, area or bulk, and uses of buildings. In some ordinances these three district classifications overlap; in others they are coterminous.

Height Districts in Zoning. In 1885 the state of New York passed an act limiting the height of houses used as dwellings. In upholding the constitutionality of this act the New York Supreme Court said there was "no doubt of the competency of the legislature in the exercise of the police power under the constitution to pass such an act." [1] In 1889 a federal statute was enacted limiting the height of buildings, by zoning, in Washington, D. C. The Massachusetts legislature in 1904 made provision for two different height districts for the city of Boston. This act was contested. The issues were: (1) May the city limit building heights under the police power? (2) If so, may it prescribe different heights for different districts? Both questions were answered in the affirmative.[2] The Supreme Court of the United States upheld the decision of the Massachusetts court.[3]

Area or Bulk Districts. The chief object of area restrictions is to prevent undue concentration, which has a tendency to increase in a city, owing to the intensive use of land and the augmentation of returns from the use of the land. This increased concentration becomes congestion which injures business, industrial, recreational, and living conditions. Congestion may throw an undue burden upon public improvements. A certain intensity of use determines the planning and construction of streets, transit facilities, sewers, and parks. There should be a fine balance between the public improvements and the bulk of structures privately owned. Undue concentration resulting in congestion increases the burden on public improvements until conditions sometimes become almost unbearable. As examples of dislocation, confusion, and heavy losses, the

[1] *People ex rel. Kemp v. D'Oench*, 111 N. Y. 359, 18 N. E. 862 (1888); see *People ex rel. Brown v. Brady*, 26 N. Y. Misc. 82, 56 N. Y. S. 567 (1889).

[2] *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745 (1907).

[3] *Welch v. Swasey*, 214 U. S. 91 (1908).

hopeless congestion of people and traffic in lower New York City and the Loop District in Chicago may be cited.

The necessity of regulating the intensity of building development to prevent congestion is now well recognized. Every building in which human beings live or work requires a certain amount of open space appurtenant to it to admit sunshine and fresh air, as a public street cannot furnish an adequate supply. There must be provision for a division of light and air between lot owners. This is accomplished by area regulations which limit the maximum bulk of structures either by requiring minimum courts and yards and perhaps front, side, or rear setbacks irrespective of the size of the building or lot, or by fixing the maximum area of the structure at a percentage of the lot. Sometimes the area requirements are made to vary with the height of the building. The government passes laws specifying standard minima of space per capita for occupants of tenements and operatives in factories; building codes set up standards of sunlight within workshops, stores, and apartments. Analogously, on the basis of expert investigation of topographical, economic, and social facts bulk restrictions determine the amount of future residential, business, and industrial building to the end that fire hazards, disease, accidents, and juvenile delinquency may be reduced to the minimum. These restrictions fall within the police power.

Use Districts. The restrictions on the uses to which a building may be put furnish the storm center of debate in zoning at present. There is general agreement on the height and area restrictions, but the widest variation of opinion exists as to what constitutes proper regulation of the uses of structures under the police power. The reason for this disagreement is that property gets its value from use. There are such a multitude of uses to which property may be put in our complex social, business, and industrial life that zoning restrictions on the use of private property must necessarily arouse opposition from owners who think their constitutional protections are being disregarded.

No zoning can be complete without restrictions on the use of private property. Zoning attempts to confine business and industrial activities to the sections best suited for them, to protect residence areas from the intrusion of uses not in harmony with the character of those districts, and to prevent premature changes in districts. The three main types of districts – residence, business, and industrial – are sometimes further subdivided; for instance, residence

districts are divided into single-family, multi-family, or apartment house areas; business districts into central and local; industrial districts into areas for light manufacturing, heavy but non-nuisance types of industry, and nuisance types. Heavy industrial districts are intended for industries of the nuisance type which require large blocks, wide streets, and an extensive spread of buildings and yards. They are usually found near transportation lines. Some zoning experts do not favor allowing residences in heavy industrial districts because the result is likely to be friction and neglected and unsanitary residences. They think in the long run the highest use of the land will be conserved by localizing the heavy industries and leaving them undisturbed. They argue that this will serve the highest purposes of zoning, especially if the residence district for the employees in the different industries is located near. Other zoning experts think that if the land is sufficiently high for drainage, residences should be permitted in the heavy industrial districts. If this is not done, the owners of certain properties that cannot be immediately converted to industrial use may be forced to pay taxes and other charges on idle land. It is contended that such persons should not be prevented from making the highest possible use of their land. Where the use of electricity, gas, or oil instead of coal reduces smoke and other forms of dirt, residences are less objectionable in industrial districts than was formerly the case. In the light industrial districts some business should be allowed. Light industries and business of certain kinds must necessarily be neighbors in the same district. Light manufacturing is a necessity in department stores, millinery shops, and jewelry stores. Residence districts may include dwellings, clubs, churches, schools, libraries, hospitals, and private garages.

Exclusions from Business Districts. For convenience, efficiency, and comfort, certain trades and industries have been excluded from the central business districts of cities. The Supreme Court of the United States, as well as the supreme courts of various states, have upheld such exclusion. The city of Little Rock, Arkansas, passed an ordinance prohibiting livery stables in the business section of the city. In upholding the constitutionality of this act the Supreme Court of the United States said it was "clearly within the police power of the state to regulate the livery stable business, as in particular localities it was a nuisance in fact and in law." So long as it was not shown to be clearly unreasonable and arbitrary, and so long as it

operated uniformly upon all persons similarly situated in a particular district, the district itself not appearing to have been arbitrarily selected, the regulation in question was constitutional.[1]

Exclusions from Residence Districts. Non-residential structures tend to obtrude themselves in a scattered and spotty manner into residential neighborhoods, thus harming a large territory without converting it into a business or industrial district. Unregulated city growth tends to subject residence districts to offensive environment. Modern comprehensive zoning strives to counteract this tendency.

In 1911 the city of Los Angeles by ordinance established a number of industrial zones or districts; the rest of the city was designated as a residence district. From the residence district stone rolling mills, carpet-beating establishments, fireworks factories, soap factories, lumber yards, public laundries, and certain other establishments, if they used mechanical power, were excluded. This ordinance was upheld in various cases on the grounds of health, safety, and prevention of offensiveness. Similar laws have been upheld in many states.

Restrictions on the use of billboards have caused city councils and courts considerable trouble in that it is difficult to discover the proper basis for regulation. The restrictions have had a double purpose: the protection of both public and private property, especially residential property, as the billboards are usually on vacant lots and make streets less agreeable for residences. The early decisions were unfriendly to billboard regulation on the ground that the restrictions were unreasonable or for aesthetic purposes only.[2]

A decision of the supreme court of Missouri in 1911 marked a turning point in billboard regulation.[3] The court held that the billboards are dangerous to public safety because they are of unstable construction, increase fire hazards, and shield immoral practices.

The city of Chicago passed an ordinance which made it unlawful for any person, firm, or corporation to erect or construct any billboard or signboard in any block on any public street in which half of the buildings on both sides of the street are used exclusively for resi-

[1] *Reinman v. Little Rock*, 237 U. S. 171 (1915). For the attitude of state supreme courts see Opinion of the Justices, 234 Mass. 597, 127 N. E. 525 (1920) and *Lincoln Trust Co. v. Williams Building Corp.*, 229 N. Y. 313, 128 N. E. 525 (1920).

[2] See *People v. Green*, 85 App. Div. 400, 83 N. Y. S. 460 (1903); *Crawford v. City of Topeka*, 51 Kans. 761, 33 Pac. 476 (1893); *State v. Whitlock*, 149 N. C. 542, 63 S. E. 123 (1908).

[3] *St. Louis Gunning Advertising Co. v. City of St. Louis*, 235 Mo. 99, 137 S. W. 929 (1911).

dence purposes, without obtaining the consent in writing of a majority of the frontal owners on both sides of the street. The supreme court of Illinois upheld this ordinance as constitutional on the ground, first, that billboards created a fire hazard because of the accumulation of combustible material; second, that they are a protection for disorderly and immoral practices; third, that the ordinance is not an unconstitutional delegation of legislative power.[1] The Supreme Court of the United States affirmed the decision.

Under comprehensive zoning, billboards may be entirely excluded from residence districts by passing a special ordinance, zoning the city as to advertising, as Los Angeles and San Francisco have done.[2] Or the same result may be accomplished under a general zoning ordinance regulating the construction and use of all kinds of business structures, including billboards. Billboard advertising may also be regulated under state statutes.[3]

Attempts have been made to exclude retail stores from residence districts. In 1898 the supreme court of Missouri declared unconstitutional an ordinance of St. Louis which prohibited all business on Washington Boulevard. In 1913 the supreme court of Illinois held void an ordinance of Chicago requiring the consent of a majority of property owners on both sides of the street for the erection of a store in any block in which all of the residences were used exclusively for residence purposes. The supreme courts of Minnesota [4] and New Jersey [5] have refused to uphold the exclusion of retail stores from residence districts. The supreme judicial court of Massachusetts, on the other hand, upheld the exclusion of all business from a residence district in these words: "The suppression and prevention of disorder, the extinguishment of fire and the enforcement and regulation for street traffic, and other ordinances designed primarily to promote the general welfare, may be facilitated by the establishment of zones or districts for business as distinguished from residences." [6] From the foregoing review it is reasonable to conclude that decisions thus far have not fixed the place of the retail store in zoning, but in view of the trend of the decisions it is reasonable to expect

[1] *Cusack Co. v. City of Chicago*, 267 Ill. 344, 108 N. E. 340 (1914).
[2] *Liggett v. Pittsburgh*, 291 Pa. 109, 139 Atl. 619 (1927).
[3] *Packer Corp. v. Utah*, 285 U. S. 105 (1932).
[4] *State ex rel. Lachtman v. Houghton*, 134 Minn. 226, 158 N. W. 1017 (1916).
[5] *Ignaciunas v. Nutley*, 125 Atl. 121 (1924).
[6] Opinion of the Justices, 234 Mass. 597, 127 N. E. 525 (1920).

that the exclusion of such stores from residence districts will be upheld by the courts in the not distant future.

It is not difficult to make out a case for the exclusion of stores from residential districts. A store may appear harmless, but business exists by attracting customers, and any successful store attracts many more persons to its locality in a day than would come there if the structure were used for residential purposes only. An increased number of vehicles would also come, and add to the noise. There is much loading and unloading of vehicles. There is sawing and hammering in opening and closing boxes and crates. All this causes interference with the sleep and rest of the inhabitants of the district. It has been estimated that one-fifth of the population of a large city are children under five years of age. No argument is needed to establish the necessity of quiet so that children may obtain a reasonable amount of sleep in the daytime. Again, in a large city not only small children need sleep but also a large number of night workers, such as newspapermen, telephone operators, motormen, policemen, firemen, bakers, and others. Day workers, too, are kept awake when stores are open late, as on Saturday night. Not only does noise need to be reduced in residential districts, but also the offensive dust, dirt, and odors that accompany stores should be excluded from them.

Exclusion of Apartments and Tenements from One-Family House Districts. The legality of excluding apartments and tenements from one-family residence districts is another open question. The supreme court of Minnesota voided a statute under which Minneapolis, under its power of eminent domain, attempted to exclude an apartment house from a residence district; but after a rehearing the court upheld the statute and in doing so said: "People are . . . calling for city planning in which the individual homes may be segregated from not only industrial and mercantile districts but also from districts devoted to hotels and apartments." [1] The supreme court of New Jersey held void an ordinance creating a residential district of one-family houses.[2] A lower court of Ohio approved the East Cleveland zoning ordinance which provided for four districts, including a one-family residence district.[3] The supreme court of California has upheld the exclusion of a four-flat building from a residence district.

[1] *State ex rel. Twin City Building Co. v. Houghton*, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159 (1919).

[2] *Handy v. City of South Orange*, 118 Atl. 838 (1922).

[3] *State ex rel. Morris v. Osborn*, 22 Ohio N. P. (N. S.) 549 (1920).

Exclusion of Particular Classes of Buildings from Proximity to Special Buildings or Areas. Special buildings need protection regardless of the zone in which they are located. The city of Norman, Oklahoma, prohibited certain industries, including laundries, within one hundred fifty feet of a church, school, or hospital. This ordinance was upheld by the supreme court of the state.[1] Public garages have been prohibited within fifty feet of a school. A Chicago ordinance was held valid which required that a junk shop should not be allowed in a block where two-thirds of the buildings were used as residences, for wholesale or retail purposes or within one hundred feet of such a block, without the consent of the property owners. A Chicago ordinance prohibiting a moving picture theater within two hundred feet of a school was upheld by the supreme court of Illinois.[2] The city of Spokane prohibited a livery stable within two hundred feet of any residence.

These decisions attach importance to such matters as "comfort," "convenience," "welfare," and "prosperity." They seem to be grounded upon the theory that property development trends and other factors have established the best use of a structure or a district, thereby building up what business men call good will or a neighborhood amenity that should not be ruthlessly disturbed by an interloping garage, moving picture theater, junk shop, or livery stable – in short, that property and human values should be protected against speculative real estate manipulators or other selfish individuals who propose to exploit both the property and comfort of others for their own selfish purposes.

Aesthetics. What is the relation of aesthetics to zoning? Use of the police power to effect aesthetics alone is not regarded by the courts as proper employment of that power. Many zoning experts, however, make a strong plea for a recognition of civic beauty in city planning. Beauty gives pleasure, and pleasure is a fundamental in human life. Beauty has an economic value also, for anything that spoils the beauty of a district depreciates and destroys property values, and anything that beautifies it increases the value of property. Taxation and the power of eminent domain have been used for the promotion of aesthetic purposes.

Retroaction and Vested Interests. In zoning a new city or new sections of any city, the question of impairment of vested interests

[1] *Walcher v. First Presbyterian Church*, 76 Okla. 9, 184 Pac. 106 (1919).
[2] *Nahser v. City of Chicago*, 271 Ill. 288, 111 N. E. 119 (1916).

does not come up; but in zoning the older parts of a well-settled city it arises in connection with structures that do not conform with the new restrictions as to bulk or use. The zoning regulations may be retroactive or the non-conforming bulk or use may be stringently restricted with a view to eliminating it as rapidly as possible. If an ordinance is not retroactive, the charge of discrimination or a lack of equal protection of the law may arise between non-conforming persons or businesses and owners who propose to devote their property to a non-conforming use in the future.

Some cities have made their ordinances retroactive for offensive industries. The industries have been given the option of moving or ceasing operation. This retroaction has been held constitutional in some leading cases. Touching the subject of retroaction and vested interests, the Supreme Court of the United States said: "No person has a vested right in any general rule of law or policy of legislation entitling him to insist upon its being unchanged for his benefit, nor is immunity from change of general rules of law to be implied as an unexpressed term of an express contract." [1]

Retroactive zoning is not to be recommended except in very unusual cases and unless public protection imperatively demands it. Non-conforming bulks and uses should be gradually eliminated so that the owner's investment will not be rendered worthless.

Zoning Procedure and Judicial Interpretation. The city has no inherent police power. Such power must come as a delegation from the state, which is the source of the police power. A constitutional amendment is not necessary for such delegation of power. All that is needed is an enabling act authorizing the city to exercise the police power for zoning purposes. The United States Department of Commerce has prepared a standard enabling act which has been adopted by many states. This model act contains five essential features: (1) a grant of zoning power to regulate height, bulk, use, yards, courts, and density of population; (2) provisions for safeguards in the preparation and adoption of a zoning plan, such as preliminary consideration of the needs of each district, arrangement for public hearings, and comprehensive and impartial application of the regulations; (3) a requirement for more than an absolute majority of the council to make changes after the submission of a written protest by property owners; (4) provisions for a board of appeals with power to vary the strict letter of the ordinance and maps in

[1] *Chicago and Alton R. R. Co. v. Tranbarger*, 238 U. S. 67 (1914).

cases of practical difficulty and unnecessary hardships on property owners; (5) provisions for enforcement and penalties.

In states that have home rule cities an enabling act is not necessary, as the police power has been granted in the state constitution. A grant of police power either by the constitution or by statute is absolutely necessary if adverse court decisions are to be avoided. The constitutionality of zoning if an enabling act has been passed has been upheld in most states.

The zoning plan should be prepared by a zoning commission under the guidance of a zoning expert and with the coöperation of the various types of property owners; there should be numerous public hearings and plenty of discussion and publicity; accurate maps and charts should be made – one for heights, another for use, and still another for density of population. These maps should show growths, trends, and prospective needs. The city council must take full responsibility for the adoption of the maps and the enactment of the zoning ordinance.

Stability should be aimed at in all this work, but there must be provisions for future changes; amendments must be made from time to time as necessity arises and circumstances change. However, to prevent a mercurial council from making hasty changes in the maps and ordinances, the state legislature should require an extraordinary majority of the council for changes. This check should be extended to home rule cities.

A safety valve device is provided in a requirement that a board of appeals be set up to decide borderline cases. The board would have power to change the letter but not the spirit of the ordinance in order to prevent unnecessary individual hardships. A board of appeals, if it functions properly, can furnish necessary elasticity, minimize lawsuits, and oftentimes forestall court cases that might endanger the constitutionality of the ordinance. The city of New York has had great success with its board of appeals. It is claimed that the work of this board has prevented hundreds of adverse court decisions. There should be a sharp line of demarcation between the powers of the council and the board of appeals. The fundamental matter of adopting the maps and ordinance is a council power, but applying the maps and ordinance to specific buildings should be committed to the board of appeals.

The local authorities should be given power to use any or all of

the following methods to bring about a compliance with the zoning ordinance: "They may sue the responsible person for a penalty in a civil suit; they may arrest the offender and put him in jail; they may stop the work in the case of a new building and prevent its going on; they may prevent the occupancy of a building and keep it vacant until such time as the conditions complained of are remedied; they can evict the occupants of a building when the conditions are contrary to law, and prevent its reoccupancy until the conditions have been cured." [1]

The courts insist upon a few essential points in a zoning ordinance in addition to the grant of police power from a state. The regulation and administration of the ordinance must stand the test of reasonableness. The Supreme Court of the United States as well as the state courts have accepted this point of view.[2] Much municipal sinning has been done in the name of zoning. Some city councils seem to regard zoning as a panacea for all municipal ills. Piecemeal zoning has sometimes been very unreasonable in its emphasis upon protecting a small block, area, or exclusive residence section. Sometimes the real if not the ostensible object of an ordinance is to beautify some preferred locality. Sometimes it is an attempt to protect a district of obsolete one-family houses and stop the development of multi-family house or business districts. Sometimes the ordinance has no relation to the police power, as when one-story stores are prohibited in favor of two stories or more. Sometimes an attempt is made to zone a suburban village into one exclusive residential district excluding all multi-family houses, churches, hospitals, stores, public garages, laundries, and factories. Sometimes property restrictions are imposed upon one landowner when the relation of the ordinance to the police power is very remote and the incidence bids fair to result in confiscation of property.

Although piecemeal zoning has often met with judicial condemnation, in some cases it has been sustained. For example, height and use zoning alone have been upheld. But area restrictions are also important. Therefore, comprehensive zoning that includes all three is more reasonable than zoning for only one purpose. Furthermore, zoning is more reasonable when the entire territory of the city is included. Classification into different districts may be made and has

[1] See *A Standard State Zoning Enabling Act*, p. 12, note 46.
[2] *Euclid Village v. Ambler Realty Co.*, 273 U. S. 365 (1927).

been upheld, but properties similarly situated should be treated alike. Reasonableness, then, extends to regulations, classifications, and administration.

The courts carefully scrutinize any attempt at an unconstitutional delegation of legislative power. In zoning, questions concerning the legality of delegations of power have arisen in connection with activities of property owners and the functioning of the board of appeals. The city of Richmond, Virginia, enacted an ordinance providing that " whenever the owners of two-thirds of the property abutting on any street shall in writing request the commissioner on streets to establish a building line on the side of the square on which the property fronts, the said commissioner shall establish such line." The Supreme Court of the United States held this ordinance void as an unconstitutional delegation of legislative power. It said the ordinance left no discretion to the committee on streets as to whether the street line should or should not be established in a given case. The action of the committee would be determined by two-thirds of the property owners.[1] Similarly, ordinances permitting or preventing the buildings in a locality to be devoted to a given use upon less than the unanimous consent of the property owners of the locality have been held an unconstitutional delegation of legislative power; but as a prerequisite to action by public authorities, or as a waiving of a prohibition, a provision for consent of property holders has been held valid.

The policy that sanctions allowing a certain percentage of property owners in a small section, such as a block, to waive restrictions that have been made by the ordinance-making power – for example, to permit the erection of a garage, a retail store, or an apartment house – does not comport with the ideals of comprehensive zoning. It is a substitution of a block plan for a community plan; the tastes, judgments, and even the caprices and whims of the owners may vary from block to block and the result may be diversity and confusion rather than unity and completeness. A comprehensive zoning plan is motivated by a desire for the promotion of the welfare of the whole territory for the general benefit of the entire city.

In city zoning the council cannot delegate the power to make laws, but it can create a board of appeals to carry out the legislative will as expressed in the zoning ordinance. The social and economic conditions of any city are so complex that a zoning ordinance must

[1] *Eubank v. Richmond*, 226 U. S. 137 (1912).

be passed in general terms and its full operation be made to depend upon future contingencies and the determination of certain sets of facts. The determination of facts is placed in the hands of the board of appeals. The council sets the standard in an ordinance and the board applies the standard to certain determined facts. As has been said before, it can vary the letter but not the standard or spirit of the ordinance. It is therefore entirely constitutional.

QUESTIONS

1. What objections are there to unplanned cities?
2. Trace the history of city planning.
3. What have been the important steps in the development of national planning?
4. What principles should guide in regional planning?
5. What should a state plan include?
6. Compare eminent domain and the police power as aids to civic planning.
7. What problems arise out of zoning? Suggest ways of dealing with at least one of these problems.
8. What are the main legal obstacles to civic planning?
9. Draw up a "model" plan for a designated area.

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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 defence, 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 I. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

SECTION II. 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 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. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State,

the Executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECTION III. 1. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

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. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *pro tempore,* in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION IV. 1. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such

meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V. 1. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI. 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 VII. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent,

together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII. The Congress shall have power

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence 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 offences 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 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, dock-yards, and other needful buildings; — and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof.

SECTION IX. 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 1808; but a tax or duty may be imposed on such importation, not exceeding $10 for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

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 X. 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* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION I. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors 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 government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the President. But in choos-

ing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION II. 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 offences 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 III. 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 IV. 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 I. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as 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 II. 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; — 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 con-

suls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III. 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 I. 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 II. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III. 1. New States may be admitted by the Congress into this Union; but no new States 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 IV. 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 amendments 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.

G° WASHINGTON
Presidt and Deputy from Virginia

[Signed by thirty-eight members of the Convention.]

ARTICLES IN ADDITION TO AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION [1]

ARTICLE I. 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 offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

[1] The first ten Amendments were adopted in 1791.

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

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 re-examined 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. 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. [Adopted in 1798.]

ARTICLE XII. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of 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. [Adopted in 1804.]

ARTICLE XIII. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation. [Adopted in 1865.]

ARTICLE XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial 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.

Section 3. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion

against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by 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 illegal and void.

Section 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article. [Adopted in 1867.]

ARTICLE XV. Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or 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. [Adopted in 1870.]

ARTICLE XVI. 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. [Adopted in 1913.]

ARTICLE XVII. Section 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

Section 2. 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.

Section 3. 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. [Adopted in 1913.]

ARTICLE XVIII. Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided by the Constitution, within seven years from the date of the submission hereof to the States by the Congress. [Adopted in 1919.]

ARTICLE XIX. 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 sex.

Section 2. The Congress shall have power to enforce this article by appropriate legislation. [Adopted in 1920.]

ARTICLE XX. 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 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 persons 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. [Adopted in 1933.]

ARTICLE XXI. Section 1. The 18th 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 liquor, 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 thereof to the States by the Congress. [Adopted in 1933.]

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