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PRINCIPLES AND PROBLEMS OF GOVERNMENT

PRINCIPLES AND PROBLEMS OF GOVERNMENT

THIRD EDITION

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PRINCIPLES AND PROBLEMS
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Preface to the Third Edition

Prepared to supplement the customary descriptive and analytical treatises on the organization and machinery of government, this volume aims to present an approach to the study of government through the consideration of principles and problems. On the assumption that the main objective of instruction in Political Science is to stimulate the process of thinking and to encourage the formation of judgments on matters of political import, certain phases of a rather bewildering and complex field are selected for analysis and discussion. As far as is possible in brief compass, an effort is made to give the historical setting for significant political problems, to present the underlying ideas involved in such problems, and to indicate trends or tendencies toward their solution. To facilitate the habit of thinking and the forming of conclusions on political issues, tentative though they may be, suggestive and provocative extracts are used from standard and well-known works of statesmen and publicists.

Since the appearance of the first edition of this work there have been some variations of major importance in the problems and policies facing modern governments. These variations have necessitated changes in emphasis and in the interpretation of political phenomena. In contrast with the optimistic attitude which was characteristic of the post-war period, some reactionary tendencies in the organization and administration of government which have become evident during the last decade have been given special consideration. It does not seem probable, however, that the ideas and principles dominating political life during the last half century will be swept away in a wave of nationalism or emotionalism. When the present anti-democratic and anti-parliamentary movement has subsided, the experience of the centuries in the development of popular control of government will no doubt furnish at least a modicum of enduring ideas and forms for molding political machinery to the needs of modern life. But there are new trends and tendencies which require a reexamination of much political thinking.

The great transformations wrought by war and reconstruction, with the subsequent economic and industrial depression, have made it necessary to prepare a second and thorough revision of this work and to note the adjustments which are under way to adapt governmental agencies to a new political and economic order.

We wish to express our appreciation for the generous aid received from teachers who have used the book and who have suggested

changes which have been made in the content and in the arrangement of the material presented. With aid from many sources, an effort has been made throughout to analyze and evaluate some of the characteristic ideas and current tendencies which dominate political thinking in Europe and America.

June, 1934

C. G. H.
B. M. H.

PRINCIPLES AND PROBLEMS OF GOVERNMENT

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CHAPTER I

THE DEVELOPMENT OF GOVERNMENT

THE forms and the functions of government can only be understood through an analysis of the basic factors in their development. Political institutions, like other results of human association, are in a constant process of change. At times the transformations come more rapidly, but significant changes are always under way. The extraordinary burdens and difficulties of the world's greatest war, the problems of reconstruction, and the economic and social distress of recent years have brought a period of rapid transformation. Whither present institutions are tending, and what will be the outcome, no one can foresee. We can feel sure only that the governments under which we now live are passing through a reconstructive process which will affect profoundly all of our social and political relations. A cursory examination of the steps through which modern political institutions have evolved will aid in the understanding of this reconstructive process. Consequently, some significant stages of the development will be reviewed. In the brief outline and summary of the continuous evolution thus presented are suggested some persistent political problems.

EARLIEST EVIDENCES OF POLITICAL ORGANIZATION

Recent researches into history and archæology have carried the beginnings of government and social institutions back many thousands of years by bringing to light well-defined organizations of society in nations which have been regarded as primitive and undeveloped. In these societies customs and law based upon religion, arbitrary taboos, and social sanctions controlled the life of man. Government, though often crude and simple in its organization, is evidenced in the rules and regulations as well as in the customs and traditions which regulated with inexorable rigor the life of primitive communities. The

laws and political institutions of such nations as Babylon, Egypt, Persia, Arabia, and India, just as much as the language and architecture of these Oriental peoples, are matters worthy of study and admiration. To ignore these ancient races as though they possessed no well-defined political organizations is not justified by the evidence of their political evolution. Mistaken impressions of political phenomena are often formed and inaccurate conclusions arrived at by confining attention to the few thousand years of human history which have intervened since the time of the Greeks.

Many of the variations in developments now evidenced in the differences in culture of present peoples may be attributed to the changes in environmental influences to which man was subjected in the thousands of years antedating the use of symbols and the introduction of written records. In these ages the forces of nature and the different natural environments of mankind no doubt molded in large part those physical and mental characteristics and traits which have since become hereditary and are now the distinguishing marks of the various races.[1]

Although the evidence is not always conclusive and there is much room for conjecture, there is good reason to believe that man existed on this planet for hundreds of thousands of years and had most of the qualities and capabilities which are now regarded as distinctly human characteristics.[2] However, it is well to recognize that the sciences dealing with the antiquity of man are not static, but are rapidly accumulating new information, so that it is necessary to keep in touch with the latest researches and to revise accordingly the standard accounts of man's early intellectual and political progress.

Among the varied remains of the Stone Age are found numerous primitive implements of stone and flint fashioned into forms adapted to the purposes of war, the chase, and domestic life.[3] There are also abundant evidences that these primitive races passed through an industrial stage in which invention was turned to the satisfaction of the human needs growing out of community life. It is impossible to trace the rise of man through any particular race or races, for it is found that one race may have replaced another, or that two races

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[1] Cf. Henry F. Osborn, *Men of the Old Stone Age* (Charles Scribner's Sons, 1916); William J. Sollas, *Ancient Hunters and Their Modern Representatives* (The Macmillan Company, 1924); Franz Boas, *The Mind of Primitive Man* (The Macmillan Company, 1922).

[2] "His slowly achieved supremacy has been a very gradual process now traceable by modern science for some five hundred thousand years of human advance." James Henry Breasted, *The Conquest of Civilization* (Harper & Brothers, 1926), p. 3.

[3] For a good brief account of the Stone Age, see *ibid.*, pp. 10-39.

may have been coexistent. The appearance in Europe of a rather superior race during what is called the Neolithic or the New Stone Age, when men had acquired the art of polishing stone, of pursuing agriculture, of making pottery, of domesticating animals, and of constructing pile dwelling and fortified camps, must necessarily have been the result of long years of progressive development.

Knowledge of the early beginnings of government must be acquired by means of information obtained largely through the sciences of archæology, anthropology, palæontology, geology, and ethnology.[4] It is not, however, with characteristics of prehistoric periods that we are chiefly concerned, but rather with the significant steps in the organized political development of man.

Beginnings of Political Organization

Only a brief survey is possible of the many thousands of years which were necessary for man to have evolved from the lower stages of human existence which have just been referred to, up to that point where he had learned to live together with his fellow men in comparatively large numbers. This large process has involved many stages about which no definite knowledge is now obtainable. But various theories and explanations have been formulated as to the nature of the earliest common ties existing among men.

In tracing the origins of civic organization it is found that two types of early society predominated, each of which affected directly the later development of the political state. The first of these types were the nomad hunters, who lived in the hills and mountain districts; and the second were the fisher and agriculturist groups, who lived a more sedentary life in the river valleys. It was the conquest of the latter by the former which frequently laid the basis of the militaristic state. When the vigorous tribes of nomads subjugated the village-dwelling and industrial peoples of the river valleys, it was customary for the conquerors to exploit and appropriate the services of the conquered, thereby establishing a system of slavery as an integral part of early society.[5]

Another factor, in addition to exploitation and conquest, which exerted an important influence in the origin of civil life was the con-

[4] See especially Franz Boas, *Anthropology and Modern Life* (W. W. Norton & Company, Inc., 1932).

[5] See Robert H. Lowie, *The Origin of the State* (Harcourt, Brace and Company, 1927), for support of the conclusions of Franz Oppenheimer in *The State* (Vanguard Press, Inc., 1926) as to the exploitative character of early political societies.

trol exercised by the priests. As the inhabitants of the valleys settled in villages and developed agriculture and industries, an opportunity was afforded for domination by those who claimed connection with and powers of control over the unseen spirits which seemed to disturb and threaten the life of primitive man. The early state has been appropriately characterized as a "class state" for "the order it imposed was based on the distinction between the king, the priest, and the nobility on the one hand, and the tribute-paying and service-rendering commonalty on the other. This was inevitable under the conditions of primitive life, where the herd instinct was confirmed by rigorous custom, where ignorance bred the spirit of superstitious subjection to unknown powers and to their human interpreters, and where the weakness and uncertainty of life required a rallying point in undisputed power."[6] Thus the forces of exploitation, conquest, and priestly control combined in the formation of distinct social groups from which patriarchal society and the political state later evolved.

The accepted basis for the beginnings of organized political life was for a long time comprised in what is termed the "patriarchal theory." This theory traced family and community organizations to the authority and force exercised by the male member of a tribe, who, as father of a family, came to be recognized as the political chief.[7] By recent investigations the patriarchal theory, however, has been subjected to analysis and criticism, and has been found not an entirely satisfactory explanation of the primordial cell of human society. The state, instead of having its origin in the *patria potestas*—the power of life and death over other members of the family and tribe, as exercised by the patriarch, the chief, judge, and priest of the household—is now traced to earlier forms of social organization in some of which the mother was the center of the family group. This explanation of the origin of the state is known as the "matriarchal theory."[8] Both of these theories are now being supplemented with the idea that formerly there existed merely an indefinite form of social organization for the protection of children and the defense of the family or of the group. From earliest times some type of family life appears to have existed.[9] It has been suggested that it is quite possible that the priority

[6] R. M. MacIver, *The Modern State* (Oxford University Press, 1926), p. 339.

[7] See especially Sir Henry Maine, *Ancient Law* (1861), with its emphasis on the patriarchal theory.

[8] For a criticism of the claims made by exponents of the matriarchal theory, see Robert H. Lowie, *Primitive Society* (Liveright Publishing Corporation, 1920), pp. 189 ff.

[9] See Robert Briffault, *Mothers: A Study of the Origins of Sentiments and Institutions* (The Macmillan Company, 1927), for the claim that "the human group did not develop out of the animal herd and did not consist, in the first stages of its development, of small isolated groups corresponding to what we understand by families."

of the particular kind of family bond, whether through the male or through the female, was a matter of place and conditions, and that no positive theory can be advanced to cover the early family in the development of the human race in all parts of the globe. One condition may have existed in one place, while the opposite may have existed in another.

The drawing together, then, of persons through blood relationship, through subjugation, and through the necessity for protection constitutes the beginnings of political or civic organization.[10] Later, thus bound together by common family ties and interests, by desire for protection, and by subjugation, family united with family and formed a gens under some form of recognized leadership. Gens then united with gens until a tribal state was organized. When, however, the tribes confederated and settled within definite territories, the possibility of developing political institutions became increasingly greater. Time was now spent in conquering and putting to man's use the resources of nature instead of wandering from place to place as heretofore, in quest of more fertile lands. When men settled within definite territory, became skilled in industries, pooled their common interests, and decided their differences through some recognized arbitrator, political relations developed. In such relations as these, primitive though they were, the complex political organizations of the present time had their beginnings.[11]

At the time of the Late Stone Age the peoples of Europe were outgrowing the tribal state and gathering together in numerous villages with a more or less definite organization. But this advance in civic organization among these peoples was temporarily arrested. Political progress, as well as progress in general, was reduced to a state of stagnation and so remained until the political and cultural achievements of the Orient were carried into Europe. Though a knowledge of the governments developed by the various branches of the Indo-European races, especially by the Greeks and Romans, forms a necessary background to an understanding of modern governments, it is likewise essential to note the influence of Oriental civilization upon the chief political organization of Greece and Rome, the city-state.

Contributions of the Orient to Political Organization

An advanced state of civilization with more or less complex political institutions had been flourishing for centuries in the Orient, when the peoples of continental Europe had developed no further than the

[10] Cf. Robert H. Lowie, *The Origin of the State.*

[11] For a brief account of the origins of the state, see R. M. MacIver, *op. cit.*, pp. 25 ff.

tribal state.[12] And at this time the peoples of Indo-Europe were no more than nomadic tribes pushing their way from east of the Caspian Sea into the fertile valleys of the two rivers, Tigris and Euphrates, and over into Europe. The countries of particular interest are Egypt and Babylonia, which were later followed by the Assyrian and Persian empires, with their militaristic organizations.

In contrast to the static conditions found in Europe from about 4000 to 3000 B.C., man had made substantial progress along social and political lines in Oriental countries. Within this time he had invented an alphabet, which made permanent intercourse possible, had learned the use of metals, and developed the art of commerce, all of which were practically unknown by the peoples of Europe and without which an advanced state in political organization was impossible. As a result of the social progress in the eastern countries, a corresponding advance appears in political institutions.

By 3400 B.C. the people of Egypt had long since passed through the various stages in civic association, such as the tribal state, the city-kingdom, the confederation of numerous cities into larger organizations, and later had accomplished the formation of two large kingdoms. These, in turn, united into one nation, which held sway for many years and extended through the period known in history as the Pyramid Age, 3000 to 2500 B.C. Here are found for the first time several millions of persons united politically under a centralized government executed by a single ruler with a body of officials responsible to him. After a time, however, this unified government, unable to hold together, was followed by a feudal age based on conquest, when the king granted lands to nobles for reciprocal favors. Still later came the great military empire, which was extended until a large part of the Oriental world of that time was subdued and brought under the rule of the first great political dominion.[13]

Similar progress in political development, but on a smaller scale and of a less enduring character, was made at a later date in Asia, chiefly by the nations of Babylonia and Assyria, and also in Asia Minor by Persia.

The city-kingdoms of western Asia, among which was Babylon, were brought in time to a position of cooperation and unification under the leadership of Sargon.[14] A great nation evolved with the union of the states of Sumer and Akkad, and survived for a number

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[12] See Frederick L. Schuman, *International Politics: An Introduction to the Western State System* (McGraw-Hill Book Company, Inc., 1933), pp. 7 ff.

[13] James Henry Breasted, *op. cit.*, chaps. ii, iii.

[14] *Ibid.*, chap. iv, especially pp. 123 ff. "Sargon was the first leader in the history of the Semitic race, and he was the first ruler to build up a great nation in Western Asia." *Ibid.*, p. 140.

of centuries, when it was finally followed by the powerful and influential nation with Babylon as the center, and from which the subjugated and politically organized territory derived the name of Babylonia. To this period belongs the first codification of ancient laws, which, through the efforts of Hammurapi, about 2050 B.C., was so thoroughly accomplished that, in addition to the advantages afforded to the people of that time, it furnished a model of codification from which future civilizations have profited. Judging from the content of the laws which have been constructed from the fragments that remain of the Babylonian legal customs and procedure, everything points to an advanced state of civilization based upon a unified legal system. Most of the important human relationships were provided for; and laws bearing upon family ties and responsibilities, upon the art of commerce and of credit, upon contract and an elaborate form of conveyance, and an extensive banking system were well formulated and rigorously limited the conduct of private affairs. The exercise of judicial functions was primarily in the hands of the priesthood, and in the administration of justice the approval of the principal god of the country or of the ruling sovereign was evoked. The nature and the extent of the laws, as well as their codification, represent a recognized legal basis for political organization in advance of anything attained up to that time.

Though the first form of provincial government was established in Assyria, the Persian Empire—about 530 to 330 B.C.—carried this form of government to a greater degree of perfection. Here, provinces, or satrapies, enjoyed a certain amount of local autonomy while still subject to the central authority of the king, to whom taxes were due and, in times of war, allegiance on the part of all men bearing arms. The central government, on the whole, was just and considerate of the rights of its subjects, but the people had no voice in its management, and in spite of their independence in their local affairs they were essentially a part of a great military organization.[15]

To the Orient, then, civilization owes the achievement of definite and systematic political organization under one ruler whose greatest asset was frequently his military supremacy. There were in these nations, however, no political freedom and no citizenship such as have developed in modern times. In the Oriental countries, the rule of the king was unquestioned, and the individual did not share responsibility in political affairs. With the decline of the kingdoms of the Orient, the further development of civilization and the advancement of political institutions passed from the East to Europe.

The chief routes by which Oriental political institutions were car-

[15] *Ibid.*, chaps. v, vi.

ried into Europe were: first, by water, the highway being the Mediterranean Sea, from Egypt to the islands of the Ægean Sea, especially the island of Crete; and, second, by land, through the valleys of the Euphrates and Tigris Rivers into Asia Minor, and thence to the mainland of Europe. Chief among the islands of the Mediterranean Sea which were to receive the benefit of Egyptian culture and political achievements was Crete. A unique civilization developed on this island, which greatly influenced and stimulated the life of the Greeks, the first of the European nations to rise into prominence.

Political Contributions of Greece and Rome

Contributions of Greece.—The Greeks, a branch of the Indo-European race, leaving their old nomadic life in the pastures of the north, poured down upon the peninsula and the islands of the Ægean, and took possession of this part of southern Europe during the period from about 2000 to 1000 B.C.[16] Here they came in contact with the superior culture and mode of living of the Cretans. After this invasion the Cretan civilization disappeared, but not until the Greeks had appropriated a sufficient amount of it to form a basis for the culture and institutions which they later developed. With them, the Greeks brought some of the elements of their primitive forms of civic association, which, when grafted upon the remnants of the civilization they had overridden, developed into the highest political institutions that had thus far been established.

Their original organization consisted of loose groups of families, which formed clans or gens differing greatly in size, but recognizing the oldest male descendant of the forefather as the clan elder or chief. A common kinship and the worship of a common ancestry formed the main bond of union. In time, clans or gens united into phratries or brotherhoods. These in turn joined with other phratries, which resulted in the formation of tribes. The original tribal ideas of the early Greeks which affected the political institutions of Greece were citizenship based upon birth as an inherent privilege of descendants of members of the tribe and the conception that sovereignty belonged to the citizen members of the state.[17]

The idea of kingship developed from the notions of tribal chieftainship and from institutions which they found existing on the islands of the Ægean Sea at the time of their invasion. Though the chief was the recognized head of the tribe, important matters were decided by a council of old men. The practice prevailed also of calling

[16] On the political achievements of early Greece and Rome, consult R. M. MacIver, *op. cit.*, pp. 69 ff.; also J. H. Breasted, *op. cit.*, chaps. viii, ix.

[17] Consult F. L. Schuman, *op. cit.*, on "The Greek State System," pp. 13 ff.

together an assembly of all men bearing arms to discuss the advisability of waging war or of moving on to other places of abode. Retaining these primary elements of civic control—chief, council, and assembly—as the tribes joined and settled permanently in southern Europe, the Greeks evolved a form of government characterized as the city-state, and similar to the political organization of the Oriental nations.

The chief characteristics of the Greek city-states were, first, that they constituted real communities or commonwealths with a distinctive small-town life, with ample opportunities for the free citizens to participate in the political activities of the time. To Aristotle there could be no government where friendship was impossible and no political life without leisure. Second, they were self-sufficient governmental units. Religion and political and social life combined to tie a Greek citizen to his city and to keep him aloof from all adjoining communities. The state to the Greeks could be defined with reasonable accuracy as "a community of citizens united by sharing in one form of government."[18]

As political development progressed in Greece, the city-states came to differ among themselves as to their internal organization. In some, sovereignty is found to have been vested in a direct democracy where every free citizen had an equal voice; in other states, the ultimate power was placed in a restricted oligarchy; and in still others, absolute authority was usurped and held by tyrants. In fact, the majority of the Greek city-states passed through all of these various stages at some time during their existence. In Athens, by a series of reforms, the power of the aristocracy was reduced, and most of the political functions were transferred to an assembly comprised of free citizens. The free citizens constituted the small leisure class who did no disagreeable work, but devoted their time to government, fine arts, and the refinements of life. Although a comparatively small number participated in the active duties of government, nevertheless the Athenian constitution represented at that time one of the greatest advances in the direction of popular government. The Athenian ideals are very well summarized in the memorable oration of Pericles.

In many respects there was a cultural unity among the Greeks, particularly in the common religious beliefs and practices and in the use of common dialects. An essential characteristic of all the city-states was that each city was inherently entitled to an independent existence, with the full right to regulate its external relations with other cities. To the Greeks the political ideal was the city; hence

[18] See William Linn Westermann, "Greek Culture and Thought," *Encyclopædia of the Social Sciences,* vol. i, p. 8. This article may be consulted for a more extensive treatment of the political ideas and contributions of the Greeks.

the notion of union with other cities was repulsive. This demand for self-realization in the management of internal affairs and external relations with other city-states led in large part to the jealousies, difficulties, and narrow self-centered interests which arose whenever the city-states attempted to confederate. Thus, the citizen was taught to regard himself not as a Greek, but as an Athenian or a Spartan, and from this narrow patriotism arose the many difficulties and jealousies when the loyalty and the local interests of one city were pitted against the loyalty and local interests of another. The relations of these city-states with one another were determined primarily by considerations of self-interest and security, which took an organized form in various leagues or amphictyonies. The independence and the separateness of the Greek city-states were in part overcome by the attempt of a few cities, such as Athens and Sparta, to attain a supremacy over the surrounding cities.

But owing to the inability of the Greek city-states to forget their local differences and jealousies, the Hellenes were never able to unite into one great nation. Such temporary federations as the Achæan League and the Bœotian League united groups of cities for a short period, only to have them separate again for an independent existence as a result of jealousies and misunderstandings which led to frequent civil wars.

Though the Greeks derived from the Orient the idea of centralized power vested in a king, they obtained through the participation of citizens in the political affairs a degree of freedom unknown to the peoples of the East. They failed, however, to develop the principle of representation, and the Greek instinct of separateness finally refused to admit either subject or allies to a common franchise. Although government in Athens and in other Greek cities was democratic in form and based upon the activity and interest of its free citizens, and although great advances were made in the fields of art, literature, science, and philosophy, nevertheless Greece was unable politically to overcome the influences of particularism and decentralization, and finally succumbed to the destructive effects of internal warfare and to the virile strength of her rising neighbor, Rome.[19]

It is worth remembering [notes Professor McIlwain] that our very word "political" comes from the Greek *polis*. It was the Greek city-state that furnished the data for the first systematic thought of our race on "civil relations." It conditioned the thinking of some of its most powerful and penetrating minds upon the perennial and still unsolved problems involved in these relations, and even today, after more than two thousand years of development and change, we can

[19] For a summary of Greek ideas on politics and economics, see *ibid.*, pp. 26 ff.

think of these in large part only in the terms that Plato and Aristotle formulated in contemplation of the political life of those small but intensely interesting centres that had taken form before the fifth century B.C. about the Ægean. Whatever our modern laws may be, Rome is the source of our jurisprudence, and whatever our form of government, Greece has furnished us the main outlines of our political science.[20]

Contributions of Rome.—While the Greeks were individualistic by nature and lent themselves to philosophy, art, and the speculative sciences, the Romans, in contrast, were practical, well disciplined, and law-abiding. Though they originated few new political ideas, they played an important rôle in transmitting Græco-Roman political thought to the rising peoples of western Europe.

Like Greece, Rome possessed in her early political organization the threefold division of king, council of elders or senate, and assemblies.[21] After the conquest of Latium by the Etruscans, the princes, claiming the title of king, ruled as autocrats. The assemblage of *curiæ* was for the purpose of hearing the king's commands rather than of expressing their own will, whereas the senate acted chiefly in an advisory capacity.

When the Etruscan princes were expelled, Rome entered her second period of political development, that of the Republic. The administrative powers formerly exercised by the king were now in the hands of a group of officials known as consuls, censors and prætors. Magistrates were elected by the assembly, which was also expected to decide all important questions. The senate, a body of nobles and ex-magistrates, served as an advisory council. In the course of time the senate became the center of political life. Composed of nobles, the senate was aristocratic and its powers were extensive. Through the struggles which followed between the plebs and the patricians and later between the rich and the poor and between Italy and the outlying provinces, political control in Rome fell into the hands of a few powerful military leaders. Thus the foundation was laid for the Empire, with the centralization of power in the hands of a single ruler. Though the senate and assembly were retained, their powers were in large part absorbed by the emperor. In fact, the emperor became the source and agency of all legislative and administrative powers. Under the leadership of capable emperors, the Roman world, comprising a territory as large as the United States, with a population of one hundred millions, lived under the Great Roman Peace for nearly four hundred years. Nevertheless, even during this period

[20] Charles Howard McIlwain, *The Growth of Political Thought in the West* (The Macmillan Company, 1932), p. 3. By permission of The Macmillan Company, publishers.

[21] See F. L. Schuman, "The Roman World State," *op. cit.*, pp. 22 ff.

of peace, Rome was a military oligarchy and the people of the provinces were held in subjection and exploited accordingly. Few aliens were given the right of citizenship, and then only as the power of the Romans weakened.

During the reigns of weak emperors, who experienced difficulty in administering the political affairs of the numerous provinces, came a disintegration of the strong and efficient organization established by the former emperors. Then followed a century of revolution and disorder which culminated in the establishment of an Oriental despotism under Diocletian.[22]

While the political power and control of the Empire steadily declined, the influence of Roman law and institutions was passed on as a permanent heritage to mankind by the codification of Roman law under the direction of the Emperor Justinian. The *Corpus Juris Civilis* was the result of the combination of Greek and Roman political and legal ideas transformed through the changes of several centuries. The prætors and early jurists under the dominance of Greek ideas gave to Roman law its philosophical content because they were influenced by considerations outside of the law. In the discharge of their duties the prætors were aided by the counsel and guidance of the jurisconsults, who rendered learned opinions on many of the vital legal problems of the time. These opinions were compiled and put in permanent form under the title *Responsa Prudentium*, and represent the fruits of exhaustive research into almost every phase of legal relations. Thus was built up an artificial body of equitable jurisprudence, a scientific law literature, whose growth occupies a period beginning 100 B.C. and ending A.D. 250, a period enriched by the works of Capito, Labeo, Papinian, Paulus, Gaius, Ulpian, and Modestinus. Though the philosophic basis of Roman law was Greek, its particular principles were the result of patient and thorough work by generations of magistrates and jurists.

The work of the great jurists, transformed by the principles of reason and equity embodied in the Stoic philosophy, along with the decrees of the emperors, was put into enduring form in the *Corpus Juris Civilis*. This code was absorbed by the law of the Teutonic tribes of the North as they poured in upon and took possession of the disintegrated empire. For many centuries the Roman law guided the church in its efforts to establish peace and order out of the chaotic conditions which prevailed throughout the Middle Ages. Later, the study of Roman law was revived, and, with the establishment of order by the national states, Roman law was used as a basis to form the codes under which a large part of the people of continental Eu-

[22] For a brief account of the political ideas of the Romans, see Tenney Frank, "The Roman World," *Encyclopædia of the Social Sciences*, vol. i, pp. 42 ff.

rope are now living. The principles of the *Corpus Juris* have also been appropriated and put into force in most of the South American countries, in Louisiana, in Quebec, and in South Africa, until a large portion of the world is governed by laws whose principles and practices are determined in accordance with those of the Roman Code of Justinian. Thus, by means of a highly organized and efficient empire, and by means of the system of law embodied in the *Corpus Juris Civilis*, Rome has profoundly influenced the political institutions of modern times.

Feudalism

As the political control of Rome weakened and the tribes of the North overran southern Europe, a condition of political anarchy prevailed, in which the restraining influence of the church and the power wielded by the great barons alone tended to preserve a semblance of peace and order.[23] It was during this period that some of the primary issues between church and state were beginning to take shape as the questions pressed for solution regarding the immunity of the clergy, the obligations of church property, and the limits of temporal and spiritual jurisdiction, involving the conflict as to ultimate supremacy. During the period of turmoil ensuing, it is not surprising that the peacefully inclined and intellectually minded of this period entered the monasteries, which were protected from the rigors and hardships of political turmoil and perpetual warfare. Neither were the lawlessness and the strife which were indulged in by the pirates and marauders and encouraged by the barons in preying one upon the other conducive to the development of commerce and industry or to the establishment of a settled political order.

The Teutonic tribes from the North did not have any fixed form of political organization. The tribe, as in early Greece and Rome, was the unit of political control, and at times these tribes united to form temporary confederacies. But the most significant factor from a political standpoint during these centuries was the Germanic conception of law. Beginning with a primitive idea of tribal law little affected by new conditions, the exigencies of the times and the peculiar characteristics of the Teutons led to a gradual evolution of the fundamental doctrine of their law, usually termed "the personality of law." Under this principle, notes Professor McIlwain, "a racial group within a state was not brought under the tribal law of the state but permitted to employ its own customary rules, and before a particular case could be determined it was necessary to ascertain which law should apply,

[23] On the characteristics of the mediæval state system, see F. L. Schuman, *op. cit.*, chap. ii.

usually through the profession of the defendant." This phase of Germanic legal thought McIlwain deems of greatest significance because

under such a system of personal laws it was possible for Roman law to survive the invasions of barbarism, if the Roman population was large enough for its law later to form a part of the local law of the district, after the peoples had become stabilized and their laws had become territorial. But for this principle of personality it is hard to see how Roman law could ever have thus persisted as local custom, as it did in places, and had it not so persisted it seems probable that the renaissance of Roman law might never have come, at least when it did, and as it did, in the eleventh and twelfth centuries. For in this darkest period of the law's history it was certainly as local custom chiefly that the Roman rules of the law lived on; it was not in the form of a scientific jurisprudence if we may judge from the few slight, scattered, and exceedingly crude epitomes that have been thought to date from this period. For these reasons the obscure period of the personality of laws must be considered one of the most critical in the whole history of political thought, for if the continuity of Roman law had been broken at this time it is safe to say that the entire subsequent development of political thought in the West would have been far other than it has been. And that continuity was in the greatest danger of being broken. Our knowledge of the full text of Justinian's *Digest* hangs by a single thread, the precious manuscript of it preserved at Florence. But for the effects of the principle of personality, there might well have been no Irnerius, no Bartolus, no Cujas, no Bodin.[24]

The importance of personality in the application of law slowly gave way to the territorial concept; but whether personal or territorial in basis, custom was the real source and sanction for the law of the invaders and the conquered.

Among the political contributions of the Teutons were (1) recognition of the great importance of the individual, with emphasis upon his rights and privileges as opposed to the control of the state; (2) a new type of popular assembly with the beginning of the modern representative idea; (3) a self-developing law, later systematized in the Teutonic codes and in the growth of the common law of England.

As the tribes began to occupy a territory with fixed geographical boundaries and to live in accordance with established laws, the mediæval state was formed. Out of this condition of political chaos of the early Middle Ages evolved the mediæval king or monarch and the mediæval political and economic system known as feudalism. With the disintegration of the political control over the communities

[24] C. H. McIlwain, *op. cit.*, pp. 169-170. By permission of The Macmillan Company, publishers.

of western Europe exercised under the Roman dominion and a weakening of the authority exercised by the leaders of the barbarians, a large number of legal or political units evolved. The characteristic social, political and economic ideas which prevailed in each of these units centered around the fief. This concept which involved the idea of a thing of value held by one person of another might concern an interest in land, personal status, or official position; but primarily reciprocal relations were established in theory if not always in fact on the basis of mutual legal rights. The status of lord and vassal became the primordial factor of the period and from this status emerged the essential political and social relations. It was the age "when the tenure of land fixed the whole status of men, determined their rights and secured their liberties, the land law and 'the law of the land' were almost equivalent terms and included most of the provisions protecting the personal as well as the proprietary rights of the subject."[25]

By combining the powers wielded by the emperors in Rome and some of the authority exercised for many centuries by the popes and bishops, the kings managed gradually to suppress feudal disorder and anarchy, and to create therefrom a power strong enough to establish unity. In this manner were laid the foundations of the mediæval state. When the idea of the personal relation of the Teuton to his chief became blended with the Roman concept of control over a particular portion of land, the tribal lord was changed into the territorial sovereign, who asserted and maintained political and economic control by means of a military caste. The subject population went into the monasteries or became serfs attached to the land, the latter being exploited by the knights and soldiers. This transformation of tribal lords into territorial sovereigns was accomplished first in France and England, and was gradually completed in the other countries of western Europe.

The mediæval kings, though often referred to as wielding absolute authority, were, it is now clearly demonstrated, limited by divine and natural laws. They ruled, according to Bracton's quaint expression, "under God and the Law." Kings might violate these so-called higher laws but in so doing they became tyrants and laid themselves open to legal and forceful resistance by their subjects. Subject to certain vague and ill-defined limits, the mediæval rulers exercised, with little in the way of practical restrictions, the *dominium et imperium* of the Roman emperors.

Separated in many respects from the manorial system, the mediæval towns developed some of the most interesting experiments in govern-

[25] *Ibid.*, p. 198.

ment and economics. As centers of production and marketing they soon came under the control of associations of traders known as merchant guilds and of groups of artisans called craft guilds. The guildsmen held a monopoly on production and distribution; they fixed the standards for the quality of work and for the conditions of the laborers. Towns not infrequently united into leagues, such as the Hanseatic League with its own courts, guildhalls, and places for exchange of products.

The towns frequently succeeded in gaining their freedom from the control both of the king and of their immediate overlords. This freedom was sometimes put into a contractual form with definite guarantees of rights and privileges. Thus the efforts to limit the royal prerogatives were fostered by the semi-independent status of the towns. Much of the art, literature and social culture of the later Middle Ages found its highest development in these active industrial centers, and the establishment of a fairly definite procedure in the conduct of the interrelations between cities prepared the way for diplomacy and international negotiations of modern times.

For a long time, the idea of a universal dominion, such as that wielded by Rome, continued to hold sway over men's minds. After the Roman Empire disintegrated, the Catholic Church, under the direction of the Papacy, appropriated the idea of a unifying power, and aimed to hold Europe together under an ecclesiastical dominion. The Roman Empire and the Roman Catholic Church were, according to mediæval theory, two aspects of a single Christian monarchy whose mission it was to shelter beneath its wings all the nations of the earth. With the expanding powers of the church and its system of canon law, the rising monarchs came into clash with the popes and their representatives until by warfare and civil strife the kings established themselves as supreme in political and religious matters. Nevertheless, the mediæval world-empire lived on as an idea until the beginning of the nineteenth century. But, by rendering the states politically independent, the Peace of Westphalia, in 1648, temporarily ended the effort to create a world state. "That peace set the final seal on the distintegration of the world-empire at once of pope and emperor, and made possible the complete realization of the doctrine of Grotius, the doctrine of the sovereignty of states."[26]

The National State

The national state had its origin in the strife for supremacy among the mediæval barons. Some forged ahead of others and by means of

[26] T. A. Walker, *The Science of International Law* (London, 1893), p. 57.

war, intrigue, negotiations, and every device known to selfishness and adventure managed to strengthen their power and to establish, under the title of king, their dominion over large areas. As the champions of the rising spirit of racial unity and taking advantage of the crumbling internationalism, the monarchs appeared as the protectors of the rights of the lower classes against the grasping powers of the manorial lords. Though each of the rising kingdoms comprised a dominant political and racial group, other races usually displayed a high degree of loyalty to the common ruler. In place of an all-inclusive empire or church, there arose a considerable number of independent sovereigns maintaining only informal relations with one another. Constituting empires rather than states, these political units formed the background for the modern national state.[27]

Since the dawnfall of feudalism, political development in western Europe has come by means of and through the agency of the national state. Through wars and resulting conquests, through diplomacy often based on cunning and trickery, and through peaceful expansion along commercial and industrial lines, the earth's surface has been almost entirely appropriated and settled by a small group of such national states. For a long time it was thought that it was better to use force and trickery than to deal openly and aboveboard, and that the prince or ruler need not be punctilious about fulfilling his promises when it was found convenient not to do so. In the statecraft of the time, the law of self-preservation prevailed and no scruples of honesty or right were to be regarded when self-interest dictated otherwise. In the course of time, however, settled customs and practices grew up in the exchange of diplomats and in the reciprocal rights and privileges granted to citizens.

Two factors of the later mediæval period gave a distinct impetus to the beginnings of nationalism. These were the acceptance of the vernacular languages as a means of literary expression, and the invention of printing, which aided greatly in the dissemination of the increasing nationalistic literary productions among a much larger part of the people. Literary differentiation was soon followed by political separation—a movement which was specially fostered by the Protestant Revolution. With the disruption of the Catholic Church the sentiment favorable to religious unity and universal dominion gradually lost its stabilizing force.[28]

The basic characteristics of nationality are a common language as a

[27] For the evolution of the modern state system, see F. L. Schuman, *op. cit.*, chap. iii.

[28] Carlton J. H. Hayes, *Essays on Nationalism* (The Macmillan Company, 1926), Essay I. See also Carlton J. H. Hayes, *The Historical Evolution of Modern Nationalism* (Farrar & Rinehart, Inc., 1931).

means of cherishing historical traditions and the so-called spirit of the group; a culture-pattern made up of customs, social relationships, and modes of artistic and literary expression; and a complex of institutions, habits, religious observances and political interests or affiliations.

The earlier types of nationalism in Europe were fostered to serve the interests of reigning families or of the aristocratic classes surviving from a feudal society, and only indirectly involved the people of the incipient states or principalities. Not until the eighteenth century was patriotism combined with the consciousness of nationality to produce "genuine nationalism." At this time the cult of nationalism was formulated and defended by philosophers and by prominent political thinkers. Humanitarian and liberal thinkers were among the chief defenders of political and economic nationalism.[29] An "enlightened" person, they contended, could best serve humanity and the cause of internationalism by being "a devoted and a reasonable nationalist." Liberal types of nationalism were in the next century to be pushed aside by more menacing forms of what Maurras called integral nationalism. Professor Hayes thus characterizes integral nationalism:

> Integral nationalism may be defined, in the words of Maurras himself, as "the exclusive pursuit of national policies, the absolute maintenance of national integrity, and the steady increase of national power—for a nation declines when it loses military might." It has to do, it will be noted, not with "oppressed" or "subject" nationalities, but rather with nationalities which have already gained their political unity and independence. It is applicable, therefore, to the contemporary nations of Europe and America more than to those of Asia and Africa. Among the latter, liberal nationalism is in the ascendant; among the former, though liberal nationalism is still an active force, integral nationalism has been superimposed upon it and in many minds has actually supplanted it.[30]

No one can doubt that nationalism now, not only of kings or aristocratic classes but also of whole masses of people, is one of the prime driving forces of political, economic, and social life throughout the world.

The modern state is built on the concept of nationalism, which assumes that each state is sovereign, that is, independent of every other state. Current opinion usually accepts the nation as the best and highest possible development in the political world. In the words of a noted exponent of this theory, "Nature has decreed that the

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[29] Cf. C. J. H. Hayes, *The Historical Evolution of Modern Nationalism,* for an analysis of the different types of nationalism.

[30] *Ibid.,* p. 165.

struggle for survival shall be in groups. The national group is the only one suited to cope with conditions."[31] One of the fundamental principles of nationalism is that each state regards itself and its ideals as superior and thinks that it has a peculiarly important mission to perform. Each state believes that its highest duty is to survive and to spread the ideas and ideals which are regarded as its peculiar heritage.[32]

Rights and Duties of National States.—Modern national states are conceived as involving certain essential rights and duties. The *first right* is that of existence, i.e., the right of self-preservation and defense. This right is the basic principle of state existence, and justifies the taking of such measures as may seem necessary for the safety and defense of the state itself and for the preservation and integrity of its territory. This right with its qualifications was well stated in the first article of the Declaration of Rights and Duties of Nations adopted by the American Institute of International Law in 1916, as follows: "Every nation has the right to exist, and to protect and conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states." The admitted rights of self-preservation and national defense, important and necessary as they are to state existence and development, constitute one of the chief obstacles to the reduction of armaments. No criterion has yet been discovered as a test between a nation guilty of aggression and one acting in legitimate self-defense.

The *second right* is that of sovereignty or independence. This right, as far as external relations are concerned, is subject to many limitations as a result of comity, agreement, and treaties on international affairs. Such limitations are especially important in semi-sovereign states, neutralized states, or states under some form of protectorate. The following rights are based upon that of sovereignty and independence:[33]

1. To establish, maintain, and change the form of government. This involves the right of revolution.
2. To enter into treaties and alliances.

[31] Cf. Karl Pearson, quoted in Edward Krehbiel, *Nationalism, War, and Society* (The Macmillan Company, 1916), chap. i.

[32] On modern cults of nationalism and patriotism, see F. L. Schuman, *op. cit.*, book three.

[33] In the preparation of this summary of the rights of states, we are indebted to A. S. Hershey, *The Essentials of Public International Law* (The Macmillan Company, 1927), chap. xx.

3. To make and change laws and to provide for their administration.
4. To exercise exclusive jurisdiction over all persons and things within its territory, subject to certain exceptions applicable to foreign sovereigns, diplomatic agents, and public ships.

These rights imply certain duties, such as the duty of non-intervention in the affairs of other nations and the duty to respect the rules and customs of international law. Forcible intervention, which was rather common in the former relations of states, is now usually condemned and is no longer deemed justifiable, except where crimes have been committed or where international interests of great importance are endangered. The refusal to give international sanction to the conquests of Japan in Manchuria is indicative of a growing public sentiment against forcible intervention.

The *third right* of a national state is equality before the law. As expressed in the terse words of Chief Justice Marshall, "Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."[34] While, as a matter of fact, states, like individuals, are not equal, and though great states wield much greater power and influence in international affairs than do smaller states and often disregard the rights of the weaker and smaller states, nevertheless the ideal of equality is constantly defended as one of the necessary and vital conditions of rational adjustments among nations.

The right to respect is the *fourth* fundamental *right* of a state. Failure to observe this right is regarded as an affront to the dignity of the state. It involves respect for the state's personality as represented by its sovereign, warships, and diplomatic agents, and also deference for its civil or legal personality, and is evidenced by customary honors and marks of courtesy.

The *fifth right* of states is that of mutual commerce or intercourse, including especially diplomatic and commercial relations. This right is subject to important limitations, but it is a necessary condition if a state is to participate in and to take its part in the family of nations.

All of these rights involve important duties and responsibilities. They demand, as expressed by Daniel Webster, that "every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but she binds her-

[34] The Antelope (1825), 10 Wheaton 65 at 122.

self also to the strict and faithful observances of all those principles, laws, and usages which have obtained currency among civilized states."

Certain corollaries are frequently conceived as growing out of nationalism. Thus, it is contended that expansion is a part of the mission of a nation. The expansion of the frontiers in the acquisition of new territory is often regarded as a necessity. And national necessity is frequently considered as taking precedence over promises, agreements, and international rules. Furthermore, each state is conceived as rivaling other states in trade, commercial relations, and diplomatic affairs. Back of these corollaries is the contention, widely maintained, "My country, right or wrong," by which the individual is expected to support his government whether or not he approves the course adopted. Certain results in the way of intolerance, militarism and war have followed from the acceptance of these corollaries. In diplomacy, it has often meant the adoption of the policy that the end justifies the means and that everything is conceded as right as long as it redounds to the national power and honor. In international affairs, it has set nation against nation, with war as a necessary part of the national life. Along with these rather extreme notions, which have often rendered the concept of nationalism odious, have come positive contributions in the development of a fine spirit of patriotism and sane rivalry and in the growth of peaceful relations which have established the basis for a growing internationalism. "To realise the contemporary ideals of universal literacy and popular sovereignty," says Professor Hayes, "the national state is far better adapted than any other political institution which the world has ever known."[35]

Progress Toward International Organization and Administration

The weaknesses of nationalism, however, such as the dominance of self-interest in the conduct of diplomacy, the difficulties and uncertainties of commercial warfare, and the frequent outbreak of war with its horrible aspects, have led men to turn to the ideal of an international or world state. Preliminary steps toward international cooperation have been taken in the agreement upon methods of procedure by which the nations, through the channels of diplomacy, settle controversies and conduct common affairs, and in the formulation of the rules and customs known as international law.[36]

Owing to the fact that international law is made in large part by treaties and diplomatic agreements, as well as by the courts of each nation, and that its enforcement is left largely to the separate nations,

[35] C. J. H. Hayes, *Essays on Nationalism*, p. 253.

[36] For the rise of international law, see F. L. Schuman, *op. cit.*, pp. 59 ff.

an effort has been made to establish international tribunals with a permanent organization and adequate powers to give sanction to international rules and principles. For this purpose a board of arbitration has been established with prescribed modes of procedure in the settlement of controversies. Other concrete agencies to apply the rules and principles of international law were organized as a result of the World War and the period of reconstruction.

Cooperative action which was found necessary from a military standpoint during the World War resulted in the establishment of the Supreme War Council. This proved to be an effective method for administrative unity in action in war time. Unfortunately, it was extremely difficult to continue cooperative action after peace was established, even in dealing with matters of finance and economic resources, and with those problems in which all nations were interested. The allied governments worked together to some extent through the continuance of the Supreme War Council and its successor, the Council of Ambassadors, but in large part the activities of these bodies were confined to the settlement of political question arising out of the war. A more definite step toward international unity and cooperation was taken by the Peace Conference at Versailles in the formation of a Covenant for a League of Nations.

Covenant for a League of Nations.—This Covenant, which was made an integral part of the treaty of peace between the Allied and Central powers, provided for an Executive Council, an Assembly, a Secretariat, and other agencies to carry out the purposes of the League. It is the duty of the Executive Council to formulate plans for the reduction of armaments and to give advice for the protection of members from aggression. The Council is to act, likewise, as a board of conciliation for the settlement of disputes. An Assembly is constituted to be comprised of representatives of the members of the League and is to meet annually or when called into special session. It is authorized to deal with any matter within the sphere of action of the League affecting the peace of the world. In addition to the Council and Assembly a Secretariat is provided for, to be appointed by the Council with the approval of the Assembly, whose duties are to make preliminary investigations of questions to be taken up by the Council or by the Assembly; to keep all members of the League informed of the progress of the work undertaken; and to serve as a secretarial body in collecting, translating, and disseminating information among all the organs and agencies of the League.

The Council, Assembly, and Secretariat work through various commissions and committees, some of which were provided for in the Covenant and others were organized as the need arose.

The Council of the League has carried out a number of the duties

allotted to it under the Covenant and has undertaken others, such as the repatriation and resupplying of prisoners of war in Siberia, the adoption of measures to prevent the spread of typhus and cholera in eastern and central Europe, and the economic restoration of Austria and Hungary. Among the most important steps taken was the appointment of a Committee of Jurists to prepare a plan for a Permanent Court of International Justice to be submitted to the Council and Assembly and then to the member nations. The plan prepared by the Committee of Jurists was approved by the member nations, and the Permanent Court of International Justice was established and held its first session at the Hague in January, 1922.

It is impossible to go into detail here as to the various duties and functions performed by the major and minor bodies created by the Covenant of the League of Nations. A more complete statement of the organization of the League, its purposes, and its accomplishments will be presented in a subsequent chapter. Suffice it to say that the League has succeeded in settling a number of difficult international questions, and through its various agencies, including the Permanent Court of International Justice, bids fair to take an important part among the modern agencies for the peaceful and judicial settlement of international controversies.

The fact that the League of Nations was established as an agency of the victorious powers in the World War and was used to carry out some of the onerous demands placed upon the defeated nations made its policies and programs to a certain degree partisan and partial in its methods of investigation and administration. This condition was remedied to a limited extent by the admission of the allied powers to membership and the attempt to enlist the interest and cooperation of non-member states. Despite these efforts to make of the League a real organ of international adjustment and administration, the refusal of the United States to join the League and an attitude of aloofness or indifference on the part of other great powers have given to one nation, France, a dominant influence in the determination of League policies. The withdrawal from the League of Japan and Germany and the threat that Italy will withdraw unless substantial amendments are made to the Covenant indicate that even to a greater degree than formerly the officers of the League can act, at least in a political sense, only with the sanction and approval of groups of smaller states. For many social, humanitarian and economic functions League agencies continue to act for the combined nations of the world.

Whether the steps thus far taken in the establishment of the League of Nations will serve as a basis for a permanent international organization remains to be decided. But whatever the verdict may be

in this regard, a series of precedents have been inaugurated which will render easier and more effective some permanent form of organization for greater cooperation among nations.

At the same time that the world has been moving toward the improvement of international agencies and the development of machinery to secure peace for the world, opposite tendencies have been swerving political and economic forces in a contrary direction. It is singular that in a little over a decade after a war was ended in a wave of enthusiasm to end all war and bring a period of perpetual peace to human society, the world is in a stage of the most extreme advocacy of economic nationalism that has ever occurred. This nationalism is ominous because it is deliberate and because present conditions render it possible to interfere with national economic interests in a way heretofore unknown.[37]

Evidence of extreme nationalistic views is to be found in the new wave of protectionism in which most of the leading nations of the world are engaged. Since the enactment of the Hawley-Smoot Tariff Act in the United States in 1930, denounced as "a terrible blow against the economic life of the world," there has been a general upward revision of tariffs by the leading countries. This movement has proceeded with unabated vigor, despite the common belief that it will drive world prices lower, reduce the volume of international exchanges, swell the ranks of the unemployed, and add to the prevailing financial confusion. The disappearance of ten billion dollars' worth of exports has not deterred the nations in raising tariffs, but has resulted in continued upward revisions. In place of peace, security, and the prospect of the growth of international understanding there is agitation, uncertainty, and the feeling that security is impossible except through the increase of armaments and the preparation for war. There has indeed come a disillusionment concerning the hopes and visions of those who participated in the war and who believed that through the agonies of world-wide conflict a new political and economic order was to emerge.[38]

The nature of this disillusionment has been well expressed by Owen D. Young, of the General Electric Company, who as chairman of a committee selected to adjust German reparations under the Treaty of Versailles has had exceptional opportunities to survey present tendencies in economic and political life.

During the Nineteen Twenties [notes Mr. Young] I held the conviction firmly that the world was to experience a period of great

[37] W. Y. Elliott, "This Economic Nationalism: Where is it Leading Us?" *Atlantic Monthly* (October, 1923), vol. clii, p. 424.

[38] Cf. F. L. Schuman, *op. cit.*, pp. 105 ff.

international cooperation in every field. The League of Nations, Locarno, the naval and land disarmament conferences, and the Briand-Kellogg pact, all seemed to me to be instruments of peace, functioning through the cooperation of nations, great and small.

And concurrently, or rather consequentially, there seemed to be a great movement for better economic cooperation throughout the world. The International Chamber of Commerce came into existence and attacked with vigor the trade barriers which had grown up through many generations and which barred the way to the freer flow of commerce, and to the wider exchange of goods and services. The International Bank was established and brought together regularly at its meetings the heads of the great central banks of the principal nations interested in finance.

It seemed that one might hope for a universal stabilization of currencies and exchanges. Certainly business might be expected to flourish everywhere if there were a determination to keep the peace, and if instrumentalities regularly functioning and widely recognized were established as the guardians of the peace. Certainly business might be expected to flourish if currencies throughout the world were sound and exchanges stable, and these in turn were guarded not only by the spirit to maintain them but by machinery adopted to that end.

It seemed to me that all these things were the natural and normal concomitants of the great scientific progress which the world had made during the last fifty years, an advance greater than had taken place in all the time before. Because of this advance one might well conclude that peace was guaranteed, affirmatively by a new spirit and new instruments to maintain it, and negatively by the very destructiveness of the weapons which science had put into the hands of man.[39]

Looking at the world today, Mr. Young raises the query to which many desire an answer.

Why is it that international cooperation is, in certain respects at least, not advancing but disintegrating? Why is it that international commerce is diminishing, not increasing? Why is it that trade barriers increase, not lessen? Why is it that financial interchange tends to become more difficult rather than easier? The outlook in his opinion, however, is not so hopeless as some would have us believe; but the road to a better-spirited and more cooperative world is not quite so straight, not quiet so easy as it was once thought, and the challenge which faces the citizens of today is to find this road and to make the way less uncertain and more secure.

Perhaps the disillusionment is temporary, the swing toward nationalism only an incident in larger movements for world betterment.

[39] The *New York Times Magazine* (December 17, 1933), p. 1. See also Senator William E. Borah, "American Foreign Policy in a Nationalistic World," *Foreign Affairs,* Special Supplement, vol. xi, no. 2.

The dream of world peace and the vision of an international organization which may serve as a center and clearing house for the humanitarian, social, economic and political activities of the world may yet be realized in an organization for which the present League of Nations has served as a model and has prepared the way.

SUPPLEMENTARY READINGS

Osborn, H. F., *Men of the Old Stone Age* (Charles Scribner's Sons, 1916), second edition.

Breasted, J. H., *The Conquest of Civilization* (Harper & Brothers, 1926).

Lowie, Robert H., *Primitive Society* (Liveright Publishing Corporation, 1920).

———— *The Origin of the State* (Harcourt, Brace and Company, 1927).

Oppenheimer, Franz, *The State; Its History and Development Viewed Sociologically,* trans. by J. M. Gitterman (The Bobbs-Merrill Company, 1914).

Vinogradoff, Sir Paul, *Outlines of Historical Jurisprudence* (Oxford University Press, 1920). Consult vol. ii of this series for an analysis of the characteristic legal and political phases of the Greek city-states.

MacIver, R. M., *The Modern State* (Oxford University Press, 1926).

Hayes, Carlton J. H., *Essays on Nationalism* (The Macmillan Company, 1926).

———— *The Historical Evolution of Modern Nationalism* (Farrar & Rinehart, Inc., 1931).

Potter, Pitman B., *Introduction to the Study of International Organization,* (D. Appleton-Century Company, Inc., 1928), third edition.

Buell, Raymond Leslie, *International Relations* (Henry Holt and Company, Inc., 1929), revised edition, especially part i.

Schuman, Frederick L., *International Politics: An Introduction to the Western State System* (McGraw-Hill Book Company, Inc., 1933), chaps. i-iii.

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CHAPTER II

THEORIES AS TO THE ORIGIN OF GOVERNMENT[1]

IN THE preceding chapter the origin and the development of government were briefly explained, but the impelling forces which led man to unite his efforts with other men to accomplish a common end remain to be considered. Various theories have been formulated and advanced by political thinkers as to the incentives which have drawn men together and have led them to submit to a common regulation of the various relationships which individuals bear to one another. Chief among the theories which have been advanced are (1) the instinctive theory, (2) the necessity and force theories, (3) the divine-right theory, (4) the contract theory, (5) the economic theory, (6) the common-consent theory, (7) the idealist theory, and (8) the evolutionary theory.

INSTINCTIVE THEORY

Since the time of the Greeks there have been those who have traced the origin of political institutions to the natural instincts of man. Aristotle, one of the first exponents of this theory, presented the view in the first book of *The Politics*, that man is by nature a political animal. While the state is an association of human beings and has been preceded by the family relation and the village, the instinct for political association is, he maintained, inherent in man. All forms of association, simple and complex, are but the outward expression of this inherent quality. Cicero also set forth the same conception in his *Commonwealth*. The first cause of an association of the entire people for the purposes of justice and utility, he thought, is not so much due to the weakness of man as to a certain spirit of congregation which naturally belongs to him. When a consciousness of mutual rights and duties existed in a community, it was thought that there likewise existed at that time the element necessary to create an organized state as an outward expression of this consciousness.[2] The uni-

[1] Some of the classics on government which present the foundation for modern political theories and which should be read are: *The Republic* of Plato, *The Politics* of Aristotle, *The Prince* by Machiavelli, *Civil Government* by Locke, *The Leviathan* by Hobbes, *The Spirit of Laws* by Montesquieu, and *The Social Contract* by Rousseau.

[2] For a survey of the development of political theories, see especially Charles Howard McIlwain, *The Growth of Political Thought in the West: From the Greeks to the End of the Middle Ages* (The Macmillan Company, 1932); and

versal instinct of human society is toward external organization of the common activities of man.

Greek philosophers thus considered political authority as a "necessity arising from the social life of man as existing in and of and for itself and as determined by the very nature of things." To them the essential psychological element of unity in action existed subjectively in the minds of people and became objective when expressed in laws and political institutions. This subjective idea of unity was thought to have been the essential element of the state and necessarily antedated the objective bond as manifested in the body politic.

The instinctive theory has an element of truth which has led to its acceptance and exposition by certain modern political thinkers.

Necessity and Force Theories

To other thinkers the necessity of self-protection appears to have been the primary motive for the formation of political societies. The necessity theory recognizes that men, because of their many wants, are mutually dependent, and are compelled by them to seek aid through political association. Plato in *The Republic* says, "that owing to our many wants, and because each seeks the aid of others to supply his various requirements, we gather many associates and helpers into one dwelling place and give to this joint dwelling the name of city." It was thought by other theorists that civic subordination was originally established by violence and submitted to under the pressure of force. Self-defense and aggression then occasioned the centralization of control in a common political agency whose power extended over a definite territory or community. Along with the concept of necessity as a basis for organized community life came the growth of the force theory, and with it the idea that might makes right.

The best account of this theory is to be found in Machiavelli's *The Prince*, where force and expediency, as among the prime motives in state control, are succinctly set forth. Machiavelli is, as Lord Acton observes, "the earliest conscious and articulate exponent of certain living forces in the present world."[3] There are, he insists, two methods by which necessary discipline can be secured, namely, law and

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the works of William A. Dunning, *Political Theories, Ancient and Mediæval* (The Macmillan Company, 1902), *Political Theories from Luther to Montesquieu* (The Macmillan Company, 1905), and *Political Theories from Rousseau to Spencer* (The Macmillan Company, 1920). See also the volume dedicated to Professor Dunning, *A History of Political Theories: Recent Times*, edited by Charles E. Merriam and Harry E. Barnes (The Macmillan Company, 1924).

[3] See J. W. Allen, *A History of Political Thought in the Sixteenth Century* (Dial Press, Inc., 1928), part iv, chap. xi; and F. W. Coker, *Readings in Political Philosophy* (The Macmillan Company, 1914), pp. 173-185.

force. The first of these is proper to men, the second to beasts. "It belongs, therefore, to a Prince to understand both, when to make use of the rational and when the brutal way." The principal foundation of states, he asserts, is good laws and good arms—"There cannot be good laws where there are not good arms and where there are good arms it follows that there are good laws." Fear rules the world and, coupled with the dread of punishment, it is deemed certain to gain the desired ends. Since men are wicked and will not keep faith with you, you are not bound to keep faith with them. Whether Machiavelli was describing what he saw men doing in political life or what he thought they ought to do, he prepared an admirable credo for the advocates of the use of force in civic affairs. He sought, Professor Laski asserts, "two essential things: first, the rules which govern the individual's ability to realize his will in a world where such realization was, without regard to its moral substance, the highest ambition recognized by men; and, second, how, in a world of fraud and force and passion, to keep what one has gained."[4]

Recent advocates of the force theory have frankly accepted the doctrines of Machiavelli. To quote one of its influential expounders:

> Force can be found only among people possessed of a strong vitality and of a progressive civilization. Progress makes for victory. If it were not for war, we should probably find that inferior and degenerated races would overcome healthy and youthful ones by their wealth and numbers. The generative importance of war lies in this, that it causes selection, and thus war becomes a biological necessity. It becomes an indispensable regulator, because without war there could be neither racial nor cultural progress.[5]

An expression quite common in certain papers, articles, and books prior to 1916 was that "war is the most sublime and most holy expression of human activity." To these advocates of war "the ideal of perpetual peace is not only impossible, but immoral as well";[6] and political leaders have been urged to combat the peace propaganda, arbitration at The Hague, and the regulation of international affairs by conventions.

The most frank and outspoken use of force in modern times has been made by the dictators which have followed in the wake of the reconstruction process after the World War, and particularly by the new regimes in Russia, Italy and Germany. "I declare that my desire is to govern if possible with the consent of the majority," declared

[4] Harold J. Laski, *The Dangers of Obedience and Other Essays* (Harper & Brothers, 1930), pp. 242-243.

[5] F. von Bernhardi, *Britain as Germany's Vassal*, trans. 1914, pp. 110-111.

[6] H. von Treitschke, *Politics* (1916), vol. ii, p. 599.

Premier Mussolini, "but, in order to obtain, to foster and to strengthen that consent, I will use all the force at my disposal. . . . For it may happen that force may bring consent, and if that fails, there is always force. With regard to all the requirements of government, even the most severe, we shall offer this dilemma, accept in the spirit of patriotism, or submit."[7]

"The question as to who is to rule the country," according to Trotsky, "will be decided on either side not by references to the paragraphs of the Constitution, but by the employment of all forms of violence." There is, he contends, "no other way of breaking the class-will of the enemy except by the systematic and energetic use of violence." And on a grand scale the Soviet Republic under the leadership of Trotsky and Lenin set about by blood and iron to make the workers free.

From present indications, the force theory is gaining sanction in many countries to an extent which would have been deemed impossible a short time ago. Whether the decline of government by representatives with popular consent and approval of dictators in certain states is merely a temporary political status and there may again be a return to government by agreement and consent, remains to be determined.

Divine-Right Theory

Probably no concept as to the origin of government has held so prominent and enduring a place in the political evolution of society as the divine-right theory.[8] The basis for this theory can be traced to the period of development when the control of civic affairs was synonymous with the execution of what were considered by primitive peoples the dispensations of the deities. In the early history of the Orient can be found the idea of the divine origin of civic mandates, when the ruler was the high priest as well as king and military leader. The foundations of the political institutions of the Orient, as well as the despotism of those in authority, supposedly rested upon the divine sanction of the community god. In Oriental countries the divine will was evoked and executed by the king or ruler, who was looked upon as the spokesman of the tribal god.

The close union of priestly, civic, and military functions likewise existed everywhere in Europe in the earlier development of political institutions. Thus, in ancient times, government and religion were inseparably associated. And it was largely through the religious fear

[7] From a speech to the Department of Finance, March 7, 1921.

[8] J. N. Figgis, *Divine Right of Kings and the Divine Rule Theory* (Cambridge, 1914), second edition.

and superstition which the ancient peoples had for an unseen will expressed through what was supposed to be a divinely appointed agent that the barbarous elements of liberty and license in man were brought into check by a common agreement or political mandate.

Alexander reinforced the idea of the divine right of rule when, during his series of conquests, he made a visit to the ancient sacred shrine in Egypt and claimed to have received there the divine sanction for the campaigns which followed in Europe as well as in Asia. Later throughout Europe further progress in political organization was effected on the theory of a close union of kingship with a divine being, just as had been the case with the despots of Asia. Support of the theory that the king or ruler obtained his power and authority from a divinity to whom alone he is responsible has been carried over into recent times.

Adherence to this idea was manifested by Charlemagne when he accepted coronation from the Pope of Rome and thus recognized a union of civil and religious authority. Such a recognition helped to restore order and political unity amid the chaos which prevailed throughout Europe during the later mediæval period. After the long and bitter struggles which followed between the church and the state, the temporal ruler gained undisputed control over things temporal, while the church was recognized as supreme over things spiritual. Although this contest ended by establishing the authority of the king as independent of that of the Pope, the former, whenever it was advantageous, still harked back to the divine origin of royal edicts. In the rise of modern nations, kings have often resorted to the time-honored theory that their power is an inheritance from God. Such was the case with the despotic rulers of England, James I, Charles I, and Charles II, and with Louis XIV of France. In the words of James I, "that which concerns the mystery of the king's power is not lawful to be disputed; for that is to wade into the weakness of princes, and to take away the mystical reverence that belongs unto them that sit on the throne of God." Louis XIV held a similar idea as to the divinity of kingship and expressed it in the following statement: "It appears from all this that the person of the king is sacred, and that to attack him in any way is a sacrilege—kings should be guarded as holy things, and whosoever neglects to protect them is worthy of death."

In modern times, conspicuous examples of nations whose rulers have claimed direct connection with a deity and divine sanction for royal authority are to be found in Germany and Japan, and in Russia until the recent overthrow of the monarchy. The divine right of kings, observes an authority on the constitution of Japan, "was carried to such an extreme in England that Charles I lost his head;

but in Japan the divine right of the Emperor is acknowledged to a degree of which no Stuart ever even dreamed."[9] According to Prince Ito, "the Emperor is Heaven-descended, divine, and sacred; He is pre-eminent above all his subjects. He must be reverenced and is inviolable."[10] It is evident, then, that the modern government of Japan is based to a certain extent upon the idea of the divine descent of the monarch; and with the merging of the oligarchy into a single power, the reverence of the people for the throne has continued.

A more striking instance of the divine-right theory was the revival at Königsberg by Emperor William of Germany of the rôle of vice-regent of God on earth: "My grandfather [said the former German ruler] by his own right, placed the Prussian crown upon his head and again proclaimed it to be bestowed upon him by God's grace alone, and not by parliaments, assemblages of the people, or resolutions of the people; and that he saw himself the chosen instrument of Heaven, and as such regarded his duty as regent and ruler. . . . Considering myself as the instrument of the Master, regardless of passing views and opinions, I go my way, which is solely devoted to the prosperity and peaceful development of our Fatherland."[11] The relation of the force theory to the divine-right theory is expressed in the speech of Emperor William to the Royal Guard in 1898: "The most important heritage which my noble grandfather and father left me is the army. . . . And leaning upon it, trusting our old Guard, I took up my heavy charge, knowing well that the army was the main support of my country, the main support of the Prussian throne, to which the decision of God has called me."

The abdication of the German Emperor as a result of military defeat and the control of liberal and democratic parties lessened temporarily the influence of the divine-right idea in German politics. In Japan, likewise, the trend toward parliamentary government is weakening the sentiment which supports the divine-right theory. Never-

[9] E. W. Clement, "Constitutional Imperialism in Japan," *Proceedings of the Academy of Political Science* (April, 1916), vol. vi, no. 3, p. 5.

[10] *Ibid.*, p. 6.

The contemporary attitude of the Japanese people to their Emperor has been expressed as follows: "The first Emperor of Japan was a divine ruler, as have been all his successors ever since. The Emperor is the centre and head of the organization of the empire. The distinction between ruler and subject remains vital and permanent. The sovereign is sacrosanct, infallible and inviolable, and obedience to him and his government is implicit. To him is due the same worship and obedience as to his ancestors, the gods of the nation." *New York Times*, November 11, 1928. Cf. Harold S. Quigley, *Japanese Government and Politics* (D. Appleton-Century Company, Inc., 1932), p. 74.

[11] "The German Kaiser and Divine Right," *The Outlook* (September, 1910), vol. xcvi, p. 53.

theless, the theory of the divine origin of political authority cannot be ignored in the study of politics, however foolish or preposterous the extravagant claims of its proponents may seem.

Contract Theory

During the latter part of the Middle Ages and up to the early eighteenth century, a new theory was advanced as an explanation for the political association of man. This idea, known as the contract theory, presupposes an original state of nature. From this condition, individuals emerged into political organization by mutual agreement whereby they bound themselves to submit to an external authority. The theory was definitely formulated in continental Europe during the fourteenth and fifteenth centuries, and was later carefully developed and elaborated by Hobbes, Locke, and Rousseau. Each conceived a somewhat different notion of the contract through which political society was formed.

To Hobbes, man was essentially selfish and lived in a state of nature in which there was perpetual warfare of all against all.[12] He undertook to find how a common life could be established for men whose actions are inspired by fear and self-interest. Among the selfish desires of men, there is the desire for comfort and an interest in security. Reason, therefore, predicated a form of agreement to attain security for the social order. Consequently, Hobbes believed the individual would be inclined to join his fellows in forming a common sovereign who might establish peace and order. The state was thus based upon a compact between individuals whereby each of them gave up a part of his own natural liberty in order that all might be protected by the strength of all. When a number of persons had so delegated their individual rights to a common authority, a commonwealth was thought to be formed. The contract, once entered into, was regarded as eternally binding and the sovereign which was formed and in whom political authority was concentrated was absolute. To the people there was no alternative but to submit to this authority, for the right of revolution was forever lost and submerged in the original contract which created a political society.

Law, according to Hobbes, is merely a command of the sovereign and as sovereignty is unlimited there can be no unjust law. "He represents at its maximum that intense desire for a strong authority, impregnable both within and without, which," notes Professor Laski, "was natural in his time. And his sense of the state as the sovereign legislator which could brook no rival, whose will was law because no

[12] F. W. Coker, *op. cit.*, pp. 302-352.

will was superior to itself was destined to play a fundamental part in future political philosophy."[13] It may readily be seen that Hobbes became a champion of an absolute monarchy such as the Stuarts were trying to establish in England and Louis XIV was laying the basis for in France.

John Locke, on the other hand, set about to justify the English Revolution of 1688 and to give sanction to King William's title to the throne. As a consequence, Locke repudiates the basic premises of Hobbes and predicates a condition in which mankind was getting on fairly well without civic association.[14] "The state of nature," said Locke, "has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it, that, being equal and independent, no one ought to harm another in his life, health, liberty or possessions." This law of nature is comprised of actual rules for the government of men. But the individual in the state of nature found it desirable, in order to secure better protection for his rights and liberties, to form a political association. The origin of government, then, is conceived by Locke as a compact wherein the individual voluntarily surrendered into the hands of a general authority certain rights and powers by which his remaining liberties and rights should be protected and preserved.

The state is thus created to protect rights already in existence. Moreover, these rights remain in the individual even after the contract is formed and have the same binding force as in the state of nature. In other words, the governing power created is in no case absolute, but is limited by these rights. The power of the ruling authorities is a fiduciary one and, when abused, may be revoked by the people who granted it. The belief that government is thus based upon the consent of the governed, and that the right of revolution against an arbitrary and abusive sovereign is an inalienable right—both of which are forcibly expressed in the Declaration of Independence—represent, in concrete form, the fundamental principles of the contract theory as expounded by John Locke.

Opposing the absolutism of Hobbes, he said, "The true remedy of force without authority is to oppose force to it! Let authority but step outside the powers derived from the social contract and resistance becomes a natural right; the state of nature supervenes, and a new contract may be made for which there is more hope of observance." These principles were also embodied to a certain extent in American state constitutions.

Rousseau began his *Social Contract* with the striking epigram,

[13] Harold J. Laski, "The Rise of Liberalism," *Encyclopædia of the Social Sciences*, vol. i, pp. 108-111.

[14] F. W. Coker, *op. cit.*, pp. 385-436.

"Man was born free and everywhere is in chains."[15] Here was suggested the doctrine of a state of nature which he had previously developed—that is, that man lived in a condition of freedom and bliss, and that he lost much of his freedom as the conventions of society grew and as political authority was asserted over him. Although man is naturally free, Rousseau believed his freedom might be protected and even improved upon by the formation of a democratic political society. The problem with him was "to find a form of association which shall defend and protect with public force the person and property of each associate, and by means of which each, united with all, shall obey, however, only himself and remain as free as before." This difficult problem is solved by the formation of government based on the *volonté générale*, or general will. The general will is not always the will of a majority; it represents rather the will of those who conceive and work for the best good of the entire society. This general will brings into being the sovereign, which, resting upon the agreement and consent of the people, is regarded as inalienable and indivisible. Since it has its source and sanction in the voice of the people, there need be no fear of creating an absolute authority. According to this theory, the government and the officers of the state are the mere agents of the sovereign, and they must look to the people for their mandate. In putting the authority of the people uppermost and in placing the sanction of government entirely upon their will, Rousseau formulated the democratic ideal which was embodied in the political philosophy of the French Revolution, and which, through the great upheaval that followed, profoundly influenced the growth of popular government in all countries.

Economic Theory

Attracting attention during the middle of the nineteenth century and gaining favor in the latter part of it, the economic interpretation of man's political development continues to claim a considerable number of adherents. Stated very briefly, it may be said that the main feature of the economic theory of the state is that political organization had as its chief incentive the necessity of man's economic struggle for existence. In the evolution from his primitive conditions to his present status in society, the satisfaction of his increasing wants has occasioned the development of the control of one person over the life and working power of another; or, in the usual phraseology, it has resulted in the economic exploitation of man by man. The consequent exploitation of one class by another and the struggles which neces-

[15] *Ibid.*, pp. 479-513.

sarily ensued were, according to this view, the important factors in the formation of the political machinery which is now called the state, with its laws, courts, and numerous agencies by which the ruling classes and later the owners of large industries have sought greater power and protection. Beginning with the first subjugation and ownership of slaves by primitive peoples and ending with the great industrial systems of modern times, the advocates of the economic theory of the state interpret the various political developments as but steps in the history of the economic struggle between classes. The national state, with all its organization and administrative machinery, according to this view, has been evolved as a means by which the more powerful class exploits the results of the labor of the less powerful. Though it has gained many adherents, the economic interpretation of the state which regards the chief motive of political organization as self-preservation and the dominance of selfish interests, backed at first by brute strength and military power and later by political institutions based on laws and courts, has at the same time been adversely criticized.

Critics of this theory have attacked it on the ground that progress in political development would have been impossible had class struggle and class hatred been the dominant elements in man's evolution from primitive conditions. Then, too, it is maintained that in emphasizing the economic motive in progress there has been a tendency to read into the past forces and conditions which did not exist and which have developed in more recent years through changes resulting from the Industrial Revolution, thus rendering it possible for a few individuals to control the work and results of the labor of many. Furthermore, instead of a deliberate attempt to form and control political institutions for the subjugation of one class by another, the interpretation and the application of laws have at times seemed to work to the advantage of one class and to the disadvantage of another. But when such interpretation of the laws is carried to an extreme, the result is likely to be a change in political institutions which alleviates to a degree the wrongs of the oppressed class. Though the economic theory of the state has thus served a useful purpose in calling attention to the influence of some of the fundamental factors in political progress, it is apparent that this theory, like some of the others briefly discussed, serves as only a partial explanation of the grounds for political obligation and control.

Common-Consent Theory

In contrast with the force and divine-right theories, there has been a new development of the contract theory toward an ideal of govern-

ment based on common consent. The ideal of common consent was formulated in the Declaration of Independence. The sentiment of the Declaration as exemplified in the government of the United States was forcefully expressed in the terse phrase of Abraham Lincoln as a "government of the people, by the people, and for the people." Former President Wilson more recently presented the case for the common-consent theory. In his address to Congress, January 8, 1918, suggesting a proposed basis for peace, he asserted that the adjustment of colonial claims should be based upon a strict observance of the principle "that in determining all such questions of sovereignty the interests of the populations concerned must have equal rights with the equitable claims of the government whose title is to be determined." Later, he again contended that "national aspirations must be respected; people may now be dominated and governed only by their consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril."[16]

Though there were keen disappointments in many quarters that the principle of common-consent or self-determination was not strictly followed in the territorial adjustments made in the Paris Peace Conference, nevertheless the principle was applied on a more extensive scale than before, so that there is justification for the conclusion that "recent events have afforded significant proof of the readiness of important states to respect such a principle."[17]

Idealist Theory

Another theory attributed in its origins to Plato and Aristotle is usually called the idealist or metaphysical theory. Its chief tenet is that through the state alone can the individual live the good life and realize the highest ends of his existence. From this doctrine arose a philosophy which glorified the state and conceived it as a mystic and super-personal entity, possessing "a will, rights, interests, and even standards of morality of its own, separate and distinct from those of individuals or even of the sum of individual wills; and it, rather than individual enterprise and effort, is the real source of civilization and progress."[18] The chief advocate of the idealist theory in recent

[16] For a suggestive analysis of the doctrine of consent in politics, see Harold J. Laski, *Grammar of Politics* (Yale University Press, 1925), pp. 241 ff.

[17] For a brief account of the growth of the principle of self-determination, consult C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little, Brown and Company, 1922), vol. i, pp. 108 ff.

[18] James Wilford Garner, *Political Science and Government* (American Book Company, 1932), pp. 228 ff.

times was Immanuel Kant. To him the state was omnipotent and infallible and its source was divine. Therefore, obedience to the state was a sacred duty. Accepting and developing these ideas, Hegel treated the state as an entity separate and distinct from the people who compose it. The state, he thought, had a will and personality of its own. According to this philosophy the state became an end in itself and the rights of the state became superior to those of the individual, and, in fact, individual rights, as far as they exist, have their sole source and sanction in the state. As the unfolding of "the divine idea" on earth, the state was deemed to be omnipotent and infallible and was bound neither by the canons of ethics nor by the rules and principles of international law.

The idealist philosophy of Kant and Hegel was carried to its logical extreme in the writings of Nietzsche, von Treitschke and von Bernhardi. To them not only was the state a divine institution but also its highest end and aim were manifested in the nobility and grandeur of war. The Machiavellian doctrine of the state as power was made an article of faith and worship. Espousal of the idealist concepts, particularly in their crude and unethical forms, during the World War has led to vigorous attacks upon these doctrines. They represent the antithesis of the principles of democratic humanitarianism which characterized the best thought of all countries in the last few generations and they result in a denial of the real worth of individual initiative and freedom.

Evolutionary Theory

The foregoing theories as to the incentive which led to man's association with his fellow beings for civic purposes have been found to be at best only partially correct. Though there is an element of truth in each, they are now felt to be but a part of the modern theory of the evolution of political institutions. It is granted that the instinctive theory explains how at the very beginning of this evolutionary process the inherent qualities or characteristics of man caused him to associate with others, and that he is by his very nature a political animal. All along the line of this development it is obvious that he has, on the grounds of necessity, established his authority by force and then has sought justification for his action. Then, too, it was advantageous for those who succeeded in gaining an ascendency over others to employ and rely on the idea of a direct personal connection with a divinity to reinforce their power and authority. And while it is generally conceded that the contract theory cannot account for the origin of the state, it has without question served man's purpose in bringing about changes in the existing order of political institutions and in justifying the formation and exercise of political authority.

Upon examining, then, the evolutionary theory which includes the other theories within its scope, it is found that modern complex political institutions represent a growth extending through many centuries. Just as the biologist maintains that plants and animals, as found today, had rudimentary beginnings in the past, and the present-day species of both are the result of actions and reactions resulting from environmental influences, so the student of politics finds that political institutions represent the outcome of man's struggle to adjust himself to his environments in order to use them in meeting the new conditions which are ever arising.

This development from the primordial efforts in civic association to our present complex political institutions has been previously discussed. The earliest forms of concerted action were there traced in the family, the clan or gens, and the tribe. It was found that tribes united with tribes to form city-kingdoms and city-states, and still later more complex and comprehensive systems of organization arose in the military nations of the Orient and of Europe. It has been shown, too, that with the growth of individual freedom in local provinces a strong centralized power dominating large areas becomes less and less possible. With the rise of the mediæval state and the modern nations, the complexity of modern political institutions has increased. This has resulted largely from the political consciousness which has been gradually awakened in man, not only in a few leaders, but in the great masses of mankind. The intricacies of modern government, then, have not arisen suddenly, nor have they been artificially imposed upon mankind by the ingenuity of a few of their number. Rather they are the results of the broadening intellectual outlook and the awakening of an increasing political consciousness within man in his attempt to adjust himself to a changing environment. The process, begun ages ago when man was a primitive animal, has continued to the present day, when he is found adjusting himself anew to the conditions of modern civilization.

Methods of the Study of Politics and Government

The subject matter of politics and government may be approached from four main points of view, namely, the historical, the comparative, the analytical, and the philosophic or ideal.

The Historical Method.—A search for the origin of society and of the political phenomena which accompany its development has engaged the attention of mankind since the union of men into social groups and the emergence of social consciousness. The beginnings of the family and the state, the evolution of custom and law, and the growth of the complex organizations under which we now live in our political life have claimed the attention of many historians and social

scientists. A guide to the interpretation of the present is furnished by the past, and government can be understood only through a systematic study of the successes and failures of preceding races and past ages.

The historical method not only renders invaluable contributions to the origin of human social and political institutions through the avenues of archæology and allied sciences, but also constantly sheds new light upon the psychic forces which move men in social groups. It is history which supplies an analysis of the forces—geographic, economic, and psychic—which give form and shape to all political institutions. Furthermore, a more careful and exhaustive analysis of ancient customs, laws, and governmental agencies is giving a better basis for comparison, analogy, and criticism of present political forms and practices. As the psychologist formulates a better method of analysis of social purposes, motives, and thinking processes, and as the historian enriches our knowledge of past ages, a basis for scientific inference and prognostication will be attained which will render political affairs amenable to more exact methods and to more certain rules of guidance.

The Comparative Method.—It is the nature of man to be provincial in his outlook and to conclude that his own community and its habits are well-nigh perfect. What ex-President Eliot of Harvard described as American "bumptiousness" is a characteristic not confined to Americans. To live in a small community, to become accustomed to its ways, and to conclude that these ways are superior to those of any other community is a characteristic which is common to mankind. To counteract this trait, man's imitative nature has been a redeeming feature. When, through war, the chase, or the exchange of products, new ways of doing things were discovered and a daring innovator brought into the home camp the idea of a better method of doing things, its adoption frequently followed, despite the opposition of tradition and inertia. It is a late development, indeed, when the narrow provincialism of community life gives way consciously to an open search for the new and the better. Yet this is what has come to pass in the introduction of the comparative method in the study and practice of government. With the historical and analytical study of many governments rendered available, and with opportunities for the observation of these governments at work, there has come a deliberate effort to reconstruct and to improve existing political institutions in the light of the study of foreign practices.

Thus, Canada, Australia, and Switzerland mold their constitutions in the light of the experience of our own federation, and other nations use our experience in developing the judicial review of legislative acts. France sends a commission to the United States to study the

separation of church and state. In improving our legal methods, commissioners are sent to England, France, and other European countries. And to remodel our local government and municipal administration, inspiration and guidance may be found in the successful experience of European nations. The comparative study of political institutions has now come to be a feature of our educational system. Moreover, in the *Continental Legal History Series,* in the *Modern Legal Philosophy Series,* and in the *Criminal Science Series* efforts have been made to encourage the exchange of legal ideas with a view of enriching legal studies and of rendering easier and more certain the necessary steps in law reform. Despite all that is being done to encourage the comparative study of politics, economics and philosophy, the outlook of the average American and of many of those in the public service remains singularly provincial.

The Analytical Method.—As a biologist examines a beetle, dissects it and places each part under special analysis and scrutiny, observes one part in relation to another, considers the composition and make-up of each portion, and attempts to discover the work or function which each division of the organism performs, so may the student of government approach his subject from the analytic point of view. Though it is not advisable to carry the analogy too far, for the state does not exhibit all of the characteristics of an organism, it is nevertheless true that the method of the biologist may be followed, with necessary variations, in the study of government. Thus, it is possible to examine the organs through which government is conducted. The departments, the divisions, and the bureaus may be analyzed in detail, and the organization and powers of each division defined. Relations of the departments and their subdivisions one to another, the functions performed by each of the departments and divisions, and, finally, the general purpose and methods of operation of the government may be critically analyzed.

In approaching government from the analytic standpoint, it is possible to consider the entire government of a nation and to define the large divisions, such as legislative, executive, and judicial; to analyze and describe the foundation of the government in constitutions and in laws, and to discuss the powers which the state exercises. But another approach under this same method is to study completely the organization of some division or bureau, such as the Census Bureau or the Public Health Service—its methods of doing work, the purpose which it aims to accomplish, and the effectiveness with which it performs these services. The latter is, of course, the more thorough and more satisfactory, but is, unfortunately, too little used in comparison with the customary superficial analysis of large governmental departments.

To the historical and comparative methods, the analytic method furnishes the minute and laborious analysis of existing governmental agencies, on the basis of which alone relatively adequate judgments may be formed.

The Philosophic Method.—The search for ideals and the attempt to peer into the future where visions and dreams may be realized seem to parallel the conscious life of man. At least as far back as records go, there are found in art, architecture, and bits of poetry the age-long efforts to depict the ideal conditions for the future.

But the philosophic or ideal method has been made immortal by its presentation in the great work of Plato, *The Republic,* in which a master intellect undertook to describe the conditions under which an ideal state might be formed and in accordance with which man might attain his highest development, material, intellectual, and moral. Since the appearance of *The Republic* there have been numerous attempts to construct imaginary ideal states. Notable among these attempts are More's *Utopia,* Campanella's *City of the Sun,* and Bellamy's *Looking Backward.* Interesting as these attempts at prophetic glimpses into the future are, none of them approaches the symmetry and the suggestiveness of *The Republic.*

The philosophic or ideal method is evidenced in the efforts not only to picture an imaginary ideal state but also to render more clear the object which rulers and people set before them as a goal. As each individual of necessity formulates and lives a philosophy of life, so those intrusted with public power act upon a philosophy or philosophies and aim to attain certain ideals. This philosophy may be, as in Greece, an attempt to give free play to the social, intellectual, and æsthetic capabilities of select groups, or, as in Rome, an effort to secure mastery and unity and, through the power thus acquired, to spread doctrines of reason, justice, and equity. The divine-right monarchs, conceiving that their mandate to rule came from God, developed a philosophy to support the concentration of all public interests and public powers in their hands, whereas, according to the ideal of popular sovereignty, the government is conceived as the agent of the people to carry out their wishes and to exercise only those powers which the popular mandate sanctions. It may be a philosophy of individualism in which the theory prevails which Jefferson epitomized in the precept, "that government is best which governs the least," and which Tolstoi describes as the ideal state when the selfishness of man is banished from the earth. Or it may be a philosophy of socialism in which all public services of man are cared for, protected, and performed by a single, all-embracing organization of society. Be it socialistic, individualistic, or one of the numerous variations between, those who govern are influenced by

their social philosophy. The attainment of ideals underlies the individual acts of public servants and determines the trend of the public affairs of a nation. As individual ideals are combined in the social group, there is formed that complex entity known as the social ideal. Such pregnant concepts as patriotism, nationalism, and militarism represent ideals which crystallize into a sentiment or a policy for which the group will strive and contend. The philosophy of government and governmental methods has, indeed, a great influence upon political practice and thus upon the lives of men in society.

None of the methods—historical, comparative, analytical, or philosophical can be pursued singly with much profit. It is only when all are combined that the best results are secured in government study. And in proportion as the art of government is enlivened and enriched by the contributions of all these methods, the management of public affairs will be elevated to a plane of reasonableness and right conduct under which the greatest good of the greatest number will be assured, and at the same time there will remain ample opportunity for individual freedom and self-expression.

While the method pursued in much of the study of government is primarily analytic, the other methods—historical, comparative, and philosophical—are constantly employed to supplement and to render suggestive the functional analyses. Just as the analysis of government at the present time necessarily involves some delving into the past, so this analysis requires a look into the future. Political institutions or practices are considered not so much as fixed things, but as in process of becoming something different. In this process, ideals of political philosophers and the visions of reformers all play a prominent part in the reconstruction which is going on. Whither, then, is an institution or a political practice tending? What are the directions in which the reformers and the idealists would have political institutions go? What is the goal toward which humanity is striving? These are perennial questions whenever any part of the complex governmental machinery is under scrutiny.

Since, then, the scope of reform and the scan of the idealist are limitless, and since to enter into the process of the reconstruction of even any small part of government is exceedingly difficult, it is impossible to get a vision of government as a progressive mechanism without some effort at least to indicate the movements for change and reconstruction which are now under way. Without setting out to defend any particular theory of reform or of reconstruction, it has seemed advisable—in fact, necessary—to give some indication of the movements, directions, and prospects for reform and reconstruction. Thus, the past may well be called upon to give the setting

for the present, and the present will be interpreted in the light of the conditions and processes out of which a new order is arising. The study of government thus becomes a working partner with history, philosophy, psychology, economics, sociology, statistics, and numerous other sciences which together are "closing in on the total meaning of life."

SUPPLEMENTARY READINGS

McIlwain, Charles Howard, *The Growth of Political Thought in the West* (The Macmillan Company, 1932).

Dunning, W. A., *Political Theories, Ancient and Mediæval* (The Macmillan Company, 1902).

——— *Political Theories from Luther to Montesquieu* (The Macmillan Company, 1905).

——— *Political Theories from Rousseau to Spencer* (The Macmillan Company, 1920).

These three volumes give a useful background for modern political thought, and are supplemented by a series of valuable chapters on modern developments and tendencies in the field of political theories, contributed by the students of Professor Dunning, in *A History of Political Theories: Recent Times,* edited by Charles E. Merriam and Harry E. Barnes (The Macmillan Company, 1924).

Gettell, R. G., *History of American Political Thought* (D. Appleton-Century Company, Inc., 1914).

Coker, Francis W., *Readings in Political Philosophy* (The Macmillan Company, 1914).

Extracts from representative political thinkers are given in this volume.

——— *Recent Political Thought* (D. Appleton-Century Company, Inc., 1934).

Recommended especially for consideration of modern tendencies in political thought.

Willoughby, Westel W., *The Ethical Basis of Political Authority* (The Macmillan Company, 1930).

Holcombe, Arthur N., *The Foundations of the Modern Commonwealth* (Harper & Brothers, 1923), especially chaps. i, ii.

Oppenheimer, Franz, *The State,* translated by J. M. Gitterman (The Bobbs-Merrill Company, 1914).

An interpretation of the economic theory as to the origin and development of the state.

Duguit, Léon, *Law in the Modern State* (B. W. Huebsch, Inc., 1919).

Laski, Harold J., *Authority in the Modern State* (Yale University Press, 1919).

——— *The Problem of Sovereignty* (Yale University Press, 1917).

Follett, M. P., *The New State,* (Longmans, Green and Company, 1920).

The volumes by Duguit, Laski, and Follett present phases of the pluralistic interpretation of the state and sovereignty.

CHAPTER III

DEFINITION OF TERMS: THE NATURE AND MEANING OF LAW

Definition of Terms

The term "political science" has been used for various purposes, to which brief reference will be made. When about forty years ago the study of such subjects as history, politics, economics, public law, and jurisprudence began to receive systematic consideration in the universities of Europe and America, it was not uncommon to use the term political science in a general sense as comprising all of these subjects. As these studies began to be more clearly differentiated into separate departments of history, economics, and sociology, the phrase "political science" came to be applied to the more specialized study of government and politics. It is the latter meaning which is now generally accorded to the words "political science."

Even in this somewhat restricted sense, the subject has come to be separated into well-marked divisions: first, courses in descriptive and comparative government, in which an effort is made to give the historical setting and the present analysis of the more important governmental systems of the world; second, courses in political theory, in which the history of political theories is traced in order better to understand and interpret the present tendencies in political thought; third, public law and jurisprudence, including international law, constitutional law, and administrative law; and fourth, functional studies, in which such subjects as political parties, legislative methods, judicial procedure, and the regulation of public utilities and of social and industrial affairs are given thorough consideration. For convenience in defining the present scope of political science, the following table is suggestive:

A. Descriptive and Historical
   1. American government
      a. National
      b. State and local
      c. Municipal
   2. Comparative government
   3. Party government
   4. Colonial government

B. Theoretic
   1. General political science—theory and analysis combined

2. History of political theories
3. Recent tendencies in political theory

C. Legal
1. Constitutional law
2. International law
3. Elements of law and jurisprudence
4. Administrative law

D. Miscellaneous
1. Foreign relations and world politics
2. Legislative methods and procedure
3. Public administration and administrative methods
4. Regulation of public utilities
5. Regulation of social and industrial affairs[1]

For the purpose of clearness and accuracy, brief definitions of a few of the terms in general use in political science are necessary. The terms to be defined are society, nation, state, government, sovereignty and law.

Society.—"Society" is a word commonly used to designate a group of persons who are bound together in relations more or less permanent and who share a common life. The term usually comprises the social groups through which the common life of a people is carried on. In calling attention to life in society, sociology has given a view of the individual as a socius, that is, a unit whose ideas and opinions are formed in large part by the groups in which he lives, moves, and has his being. It may be going too far to insist, as did Gabriel Tarde, that the life of the individual is largely the result of imitating the acts and thoughts of his fellows, but sociology and psychology are both combining to demonstrate how completely the life of the individual is a reflex of the groups to which he belongs.

Though the consideration of the influences that mold individual life in the major part of these groups belongs to sociology and psychology, in so far as these groups participate in and influence political action they become of interest to the student of government. In the growth of democratic government and in the increasing influence of public opinion in politics such groups take a larger part in the determination of political action. It becomes imperative, therefore, to give consideration to the activities of social, political, and other groups as participants in the formation of public opinion and in the management of government. Society, then, as comprised of or-

[1] See report on *The Teaching of Government* by the Committee on Instruction of the American Political Science Association (The Macmillan Company, 1916), p. 199.

ganized groups which assist in the direction of public affairs, becomes an integral part of the study of government.[2]

Nation.—"Nation" has two rather distinct meanings. According to one, it refers to a collection of individuals who speak the same language, have similar customs, and are bound together by sentimental and psychological ties which go to distinguish one race from another. Thus, all who speak the German language, live in accordance with German customs, accept and follow German culture and traditions, no matter whether they live in Germany, Switzerland, the United States, or Brazil, are regarded as a part of the German nation. The criterion of nation in this sense is racial, and the ties which bind such groups are conceived as ethnic in character. To those who believe that government should be made to accord wtih racial customs and traditions, this view becomes of prime importance. And for countries inhabited by many races it creates a very difficult situation.

As the perpetuation of nationality in this sense has become one of the chief aims of modern political and social groups, the difficulties involved in the territorial idea of government have increased. In England and in America, nation is used rather in a political sense to comprise all of the people who live within a given territory and are subject to a common political control. The American nation thus comprises all of the people who live under the political jurisdiction of the government of the United States. From this standpoint the criterion of nation is political and not racial. Nation in the latter sense designates a people under a single political jurisdiction and is practically synonymous with the more common and specific term, state.

State.—Common terms in the description and discussion of political affairs are "state" and "government," which are often vaguely and loosely understood. State is sometimes considered in an abstract sense to denote the universal phenomenon which appears in all types of political life. Thus, according to Willoughby, "we recognize that no matter how organized or in what manner their power be exercised, there is in all states a substantial identity of purpose; and that underneath all these concrete appearances there is to be found a substantial likeness in nature. If now we disregard all non-essential elements, and overlook inconsequential modifications, we shall be able to obtain those elements that appear in all types of state life, whether organized in monarchical or republican, the despotic or limited, the federal or unitary form."[3] It is in this abstract sense that the state

[2] See E. Pendleton Herring, *Group Representation before Congress* (Johns Hopkins Press, 1929).

[3] W. W. Willoughby, *An Examination of the Nature of the State* (The Macmilian Company, 1896), pp. 14-15).

is conceived as the political activities of mankind wherever manifested.[4] To some, the state is regarded as beginning only when a supreme power is created, such as that exercised by the patriarchs in Judea, Greece, and Rome. To others, the state begins with the social and political life of man, and its origins are lost in the long recesses of the past when men first began to live in groups. To the sociologists the state is the most important of the fundamental types of organs or agencies utilized by society to insure that collective life shall be more safe and efficient.[5]

The more general use of the term "state" is to denote the permanent political organization of a particular portion of mankind.[6] It designates, then, in a concrete sense, the organization through which the political life of a community functions. Though the manifestations of public power vary greatly, four essentials have come to be associated with the concept state, namely:

1. A group of persons with common interests and common aims
2. A determinate portion of the earth's surface—a territorial basis
3. Freedom from foreign control
4. A common supreme authority

Political control in primitive communities does not, of course, exhibit all of these essentials. In fact, all four are distinctly manifested only in the modern nationalized state. In the pastoral tribes of the Orient and among the American Indians the territorial basis of political authority was not well defined. In neutralized states, semi-sovereign states, and protectorates complete freedom from foreign control is lacking. With the growth of international comity and international law, complete independence on the part of any state is possible only for an international outlaw; and through the establishment of agencies to enforce international law, independent action will be even further curtailed. Moreover, while the organs of the state may possess authority to render final legal decisions, it is well known that the supremacy of the state is not absolute and not without limitations.

[4] "From the standpoint of the idea," says Professor Burgess, "the state is mankind viewed as an organized unit. From the standpoint of the concept it is a particular portion of mankind viewed as an organized unit." John W. Burgess, *Political Science and Constitutional Law* (Ginn and Company, 1902), vol. i, p. 50.

[5] See especially R. M. MacIver, *The Modern State* (Oxford University Press, 1926), introductory chapter and book one.

[6] The efforts to make a sharp and logically clear distinction between state and government have usually proved rather futile, though the use of these terms in international law seems to require the application of certain workable differences.

Recognizing such limitations and restrictions, we may define the state roughly as *a permanent political organization, supreme within a given territory and (at the present time, for most purposes) independent of legal control from without.*[7]

Government.—The organization and agencies through which the functions of the state are performed are known as the government. When we use the term "government," we think of the organs through which the public functions, the machinery for carrying out the public will. All of the departments—legislative, executive, and judicial; the boards, bureaus, and commissions; officers and employees—go to make up the government. It is more specific than state, and comprehends more definitely those who may be conceived and visualized as comprising public authority.

Sovereignty.—Sovereignty, or, as it is often called, supreme power, is considered the essence of the state. It is usually deemed the factor without which there can be no state. About this term the political theorists have waged a long controversy. According to one school of theorists, sovereignty is unlimited, inalienable, indivisible, and absolute. To another school, such an unlimited, absolute power is inconceivable; it is contended that all public powers are limited, and, in so far as public authorities rule by law, they are of necessity restricted in authority and in action. It would be of lasting benefit to political science, believes Professor Laski, "if the whole concept of sovereignty were surrendered. That, in fact, with which we are dealing is power; and what is important in the nature of power is the end it seeks to serve and the way in which it serves that end."[8]

Part of the difficulty in defining the word comes from a failure to distinguish various meanings. At one time, political sovereignty is thought of as the vague force at work through public opinion and the electorate, which are regarded as the ultimate power in democratic societies. At another time, the concrete expression of public power in constitutional conventions or constituent assemblies is considered as the exercise of sovereignty. The supreme power acting in this constituent manner, in the process of constitution-making, is that alone to which some would apply the term sovereignty.[9] What is ordinarily meant when the word is used in a governmental sense

[7] A recent definition has been suggested as follows: "The state as a concept of political science and public law, is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent, or nearly so, of external control, and possessing an organized government to which the great body of inhabitants render habitual obedience." James Wilford Garner, *Political Science and Government*, p. 52.

[8] *Grammar of Politics* (Yale University Press, 1925), pp. 44, 45.

[9] Cf. John W. Burgess, *op. cit.*, vol. i, pp. 137 ff.

is more accurately called legal sovereignty. Legal sovereignty is the aggregate of powers possessed by the ruling bodies of a political society. It is made up of two features:

1. Internal sovereignty—legally paramount authority over all individuals and authorities within the state.

2. External sovereignty—independence from legal control from without. In a general sense the sovereign is regarded as incapable of legal limitations, but public power is, as a rule, exercised through public organs which are required to keep within certain spheres of action and are almost invariably limited in authority.

Pluralistic and Monistic Theories of Sovereignty.—A controversy in which many political thinkers are now interested is concerned with the nature of sovereign power and its significance in society. Two views which are defended by opposing groups are the monistic theory and the pluralistic theory of the state. According to the monistic theory, which has been for a long time the accepted theory of political science, the state is defined as a political organization which can assert its will, if need be, by the use of physical force. To the major physical power which is the basis of this organization is given the name of sovereignty. Among the essential characteristics of such political organizations, according to the monistic school, are:

1. A territorial basis over which the sovereign power may be exercised.
2. Unity—there can be only one such sovereign in a territory.
3. The sovereign is absolute, unlimited, inalienable, and indivisible.
4. Individual liberty depends upon the protection and guaranty of the state.

By the advocates of the monistic theory attention has been drawn chiefly to "direct and absolute power over each individual subject as well as over all groups of subjects."[10]

To the pluralists the underlying facts of political organization deny the unity and absolutism of the state which is characterized in the monistic concept of sovereignty. They do not regard the state as a social group as distinct from all other groups and paramount to them; the state is merely one among many groups into which man-

[10] See Ellen Deborah Ellis, "The Pluralistic State," *American Political Science Review* (August, 1920), vol. xiv, p. 393; and F. W. Coker, "Pluralistic Theories and the Attack upon State Sovereignty," in *Political Theories: Recent Times* (The Macmillan Company, 1924), chap. iii, for a brief summary of the views of the opposing schools. For a more recent interpretation of the monistic view, see John Dickinson, "A Working Theory of Sovereignty," *Political Science Quarterly* (December, 1927), vol. xlii, p. 524.

kind is divided and to which allegiance is accorded. Thus, it is contended, men form themselves into groups and societies of various kinds—religious, cultural, social, economic, and political. Wherever there is an interest strong enough to form a nucleus, men gather around it in an association. To certain of these associations, it is maintained, the individual gives allegiance and loyalty not differing either in degree or in kind from that accorded to the state. The pluralistic conception of society, in the words of one of its chief advocates,

> denies the oneness of society and the state. It insists that nothing is known of the state-purpose until it is declared; and it refuses, for obvious reasons, to make *a priori* observations about its content. It sees man as a being who wishes to realize himself as a member of society. It refers back each action upon which judgment is to be passed to the conscience of the individual. It insists that the supreme arbiter of the event is the totality of such consciences. It does not deny that the individual is influenced by the thousand associations with which he is in contact; but it is unable to perceive that he is absorbed by them. It sees society as one only in purpose; but it urges that this purpose has in fact been differently interpreted and is capable of realization by more than a single method. In such an analysis the state is only one among many forms of human association. It is not necessarily any more in harmony with the end of society than a church or a trade-union, or a Freemasons' lodge. They have, it is true, relations which the state controls; but that does not make them inferior to the state. The assumption of inferiority, indeed, is a fallacy that comes from comparing different immediate purposes. Moral inferiority in purpose as between a church and state there can hardly be; legal inferiority is either an illegitimate postulation of Austinian sovereignty, or else the result of a false identification of state and society. The confusion becomes apparent when we emphasize the content of the state. When we insist that the state is a society of governors and governed, it is obvious that its superiority can have logical reference only to the sphere that it has marked out for its own and then only to the extent to which that sphere is not successfully challenged.[11]

To one of the best-known exponents of the pluralistic theory the chief problem of political science is whether principles or rules (*une règle de droit*) are superior to the state and limit state action. The problem is "to learn whether there are obligations of a legal kind, positive or negative, which bind the state, considered by itself, delimiting the power of its several departments with the result of im-

[11] H. J. Laski, *Authority in the Modern State* (Yale University Press, 1919), pp. 65-66.

posing duties of action or inaction upon its several departments, legislative as well as executive."[12] According to M. Duguit, the answers to the problem take chiefly one of two forms, which for convenience have been described as the metaphysical and the realistic doctrines. With the metaphysical school are classified all those who regard the state as a personality distinct from that of individuals and who consider the basic element of the state "a personal being possessing a will which is by nature superior to individual wills, having no other will superior to it. The name ordinarily given to this concept is sovereignty." From the standpoint of the realistic doctrine the state as a person is not distinct from the individuals that compose it. There is a state in human society when an individual or group of individuals has succeeded in monopolizing the power of constraint in that society and within definite boundaries, or, in other words, when there is in a given society permanent differentiation between those governing and those governed. Instead of the will of the state there are merely the individual wills of those governing.[13]

Undoubtedly there are merits in the contentions of each school. The monists set up as an ideal to work for in human society political organizations which exercise a supreme control over the political and social activities of the individual. Of course, not all social activities are controlled by this all-powerful sovereign, but there is none which may not be subjected to political control when those wielding public power so decide. On the other hand, the pluralist rightly protests against an unlimited sovereign with a corresponding legal omnipotence, and asserts that states as well as other groups must keep within the limits of the moral law and the other requirements necessary to maintain social solidarity. In this respect the pluralist becomes an advocate of the theory of natural rights which is designed to check overinterference of the state with the affairs of individuals and groups. The contrast between the two views is well put by Ellen Deborah Ellis:

The pluralist doctrine is timely in that it calls attention to the present bewildering development of groups within the body politic, and to the fact that these groups are persistently demanding greater

[12] Léon Duguit, "The Law and the State," *Harvard Law Review* (November, 1917), vol. xxxi, p. 2.

[13] The leading exponents of the pluralistic theory are: Dr. Otto Gierke, in *Das Deutsche Genossenschaftrecht* (Weidmann, Berlin, 1913), 4 vols.; J. N. Figgis, *Churches in the Modern State* (Longmans, Green and Company, 1913); Graham Wallas, in *Human Nature in Politics* (A. Constable, 1908), and *The Great Society* (The Macmillan Company, 1914); Léon Duguit, *op. cit.*, and *Law in the Modern State* (B. W. Huebsch, Inc., 1919); H. J. Laski, *Problems of Sovereignty* and *Authority in the Modern State* (Yale University Press, 1917 and 1919).

recognition in the governmental system. How this recognition is to come, whether through group rather than geographical representation in legislative assemblies, or by some other means, is a problem in itself, for the proper and best way to deal with these groups is perhaps the greatest question before political science today. It may be, as most of the pluralists believe, that a federal organization of government is the solution. To such a solution, the monist could theoretically give his very hearty support, whatever his views as to its practicability might be; but in thus approving it, he would call attention to the all-important fact, so consistently overlooked by the pluralist, that the truly federal state is a unitary state, of which the essence consists in the fact that in and through and above its multiple governmental organization there is one supreme loyalty and political sovereignty.[14]

Since government depends very much upon the character of the men who hold public office and who exercise public powers, as well as upon the legal rules which are laid down for their guidance, modern writers are inclined to think of sovereignty as the powers and the authority which those intrusted with public office see fit to exercise. In so far as they work by law and are guided by rules, their actions are limited; in so far as they are free to exercise an uncontrolled discretion and to render decisions with the full force of public power back of them, they are, at least politically and legally, unlimited.

Law.—Government is, to a large extent, a law-making and law-enforcing agency. The object of law is to provide for the systematic and regular public administration of justice. And justice, according to the famous Roman precept, requires the individual "to live honorably, to injure no one, and to give every man his due." Justice as thus defined may be administered according to the discretion for the time being of the person who administers it, or according to law. Law presumes uniformity of judicial action—generality, equality, and certainty in the administration of justice. The advantages of law are claimed to be: (1) it enables the prediction of the course which the administration of justice will take; (2) it prevents errors of individual judgment; (3) it protects against improper motives on the part of judicial officers; (4) it gives the magistrate the benefit of all the experience of his predecessors.

According to the English jurist Austin, law was defined as a command set by a sovereign to his subjects. These commands were in the nature of rules made by a determinate human authority, were general in application, dealt with external human action, and re-

[14] *Op. cit.*, p. 407. For a consideration of the relation of pluralistic theories to the problem of administrative decentralization, see chap. xx.

ceived their force and effectiveness through the sanction of the sovereign. Later jurists modified this view to include the rules enforced by the state, as well as those which were made by the state. The ideas concerning government and law are of such significance that they deserve special consideration.

The Nature and Meaning of Law in Modern Society

The problem of the nature and meaning of law and of its relation to government and society is one that is constantly in need of reappraisal. Moreover, such reappraisal must be made from many different viewpoints to form a composite judgment for any time and place. For a long time, at least in Anglo-American jurisdictions, law has been conceived as comprised of rules which emanate from the sovereign or which have been sanctioned by authorized agencies of the sovereign. Its essential element is deemed to be will and only those rules which embody the sovereign's will are accepted as law. To keep the field of law "pure" and uncontaminated by interminglings or too close associations with allied fields, such as ethics or morality, custom or convenience, natural or divine precepts, a cult has arisen the main tenet of which is the advocacy and preservation of the *Juristic, Positivist* or *Austinian* concept of the law.

Juristic Theories.—Though involving the restatement of well-known views, brief summaries will be given of some of the best expositions of the doctrines of the Positivist or Analytical School. Representative advocates of Positivist dogmas among American contemporaries are John W. Burgess, W. W. Willoughby and John Dickinson. According to Burgess, the state is a particular portion of mankind viewed as an organized unit and has the following distinguishing characteristics:

1. The state is all-comprehensive, i.e., it embraces all persons and all associations of persons within its territory.
2. The state is exclusive. There can be no *imperium in imperio.*
3. The state is permanent.
4. The state is sovereign. This Burgess regards as its most essential principle.

Sovereignty is defined as the original, absolute, unlimited and universal power over all individuals and all associations of individuals. There can be no such thing as a limitation of sovereignty by the laws of God, laws of nature or reason, law of nations or any other power or agency.

"I do not ignore the fact," says Burgess, "that some great publicists think they see in the body of general agreements, positive and

customary, between states, called international law, the postulates of a consciousness wider than that of a single state. This may be true; but we must not forget that these agreements and customs are not law between a state and its own subjects unless the state recognizes them as such."[15]

With these postulates as a foundation, the conclusion is reached that the modern national state is the most perfect organization yet attained in the world, and for these organizations the principle must be accepted that the state can do no wrong.

In order to find a basis for the protection of the rights of the individual, Burgess distinguishes between state and government. The state is conceived to be the ultimate, constituent or constitution-making authority in a given society. Its essence is sovereignty and to this ultimate power there can be no check or limit not approved by its own sanction or will. Government comprises the agencies through which the state will is carried out. It may be subject to many and varied limitations, and individual liberty is regarded as secure only when the most important of these limitations are written in the fundamental law and are interpreted and applied by an independent judiciary. As head of the first School of Political Science in the United States, at Columbia University, Professor Burgess exerted a great influence on the young scholars in the field.

Professor W. W. Willoughly is one of the foremost advocates of the Juristic or Positivist theory of the state.[16] Willoughby defines the state as "the political person or entity which possesses the law-making right," and government as the organization through which the will of the state is formulated and executed. He then proposes a juristic conception of the state which regards it as the sole source of positive law and makes sovereignty the essential characteristic of the state. Sovereignty, which connotes legal omnipotence, must by its very nature be a unity. The real test is who has the legal power to determine its own competence within a given society—this person or these persons are the sovereign for that society. Sovereignty by its very nature cannot be limited, for to limit it is to destroy it; nor can a state impair its own sovereignty. The state cannot limit its authority, for "being regarded as itself the source of law, it cannot be bound by the obligations which that law creates." Though the authority of the state is illimitable, the government or the agencies of the state may be rendered subject to many and effective limitations. Hence

[15] John W. Burgess, *op. cit.*, vol. i, p. 54.

[16] See *An Examination of the Nature of the State* (The Macmillan Company, 1896); *The Fundamental Concepts of Public Law* (The Macmillan Company, 1924); *The Ethical Basis of Political Authority* (The Macmillan Company, 1930), and articles in the *American Political Science Review*.

"no act of a sovereign state can, therefore, be illegal; and no illegal act can be an act of a state."

Law is defined by Willoughby in accordance with the views of the English jurist John Austin, as the declaration of a rule or principle for the governance of human action. With the origin or purpose of a legal rule the Analytical jurist claims to have no concern, nor with the element of the enforcement of legal rules, "for it is not the actual enforcement of a rule by the state which transmits it into a positive law, but the authentic manifestation by the state that it accepts or declares that rule to be an expression of its sovereign will."

That which gives law force and efficiency is the threat of coercion, or the imposition of penalties by a superior power in case of violations. In the strict Positivist sense law is defined as the rules of conduct that courts of justice if resorted to will apply in the exercise of their authority to decide concrete cases. The actual enforcement of the law by the courts is not, however, an essential to make law effective. Willoughby does not attach as much significance as Austin to the enforcement or sanction for law. The true sanction of a positive law, says Willoughby, consists in the fact that the authority issuing it claims to be superior politically to the persons to whom it is directed. Juristic theory as thus envisaged is admitted to be "a purely formalistic" approach to the nature of law and its purpose is to provide conceptions whereby legal thinking may be systematized. From such a Positivist standpoint Willoughby concludes, as did Austin, that there can be no such thing as international law in the strict sense of the word. There is no sovereign to issue international commands, hence there can be no international law. He does not relegate international law to the field of positive morality, as did Austin, but places it in an intermediate category between law properly speaking and customary morality.

Criticizing the theories of Duguit and particularly his view that law exists without a sovereign and above a sovereign, Willoughby insists that "the juristic conception of the state as a person, with a plenitude of legal competence, carries with it no implication as to the ethical rightfulness or of the physical power to control the actions of persons subject to its authority."

Duguit's views, though of interest to the sociologist or the moralist, are deemed by Willoughby of no interest or value to the jurist. The doctrines of Krabbe, Laski, Cole and others who deny the validity of the Positivist theories are analyzed and found impractical and illogical. The government of a state is then defined as "the machinery or complexus of organs or instrumentalities through or by means of which the State effectuates its purposes, that is, issues its commands and secures their enforcement."

John Dickinson also joins the defenders of the Positivist school of jurisprudence. He has attempted to state the older theory in a form that might be more acceptable to those inclined to disagree with the tenets of this school. Essentially there is nothing new in Dickinson's "working theory of sovereignty," but some consideration may well be given to the effort to reformulate the Austinian hypotheses.

A system of law Dickinson regards as a body of general rules which produce like decisions in like cases and are capable of being known in advance. If there is to be uniformity in the application of these rules, then, Dickinson insists, "there must be a single source of law which all inferior tribunals and officials within that community are content to recognize as speaking with ultimate authority, and to whose pronouncements they will therefore voluntarily conform, so far as they know how, their own separate acts and decrees."[17] This need for a single source of authoritative formulation of law or an ultimate center of legal reference leads to the logical postulate or presupposition of sovereignty as the necessary basis for any legal order. There must be some power or authority to choose between competing rules of law and to delimit the boundaries between competing jurisdictions. The juristic sovereign is the "organ or funnel through which the forces of fact, motive, power, desire transmute themselves from ineffective formlessness into the form of specific rules." Only that which passes through this channel has the force of law.

Juristic sovereignty is distinguished from political sovereignty which has reference only to the forces which operate on the juristic sovereign to determine where to draw the line between what is and what is not law. Dickinson believes it is a matter of great importance to keep the idea of law distinct from all other rules and imperatives which influence human conduct. Thus social conventions and business customs are deemed as emanating from wholly independent sources and, it is claimed, must be carefully distinguished from law. Emphasizing the significance of the acceptance of juristic sovereignty as the sole authoritative source of law as over against the alternative of chaos and anarchy, Dickinson maintains, "The point is that juristically it makes no difference what particular organization is recognized as having ultimate law-making authority, so long as one and only one such organization is recognized within the community."

Difficulties are recognized in the location of the sovereign. But in every state, it is claimed, there is an "organ with ultimate power to pass authoritatively upon questions of disputed competence which

[17] "A Working Theory of Sovereignty," *Political Science Quar.*, vol. xlii, pp. 524, 525.

binds the multiplicity of law-pronouncing organs into a single unified system and preserves sovereignty by making it possible to secure a final authoritative determination of what is not law."

Following the usual custom of the Positivists, Dickinson believes that international law can be conceived as deriving obligatory validity only from acceptance by every sovereign. International law is characterized as "common sense, traditional practice and good faith." Though international law is classed as mere "moral rules," it is granted that its rules are "far more precise, certain, and juridical in their content than mere 'moral' rules." But inexorable logic demands that there must be either a world sovereign with merely subordinate states or independent sovereigns subject only to moral rules and obligations.

Jural sovereignty then is conceived as an indispensable instrumentality of beneficial change and an essential lever of progress; in fact, a regime of positive law presupposes and requires the existence of juristic sovereignty. Such a sovereignty can be subject to no limits; there is no higher law which can bind sovereigns. Speaking of the ever present danger of revolution and a lapse into anarchy, Dickinson concludes: "The institution of sovereignty exists primarily because of the need of an organ to form and formulate these fundamentals, by more or less vague and disputed canons, into precise and uniform rules which on one hand have the fixity and generality necessary for a rule of law, and which on the other hand represent the moral conceptions that command acceptance among the most influential members of the community rather than views which are held by isolated private thinkers."

Similar views as expressed by English or American authorities could be quoted *in extenso* but it is unnecessary to give more detailed accounts of Analytical or Positivist doctrines.[18] They can all be summed up in the insistence upon the logical need for a jural ultimateness or sovereignty for any satisfactory or efficient system of law.[19] The logic and formalism of the sovereignty concept are affected by philosophical ideas of unity such as are involved in the Hegelian and neo-Hegelian thinking. A type of what Laski calls

[18] The Positivist, Analytical or Austinian concept of law is defined by one of its foremost interpreters as "a general rule of external human action enforced by a sovereign political authority." J. G. Holland, *Jurisprudence,* chap. iii. Von Jhering also defined law as "the form assumed by the conditions of life in society, based upon the power of coercion in the state." *Der Zweck im Recht* (1877), vol. i, sec. 10, p. 443.

[19] Thus Professor Kocourek observes, "No doubt the postulate of the existence of legal rules, as a social fact, is an illusion and, therefore, is untrue, but the legal process itself is fundamentally bottomed on that illusion." *An Introduction to the Science of Law* (Little, Brown and Company, 1930), p. 209.

the "mystic monism" is deemed by many to furnish the unavoidable jural premise for a workable system of law.[20] From or to this sovereign emanates or is accorded the sanction for the rules which alone have the force of law. Sometimes the illusory character of this foundation for law is recognized, but in general the ideas underlying the Positivist doctrines are treated as though they exist in the realm of fact and reality.

Underlying Ideas of Positivism.—The fictions and illusions underlying the theories of the Positivist school have been frequently analyzed and exposed, but it may be well to bring into clearer perspective some of the serious consequences of these illusions, as they affect the administration of justice in modern society. In the first place, the Positivist theory gives primary emphasis to force and makes this element the essence of the state and sovereignty. The best evidence of the law is the policeman's club and gun. For the nation it is the army and navy that typifies the essence of law.[21]

A question to which an answer must be given and which is too frequently slurred over without adequate consideration is, "Does the state gain preeminence by force or by consent?" To the Positivists force is the very essence of the state, the *sine qua non* of its existence and vitality. Though the doctrine that might makes right is often accepted without a realization of its dire consequences, the ultimate basis of law and of rights is frankly postulated on the possession and exercise of physical force by the state.

And for the courts it is the strong arm of force as wielded by the marshal and the sheriff that gives judicial decisions the effect of law. The emphasis is directed to the physical force which is conceived as giving sanction to the rules which guide conduct in civil society. Law is not justice or reason or a fair adjustment of human relations. It is merely a command issuing from the sovereign regardless of the aim or purpose as it affects civil conduct.

A direct consequence of the emphasis on force as the main feature of law is the contention that what the courts as agents of the sovereign accept and enforce alone is law.[22] And to have the courts

[20] The underlying idea of unity Gierke expresses as follows: "Never and nowhere can a purpose that is common to Many be effectual unless the One rules over the Many and directs the Many to the goal. . . . Unity is the root of All, and therefore of all social existence." *Political Theories of the Middle Ages*, trans. by F. W. Maitland (Cambridge University Press, 1922), pp. 9, 10.

[21] "The rule armed with force," said Lasson, "first gives us the conception of law." *System der Rechtsphilosophie* (1882), p. 207.

[22] Law is "the sum of the rules administered by the courts of justice." Sir Frederick Pollock and F. W. Maitland, *History of English Law* (Little, Brown and Company, 1911), Introduction. Cf. also John W. Salmond, *Jurisprudence*, eighth edition by C. A. W. Manning (Sweet and Maxwell, 1930), sec. 5.

function in the significant process of divining and applying the sovereign's will, there must be a controversy as between parties. There must also be a definite formal method and technique in arriving at a settlement of the issue involved. As exemplifying this phase of Analytical doctrines, one of the old and well-recognized principles of the common law is that the function of the judiciary is to decide an issue "in being between two parties," a *lis inter partes*, and not to give hypothetical answers on abstract questions.[23] This view of the judicial function has been put into standard form in the oft-quoted characterization by Blackstone, as follows:

Blackstone says a "court is a place wherein justice is judicially administered." To administer justice judicially, there must be a judge, and usually, though not always, there are also other officers, such as clerk and sheriff or marshal. That also implies the right to issue compulsory process to bring parties before the court, so that jurisdiction may be acquired over the person or property which forms the subject matter of the controversy. To administer justice judicially two parties to a controversy must exist; there must be a wrong done or threatened, or a right withheld, before the court can act. Then a hearing or trial follows, and the "justice to be judicially administered" results in a formal judgment for one of the parties to the controversy. The judgment to be pronounced usually has full binding force, unless modified or reversed. The courts can issue the proper process to carry their judgments into effect, and in that way subserve the great ends of their creation.[24]

Such is the "cockfight theory of justice," as it has been characteristically described. Two parties must not only be seriously concerned regarding their rights and privileges, but they must also be ready to engage in a wager of battle. They must secure their managers and seconds and after much preliminary preparation appear in the arena where all is primed for the battle and where due decorum is to be preserved during the fight. In the clash, controversy, or fight which ensues with the judge as umpire, the rights of the parties are to be duly determined; and out of the furor and turmoil of battle there results a judgment or decision, and law is either made or applied depending upon the viewpoint of the jurist who surveys the process.[25] But whether law is made or found in such a legal battle.

[23] See Lord Sumner, in Russian Commercial Banks *v.* British Banks for Foreign Trade [1921] A. C. 453.

[24] See Fuller *v.* County of Colfax, 14 Fed. 177 (1882).

[25] "A contest begins when the contestants, satisfied no longer with minatory gestures, are at grips with each other in the arena of the fight. When the fight is a civil controversy, the arena is the court." Justice Cardozo in Killian *v.* Metropolitan Life Ins. Co., 251 N. Y. 44, 50 (1929).

or by some other agency of the sovereign, it has a sanctity which places it above any other type of control over civil relationships.

The Positivist theory as to the nature of law, placing its emphasis upon "pure law," tends to foster the point of view that law is of a character separate and aloof from ordinary human activities. A mythical sovereign either makes or sanctions the rules of which it is comprised. These rules which may be accorded the dignity of being called law must be different and in a distinct category from morality or ethics, custom, community usage, business practices, and the common agreements or understandings by which a multitude of community relationships are determined. The subject matter of law must be "somewhat transcendent and too high for ordinary capacities."[26] There must be a secrecy about it which only the favored few can discover and understand. Its meaning must be such that only the properly attuned intellects can interpret it. The whole scheme of things to the Positivist, as far as legal relations go, must be conceived so as to create and foster a real "aristocracy of the robe."

This theory makes of the leading exponents of the law a class who in their separateness and superiority over ordinary individuals of society look down with more or less contempt upon those not so elevated and favored in fathoming the occult mystery of the law. In proportion as the law is comprised of terms and principles which only the few initiated can comprehend, it approximates the ideal which is sacred to the Positivist. There must be an unbridgeable gulf between law and the actual realities of human life. Lawyer's law, claims Llewellyn, means pitifully little to life and yet life is terrifyingly dependent on law.[27]

Legal Sovereignty.—Sovereignty of legal theory is deemed by many to be too simple an explanation of the phenomena concerned. It is, according to Jerome Frank, a childish conception.[28]

Modern theories of sovereignty are the result of crises when the very existence of political authority and the state were in danger. They are to a large degree an outgrowth of concepts of absolutism which were regarded necessary to combat the authority of the church and to sanction the rising power of national monarchs. They fit poorly into the political and economic realities of the twentieth century. One of the primary objections to the Positivist doctrines inheres in the mythical or fictional postulates or assumptions on which the whole structure is based. In the first place, it is assumed that for every society deserving of the classification of a state there is a

[26] Sheppard's *Touchstone,* preface, p. xviii.
[27] "What Price Contract," *Yale Law Journal* (March, 1931), vol. xi, p. 751.
[28] See *Law and the Modern Mind* (Brentano's, 1930).

known and determinate sovereign who is presumed to be the sole author or sanction for law.

Discarding much of the formal and conceptual thinking in relation to sovereignty which has been characteristic of the Positivist schools, there have been some who look upon the term primarily in a practical and realistic way. Though the dictum of Gray that "the real rulers of a society are undiscoverable" is recognized as largely true, it is insisted that the only practical significance which the term "sovereignty" possesses is attached to the authority wielded by those who for the time being are in the position to exercise public powers.[29] Dean Green's definition of law as made up essentially of two elements —the power or authority of the judge or arbitrator and the technique which he employs in resolving disputes—fits with a greater degree of appropriateness into the realistic conditions of modern life.[30]

The sovereign, if there be such, acts only by and with the consent of men, though many times it is a consent not freely given and not entirely voluntary. Modifications of the sovereign will as it becomes adjusted to this consent are, indeed, factors of great importance in law enforcement. No better example of the gradual adjustment of the enforcement of a law to the mutual consent and wishes of the people can be found than the variations in the enforcement of the federal prohibition laws enacted in accordance with the Eighteenth Amendment. The significant reply of a New York City saloon keeper, when warned as to the dangers of violations of the state laws, that "injunctions do not run down here," was found to express the sentiment of many communities where organized defiance of the law made attempts at enforcement frequently a farce.

In the efforts to explain and justify public authority too little weight has been attached to the element of consent or to forms of acquiescence in the exercise of public powers, which involve not simply fear of consequences and the dangers of disobedience but to an appreciable degree agreements to abide by common regulations because of mutual advantages. The contractual basis of political authority in its simple form may be lacking, as when Patrick Henry argued, the King has contracted to govern us well; having ceased to fulfill this obligation he is no longer King. There is indeed "a contingent moral obligation" in the exercise of governmental powers, namely, that political action is deserving of support and acquiescence when

[29] The state, according to Laski, is "no more than the judgment of a small body of men to whom, in an organized way, have been entrusted the reins of power." *Grammar of Politics*, p. 56.

[30] Leon Green, "The Duty Problem in Negligence Cases," *Columbia Law Review* (December, 1928), vol. xxviii, pp. 1039, 1040, and *Judge and Jury* (Vernon Law Book Co., 1930), chaps. iii and iv.

it subserves the ends of a given society or protects the rights of those concerned. It receives such support and acquiescence frequently when rights are violated and sacred privileges are trampled upon; but under such circumstances effective enforcement of state action will in the long run be impossible and, if carried to too great an extreme, leads to the way of rebellion. The contingent element of consent, agreement and mutual recognition of advantage in the enforcement of a legal rule and in its acceptance by parties concerned is not infrequently a factor of much significance which is ignored by publicists and lawyers or relegated to the domains of ethics or philosophy.

Various Definitions of Law.—Such a variety of definitions and interpretations has been given to law that it is not strange that recent authors have deemed the word indefinable. But any approach to the nature and significance of law in modern society requires at least a preliminary analysis as to the meaning of law. The first observation necessary in attempting to define the term "law" is that there is involved in this word a bundle or collection of meanings. Depending upon the attitude or point of view of the writer, law may be considered from a number of angles or approaches. Though it is impossible to give any more than a cursory analysis of the different meanings and attitudes toward law, a summary statement of various points of view is essential to understand the significance of law as a legal and political concept.

In presenting the views of representatives of the Positivist school it was apparent that to them the essence of law is a command issuing from a positive will or sovereign with the sanction of force and authority behind it. Since sanctions are normally applied by courts of justice, law has been described by Justice Holmes as a statement of the circumstances in which the public force will be brought to bear upon men through the courts.[31] Closely related to the Positivist approach is the dogmatic or authoritarian view of the nature of law, according to which law must be obeyed by the citizens and interpreted by the judges dogmatically, i.e., with no regard to the historical sources of legal rules or ethical questions as to justice or reasonableness.[32]

For those who accept the Positivist, dogmatic or authoritarian definition of law, the term, as interpreted and applied by the courts as the mouthpiece of the sovereign, has different meanings as to whether the emphasis is upon *law as rules, or concepts, or principles, or standards.* When a definite and detailed provision is made for a

[31] American Banana Co. *v.* United Fruit Co., 213 U. S. 347, 356 (1909).

[32] Herman U. Kantorowicz and Edwin W. Patterson, "Legal Science—A Summary of its Methodology," *Columbia Law Review* (June, 1928), vol. xxviii, p. 679.

specific state of facts, such as the provision that no one can transfer a better title than he has, or the conditions are prescribed under which an instrument is negotiable, or that the driver of an automobile must keep to the right side of the road, we have instances in which law is made up of rules rather arbitrarily predetermined. Such provisions are found more frequently in the law of property and of commercial transactions and in the criminal law.

For certain phases of civil relations conduct is limited and conditioned by concepts which result in attaching legal consequences to individual actions. Thus the concept, liberty of contract, though not within the range of express constitutional provisions or statutes, through the interpretations of courts confines the action of employers and employees in the field of industrial relations. Such are the concepts which Justice Cardozo thinks should be deemed as nothing more than provisional hypotheses to be reformulated and restrained when they result in injustice or oppression.

One of the most common assumptions in legal thinking is that law is comprised of groups of clearly formulated and readily ascertainable principles. These principles are in the nature of general premises to which lawyers and judges may turn to interpret old rules, to supply new rules and thus to meet new situations, and to measure the scope and application of rules and standards. "The theory of our system of law," says Judge Pound, "is that the law consists not in the actual rules enforced by the decisions of the courts at any one time, but in the principles from which those rules flow."[33] Examples of such principles supposed to act as a divining rod to resolve controversies are: no person may unjustly enrich himself at the expense of another, and liability is a corollary of fault. The inevitable conflicts and uncertainties relating to so-called principles are often deliberately obscured. For principles of law often come significantly in pairs of opposites, and the real issue in the settlement of a legal controversy is the drawing of a line between two opposing legal principles. Conflicting theories frequently parallel competing principles. The courts continue to state general principles, maintains Judge Pound, but the force of their observations lies in the application of them, and this application cannot be predicted with accuracy.

Not only is law conceived as comprised under differing conditions of rules, concepts and principles, but there are also criteria of conduct applied by the courts with such regularity that they become standards for measuring individual action. Due care in the law of torts, fair conduct of a fiduciary in equity, reasonable service in the law of public utilities, unfair competition in business transactions

[33] Williams *v.* Miles, 68 Neb. 463 (1903).

and due process of law in testing the validity of legislative or administrative action are typical instances of such standards. It is along the line of the formulation and application of standards of this type that much of modern administrative law is in process of development. The statutes granting authority to the Interstate Commerce Commission fairly bristle with provisions granting discretionary conduct to the commission on the basis of standards to be determined by this body.[34]

To the Idealistic schools law is nothing but the jural form of the habits, usages, and thoughts of a people, or, as conceived by Savigny, the product of inner silently working forces and not the result of the will of a lawgiver. Idealistic theories are much more important in Europe where the doctrine of a *richtige Recht* or just law is expounded by Stammler and other philosophical jurists. Real law to these jurists is ideal law, and positive enactments or judicial decisions have validity and sanction in so far as they accord with or approximate the precepts of the ideal norms and principles.

An approach to the law which is of greater significance than is ordinarily realized is involved in the close relations and similarity of methods of arbitral procedure. Historically arbitration is often a more effective source of legal procedure than the magistrate. Sir Frederick Pollock has shown how closely the early Anglo-Saxon law from which the common law arose approximated to the settlement of disputes by arbitration. And it is no doubt true that "the more popular, customary conception of justice has never been obscured. The function of the courts is partly administrative, partly arbitral and, in any case, sporadically sought. Civil justice today seems typically an administrative machinery for the collection of claims or the encouragement of private settlement and atypically to culminate in the declaration of rights in disputes brought into court by those who seek justice."[35]

In arbitration a judge or authoritative person hears the evidence in a cause and decides the controversial issues involved. Though there are frequently no fixed standards to serve as a guide in rendering judgment, arbitrators seek precedents or generally understood rules in passing on particular phases of human relationships as well as being guided by the innate sense of justice and fairness. Extensive use of arbitration is made in England in administrative procedure under the common law, under the Arbitration Act of 1889, and under special statutory provisions relating to the housing of the working

[34] I. L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure* (The Commonwealth Fund, 1931), p. 358.

[35] Hessel E. Yntema, "The Rational Basis of Legal Science," *Columbia Law Review* (June, 1931), vol. xxxi, p. 951.

classes, workmen's compensation and public health. An arbitrator is appointed for the particular case or controversy. The whole process is under the supervision of the courts and the awards are enforceable by judicial procedure.

With so many definitions, attitudes and approaches to the single term "law," only the most important of which have been mentioned, it is not surprising that modern authorities desire to eliminate some of the confusion, and a few would abandon entirely the use of so vague a word. Regardless of the variety of meanings attached to the word "law" and the vagueness and uncertainties resulting from much legal thinking because of it, there is little prospect of finding a new term or of securing agreement on the meaning intended for particular uses of the word.

The chief difficulty with most of the standard and commonly accepted definitions of law is that they exclude from the realm of law proper two of the most important fields where civil relations are today being determined to an increasing degree, namely, international relations and administrative law and procedure. All of the Positivist or authoritarian advocates exclude international law from the range of law proper and relegate the rules and customs which guide the conduct of nations to the realm of morality or ethics, except so far as such rules have been made a part of the municipal law of each nation. But international law cannot be resolved into the expressions of the will of individual states, notes Professor Shepard, "without the employment of the most transparent fictions. It springs from a world-wide public opinion or sense of right; it is sanctioned by the same universal sense of right; it imposes obligations upon states against their wills."[36]

A much greater defect in most definitions of law is that administrative rules and procedure are also excluded from the category of law, though the greater part of civil relations are now controlled by conditions and requirements determined by administrators and applied by them to the concrete situations as they arise. The usual misconception of Positivists is that judicial tribunals are guided by law and administrators only by individual discretion. An administrative tribunal, a representative of this school insists, "must inevitably be guided by its own wishes, because it has no fixed standard to follow, but only policy and expediency; and these are what it makes them. Its standards are purely subjective, so in last analysis it follows its own will."[37] In the first place, this view overestimates the extent to which judges

[36] Walter J. Shepard, in *The History and Prospects of the Social Sciences*, edited by H. E. Barnes (Alfred A. Knopf, 1925), pp. 437, 438.

[37] D. M. Gordon, "Administrative Tribunals and the Courts," *Law Quar. Rev.* (January, 1933), vol. xlix, p. 110.

are bound by rules in deciding cases, as the group of so-called "Realists" in jurisprudence have so effectively demonstrated.[38] In the second place, it exaggerates the extent to which administrators are guided in their actions by individual whims or caprices. The field in which administrators may exercise discretion and may act in accordance with personal ideas and desires is quite limited. If definite rules are not prescribed for administrative action or for decisions by arbitrators, the natural tendency of human thinking to follow order and system results in self-prescribed rules. The exercise of the pardoning power or the prerogative of mercy indicates the manner in which self-formulated rules are developed. Whether in courts of law or in administrative proceedings, "when the uniformities are sufficiently constant to be the subject of prediction with reasonable certainty, we say that law exists."[39] A considerable degree of uniformity results from the fact that persons similarly occupied, affected by the same types of social facts and conditions, naturally develop the same mental outlook and express their conclusions in strikingly similar language.

It is a question whether a new definition of law is not in process of formulation and adoption—a definition which puts the emphasis not on force or mechanically applied rules and principles but rather upon the practices and procedure by which controversies are settled and civil relations controlled in accordance with generally accepted standards of fairness and justice; a definition which gives greater weight to community sentiment, to the *mores* or the customs of a trade, a profession or a society, and to the sense of justice prevailing among groups of men. May we not define law broadly, inquires Professor Shepard, "as those rules of conduct, prescribing what is right and forbidding what is wrong, in regard to relationships of individuals or corporate members of any society, originating in and sanctioned by the general sense of right of the society?"[40]

Indications of the emergence of such concepts of law may be found in the increasing use of conciliation and arbitration in the settlement of disputes—a method of the adjustment of controversies which is discussed more fully in a subsequent chapter.[41] Similar indications are apparent in the extension of the practice of awarding declaratory judgments—a device by which the relative rights of parties are deter-

[38] See Jerome Frank, *Law and the Modern Mind* (Brentano's 1930), and "Are Judges Human?" *Univ. of Penna. Law Rev.* (November and December, 1931), vol. lxxx, pp. 17 and 233; Karl Llewellyn, "A Realistic Jurisprudence the Next Step," *Columbia Law Rev.* (April, 1930), vol. xxx, p. 431.

[39] Benjamin N. Cardozo, *The Growth of Law* (Yale University Press, 1924), pp. 37, 38.

[40] See Walter J, Shepard, *op. cit.*, pp. 437, 438.

[41] Cf. *infra*, chap. xxii.

mined without the usual ordeal of a trial by battle which follows when the controversy is adjudicated according to all the technical formalities of the law.

But the most important field in which law-making and enforcement are carried on in accordance with the new definition and point of view is in the practice and procedure of administrative justice. In the report of the Committee on Minister Powers in England it was pointed out that as soon as the state began to regulate the social and economic life of individuals it was necessary to delegate portions of legislative power to administrators, and as such regulations have been extended more legislative powers have been delegated. And if legislative bodies are not to prove wholly inadequate to meet the conditions of modern life, must not the principle of delegated legislation be applied to larger areas of governmental control? For example, the legislature may provide that all steam boilers must be operated at a *safe working pressure*, but a board of boiler examiners alone can determine the proper working pressure for different models and ages of boilers. Or the legislature may require that every employer furnish a *safe working place for his employee*, but a workmen's compensation commission must determine the requirements of safety for particular employments, and in practice such standards must be presumed to be reasonable and proper. Numerous vague and general phrases in the statutes can be given precision only by administrative definitions, standards, and delimitations. When the legislature prescribes that only automobiles fit to run shall be on the road, the administrators definition of "fitness" becomes a matter of serious consequence.

The extent to which at present law-making and enforcement rest with administrative officers who determine their own standards of fairness and justice as applicable to the conduct of individuals and groups is amazing. Such are the standards of dependableness and safety in the operation of public utilities and of a reasonableness of rates, of the fairness of competitive methods and of standards of safety in business, of reliability and honesty in professional conduct, of safety and security in the investment of funds, of reasonable precautions for cleanliness and health. Where the duties, rights, and interests of the individual may be affected occasionally by statutory provisions they are likely many times to be limited or controlled by administrative rules, orders, and decisions.

According to the traditional concept of Anglo-American law, law results only from a controversy, a cockfight. Even so radical a legal analyst as Jerome Frank can conceive of the formation of law only in the legal battle array. In this atmosphere judges make law. In such a roundabout process, through a sufficient number of legal battles one is supposed to be able to make a prediction of what the law is. Some

would call it a rule, some a principle, and some merely a judgment. But conflict-made rules, principles, and judgments alone are customarily deemed law.

Administrative law, now conceded as such by many authorities, on the other hand, is made partially and by degrees, as Professor Merkl would say, in the process of its application. Much of administrative law is law-making *ad hoc*—the modification or adaptation of previously determined standards to meet special and pertinent conditions. A typical instance of law-making by new methods and technique is found in one of the most successful of administrative agencies. The Industrial Accident Commissions call groups of employers and of labor organizations in an industry to select representatives to serve on a committee to formulate *safety standards* for the industry. This committee meets with the commission experts and such regulations are formulated as the employers and the laborers can agree upon. Public hearings are then held upon the recommendations of the committee. After the hearing the commission adopts the proposed order with the alterations deemed necessary, and extensive publicity is given to the order. Inspectors check the extent to which the order is violated. When violations are noted they are called to the attention of the employers with recommendations as to the necessary changes. Failure to comply after repeated recommendations may lead to criminal prosecution. There are few criminal prosecutions as the commission's educational efforts usually secure compliance. This method of cooperation, though not required by statute, is the one most extensively used. The experience in this type of proceeding establishes definitely the proposition that greater care to avoid accidents is secured through such encouragement of cooperation and by educational work than could possibly be secured by the arbitrary imposition of regulations from above without consultation with the industry, and their enforcement by promiscuous criminal prosecution. These orders have a flexibility greater than a statute or a code since they can be amended or modified to conform with developing experience.

May not law-making by *conference, agreement, cooperation* and mutual adjustments and compromises prove to be more real, vital and effective in meeting the changing conditions of economic life than the methods formerly prevailing? And if representative government endures, must not these processes be improved and extended, and find their place in the legal firmament by the side of the code, the statute and the judicial decision as the traditional sovereign-made law?[42]

[42] Referring to the adjustments between the component parts of the British Empire, P. J. Noel Baker observes that group questions are frequently not

Again quoting Professor Shepard:

The implications of this conception of law are of the highest significance to political science. The law of the state is merely one kind of law among many. Its origin and nature is the same as that of all other kinds of law. So far from being an expression of the sovereign will, the law of the state is merely the body of rules regulating the relations of members of a particular society, or group-unit. So far from any of the organs or agents of this group unit being *legibus solutus*, they are bound and controlled by law at every turn. Nor is the state itself above the law. Rather is it limited and obligated at every turn. It is subject to international law in its relations to other states. It is legally restricted in relation to the church and to the latter's members. It must not encroach upon their freedom of worship. In its contact with individuals it must not invade that sphere of liberty of the spoken and written word, of free movement, and of freedom in engaging in private business, which is the hard-won legal fruit of centuries of struggle. We are beginning to recognize that such other group-units as trade unions have a legal status and legal rights which the state may not impair. And if it be asserted that these individual and corporate rights may undergo transformation in the future as they have been transformed in the past, this merely means that the law is dynamic and not static; that the law itself is subject to change; not that the arbitrary expression of the state's will is law. This view of law involves a change in emphasis from the mandatory to the normative element. The content of the rule, rather than its expression of will, attracts attention; not who prescribes it, but whether the prescription adequately adjusts conflicting interests, becomes important.[43]

SUPPLEMENTARY READINGS

For Definitions consult

Leacock, Stephen, *Elements of Political Science* (Houghton Mifflin Company, 1921), new and enlarged edition, part i, chap. i.

Garner, James W., *Political Science and Government* (American Book Company, 1928).

Gettell, Raymond G., *Political Science* (Ginn and Company, 1933).

Burgess, John W., *Political Science and Constitutional Law* (Ginn and Company, 1920), book ii, chap. i.

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resolved by the application of law but are decided by consultation and cooperation as cases arise. See *The Present Juridical Status of the British Dominions in International Law* (Longmans, Green and Company, 1929). Modern theory and practice tend to regard as law rules applied by umpires and by arbitrators, as well as by quasi-judicial administrators. See Herman U. Kantorowicz and Edwin W. Patterson, *op. cit.*, pp. 679 ff.

[43] Walter J. Shepard, *op. cit.*, pp. 438-439.

Relations of Political Science to Other Social Sciences

Bryce, James, "Relations of Political Science to History and to Practice," *American Political Science Review,* February, 1909, vol. iii, p. 1.

The History and Prospects of the Social Sciences, edited by Harry Elmer Barnes (Alfred A. Knopf, 1925).

The Social Sciences and Their Interrelations, edited by William Fielding Ogburn and Alexander Goldenweiser (Houghton Mifflin Company, 1927).

Nature and Meaning of Law

Frank, Jerome, *Law and the Modern Mind* (Brentano's, 1930).

Cardozo, Benjamin N., *The Nature of the Judicial Process* (Yale University Press, 1922).

Coker, Francis W., *Recent Political Thought* (D. Appleton-Century Company, Inc., 1934), chap. xix.

Duguit, Léon, *Law in the Modern State* (B. W. Huebsch, Inc., 1919).

Laski, Harold J., *Studies in Law and Politics* (Yale University Press, 1932), chaps. xi and xii.

Holland, T. E., *The Elements of Jurisprudence* (Oxford University Press, 1924).

Willoughby, Westel W., *The Fundamental Concepts of Public Law* (The Macmillan Company, 1924).

Zane, John M., *The Story of the Law* (Ives Washburn, Inc., 1927).

MacIver, R. M., *The Modern State* (Oxford University Press, 1926).

Pound, Roscoe, *The Spirit of the Common Law* (Marshall Jones Co., 1921).

———— *Interpretations of Legal History* (The Macmillan Company, 1923).

CHAPTER IV

THE ENDS AND PURPOSES OF GOVERNMENT IN MODERN SOCIETY: GENERAL VIEWS AND THEORIES

GOVERNMENT is a social necessity. Whatever theories may prevail as to its proper form and scope, some form of political organization or government is inevitable. Every society of a permanent character has some form of political organization—the elements of a state in rudimentary form. To some persons the state is, as Professor Giddings characterized it, "the mightiest creation of the human mind, the noblest expression of human purpose"; whereas to others it is a crude, imperfect and temporary organization necessary only because of man's weaknesses and imperfections. For the anarchists the ideal form of government is no government. They visualize a regime with no law, no compulsion and no exercise of force. Voluntary associations would take the place of the "coercive" state. Only slightly removed from the doctrines of the anarchists is a form of individualism prevalent during the eighteenth and nineteenth centuries. For the individualists all governmental action is to be condemned which imposes restrictions upon business or industry or interferes with the social or moral habits of individuals. "The sole end," asserted J. S. Mill, "for which mankind are warranted individually or collectively in interfering with the liberty of action of any of their number is self-protection."

INDIVIDUALISM AND CAPITALISM

To form a judgment as to the functions which the state ought to perform requires an analysis and evaluation of the political doctrines of the individualists and collectivists which, though neither of the two doctrines has been accepted, have in large measure determined the trend of governmental policies and practices during the last few centuries.

Individualism.—The doctrine of individualism is an ancient one and has been a dominant motive behind the policies of government since the middle of the eighteenth century. It was for a long time the official creed of the leading governments of the world, and was defended by some of the greatest political thinkers of the eighteenth and nineteenth centuries.[1] According to this theory, the state was to inter-

[1] Among the leading exponents of individualism were Adam Smith, whose work, *The Wealth of Nations,* and Jeremy Bentham, whose *Principles of Leg-*

fere as little as possible with the individual in the enjoyment of his rights and privileges. It was to impose few, if any, restrictions upon his business and commercial activities. The theory of non-interference grew into a government philosophy which was widely accepted and practiced in Europe at the time governments were established in America. Strength of character, it was thought, would be developed through the rivalry between individuals. Such conflicts would stimulate originality by offering the rewards of wealth and fame and would result in an increase of wealth thereby. The theory became associated with and was looked upon as a corollary to the developing doctrine of popular sovereignty. In America the doctrine of natural and inherent rights beyond state control served as a basis for a corresponding theory of civil liberty which proposed to limit the functions of government to the minimum necessary to keep the peace. Jefferson characterized the prevailing view in the dictum, "That government is best which governs least." At this time strong emphasis was laid on the value of personal enterprise and of individual initiative as factors in the growth of the community.

The automatic control theory as stated by a leading economist held that "under normal conditions competition is indeed the life of trade. The individual competitor may incidentally amass a fortune but if he does so honestly . . . it can only be by conferring on the community still greater benefits. He conquers who does best for society."[2] Working hand in hand with the principle of private property, competition was lauded as the chief incentive to progress and as furnishing the automatic force which reduces the gains of the inefficient and makes profits depend on low, rather than on high, prices. An industry which served the people best was the one which made the most profit. If profits became too high, others would enter the industry and profits would soon be down to "normal." Wages were dependent upon productivity in a competitive market, and in case of low wages competitive forces gave laborers just what they earned. If farmers or any other class were in difficulty, there was nothing to do but to wait patiently for the working of natural forces which sooner or later would restore a normal equilibrium and bring back prosperity.

Professor Beard has stated effectively the underlying theories of the individualists, as follows:

Society is composed of individuals, each struggling to avoid pain

islation, served as a philosophic basis for later theories. The doctrines of individualism were chiefly advanced by the Manchester School of Economics under the leadership of such noted writers as David Ricardo, John Stuart Mill, and Thomas Robert Malthus.

[2] E. R. A. Seligman, *Principles of Economics* (Longmans, Green and Company, 1916).

and to secure pleasure-giving goods. Where legal freedom of contract and of motion is allowed, the individual applies his talents and capital to the enterprise for which he is best fitted. Competition guarantees the survival of those who render economical services at the lowest price. Competition and rent regulate prices, profits and wages, so that each productive factor in society obtains a reward fairly apportioned to its deserts. Pressure of population keeps wages near the subsistence level, and the improvidence of the poor assures an abundant labor supply. Everybody is the best judge of what is beneficial to him, and by trusting to his instincts and reason can find the place in society to which he is best adapted. Attempts to control prices and wages are interferences with natural law, ruinous in consequences and bound to fail. The freedom that works so well within the state works equally among states; under a regime of free trade each nation produces the good for which it is equipped by nature—climate, soil, and resources—and by talent; and a free exchange of goods among states results in the widest benefit to all, each party to the transaction receiving the most desirable goods at the lowest prices. If private monopolies arise and control prices they violate natural law; if trade unions make the same attempt to control wages, they also violate natural law. As for the state, its duties are clear; its business is to protect property and to keep order, allowing the economic machine to function freely under its own momentum—the profit-making passion and the struggle for existence.[3]

The theories of independence, individual initiative, and self-reliance which were fostered in the settlement of the American colonies and in the pioneer conditions which prevailed in the United States led to the conclusion that the individual should be restrained by the law only so far as was absolutely necessary. A theory gradually became ingrained in the political habits of the people to the effect that government should not interfere with the processes of business any further than is necessary to preserve the principle of fair competition and to insure the observance of ordinary legal obligations.

Individualism in its extreme form was sponsored by Herbert Spencer. In his *Man versus the State* he asserted that it was "unquestionably true that government is begotten of aggression and by aggression." Comparing a regime of status with one of contract, he condemned all kinds of regulative acts and opposed public education, poor relief, and all forms of public welfare legislation. Though there are few today who would agree with the extreme *laissez-faire* policies of Spencer, the doctrines promulgated by him and his school have had many and enthusiastic followers in the United States, with the result

[3] Charles A. Beard, "Individualism and Capitalism," *Encyclopædia of the Social Sciences*, vol. i, p. 154.

that the efforts to regulate business and industry and to secure welfare legislation have been seriously retarded.

The individualist or *laissez-faire* theory had, in many respects, its greatest development in the United States where the sparsity of population, the immense stretches of free land, and the wealth of natural resources rendered it possible for individuals of sufficient energy and physical vigor to make their way without aid from the government and with little need of social control. Governments of state and nation were formed at a time when the individualistic theory was dominant. Following the principle of limiting the government as much as possible, many restrictions on governmental action were enumerated and the bill of rights so characteristic of American public law took shape in the state constitutions.

It was this view that led to the insertion of the phrases in constitutions to the effect that private property shall not be taken except for just compensation, and shall not be interfered with except by due process of law, and that the obligation of contracts shall not be impaired. And the protection to property and contracts extended by the guardianship of the courts has resulted in the condition to which President Hadley of Yale referred when he said: "The general status of the property owner under the law cannot be changed by the action of the legislature or the executive or the people of the state voting at the polls, or all three put together. . . . The fundamental division of powers in the Constitution of the United States is between the voters on the one hand and property owners on the other. 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 between them."[4] In fact, it was the desire to protect property and contracts, and at the same time to preserve a sphere of individual liberty, that served to strengthen and extend the principle that courts should become the guardians of constitutions and that one of their functions should be that of defining and restricting the limits of legislative authority. The developing doctrine of judicial supremacy became the mainstay of the supporters of individualism who were known as the defenders of civil liberty.[5]

The same doctrines gave free reign to individuals and corporations to develop the vast resources of America, and often to prey unhampered upon human weaknesses and ignorance; and it was these con-

[4] A. T. Hadley, "The Constitutional Position of Property in America," *The Independent,* April 16, 1908; see also Elihu Root, *Addresses on Government and Citizenship* (Harvard University Press, 1916), p. 539.

[5] See Francis Lieber, *Civil Liberty and Self-Government* (New York, 1859), and a more recent interpretation of the same view by John W. Burgess, *Political Science and Constitutional Law* (Ginn and Company, 1902).

cepts which led courts to restrict labor legislation on the ground that it was an interference with the liberty of contract and that it was humiliating and degrading to the laborer to interfere with his right to contract for such wages and hours as he desired. Theories of individualism and of *laissez faire* retarded for a long time the progress of labor legislation and made it extremely difficult to regulate business and commercial dealings. In short, industrial capitalism had a relatively free and untrammeled field in which to operate.

Capitalism.—The industrial system which evolved during the eighteenth and nineteenth centuries along with the theories and practices of individualism in economic relations led to the growth of the capitalist regime. The capitalist system which replaced feudalism and the mercantilist economy superseding it, involved production largely through factories and machines, an elaborate mechanism of distribution, and the widespread use of banking and credit to finance complicated industrial relations. It is essentially a system in which production and exchange are based on the acquisition and accumulation of profits in place of the former "just price" system. "Concentrating on the production of goods for profit," Professor Beard observes, "capitalism calls for the predominance of secular interests in intellectual life, emphasis on science, business, government, economy, commerce and other related branches of thought. Using the state to maintain order, advance its enterprises in foreign markets and protect its more distant commerce, it requires a freedom of the state from entangling alliances with classes founded on landed possessions—landlords and clergy—a secular state separated from church and justified by secular performances rather than divine sanctions. Resting, at least in its early stages, upon the enterprise and labor of individuals rather than corporations, capitalism needs for fruition an emphasis on the excellence of a settled order of classes such as held the center of the economic field in the Middle Ages."[6]

Capitalism is characterized by the ideas of competition and the acquisition of wealth free from any but a minimum of regulation and interference from the outside. The restrictions which law and usage impose upon the conditions of business and commercial management are expected to affect only the most marginal of their activities. Capitalistic enterprise as a form of wealth acquisition must be successful, i.e., it must insure a high degree of productivity. It has tended to proclaim the supremacy of business over all other values of life and to interpret progress in terms of "advance in technology, reductions

[6] Charles A. Beard, *op. cit.*, p. 148.

in costs, increase in the briskness of trade, and the growth of wealth."[7]

The structure of the capitalist economy is increasingly aristocratic, and the tendencies are away from the system of former years when the entrepreneur was often inventor, organizer, and merchant. In recent times capitalistic enterprise has changed from the individual or partnership to the corporate form of organization. With increasing hierarchical control through mergers and holding companies, executive management has become dissociated from capital ownership, and increased functional specialization has taken place within each industry. But above all there has come into prominence the investment financier, banker or stock broker, whose important activity is the creation and accumulation of capital by technical manipulations in the stock market.

And despite all the anti-monopoly or anti-trust laws and attempts at the limitation and regulation of large-scale production, there has been a steady and persistent tendency toward the concentration of economic power and control. Corporations have almost eliminated the individual entrepreneur or producer, ninety per cent or more of all manufacturing being carried on by corporations.[8] The trend toward corporate organization demands attention because "economic power, in terms of control over physical assets, is apparently responding to a centripetal force, tending more and more to concentrate in the hands of a few corporate managements. At the same time, beneficial ownership is centrifugal, tending to divide and subdivide, to split into ever smaller units and to pass freely from hand to hand. In other words, ownership continually becomes more dispersed; the power formerly joined to it becomes increasingly concentrated; and the corporate system is thereby more securely established."[9] The extent of concentration and control by large holding companies[10] is shown by the fact that in 1930 fourteen great railroad systems operated 86.6 per cent of the first-class mileage and 81.7 per cent of all the railroad mileage in the country; and two hundred non-banking corporations controlled 49.2 per cent of all non-banking corporate wealth, while the remaining half was owned by more than 300,000 smaller companies.[11] From the standpoint of control through holding

[7] Werner Sombart, "Capitalism," in *Encyclopædia of the Social Sciences*, vol. iii, p. 195.

[8] Adolf A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (Commerce Clearing House, 1932), p. 14.

[9] *Ibid.*, p. 9.

[10] For the nature and significance of the holding company, see *infra*, p. 148.

[11] For a list of the most important large corporations, see Adolf A. Berle, Jr., and Gardiner C. Means, *op. cit.*, pp. 19 ff.

companies, trusteeships, interlocking directorates, and other devices, it is estimated that approximately "2000 individuals out of a population of one hundred and twenty-five million are in a position to control and direct half of industry." The Great War has accelerated, more than is commonly realized, the process of amalgamation of the separate capitalist enterprises within each industry or group of industries frequently for the purpose of controlling or putting an end to competition.

The development of the security-investment-credit system which became so prevalent after 1900 fostered a type of fraud scathingly condemned by the Lord Chief Justice of England as "fraud of a most dangerous kind, widespread in its operation—touching all classes, involving great pecuniary loss to the community—loss largely borne by those who are least able to bear it. And even, much more important than this, fraud which is working insidiously to undermine and corrupt that high sense of public morality which it ought to be the common object of all interested in the good of the community to maintain."[12]

Socialism and Communism

Socialism.—At the same time that individualism and its handmaid capitalism were in the process of becoming dominant and were conditioning not only all phases of economic life but also the operation of government and its relation to society, the antithetical movements of socialism and communism were taking root. Though the idea of socialism as a national policy is of ancient origin, the word was first used in the western sense in connection with the social theories of Robert Owen in the early decades of the nineteenth century. The leading idea of the socialists is to have the gains and profits of the few distributed so as to benefit the many. Others share these views, but socialists would use the powers and authority of the state to gain the desired ends. There are many different groups of this type holding a variety of opinions, but certain doctrines are common to all but a few of the several groups. In the first place, all of them criticize the existing industrial order, which they hold is largely based on an individualistic philosophy. The chief criticisms of the social order, based, as it is contended, on the theories of individualism and civil liberty, are:

That the invention of machinery and the rise of factories rendered it possible for the capitalist owners of the means of production to become the dominant class, and the proletariat, composed of propertyless workers, the subject class; that the compensation of the laborer

[12] Sidney and Beatrice Webb, *The Decay of Capitalist Civilization* (Harcourt, Brace and Company, 1923), pp. 135, 136.

under the capitalist system takes the form of a competitive wage, which it is the aim of industrial managers to keep as low as possible; that the capitalist system necessarily involves great losses through duplication of establishments and services and through the advertising of goods; that it fosters poverty on the one hand and extreme accumulation of wealth on the other hand, with the consequent development of an unproductive leisure class;[13] that the capitalist system is planless and extremely chaotic and that this is necessarily the case when the guiding motive is personal profit; that frequent changes in wants and in the industrial processes result, on the one hand, in rewards for people in favored positions irrespective of their ability, and, on the other, in poverty and unemployment in the midst of potential plenty.[14]

The socialists have formulated certain theories on which the indictment of the capitalist system is based and the various programs of reform are constructed. Chief among these theories are the economic interpretation of history, which maintains that economic factors largely determine ethical standards, legal codes, and religious, moral, and social ideas; and the class-struggle theory, which holds that the history of man's development is largely comprised in "a record of struggles between economic classes" and that the modern form of that struggle is a conflict between the capitalist class and the proletariat.

Any attempt to summarize the constructive programs of the socialist groups meets with great difficulties, for their platforms are often vague and contain generalities which require extended explanations, or they differ so widely as to render comparisons misleading. A few general characteristics of the programs may be noted. They provide for the socialization of banking, the basic industries and public utilities, and government control of all natural resources. Their platforms usually include proposals for large appropriations for unemployment relief and for public works. They favor high income and inheritance

[13] The socialist indictment of the capitalist system is based, according to Sidney and Beatrice Webb, (*op. cit.*, pp. xvi-xvii), on four main counts, as follows:

First, wherever the greater part of the population are divorced from the ownership of the instruments of production, a large proportion of the people live in penury and many are continually threatened with starvation;

Second, this penury and its accompanying insecurity are rendered more humiliating by the relative comfort, luxury, and idleness of the proprietary class;

Third, these conditions result in glaring inequalities in personal freedom between the property-less persons and the class of owners and proprietors;

Fourth, the very basis of organization for the production and distribution of commodities and services under the capitalist system is deemed to be scientifically and rationally unsound.

[14] Norman Thomas, *America's Way Out: A Program for Democracy* (The Macmillan Company, 1931), pp. 35, 36.

taxes on large incomes, and the enactment of laws to provide employment, health, and accident insurance. Programs for disarmament and for the entrance of the United States into the World Court and the League of Nations are usually approved. Individuals, according to all but the communists, might still have property rights in such things as houses, clothing, and food. The nationalization of the land as the basis of the operations of production and distribution is sometimes included in socialistic plans.[15]

Though the leaders of socialism are constantly working for a complete reorganization of the political and social order, they are willing, in the meantime, to join with other parties in securing practical reforms to improve the general conditions of the working classes. Thus among the planks of the reform programs of socialists are such matters as universal suffrage, direct legislation, including the initiative, referendum, and recall, and proportional representation. They favor the abolition of the powers of the courts over legislation which are regarded as protecting class privileges. Thus many of the features of modern industrial legislation, such as workmen's compensation, social insurance, and legislation regarding wages, hours of labor, and sanitary conditions, have been sponsored by the socialists.

Though many members of other parties are willing to agree to part of the socialist's plan for economic reform, they do not favor turning over to a central government the control of all industries. Such a comprehensive scheme of central control and supervision would, it is believed, seriously interfere with personal rights and liberties and would be detrimental to the initiative and responsibility which are considered the mainsprings of the conduct of individuals.

Communism.—Along with industrial capitalism developed primarily under a *laissez-faire* regime with a limited degree of government protection to property and contracts, and socialism—a considerable part of the program of which has been slowly adopted by all modern governments—must now be considered the policies of the communists. Communism, according to Professor Laski, a sympathetic interpreter of its aims, "has become, in our day, at once an ideal and a method. As an ideal, it aims at a society in which classes have been abolished as a result of the common ownership of the means of production and distribution. As a method, it believes that its ideal can be attained only by means of a social revolution in which the dictatorship of the proletariat is the effective instrument of change."[16]

As an ideal, communism reaches back to the beginnings of political

[15] Francis W. Coker, *Recent Political Thought* (D. Appleton-Century Company, Inc., 1934), chaps. iv-vi.

[16] Harold J. Laski, *Communism* (Henry Holt and Company, Inc., 1927), p. 11.

thought. Many of the ablest political theorists were attracted to its doctrines. The ideal was not put into definite and coherent form until the epochal works of Karl Marx. "He found communism a chaos and left it a movement. Through him it acquired a philosophy and a direction."[17]

The economic system, Marx believed, was based upon a labor theory of value and a surplus value theory. The value of a commodity, it was claimed, is determined by the amount of socially necessary labor-time embodied in it. The object of the entrepreneur or capitalist is to secure profit or surplus value from the workers. Capitalism, sanctioned by political authority, then becomes a method of filching from the laborer some of his hard-earned values. As the capitalists are a selfish class who continue to prey upon labor and increasingly to take advantage of those who work, the only alternative, according to Marx and his followers, is the overthrow of capitalism and the establishment of the dictatorship of the proletariat.[18]

The economic theories of Marx which form the basis of modern communism assert that the primary motive force in society is the system of economic production; that the struggle between classes is the vital factor in accelerating social change; and that the prime necessity in social reconstruction is the abolition of the capitalist class and the development of the control of political and economic affairs in the hands of the wage earners.

One of the chief methods of communism and one which is subject to the most severe condemnation is the frank and avowed use of force and violence. In the words of Leon Trotzky, "to make the individual sacred we must destroy the social order which crucifies him, and this problem can only be solved by blood and iron."

The chief organization for the extension of communism throughout the world is the Third International. Its purpose is to prepare the way by publications, by the training and organization of agents to secure the overthrow of capitalism, by the establishment of the dictatorship of the proletariat, and by the realization of socialism as the first step toward a communist society. The outstanding example of a society based in part upon the doctrines of communism is the Soviet Republic in Russia. Starting with the elementary rule that "he that will not work shall not eat," a social and political system was founded on the policy of compulsory labor. To carry out their plans the Bolshevists established a real rule of "blood and iron," drove thousands of Russians from the country, disposed of the recalcitrant ones who remained, and by the strictest military and police methods

[17] *Ibid.*, p. 22.

[18] Francis W. Coker, *op. cit.*, chaps. ii and iii.

enforced the principles and policies of the new regime. The primary aims of the Bolshevists have in part been carried out, namely, to aid the development from an agrarian to a modern industrial community, to extend socialist enterprise into trade and industry, and to prevent the rise of a new bourgeois class. Lenin, the master mind of the Soviet regime, insisted that modern democracies are bound by the narrow confines of capitalist exploitation, and that in reality they foster the control of a minority or the possessive class.

Reprehensible as are some of the practices and methods of the communists, it is a question whether the efforts to outlaw the movement as directed by a band of criminal adventurers have not fostered the growth of communist ideas and beliefs. The doctrine ably defended by Jefferson and made a part of the political life of the nation a century and a half ago may perhaps be advantageously applied today in dealing with communists and similar groups: that it is not desirable to suppress the expression of opinions or to interfere with the right of assembly as long as they do not result in overt acts interfering with the civil rights of others or in disturbing the peace. "It is time enough for the rightful purpose of government," Jefferson insisted, "for its officers to interfere when principles break out into overt acts against peace and good order." On the other hand, the tyranny and terrorist methods which accompanied the establishment of the Bolshevist rule, and its counterpart Fascism, with secret police, espionage and arbitrary executions, cannot be too severely condemned. Such a system may be adapted to a people who have been accustomed to despotism for centuries, but to suppose that it could be applied to the United States is to ignore the essential facts of American life and experience.

It is obvious from this brief summary of the principles and policies of socialism and communism that modern governments, with the exception of the Soviet system in Russia, have accepted only part of the program of the socialists or communists. In the United States these groups have been relatively weak, and have gained sufficient political power in only a few communities to carry out certain measures sponsored by the socialists. Though the views held by the followers of each of the two extreme groups of the nineteenth century affected in certain respects the organization and administration of government, the course of political development has been along a median line involving the acceptance neither of the program of extreme individualism nor of that of socialism. The spread of Fascism in Europe and the efforts to extend social control over industry and economic life in the United States are indicative of a well-marked trend toward the adoption of socialist principles.

Fascism

A form of government has gained ascendancy in Italy which formerly was declared to be "not an article for export," but is now held forth as paving the way for a world revolution. The Fascism of Premier Mussolini has evolved as an alternative to capitalism as it exists today, and to communism as it is applied in Russia. In its early stages Fascism was based on an opportunist program backed by military force and ruthless methods to gain the desired ends. As the Premier became intrenched in his position, representative institutions and the liberalism which fostered them were subjected to attacks. The rationalism and utilitarianism of English Radicals were rejected and in their stead the political realism of Machiavelli was adopted. Liberalism, says Mussolini, "is not the last word; it does not represent any final and decisive formula in the art of government. . . . Liberalism is the contribution, the method, of the nineteenth century. . . . It cannot be said that Liberalism, a method of government good for the nineteenth century, for a century, that is to say, dominated by two essential phenomena like the development of capitalism and the growth of nationality, should be necessarily good for the twentieth century, which already betrays characteristics differing considerably from those of its predecessor. Facts outweigh books; experience is worth more than theory. Today the most striking of post-war experiences, those that are taking place before our eyes, are marked by the defeat of Liberalism. Events in Russia and in Italy demonstrate the possibility of governing altogether outside the ideology of Liberalism and in a manner entirely opposed to it. Communism and Fascism have nothing to do with Liberalism."[19]

Parliamentary government which, as Lloyd George called it, is "government by talk," is replaced, according to Mussolini and other dictators who have attempted to follow in his footsteps, by work, discipline, and unity. The revolutionary syndicalism of Sorel has been made over by the Fascists into a weapon to foster and support the rule of the dictator. Essentially, a system has been developed in Italy based on economic and political domination and an aggressive nationalism sanctioned by militarism and the use of force. "I declare," says Mussolini, "that my desire is to govern if possible with the consent of the majority; but, in order to obtain, to foster and to strengthen that consent, I will use all the force at my disposal." He promised to leave Parliament, as long as it was made up of loyal Fascists, to act as a cheering corps. "Representative government," he

[19] Speech to the Department of Finance, March 7, 1921.

wrote in the dissertation on Machiavelli, "belongs to the domain of mechanics," and "to speak of a sovereign people is to utter a tragic jest." Fascism, then, is an attack not only on liberalism, but also on parliamentarianism and on all democratic political theories and practices.

With the consolidation of the regime of Mussolini, the political aspects of Fascism are being pushed into the background and its economic aspects are coming to the fore. The success of the political movement has aroused an enthusiasm and a public spirit which have rendered economic reconstruction possible and have paved the way for the establishment of the "corporate state." With the object of insuring a degree of planning in the processes of production and distribution, the corporate state has been developed as a system in which employers and employees are formed into mixed national corporations which participate actively in the management of government. Strikes and lockouts being outlawed from the beginning and a policy adopted of settling industrial disputes by means of conciliation or by special labor courts, the ultimate aim of the corporate state is claimed to be the maintenance of industrial peace. To this end employers and employees are considered civil servants in the broad sense of that term.

The new order in Italy was recently defined by Mussolini as a corporation system under "the ægis of the state, which will actuate the integral, organic and single discipline of productive forces."[20] In the new order a National Council of Corporations is to replace the Chamber of Deputies. A legislative body of the type that functions in countries where representative and democratic government prevails, is declared to be extraneous to the mentality and feelings of Fascists.

The corporate state was created, contends Mussolini, to develop the wealth, the political power, and the well-being of the Italian people. But for the corporative economy to be successful there must be, he insists, a single party which through economic and political discipline binds opposing factions together; and there must be also "a supremacy of the state so that the state may absorb, transform and embody all the energy, all the interests, all the hopes of the people." The success of Fascism from an economic and industrial point of view has won to its cause many who disapprove of its underlying ideals and its Machiavellian practices. The fact that a wave of extreme nationalism is sweeping over Europe makes the Fascist program an appropriate means to adjust the people to the realities of economic and political life.

The primary aim of Fascism now appears to be directed toward

[20] *New York Times*, December 3, 1933.

a plan of economic reconstruction by which the respective spheres of the various social classes in the processes of production and distribution may be determined. To carry out such a policy a National Economic Council has been formed to advise with the Premier and assist in formulating and carrying into effect the details of an economic plan.[21] Conceived, then, as an antidote to nineteenth-century capitalism and to socialism, Fascism repudiates the doctrine of economic *laissez faire* and adopts a system of complete control of economic life.

Fascism from the beginning has been based upon an exaggerated form of nationalism as expressed in the phrase, the "will to power and empire." Building upon the World War type of nationalism, Italy has set about to strengthen its hold on the people of surrounding territories and, on the other hand, to encourage national self-sufficiency. Fascism, says Mussolini, "does not believe in either the possibility or the utility of perpetual peace. . . . Only war raises all human energies to the maximum and sets a seal of nobility upon the peoples who have the virtues to undertake it."[22]

With certain variations, the typical modern state was governed under the direction of a parliament which was elected by the people; the decisions of a majority, both among the voters and in the parliament, were accepted as binding upon all until a majority decided on a different policy. There was, as a rule, liberty of person, of thought, and of the press; religious toleration was accorded to all individuals or groups as long as the civil laws were not violated; citizens could not be arrested or punished, except by the regular processes of law. Such was democracy as it prevailed in most countries of the modern world. Autocrats and oligarchies might secure control for short periods, but they were likely to be replaced by a regime with a more general support. But today over a large part of the European world autocracies and dictatorships replace constitutional and parliamentary governments. Some of these have continued so long and appear to have secured such stability that the query is being frequently raised whether we are facing in this respect a temporary or a relatively permanent political phenomenon. The answer to the query depends in part upon the possibility of developing effective methods for the control of the undesirable and unfair methods of capitalism based upon individualistic theories.[23]

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[21] See Paul Einzig, *The Economic Foundations of Fascism* (The Macmillan Company, 1933), pp. 48, 49.

[22] From "Fascism's Tide Sweeps Onward," *New York Times Magazine* (November 6, 1933).

[23] For efforts to control a capitalistic regime, see *infra*, pp. 91 ff.

What Are the Appropriate Functions of the State?

States, as we have seen, have been organized for various purposes, selfish and altruistic. From the standpoint of an ideal analysis, the state has been described as "a fellowship of men aiming at enrichment of the common life," or as an agency for the maintenance of conditions under which all subjects might live, as Aristotle said, "a perfect and self-sufficing life." Formerly the ends of the state were thought to be comprised under the following main objects: (1) the development of national power and authority; (2) the maintenance of justice and law; (3) the promotion of social progress and civilization.[24] Professor Burgess formulated the ends of the state into primary, secondary, and ultimate objectives—the first comprising the organization of government and liberty so as to give to the government the highest possible power consistent with the highest possible freedom in the individual; the second, the promotion of the national genius of a state so that its special social and political ideals may be made objective in customs, laws, and institutions; the third, the promotion of world civilization or the perfection of humanity.[25] By modern political scientists these ends have been summarized as comprising the advancement of the good of the individual, the promotion of collective interests, and the furthering of civilization and progress.

For a long time it was the protective function with which the state was chiefly concerned; and even the functions of a policeman were performed in only a limited way, much being left to the individual, to the family, and to the community for the protection of life, liberty, and property. But with the concentration of population in large urban centers, with the remarkable growth of economic and social activities, and with the extension of the principles of democratic government has come a great increase of governmental functions along all lines, protective, commercial, and social. The last few decades have seen the most phenomenal expansion of public functions with the consequent growth of public expenditures. The functions of government, such as keeping the peace and suppressing crime, preserving public health and enforcing sanitary conditions, and guarding life and property from the ravages of fire, now require large groups of trained and competent officials with elaborate scientific equipment and apparatus to render the necessary protection of life and property. But to the protective functions have now been added another group of state

[24] See von Holtzendorff's *Principien der Politik*, pp. 219 ff.
[25] John W. Burgess, *op. cit.*, pp. 83 ff.

services which formerly were left largely to private care. Social welfare agencies provide for the defective and delinquent members of society and render aid to those temporarily unable to sustain themselves through profitable employment. In this respect what was heretofore regarded as a minor phase of government activity looms up as one of the major functions of the public order.

To the protective and social service agencies of the government have been added two other functions which now demand a large part of the income available for the support of public functions. Public roads, which were at one time indifferently built and preserved by local units of government at a small cost, now require as much as a third of all money raised by taxation. Public education taken over by the state gradually has come to draw on the community income for another large share of the public revenue. For the building and maintenance of public roads, for the furnishing of educational facilities from the kindergarten to the university, for improved social service agencies as well as for other public services, large bond issues have been approved and now require a considerable portion of the annual income for their redemption.

Government and Liberty.—It is natural to think that the state ought to perform many services and that its end and justification should be measured by the standards of accomplishment by which these services are rendered. However, one of the foremost problems of politics is likely to be neglected, namely, what functions may rightfully be undertaken by the state and what forms of action should be left, with as little interference as possible, to individual efforts. The absorption of functions ordinarily deemed within the realm of individual action during the World War and its aftermath and the trend toward absolute control at the hands of dictators have tended to suppress the sentiment that one of the primary purposes of government is the protection of the liberty of the individual.

The business of the state, according to Thomas Hill Green, is not merely "the business of a policeman of arresting wrongdoers, or of ruthlessly enforcing contracts, but of providing for men an equal chance, as far as possible, of realizing what is best in their intellectual and moral natures." The dominant rôle of government in human affairs and its all-pervasive activities is one of the marked characteristics of society. The great problem is to see that the machinery of the state shall be used not merely to keep peace and order but to mitigate social inequality and to protect individuals in the development of their best faculties. "The freedoms I must possess to enjoy a general liberty," said Professor Maitland, "are those which, in their sum, will constitute the path through which my best self is capable

of attainment."[26] To carry out such a policy, restrictions must be placed on "rapacious" individualism. But here as elsewhere, the everlasting enigma is apparent. To what extent can liberty and law be reconciled?

Laissez-faire advocates frequently assume that the state is inimical to freedom and that government and liberty are necessarily opposed. It is believed that as the functions of government are expanded the domain of individual liberty is restricted and initiative and self-reliance are weakened. But this point of view does not take into account the fact that state action may improve the physical, intellectual, and moral capabilities of the individual and may prevent depredations upon his rights and privileges by the strong and self-seeking. Liberty in its extreme form is the negation of law, for law necessarily involves restraint, and the absence of restraint is anarchy.

Types of liberty which deserve consideration and protection in varying degrees are: First, private liberty, which involves a freedom of choice in matters of religion, morality, and the conventions of social life; second, political liberty, which assures the privilege and opportunity to participate in public affairs; third, economic liberty, which concerns the opportunity and security to earn a livelihood. Freedom in any real sense, whether private, political, or economic, requires special guarantees which the state alone can foster and preserve.

The problem of liberty is tied up in many respects with the principle of equality. Where great inequalities of wealth and power exist, inequalities of consideration and treatment of individuals are likely to occur. It is generally conceded that it should be the effort of statesmanship to provide conditions of equality and to elevate the situation of the common men. There is, indeed, a general acceptance of the notion that the legislature should regulate social conditions to establish some degree of equality of opportunity between the rich and the poor. "The individual," Justice Cardozo observes, "may not only insist that the law which limits him in his activities shall impose like limits on others in like circumstances. He will also be heard to say that there is a domain of free activity that may not be touched by government or law at all."[27]

Between liberty and democracy there are close affiliations.[28] Unless

[26] Frederic William Maitland, "Liberty," *Collected Papers,* vol. iii, p. 90.

[27] Benjamin N. Cardozo, *Paradoxes of Legal Science* (Columbia University Press, 1928), p. 98.

[28] Professor Laski maintains: "If in any state there is a body of men who possess unlimited political power, those over whom they rule can never be free. For the one assured result of historical investigation is the lesson that uncontrolled power is invariably poisonous to those who possess it. They are always

the government can be called to account for its action, there is no substantial basis for liberty. Rulers who do not move in the shadow of defeat are not likely to be considerate of the wishes of those whom they govern. The difficulties and dangers of dictatorial and autocratic governments are that political power is acquired and sustained by the suppression of individual liberty. None of the great gains for the free and harmonious development of individual life, such as freedom of religion, freedom of speech and the press, freedom of participation in public affairs and the right to be free from interference and deprivation of privileges except by the due process of law, are preserved against the dominant and imperious demands of dictators. No gains or advantages, commercial or political, can compensate for a system of government which violates, often in a ruthless and cruel manner, the most sacred and cherished privilege of individual freedom and self-expression.

Though weak, cumbersome and in some respects impotent, may not representative and democratic institutions be yet defensible for the lack in the long run of any workable substitute? Such a defense for democracy has been ably made by General Smuts, the philosopher-statesman of South Africa:

The end of government is not merely good government, but the education of the people in good government, its self-education in running its own affairs. . . . The short cuts do not really bring us much further, except to the next turn of the wheel of revolution. Liberty as a form of political government is a difficult experiment, and it is not without its dangers. . . . But it is at any rate less dangerous than its alternatives, and under modern conditions it is probably the only political system that promises to endure. The consent of the governed is the only secure and lasting basis of government, and liberty is the condition of consent. Only free men can consent to their form of government. Where there is no freedom and no consent, there must be a basis of force; the one or the minority in control can keep the majority in check only by means of force or domination, which is utterly repugnant to the new tendencies which are shaping political developments today. Bolshevism and Fascism, which are the current alternatives to democratic liberty, may be defended as a way out of intolerable situations, but they are temporary expedients, often tried and discarded before, and they will be discarded again after the present trials. The only political philosophy which holds the field is that which recognizes the fundamental ideals of human life in

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tempted to impose their canon of good upon others, and, in the end, they assume that the good of the community depends upon the continuance of their power. "Liberty always demands a limitation of political authority, and it is never attained unless the rulers of a state can, where necessary, be called to account." Harold J. Laski, *Liberty in the Modern State* (*London*, 1930), p. 12.

human government, and of these the greatest is liberty. No enduring system can be established on the negation of liberty, even if it comes with the temporary gift of good government.[29]

SUPPLEMENTARY READINGS

Leacock, Stephen, *Elements of Political Science* (Houghton Mifflin Company, 1921), new and enlarged edition, part iii.

Garner, James W., *Political Science and Government* (American Book Company, 1928).

Gettell, Raymond G., *Political Science* (Ginn and Company, 1933).

Coker, Francis W., *Recent Political Thought* (D. Appleton-Century Company, Inc., 1934).

Burgess, John W., *Political Science and Constitutional Law* (Ginn and Company, 1902), vol. i, book ii, chap. iv.

Merriam, Charles E., *American Political Ideas* (The Macmillan Company, 1920).

Hoover, Herbert C., *American Individualism* (Doubleday, Doran and Company, Inc., 1922).

Thomas, Norman, *America's Way Out: A Program for Democracy* (The Macmillan Company, 1931).

MacDonald, J. R., *Socialism: Critical and Constructive* (The Bobbs-Merrill Company, 1924).

Laski, Harold J., *Communism* (Henry Holt and Company, Inc., 1927).

——— *Liberty in the Modern State* (London, 1930).

——— *Studies in Law and Politics* (Yale University Press, 1932), chap. v.

Cardozo, Benjamin N., *Paradoxes of Legal Science* (Columbia University Press, 1928).

Schuman, Frederick L., *International Politics; An Introduction to the Western State System* (McGraw-Hill Book Company, Inc., 1933), chap. xiv.

Commons, John R., *Legal Foundations of Capitalism* (The Macmillan Company, 1924).

Beard, Charles A., "The Myth of Rugged Individualism," *Harper's Monthly Magazine* (December, 1931), vol. clxiv, p. 13.

Kallen, H. M., *Freedom in the Modern World* (Coward-McCann, Inc., 1928).

[29] Felix Frankfurter, *The Public and Its Government* (Yale University Press, 1930), pp. 124-126. On the controversy over democracy, see Francis W. Coker, *op. cit.*, pt. ii.

CHAPTER V

PROBLEMS IN THE REGULATION OF INDUSTRY, LABOR AND SOCIAL WELFARE

NEITHER unrestrained individualism, nor socialism, nor modified forms of the latter such as Bolshevism or Fascism have appealed to public sentiment in the United States. Instead, the individualistic and capitalistic regime of the nineteenth century has been subjected to steady and persistent types of public regulation. Though it is impossible within the scope and purpose of this volume to deal in detail with the efforts to regulate labor, industry, and social conditions generally, some tendencies, characteristics, and problems connected with the public control movement may be briefly sketched as indicative of changing concepts regarding the ends and purposes of government.

REGULATION OF BUSINESS AND COMMERCIAL INTERESTS

The regulation of business and commercial interests in the American states, in addition to the control exercised over public utilities which will be considered in separate chapters,[1] has been extended through (1) the granting of charters of incorporation; (2) special supervision over such matters as banking and insurance; and (3) efforts to maintain fair conditions of trade and competition.

The granting of charters, which was formerly done by special legislative acts, was later provided for by general laws, the terms of which could be applied and charters granted by the secretary of state or some other state officer. It was customary to encourage the formation of corporations, to require few conditions, and to grant charters for long terms of years, or in perpetuity. A fee or tax was usually charged, and certain states, by a liberal policy in granting charters, raised a considerable part of state revenue in this way. A charter granted in one state rendered it possible to do business in other states by compliance with certain conditions laid down for foreign corporations. Though corporation charters might be annulled by a *quo warranto* proceeding for an abuse of corporate powers, the process was judicial in nature, was difficult of application, and was rarely used by state authorities. By constitutional enactments and recent laws, however, more stringent requirements have been formulated, particularly

[1] See chaps. vi and vii.

with respect to long-term charters and other special privileges frequently accorded to incorporators.

A check has also been placed upon the formation of companies to sell bonds, stocks, or other securities by the enactment of so-called "blue-sky laws," which are designed to prohibit the granting of permits to do business within the state without authorization from some state officer. These laws require information regarding the financial condition and property of the corporation desiring to issue securities. The acts usually require that the securities be classified into groups according to the degree of speculative character so that the investor may know what kind of security he is purchasing. They have served as a check upon some of the gross types of fraud connected with the issuance and sale of worthless stock, but the stock market crash of 1929 indicated how ineffective such laws may be in protecting investors from fraudulent stock issues by large corporations and holding companies.

Banking and insurance have been regarded as semi-public in nature, and around these enterprises special safeguards were placed for the protection of the public. Companies doing business of this character were subjected to inspection and control by a state commission or commissioner whose duty it was to see that the laws of the state were enforced. But the failure of thousands of state and national banks during the course of the recent depression demonstrated the weaknesses of the laws regulating banking operations and the ineffectiveness of state supervision over a faulty banking system. Regulation of banking has been extended in certain states to require the setting aside of a guaranty fund to reimburse depositors in case of bank failures. However, the attempt to protect the funds of depositors in state banks as a rule proved unsuccessful and in course of the depression broke down completely. "From the condition of the fund itself," said the supreme court of Nebraska, "instead of a stabilizer of the state banks, it became a menace and a threat."[2]

For insurance the states have aimed to prevent fraud, to secure safety in management, and to require reasonable rates. By the requirement of a license to do business, and periodic inspections, state agencies have helped to maintain safety in insurance investments and to inspire public confidence in the business.

In addition to the ordinary regulations regarding the granting of charters, efforts have been made in many states to prevent monopolies and to prohibit unfair competition. Statutory provisions have had a twofold object: first, to protect business men from competitive

[2] Hubbell *v.* Bryan, 245 N. W. 20 (1932). On the failure of the state guarantee plan, see D. McCahan, in *The Annals* of the American Academy of Political and Social Science (March, 1927).

practices harmful to them; second, to protect the public from dishonest or fraudulent dealings.

Anti-trust laws in the various states attempt to cover a variety of alleged business wrongs. Chief among these classes of enactments is the prohibition of monopolies and pooling, of agreements or conspiracies in restraint of trade, and of restraint of competition as distinct from restraint of trade, such as price control, increasing prices, fixing a standard price or local price discriminations, limitation of output, division of territory, or restraint on resales. Though monopolies and agreements in restraint of trade involve the principle of unfair competition, it has seemed necessary to enact special laws to provide that there may be "reasonable competition," and to uphold the doctrine of "free and fair competition" as an inherent right of the people.

It is difficult to summarize the laws relating to unfair competition. The prohibition of unfair competition is usually combined with the prohibition of combinations and agreements in restraint of trade. Recently, the statutes have dealt more fully and specifically with such unfair practices as are coming to be designated unfair competition. As a result of the experience of the last few decades almost every state has statutory provisions covering monopolies or restraint of trade or unfair discrimination, and in a majority of the states an effort was made to cover all three of these types of misdemeanors.[3] There is a tendency to declare illegal all combinations to restrain trade, to limit production, to fix prices, or to prevent competition. Usually a penalty is imposed for a violation of the statute, and not infrequently the attorney-general is charged with the enforcement of the law by criminal prosecution or by *quo warranto* proceedings or by both remedies against offending combinations. It is a well-known fact that such statutes have seldom been enforced in the states. The astounding growth of large corporations usually monopolistic in scope and purpose during the last half century shows the impracticability of attempting to deal with many phases of industrial development through the piecemeal processes of about fifty legislatures.

Regulation by Federal Government.—The first significant efforts on the part of the federal government to regulate business were made in the enactment of the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890. The nature of the former act will be described in connection with the gradual extension of federal control over railroads and other public utilities national in scope;[4] the latter was the culmination of an anti-monopoly movement

[3] Cf. *Harvard Law Review* (November, 1933), vol. xlvii, pp. 105 ff.

[4] Cf. *infra*, pp. 134 ff.

which began in the states and was designed to prohibit all contracts and combinations in restraint of trade and to punish violators with fines and with criminal penalties. The prevailing faith in competition unhindered by governmental interference was not at first seriously shaken by the passage of these acts.

But during the administration of Theodore Roosevelt a series of investigations led to some startling revelations of corruption and dishonesty on the part of large business concerns. As a result of the evidence available, a renewed effort was made to enforce the Sherman Anti-Trust Act and a number of cases arose under the act. It was at this time that the Supreme Court applied the "rule of reason" in the interpretation of the law, holding that the Sherman Act prohibited only unreasonable restraints of trade. And it became the duty of the government to distinguish between "good" and "bad" trusts.

The enforcement of the Sherman Act, as well as increased activity along this line by state governments, resulted frequently in a mere change of form in business organization with a continuance of many of the evil practices condemned by public opinion. In some instances it led to such drastic action that the business interests involved secured the protection of the courts, and laws were held invalid. A condition of uncertainty was fostered because corporations found it impossible to know in advance what rights and privileges they had under the law, and an agitation arose for the formation of corporation or industrial commissions whose duty it should be to grant charters and define, in accordance with general laws, the conditions under which corporations could do business in the states. Similar uncertainty as to the control of corporations doing interstate business, in the enforcement of the Sherman Anti-Trust Law, prepared the way for two new acts, namely, the Federal Trade Commission and Clayton Acts.

The Federal Trade Commission Act not only declares unlawful unfair methods of competition in commerce, but also directs the commission to prevent such practices by persons, partnerships, or corporations, except banks and common carriers. The commission is authorized, after due hearing, to issue orders requiring the cessation of unfair practices, the enforcement of such orders if necessary being referred to the courts.

The prohibition of unfair practices is further extended by various sections of the Clayton Act, whereby it is declared unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities sold for use, consumption, or resale within the jurisdiction of the United States, where the effect of such discrimination may substantially lessen competition or tend to create a monopoly. It is also declared unlawful for any person

engaged in commerce to lease or sell commodities, patented or unpatented, or to fix a price or a discount therefor on the condition that the lessee or purchaser shall not deal in the commodities of a competitor, where the effect of the lease or sale may be substantially to lessen competition or tend to create a monopoly. Labor and agricultural or horticultural organizations are by a separate section excepted from these provisions, though the courts have rendered the clause exempting labor largely ineffective by holding it in conflict with the equal protection clause of the Fourteenth Amendment. Instead of specifically defining unfair competition, Congress by general decree condemned unfair practices and left it to the Federal Trade Commission to determine what practices are unfair. The work of the commission has been considerably restricted by the courts, due to the fact that they have insisted upon the right to give the final and authoritative definition of "unfair" methods and have often substituted their judgment for that of the commission as to the weight of the evidence submitted.

The Sherman and the Clayton Acts are in a measure declaratory of a principle of the common law, according to which "agreements tending to fix prices or to control the market may be null and void as in restraint of trade." Under this principle the commission and the courts have developed the doctrine of unfair competition and have built it largely on the theory that business rules and agreements must not be unreasonable or against public policy. The general effect of the enforcement of the Trade Commission Act has been to place restrictions upon trade practices involving misrepresentation, fraud or deceit, methods of coercion, or methods tending to restrain trade. Within recent years the commission has aided commercial and industrial interests to formulate methods of fair dealing and has encouraged them to put these methods into effect by agreement and compromise.

Numerous state laws have been passed to condemn unfair practices; and the decisions of the courts, federal and state, have been arriving at the conclusion that in the competitive process the individual has rights which, whether regarded as property or not, are entitled to protection, and that business practices unfair to both the injured party and the public must be declared inequitable and prevented by judicial process.

With the growth of large holding companies designed to control and monopolize the power industry, at least within extensive areas, and the failure or impotence of state authorities to cope with the situation, Congress in 1920 established the Federal Power Commission, composed originally of the Secretaries of Agriculture, the Interior, and War. This commission was reorganized in 1930 and given

enlarged powers to control the production of power on the public lands and on navigable streams. Through a system of licensing, the commission is authorized to regulate rates, services, and the issuance of securities by the companies engaging in the production and transmission of electricity on sites within its jurisdiction.

Faced with the necessity of dealing with commerce and industry on a national scale to ameliorate the conditions of unemployment, Congress in 1933 enacted laws to relax some of the restrictive features of the Sherman Anti-Trust Act and the Clayton Act. Though monopolies to control prices and to assure inordinate profits are still under the legal ban, combinations to stabilize conditions in an industry, to prevent unreasonably low wages, and to provide for fair dealing may be approved.

Efforts to regulate business and industry made by the state governments, whether by declaring a business a public utility and regulating it accordingly or restoring a modicum of competition by checking the movement to establish and operate chain stores, have met with obstacles which the Supreme Court has interposed in applying the "due process" and "equal protection" phrases of the Fourteenth Amendment.

An Oklahoma statute declared the manufacture, sale, and distribution of ice a public business, and forbade anyone to engage in it without first having procured a license from a state commission. No license was to be issued until proof of the necessity was established, and if the facilities already operating were sufficient to meet existing needs an application for a license was to be denied. This act was held void by the Supreme Court of the United States on the ground that the ice business was a private and not a public business and that state regulation cannot curtail "the common right to engage in a lawful private business." The aim of the state was held to be not to encourage competition but to prevent it; not to regulate business, but to preclude persons from engaging in it. And according to Justice Sutherland, "The privilege is embedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments."[5] To the dissenting justices a regular supply of ice may under certain circumstances be considered a necessary of life, comparable to water, gas, or electricity and hence subject to regulation by the state.

Justice Brandeis said, rightly or wrongly:

> Many persons think that one of the major contributing causes [of the economic depression] has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally

[5] New State Ice Company *v.* Liebmann, 285 U. S. 262 (1932).

right, that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity. In justification of that doubt, men point to the excess-capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from thirty to one hundred per cent. more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business. All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. There are plans for proration. There are many proposals for stabilization. And some thoughtful men of wide business experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules.[6]

To Justice Brandeis it is deemed essential that the community through its legislative and administrative agencies exercise a more extensive and directing control over industries closely related to the public welfare.

Florida levied a state tax on the privilege of maintaining chain stores, fixed at so much per store without regard to volume of business, and increasing progressively with the number of stores maintained by the owners. In so far as this act levied a heavier tax per store on the owner whose stores were in different counties, it was held void as involving an unreasonable method of classification.[7] Justice Brandeis, dissenting, maintained:

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy, and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the re-

[6] 285 U. S. 280.

[7] Liggett Company *v.* Lee, 288 U. S. 517 (1933).

sponsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty. If the citizens of Florida share that belief, I know of nothing in the federal Constitution which precludes the state from endeavoring to give it effect and prevent domination in intrastate commerce by subjecting corporate chains to discriminatory license fees. To that extent, the citizens of each state are still masters of their destiny.

Regulation of Labor Interests

When the theory of individualism was dominant the state was not expected to interfere in labor contracts. Under the conditions which prevailed when the Industrial Revolution began, there was comparatively little need for public regulation of wages or the conditions of labor. Though there were serious injustices and inequalities under the domestic system of manufacture of the eighteenth and early nineteenth centuries, the paternal attitude and interest of the home were seldom absent in the small workshop and tended to foster a humane interest in the laborer and his conditions of work. It was not until a scarcity of land rendered it impossible to acquire ownership merely by labor, and large-scale production brought a class permanently dependent on wages, that it became necessary for public regulation to enter extensively the field of industrial enterprise. Even then the progress of labor legislation has been slow and has met with many obstacles in the enactment of laws and their enforcement.

Though under the *laissez-faire* regime the conservation of the life, health, and energy of wage earners was considered an individual affair, it was found, with the growth of trade and manufactures, that action on the part of the state was imperative if the life and vigor of its citizens were not to be undermined or destroyed.[8] Consequently provisions were made by law to safeguard the worker from accidents, to protect him from the dangers of occupational diseases, and to place special safeguards around women and children. Much of this legislation was defective because of incompleteness and the absence of any well-defined standards and because of inadequate methods of enforcement. The manner of regulating industrial conditions through administrative orders, cooperatively formulated and issued by a permanent commission, has resulted, in several states, in a progressive adjustment of factory inspection and regulation to the new risks that accompany modern industry.

[8] For a valuable account of the growth and an analysis of labor legislation, consult John R. Commons and John B. Andrews, *Principles of Labor Legislation* (Harper & Brothers, 1927), revised edition, especially chap. vii.

Another phase of labor relations to which the government cannot remain indifferent is strikes and lockouts. The waste and suffering which they entail and the menace to public peace which they involve compel the government to take cognizance of strikes and in many cases to interfere actively.[9] In the main, the agencies of the government are called upon primarily to keep peace and to prevent disorders in the regions affected by strikes. But as property is frequently destroyed and lives are endangered in the course of strikes the attitude of the government becomes of vital significance to the outcome. By means of police protection and by the use of injunctions employers have weapons to compel acquiescence to their requirements.

One of the principal causes of industrial unrest is the belief on the part of labor that the courts do not deal fairly and justly by both disputants in labor disputes. In the case of the injunction, notes Dr. Witte, there are no radicals or conservatives in the labor movement; labor is a unit in its opposition to the injunction and in its criticism of the courts.[10] Though attempts have been made to limit the use of injunctions in labor disputes they have had so far only slight effect. The Norris-La Guardia Act of 1932 makes the "yellow dog" contract unenforceable in the federal courts, and the federal courts are prohibited from issuing injunctions against workers for striking or for acts incidental to strikes. Labor, on the other hand, must refrain from acts of violence and fraud; and an injunction may still be issued where the employer can show that every reasonable effort was made to settle the strike and that failure to secure a settlement is resulting in irreparable injury.

Colorado in 1915 passed an Industrial Disputes Act modeled after the Canadian plan of settling strikes by investigation and publicity. Strikes and lockouts in industries affected with a public interest are prohibited pending investigation by the Colorado Industrial Commission. The law has been applied successfully in a number of labor disputes.

Mediation and Arbitration of Labor Disputes.—The movement for conciliation in labor disputes, which has resulted in the establishment of special courts in Australia and in other countries, has recently received favorable consideration in the United States. After numerous attempts to provide for voluntary or compulsory arbitration of disputes arising between employers and employees in the railway service, a Board of Mediation was established in 1926 the members of which are appointed by the President. Separate boards of adjustment set up in connection with each railway system assist

[9] Edwin E. Witte, *The Government in Labor Disputes* (McGraw-Hill Book Company, Inc., 1932), p. 6.

[10] *Ibid.*, p. 7.

the national board in securing information and in settling matters in dispute between the railway management and the employees. Since 1913 the Secretary of Labor has been authorized to appoint conciliators in labor disputes, and thousands of controversies are settled, in part at least, as a result of the efforts of the agents of this department.

The majority of the states have enacted laws relating to the settlement of industrial disputes, usually with the establishment of permanent boards or commissions for conciliation and arbitration. The American states have not gone so far as certain foreign countries which have prohibited the right to strike on railways or other public utilities. In certain instances the right to strike is not denied, but is restricted, as the government requires a notification and a delay in action until a government investigation and report may be made. Special courts known as "industrial courts" are sometimes established for the settlement of disputes arising out of labor contracts between employers and employees. Continental European countries usually provide such courts, composed equally of employers and workmen. Procedure in these courts follows that of the conciliation courts described in another chapter,[11] lawyers often being excluded and the process made as informal, expeditious, and inexpensive as possible.

A rather unique type of adjustment for the settlement of labor problems was provided in the establishment of the Whitley Councils in England. As a result of a parliamentary inquiry, the following suggestions were made for securing a permanent improvement in the relations between employers and workmen:

A form of industrial organization was to be established with four stages: (1) individual firm or shop committees; (2) district councils for discussions between employers and workers; (3) joint industrial councils for the industry as a whole; (4) appellate tribunals to resolve differences between councils. Joint industrial councils not created by statute but sanctioned by the ministry are regarded as authoritative bodies to consider matters relating to the industry as a whole. By 1930 there were more than fifty councils in operation, affecting from two to three million workers, and on the whole they have been successful in dealing with difficulties which have arisen in their respective industries.[12] Though the plan was originally intended not to apply to the civil service, there has been an extensive development of councils in various branches of the service.[13]

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[11] See *infra*, chap. xxii.

[12] Lord Amulree, *Industrial Arbitration in Great Britain* (Oxford University Press, 1929), p. 154.

[13] Leonard D. White, *Whitley Councils in the British Civil Service* (University of Chicago Press, 1933).

The participation of the state in the settlement of industrial disputes is extended somewhat by the Industrial Courts Act (1919) of Great Britain. A permanent court of arbitration is established, to which industrial disputes may be referred if both parties concerned consent. Provision is made in the act for the appointment of courts of inquiry which shall make immediate investigation of any existing or apprehended dispute and give an impartial report of its merits to the public.[14] However, the attempt in the United States to apply judicial methods to the settlement of industrial disputes by the establishment of the Kansas Court of Industrial Relations proved ineffective as a result of the decisions of the Supreme Court. It was held that the act constituted a denial of due process of law in so far as it authorized the court to control, direct, and operate an industry when employers and employees failed to agree on satisfactory terms of employment.[15]

On the other hand, after citing numerous instances of the failure to secure any satisfactory progress toward arbitration through legislative and administrative methods, Lord Amulree turns to the more successful results through the spontaneous efforts of workers and employers. The list of instances he observed in which voluntary efforts succeeded in doing that which legislation had failed to accomplish is an impressive one and is indicative of the general movement toward peace through mutual accommodation and adjustment.[16]

The most recent effort in the direction of regulating wages is the enactment of minimum wage legislation. Through numerous investigations in the United States and in foreign countries, it has been shown that the majority of unskilled industrial workers receive wages too small for decent self-support. One of the first attempts to remedy this situation by legislative action was the enactment of a minimum wage law in 1896 by Victoria, Australia. This method, which involves the creation of representative boards to fix minimum wages in certain industries designated by the legislature, was adopted in England and in certain American states, but has been applied in the latter principally to the wages of women and children.

Since 1896 minimum wage laws have been enacted in more than a dozen states and in many foreign countries. Most of the statutes enacted in the United States are applicable to women only, and in a few instances the rate of wages is fixed directly by the legislature. As a rule, when these statutes have been attacked in the state courts

[14] W. H. Stoker, *The Industrial Courts Act, 1919*, and *Conciliation and Arbitration in Industrial Disputes* (Stevens & Sons, 1920).

[15] Wolff Packing Company *v.* Industrial Court, 262 U. S. 522 (1923), and Dorchy *v.* Kansas, 264 U. S. 286 (1924).

[16] Lord Amulree, *op. cit.*, p. 96.

they have been held valid. But when Congress passed a minimum wage act to protect women workers in the District of Columbia and placed the administration of the act in charge of a board, the orders of this board were attacked in the courts and the act was held unconstitutional by the Supreme Court of the United States.[17] The majority of the court held that the right to contract about one's affairs is a part of the liberty of the individual protected by the Fifth Amendment. Quoting with approval the much criticized opinion of Justice Peckham in the case of Lochner *v.* New York,[18] Justice Sutherland concluded that the act of Congress is "simply and exclusively a price-fixing law, confined to adult women who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—freely to contract with one another in respect of the price for which that one shall render services to the other in a purely private employment where both are willing, perhaps anxious, to agree." The standard for the guidance of the board under the act was regarded as so vague as to be impossible of practical application because it took into account the necessities of only one party to the contract and it fixed an arbitrary wage payment and thus interfered with economic *laissez faire.* Altogether the act was characterized as "a naked, arbitrary exercise of power."

Chief Justice Taft, dissenting, took issue with the contention that there is, in many instances, a substantial equality as between employer and employee. He admitted that the policy of a compulsory minimum wage is one on which there is much dispute, but he thought that it "is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound." The principle of the limitation of liberty of contract was recognized by the court in the regulation of wages and labor conditions under the police power, and it seemed difficult to understand the difference between regulating the manner and time of payment of wages and fixing maximum hours of labor and a minimum wage. In his opinion the Lochner case was overruled and he expressed surprise at the attempt of the majority to quote the case as a precedent. The intimation that the controlling effect of earlier opinions had been weakened by the Nineteenth Amendment was answered by the statement that this amendment did not change the differences between men and women recognized by Congress in the passage of this act. Minimum wage legislation in the United States thus suffered a setback which re-

[17] Adkins *v.* Children's Hospital, 261 U. S. 525 (1923).
[18] 198 U. S. 45 (1905).

stricted the movement to voluntary or optional acts or to the continuance of the minimum wage principle by cooperation and agreement, until the conditions created by economic depression again brought to the forefront the extreme need for effective compulsory minimum wage laws.

Section 7 of the National Industrial Recovery Act of 1933 provided that employers shall comply with the minimum rates of pay approved or prescribed by the President. And President Roosevelt indicated that he regarded this provision as one of the most significant measures to improve industrial conditions which the national government is undertaking. The movement to control child labor also received special consideration in the sessions of the state legislatures held during 1933. A number of states gave their approval to the pending child labor amendment to the federal Constitution, and new state laws were enacted to prevent unreasonably low wages for women and minors. In the main the features of the model act prepared by the National Consumers League are incorporated in these acts. A state commission is established to investigate industries to determine whether wages are "fairly and reasonably commensurate with the service or class of service rendered." An oppressive or unreasonable wage is defined as one "which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." It is hoped that the legal objections expressed by the Supreme Court in 1923 will be obviated by the new legislation. Perhaps the changes of a decade may be reflected in a reversal of judicial opinions which even in 1923 were preponderantly in favor of this form of legislation.[19]

Hours of Labor.—One of the matters upon which the state has entered with its legislative and administrative powers is the regulation of hours of labor. The movement for the restriction of the hours of labor began in the middle of the nineteenth century, the first acts defining the workday in an indefinite sense, usually stipulating ten hours, and suggesting as an ideal the eight-hour day. As there was no way of preventing contracts for a longer day, these acts had little effect. The first effective step in hours-of-labor acts was the introduction of clauses preventing laborers from working and employers from requiring service beyond the time specified by law, and the most effective of these laws were those made applicable to child labor. For railroads the legislatures established a maximum number of hours during which a train operator might be required to work without rest, and further established the number of hours of rest that

[19] Thomas Reed Powell, "The Judiciality of Minimum Wage Legislation," *Harvard Law Review* (March, 1924), vol. xxxvii, p. 545.

must intervene before work might be resumed. The hours of labor for women are regulated in a majority of the states. A few states allow the time to be determined by a state industrial commission. By means of legislation, collective bargaining, and other agencies there has been a marked decrease in the hours of labor required in the important industrial establishments.

The trend toward the reduction of hours of labor is shown by reports in 1921 that 3,500,000 wage earners as compared with less than a million in 1914, or approximately 50 per cent of the workers, were then working in establishments where the prevailing hours were forty-eight or less per week. Changing economic conditions due to the introduction of machinery, efficient management, and other causes have made long hours unnecessary, and experience has proved them detrimental to industry and society.[20] Though there was a steady decrease in the hours of labor during the decade from 1920 to 1930, the economic depression tended to increase the length of the work week until the government intervened to check the upward movement. One of the chief methods adopted by state and federal authorities to relieve unemployment was to secure a reduction in hours of labor and a consequent spread of employment. Provisions in the codes approved under the National Industrial Recovery Act and the requirements prescribed in the public works' program tend toward a 30-hour-week standard.

Social Insurance

Of special significance are the laws which aim to protect the lower-paid workers and those who by injury or sickness are incapacitated for regular employment. The term applied to this protection is "social insurance." Such insurance may provide for (1) accidents; (2) unemployment; (3) incapacitation by old age or invalidism; and (4) sickness. The purpose of social insurance is to secure a reasonable degree of economic security for the worker by providing an indemnity for the loss and expense involved in a misfortune that befalls him. The extent of misfortunes requiring some form of aid is enormous, and when to the loss through accidents is added the appalling waste through sickness and unemployment the total is staggering. It is the aim of this type of legislation, to adopt the figure used by Premier Lloyd George, to drain the morass of wretchedness, poverty, and degradation which results to those earning a bare existence when misfortunes occur.

A typical instance of the entrance of the state in the regulation of

[20] John R. Commons and John B. Andrews, *op. cit.*, p. 242.

business and economic conditions is the gradual adoption by the state and federal governments of workmen's compensation or industrial accident plans. Under the former system of common and statutory law the employer who refused to pay reasonable damages to a laborer for an accident in the course of employment had three legal defenses. He could claim that the laborer had assumed the risk and that hence he should not be held liable for damages; he could insist that the laborer contributed to the injury by his own negligence and therefore no liability should be assumed; and he could plead the "fellow servant" defense that negligence of another employee was the proximate cause of the injury. As a consequence, in most of the contested cases—and it was to the pecuniary advantage of the employer to carry cases to the courts—the laborer or his dependents were defeated. Since a large part of accidents were due to the negligence of neither the employer nor the employee, there was no basis for a damage claim and the worker or his family had to suffer the consequent losses. Thus those least able were compelled to bear the major part of the cost of industrial injuries.

Industrial accident legislation changed some of the underlying ideas in the relations between employers and employees. The theory of fault is eliminated and the employer is no longer deemed guilty of a breach of duty toward the employee. That compensation for injuries arising out of a workman's employment is to be borne by the industry as a part of the cost of production is the basic principle of the plan of workmen's compensation. Through insurance the business and the ultimate consumer of its products, rather than the injured employee, bear the burden of accidents incident to the business. The compensation acts, though originally opposed by the courts, particularly if they comprised compulsory features, have gradually been approved as a legitimate exercise of the police power of the state.

The purpose of social insurance is to secure a reasonable degree of economic security for the worker. As a supplement to the minimum wage it aims to serve as a protection for the periods of distress due to disability, unemployment and death. Certain misconceptions have tended to discredit social insurance in the United States. In the first place, the ills to be met are thought to be due largely to the workers themselves and should be corrected by regular employment and adequate wages. Several millions out of employment for the greater part of the year did not seem to disprove the usual assumptions on which such a view was based. But when fifteen millions or more were on the unemployment rolls these assumptions were no longer tenable. A second misconception which has been fostered in opposition to social insurance is the belief that such insurance amounts

to a "dole"; and a "dole" is to be sedulously avoided as contrary to American ideals and principles.

Let us look at the English system which is commonly cited as having the reprehensible dole. Not only is the English worker protected against accidents but he also contributes to a social insurance fund to which the employer and the government also contribute. "From these funds the worker and his family are supported when he is too ill to work or cannot find employment. From these funds the worker receives an old age pension when he is sixty-five (as does his wife also), and in the event of his death his widow and minor children are maintained by pensions. Systematically and in business-like fashion, the worker builds up a pooled fund to meet catastrophes that inevitably come and to avoid the degradation of pauperization."[21]

This contributory insurance system has been an important factor in aiding the British people to meet the distressing conditions since 1921. In addition to Great Britain, compulsory unemployment insurance systems are in operation in other European countries and in most instances are deemed to be a necessary feature of modern industrial life.

American states in proposing plans to meet the problem of unemployment have been inclined to substitute individual establishment funds for general funds and to set aside unemployment reserves rather than to adopt an unemployment insurance system.[22] But the Ohio plan follows a different procedure; it provides that all contributions must be placed in a single fund without segregation for either individual employer or separate industry. The American Association of Labor Legislation has encouraged the establishment of unemployment reserves as a useful and necessary step in the direction of a comprehensive insurance scheme. Whether the usual European model will be followed or a plan better adapted to American experience, it is no longer possible for legislators and administrators to ignore the unemployment problem.

Though many countries have state-administered old age pension systems, Germany having begun an experiment in this line as early as 1889, the American states were slow to adopt this type of legislation. However, since 1923 laws have been enacted in more than a score of states inaugurating some form of old age assistance. Before the depreciation of credit and income due to the depression, it was found by state commissions that for the majority of workers the earning power terminates between the ages of 55 to 65 and that

[21] Barbara Nachtrieb Armstrong, "The Nature and Purpose of Social Insurance," *The Annals* (November, 1933), vol. clxx, p. 3.

[22] See Paul A. Raushenbush, "The Wisconsin Idea," "Unemployment Reserves," *ibid.*, pp. 65 ff.; also "The Ohio Idea," pp. 77 ff.

roughly one-fourth of these are self-supporting on earnings or income. The first acts were usually optional with the counties and were ineffective, but since 1929 the tendency has been to adopt statewide mandatory laws. Experience with these acts has been too limited to permit any judgment as to the cost of such pensions and the advantages to be gained from state assistance, but it appears likely that some form of old age pension system will be considered an indispensable feature of a state's social welfare program.

About twenty-five countries have in operation compulsory health insurance laws; however, this form of social welfare protection has not as yet found a place in our governmental regime. The report of President Hoover's Committee on the Cost of Medical Care, published in 1932, indicated the extent to which existing agencies fail to meet the needs of wage earners in the cure and prevention of illness. Philanthropic medical and relief organizations cannot deal adequately with the situation. Though there is a wide divergence of opinion as to the extent to which the public should assume responsibility for medical care and as to the best method of financing such services, it is obvious that here too is a matter which cannot be ignored without serious consequences.

Regulation of Social Welfare

When individualistic theories prevailed it was not regarded as the function of the state to protect its citizens against unhealthful and unsanitary conditions. What protection was accorded in this line was left almost entirely to private initiative. But the changes from the individual to the social theory of the functions of government have brought a radical transformation in this regard. The entrance of the state was first manifested in the matter of the protection of the people from the ravages of dangerous diseases. With the increased concentration of population in cities and the consequent spread of diseases through unhealthful and unsanitary conditions, the control of the state over conditions affecting health has been rapidly extended. The development of medical science and the related sciences of sanitation and sanitary engineering has augmented the powers of public control. It has become the function of the state to assist in preventing the spread of contagious diseases by quarantine, vaccination, and other measures; to establish laboratories, and to conduct investigations as to health conditions; to assist in maintaining reasonable standards of purity in water, food, and drugs; and to uphold the maintenance of conditions conducive to the health and vigor of all citizens. This function is performed by federal, state, and local officers through boards of health and other public agencies who conduct investigations, inspect sanitary conditions, and, through numerous channels, dis-

seminate information and advice with respect to affairs related to the maintenance of good health. In no line has the growth of state powers touched more vitally the lines of its citizens and rendered a more direct service to the individual.

Just as in the case of health, the changes in conditions, the development of medical science, and the emergence of new points of view have placed upon the government duties and responsibilities in the field of charities and corrections. The state has gradually assumed a responsibility for the care of the dependent, the defective, and the delinquent. This responsibility may be assumed by a subsidy to private charitable and correctional institutions with a system of inspection of the work performed by them, or by the establishment and maintenance of state institutions. Owing to the variety of functions performed, the similarity of the problems of administration involved, and the necessity of some effective check upon the financial methods of these state institutions, an effort has been made to establish centralized control and supervision over all the institutions by means of a state board of control. As in other fields, there are not merely difficulties of administration to encounter; greater obstacles are involved in the determination of how far the duties and responsibilities of the state should be extended in the care of the dependent and defective classes, as well as in the removal of the conditions which foster such classes.

The scope and character of government have indeed changed enormously in the last fifty years. Formerly, government was chiefly regulatory and negative: its main task was to keep peace and maintain fair play while private interests asserted themselves freely. Today, government is largely concerned with the administration of social services, and has become positive in a new sense. A century ago, the state acted mainly as policeman, soldier, and judge. Today, it acts also as doctor, nurse, teacher, insurance organizer, house builder, sanitary engineer, chemist, railway controller, supplier of gas, water and electricity, town planner, pensions distributor, provider of transport, hospital organizer, road maker, and in a large number of other capacities. The change from regulatory or *control* activities to *service* activities on the part of government necessitates new devices and methods of administrative organization.

Despite the regulative efforts of government in modern society, the underlying forces of individualism and capitalism have created an economic order which is extremely unstable. In many respects the various plans to regulate economic life have proved ineffective or futile. The systems of banking control and regulation did not protect depositors when in the midst of economic depression thousands of banks failed. Anti-trust laws did not prevent the continuous con-

solidation and concentration of industrial establishments in large holding companies, pools, or mergers. Blue-sky laws failed to prevent the issuance of stock and the sale of securities without any reasonable basis in property or earning capacity. Laws designed to assure fair methods in trade and business checked only to a small degree rebates, concessions, collusion, excessive salaries, and many other unfair practices by which a firm or group of firms took advantage of others to gain excessive profits. Perhaps the factors which operate in modern economic life are too complex to permit governmental agencies to exercise any more than a limited authority over them. Or it may be that regulation has been undertaken in a half-hearted and indifferent manner, with poorly qualified personnel and inadequately financed agencies. After all forms of regulation are analyzed, it is seen that the protective arm of the government was applied to relatively few phases of economic and social life.

For the larger part of economic relations the automatic controls of individualistic and capitalistic methods were supposed to work a reasonable adjustment of the relations of individuals and groups in society. But after a series of recurrent periods of economic prosperity, at least as far as the successful members of an acquisitive order are concerned, and after disastrous depressions in which all suffered—in particular, the workers, those receiving small wages or salaries, and those dependent upon society for partial support—there came the stock market crash of 1929 and the devastating depression which followed. For a while it was thought the automatic forces would again operate to turn the tide toward better conditions. And President Hoover insisted that America must not turn to the "dole" and lauded as the proper corrective the "rugged individualism" which is so characteristic of American society. As conditions continued to grow worse the President was obliged to sanction governmental aid to business and industry on a vast scale, hoping it would eventually trickle down to the workers and to the increasing number on the unemployed and charity lists. But world-wide economic derangements, with high tariffs, partly retaliative to meet our own extremely high rates, and with assertive policies of nationalism and self-sufficiency, combined to destroy the greater part of world trade and thus further to paralyze the processes of commerce and industry. These general conditions became so serious and distressing in the United States, with the government seemingly unable to stem the downward rush, that when the opportunity came the voters rejected the platform and policies of the party which had been in control of the government for twelve years and elected Franklin D. Roosevelt as President on a program which during the campaign had been hailed as "The New Deal."

The Policies and Program of the Roosevelt Administration

The economic and political purposes and implications of the so-called "New Deal" are too extensive to be described even in summary form within brief compass. A few of the objectives and the means to be employed to secure them are pertinent to a consideration of the general ends and aims of the government.

With many of the banks of the nation closed and financial operations at a standstill, an emergency banking act gave the President broad powers over transactions in credit, currency, gold, silver, and foreign exchange. A subsequent act extended federal regulation over private banks, required a separation of security selling and deposit banking, and authorized the establishment of a plan for deposit insurance beginning January 1, 1934. Additional authority was given to the President to issue Federal Reserve and Treasury notes, to decrease the gold content of the dollar, and to restore the free coinage of silver at a fixed ratio to gold. And to carry out part of the proposed program the "gold clause" in public and private contracts was declared void. Under these powers a series of steps were taken to expand credit and increase the circulating medium for commercial transactions.

By means of additional authority granted by Congress in its regular session in 1934, President Roosevelt fixed a new standard for the American dollar at 59.06 per cent of its former gold content, establishing a dollar based on gold reserves but not redeemable in gold. The gold held by the Federal Reserve banks was transferred to the Treasury of the United States with a gain in value of nearly three billion dollars. Two billions of this amount are to be held as a stabilization fund to protect United States money in international exchange. The main purpose of the new policy, according to the President, is "to stabilize domestic prices and to protect foreign commerce against the adverse effect of depreciated foreign currencies."

By an agricultural relief act the President was empowered to regulate the sale and consumption of agricultural products, to license producers and processors in order to restrict production to market needs, to lease lands to take them out of production, and to guarantee the cost of production.[23] A large fund was appropriated and machinery

[23] Through the Department of Agriculture the government of the United States has over a period of years conducted experiments and made studies which are of special interest and value to the farmer, including such matters as the chemistry of soils, the care of animals and plants, the control of pests, and the maintenance of quarantines. By joint action of the state and federal

was to be set up to refinance farm mortgages. Under the provisions of these acts efforts were made to curtail the production of cotton, wheat, corn and hogs, and prices were raised to cover part of the necessary expenses to carry out such a program.

National Recovery Administration.—One of the most important phases of the new legislation was the National Industrial Recovery Act, the purpose of which was declared to be as follows: A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof, to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups; to induce and maintain united action of labor and management under adequate governmental sanctions and 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.

To carry out these purposes the President may approve codes of fair competition, and if industries refuse to act he may prescribe a code; he may limit importation which interferes with codes or agreements, and may require a trade or industry to take out a license. Labor is authorized to organize and bargain collectively, and the so-called "yellow dog contract" is outlawed for no one may be required to join or to refrain from joining a union. Employers must comply with the maximum hours of labor, minimum rates of pay, and con-

governments, agricultural colleges are maintained with specially equipped experiment stations, and extension services are offered to bring information and advice to the farmers. In addition to these regular and continuous services, a series of acts have aimed to give special aid to the farmers. In 1916 a Federal Farm Loan Act established federal land banks in order to lend credit to farmers in need of additional funds. To carry out the purpose of this and other acts the Farm Credit Administration was established in order to aid the farmer to borrow money for planting and harvest. In 1929 an Agricultural Marketing Act was passed to promote the effective marketing of agricultural products in interstate and foreign commerce. All of these steps were preliminary to the Agricultural Adjustment Act of 1933 in which the federal government attempted on a large scale to aid agriculture in the fields which were most seriously affected by the depression.

ditions of employment agreed upon or prescribed by the President. Included in the act is a large grant of money for a public works program. In carrying out this program the maximum time of employment shall be thirty hours a week; just and reasonable wages shall be paid, "which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort," and a "maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage."

In accordance with this act the National Recovery Administration was set up with the object of bringing all business and industry under codes and licenses, increasing employment by shortening hours, preventing price cutting, unfair competition and sweatshop conditions, and fixing minimum wages and maximum hours of employment. The codes established under the direction of the National Recovery Administration were in the nature of constituent acts for the industries concerned. They usually contained provisions for maximum hours of labor in order to increase the number employed by an industry or establishment. They fixed minimum rates of pay and prohibited child labor, the minimum age of employment being normally sixteen years. They guaranteed to labor the right to organize and to be represented by men of its own choosing. They fixed standards of fairness in the conduct of business, frequently condemning price cutting, rebates and bonuses, and they usually required uniform methods of accounting and the making of reports. In the main, it was intended that the terms of the code would be enforced by agencies within the industry itself. In so far as the trend is in favor of autonomy or self-government within an industry, the organizations under the code correspond to the German cartels, designed as they are to sustain and strengthen the industry by protecting it against losses in operation and to prevent the destructive measures that usually accompany price cutting.

The main features of the recovery program may be summarized as follows:[24] First, the usual method of opposing mergers or combinations and of aiming to dissolve them by lawsuits and prosecution is replaced by a plan providing for combinations in carrying on industrial enterprises and seeking to limit monopolistic tendencies and profiteering. Second, the program involves a more definite recognition of the right of labor to participate in the carrying on of industrial activities and the conservation of labor interests. Third, the method of cooperation is given a foremost place in the adjustment of matters

[24] This summary follows in part the conclusions of Charles A. Beard and George H. E. Smith in *The Future Comes: A Study of the New Deal* (The Macmillan Company, 1933), pp. 161 ff.

relating to industry and agriculture in determining the nature and extent of production, fixing prices, and maintaining standards. And agriculture is considered on a par with industry with respect to the aid and advantages to be accorded in the development of the recovery program. In fact, there is a definite recognition of the inequalities in the organization and leadership of the farmers in defending themselves against the deleterious effects of machine industry. Fourth, the recovery program repudiates the idea that the misery and distress of the unemployed are due to their own indifference, weakness, and failings, and assures government assistance in aiding their restoration to a normal and independent economic life. Fifth, through the control of banking and credit, through the establishment of public corporations, and special taxes, the recovery program aims to bring the control of many private interests under a broad national and central supervision. "If in these things clear-cut novelty is not discernible," observe Professors Beard and Smith, "there is in them a sharpness and weight of emphasis sufficient to make the New Deal signalize a break with the historic past and the coming of a future collectivist in character."

Though the major parts of the recovery program are comprised in the monetary and inflation schemes, the agricultural adjustment program, and the National Recovery Administration, other features of the "New Deal" are of only slightly less significance. An approaching paralysis of national transportation systems led to the appointment of a federal coordinator of transportation to reduce unnecessary duplication of service and facilities and to avoid waste and unnecessary expenses; and to this end the coordinator is given general supervision over the railroads and their subsidiaries. Federal aid has been granted to weak and unsuccessful railroads.

A Home Owner's Loan Corporation has been formed to issue bonds and to exchange them for privately held mortgages on home property, and to make cash loans for the purpose of clearing up mortgage or tax indebtedness or making necessary repairs. This aid has been rendered available only where there is danger of losing property by foreclosure or tax sale. A large fund was allocated to the Civil Works Administration to provide employment for millions who had not found positions either in the enlarged scheme of public works or in the rehabilitation of industry which the government had fostered. This form of public aid to the unemployed supplemented the establishment of a Civilian Conservation Corps engaged in reforestation projects, and government aid to camps for transients. By the Wagner Employment Agency Act passed in June, 1933, a definite plan of cooperation between state and federal employment agencies was initiated, with federal aid in support of the states which

provide an adequate program for the placement of workers. Though relatively small grants were made in direct aid to those in need of the necessaries of life, the government lent assistance to charitable and relief agencies by purchasing quantities of food products and rendering them available to those dependent upon charity.

A securities act modeled after English legislation requires registration with the Federal Trade Commission of securities offered in interstate commerce, and the filing of a prospectus for the truth of which the company is held liable. The Tennessee Valley Authority was created to take over the construction and development of the Muscle Shoals project in Alabama, to build new dams and to undertake the generation and transmission of electric power throughout the Tennessee Basin. Among the objects of this act, it is proposed to promote industrial development, control floods and erosion, to aid reforestation, and to provide for better land utilization.

Long-delayed reorganization of the executive and administrative agencies of the federal government was authorized by Congress and a beginning in this direction has been made by the President. And though efforts were made along various lines, including a reduction in veterans' benefits, to reduce the budget of the federal government, additional funds allotted for relief and for unemployment and other features of the recovery program have increased the expenditures of the government and have added to the public debt.[25]

New Purposes of Government

As a result of new legislation and administrative machinery set up in recent years, a change has been introduced in the relations between government and society. There has come to be a recognition of the fact that human beings cannot indefinitely be sacrificed by the millions to the operation of economic forces. Furthermore, it is believed that organized efforts which could create such an efficient economic mechanism can be invoked to prevent the shocking toll on life and health which readjustments under modern conditions demand. Central control over social and industrial forces is regarded as an inevitable result of the economic development of the time. Though in the decades following the war the American people were willing to tolerate expensive government, they wanted the government to interfere as little as possible in the management of their affairs. Now they seek inexpensive government but insist that it shall control the essential political and economic relations. To many, progress lies not in building a superstate that controls and dominates social

[25] For a consideration of some financial phases of the recovery program, see *infra*, chap. xxi

and industrial life in its national and international aspects, but in the growth and recognition of semi-autonomous bodies within the state. The efforts toward self-regulation in business which have taken definite form in many industries subject to the supervising authority of the government are indicative of a trend which has promising possibilities.

If these tendencies continue and are accelerated it will increasingly become the main object of the government to prevent unreasonably low wages, sweatshop conditions, and undesirable practices which tend to lower the standard of living and to impair permanently the life and health of the workers. On the other hand, it will become increasingly necessary to use the force of the public power of the state to prevent unfair practices, excessive profits, and the domineering methods of monopoly. Between the two extremes as large a degree of self-regulation and direction as possible will not only be permitted but will be fostered and practiced by the government. Involved in such a plan of regulating economic interests will be a more thorough and extensive control of credit, banking, and currency than has heretofore prevailed.

The overwhelming question today is, will the attempt to mold an individualistic, capitalistic system into a directed economic order produce the desired results? With more food, more clothing, more housing, more luxuries than we have ever had, there are millions who are hungry or living precariously with little more than the bare necessities of subsistence. The theory that the ordinary working of the law of supply and demand, and that the operation of the normal economic laws in a capitalistic society will meet the situation is no longer warranted. We know today that production for private profit is as likely to be inefficient as efficient; and that while private profit in a small enterprise makes for efficiency, in a large enterprise it is likely to make for wholesale plunder.

It is the failure to control the grasping and exorbitant demands of those engaged in the production of commodities and in the manipulation of investments and credit that resulted in large part in the disastrous panic of 1929 and the distressing consequences which have followed. Unless some means of governmental regulation can be devised to prevent selfish interests from again controlling investment securities and corporate earnings to their own interest and profit, we can only look forward to disasters similar in nature.

Economic Planning

As an outgrowth of the World War and its economic and political developments there has come a movement to supplement the usual

legislative, executive and judicial agencies for the control of civic and economic activities by the establishment of economic councils. One of the first acts of the Bolshevist regime in Russia was the creation of a National Council of Supreme Economy. To this council was intrusted the task of nationalizing the large industries of the country and of supervising the enforcement of workers' control throughout the country. By executive orders the council was made practically the supreme regulating organ of large-scale industry in the Soviet system. The most ambitious attempt ever made to control the economic life of a nation was comprised in the Soviet Five-year Plan to stimulate industry and production and to control the distribution of economic goods. Though opinions differ as to the success of the plan and as to the permanent results accomplished, it is generally agreed that the plan was of service in checking the detrimental effects of the depression from which all nations were suffering.

The Russian experiment was soon followed by the formation of economic councils in Germany and Czechoslovakia in the constitutions adopted from 1918 to 1920, and a similar project was undertaken in France by the setting up of a voluntary economic council. More than a dozen such councils were formed in various nations, with membership varying from about 50 in France to more than 300 in Germany. Members of such councils are in some cases elected by economic organizations and trade associations in accordance with regulations prescribed by the government, and in other cases lists are prepared by trade associations and members are appointed by administrative officers of the government. Members usually represent groups, such as agriculture, industry, commerce, banking, transportation, and the professions. Consumers are represented through cooperative associations and municipalities.

As originally established, the councils may be roughly classified into three groups: first, a regulatory planning type, such as the council of the Soviet Union and the National Economic Council of Italy; second, the representative advisory type, such as the councils provided in Germany, Czechoslovakia, and France, where the primary purpose is to advise the government on economic and social matters; third, the appointed consultative type, such as the Economic Advisory Council of Great Britain, under which groups are formed to aid the government in giving technical advice and consultation.[26]

The idea and incentive which led to the creation of economic councils were due to the emergence of economic interests to a primary place in society and to the desire to secure definite plans for social

[26] Lewis L. Lorwin, *Advisory Economic Councils* (The Brookings Institution, 1931).

and economic reform. Capital and labor were to have an equal opportunity to aid in the development of an orderly adjustment of the relations to one another and to the government. The most useful work has been done by advisory councils, as in France, where executive officers and council members sit together and aid in the preparation of reports on such economic and social problems as housing, unemployment, hydroelectric power, and commercial aviation.

Though introducing a new point of view and approach to political problems, the councils in certain instances proved a disappointment to their proponents. The legislatures regarded them as rivals and took steps to curtail their powers, and executives moved to render them merely agencies of the present administrative regime.

There is general agreement that the influence of the councils on legislation has been slight. It is remarkable, observes Dr. Lorwin, "how clever the conservative groups are in turning a great reform into a small thing." The councils have become primarily agencies for facilitating and rationalizing the making of national economic policies sponsored by the dominant political parties or executive leaders in charge of the government. "Whether advisory economic councils are likely to develop and become a permanent feature of the political and legal structure of Western civilization," believes Dr. Lorwin, "depends partly on the continuance of democratic institutions in general and partly on their capacity to meet the problems that gave rise to them."[27]

With the organization and policies of the War Industries Board of the World War as a pattern, numerous proposals were made for a national industries board or economic council in the United States. The impetus toward economic and social planning was greatly augmented by the vast scope and disastrous consequences of the depression beginning in 1929. Among the many plans proposed since 1929 there are four main types: first, an administrative board with authority to enforce its regulations; second, an advisory council after the European model designed to serve as an aid to Congress and state legislative bodies; third, an association of employers in a single industry with limited control and supervision by the government; fourth, a national organization established by the industries themselves, with local bodies to act in cooperation. Of these, the first and second would be organized as governmental agencies, and the third and fourth would be voluntary organizations functioning for the industries as a whole.

To Professor Beard, who prepared one of the most widely discussed plans and aided in presenting to the public other proposals of a similar nature, the challenge to capitalism and the effort to meet the

[27] *Ibid.*, p. 54.

challenge by a combination of individual liberty and initiative with collective planning and control seem to mark a new phase in the intellectual and moral development of mankind. The Beard plan recommended the creation of a national economic council to be authorized by Congress, with an affiliated board of strategy and planning for the purpose of securing a unity of direction of all corporations engaged in the production of the necessaries of life. This body would be charged with the function of coordinating the divisions of economy for the prime necessities of food, clothes, and shelter, and working out their relations—financial, operative, and distributive.[28] Each industry or group of industries would form a holding company and have its own planning board to cooperate with the national council. Among the duties of the national council is the preparation of criteria for standard services, equitable charges, and a fair return on prudently invested capital.

In contrast with such a plan are the proposals of Henry I. Harriman, President of the United States Chamber of Commerce, and of Gerard Swope, President of the General Electric Company, which are intended to secure a rational program of production and distribution to be initiated by business. Recognizing the need for central control and direction of economic activities, these plans have as their chief objectives to maintain private initiative and free competition, under which it is claimed great and substantial progress has been made, and to supply some control to reduce the severity of business fluctuations. It is Harriman's desire that business set its house in order with relatively little cooperation or control by government. Swope, on the other hand, would have trade associations for each business or industry with fifty or more employees, acting under the supervision of the Federal Trade Commission or the Department of Commerce, to consider trade practices, simplification and standardization of products, stabilization of prices, and all matters which may arise from time to time relating to the growth and development of industry and commerce, in order to promote stabilization of employment and give the best service to the public.[29] A general board of administration would be created to aid in the protection of employees.

All of the numerous proposals for an economic plan are predicated on the assumption that the present unemployment and economic distress with its consequent misery and insecurity existing by the side of a large surplus of raw products and manufactured goods more than enough to supply the needs of all, must not be permitted to continue.

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[28] *America Faces the Future,* edited by Charles A. Beard (Houghton Mifflin Company, 1932), pp. 124 ff.

[29] Gerard Swope, "Stabilization of Industry" in *America Faces the Future,* p. 160.

The plans attempt to answer the query whether the seemingly inexorable business cycles of expansion, explosion, contraction and resultant calamity are the outcome of human factors which are susceptible of control by intelligent action.

Though most of the plans presented to the people for consideration aim to correct the evils of capitalism but leave the basic features of the capitalistic system intact, there are a variety of schemes which would lead progressively to the principles and policies of either socialism or communism. Extreme measures of this type do not now commend themselves to the majority of the American people, but the main features of the federal government's recovery program indicate a distinct trend toward socialistic control of economic life.[30] The immensity of the tasks to be undertaken to accomplish even partial planning for a few industries indicates that progress toward a comprehensive national plan can only be made slowly; and to carry out such a project under the guidance of democratic and representative institutions requires some difficult modifications and adjustments in the current legal and political mechanisms.

SUPPLEMENTARY READINGS

Young, James T., *The New American Government and Its Work* (The Macmillan Company, 1933), third edition, chaps. xiii, xiv, xxxi, xxvii.

Beard, Charles A., and Beard, William, *The American Leviathan: The Republic in the Machine Age* (The Macmillan Company, 1930), chaps. xiv, xix.

Crawford, Finla Goff, *Readings in American Government* (F. S. Crofts & Co., 1933), revised edition, chap. xxiv.

Berman, Edward, *Labor and the Sherman Act* (Harper & Brothers, 1930).

Commons, John R., and Andrews, John B., *Principles of Labor Legislation* (Harper & Brothers, 1927), revised edition.

Callcott, Mary S., *Principles of Social Legislation* (The Macmillan Company, 1932).

Epstein, Abraham, *Insecurity—A Challenge to America* (Harrison Smith & Robert Haas, Inc., 1933).

Berle, Adolf A., Jr., and Means, Gardiner C., *The Modern Corporation and Private Property* (Commerce Clearing House, 1932).

America Faces the Future, edited by Charles A. Beard (Houghton Mifflin Company, 1932).

Beard, Charles A., and Smith, George H. E., *The Future Comes: A Study of the New Deal* (The Macmillan Company, 1933).

[30] See *America Faces the Future*; Hugo Haan, "American Planning in the Words of Its Promoters," *The Annals* (March, 1932); Stuart Chase, *A New Deal* (The Macmillan Company, 1932); George Soule, *A Planned Society* (The Macmillan Company, 1932).

Lindley, Ernest K., *The Roosevelt Revolution* (The Viking Press, Inc., 1933).

Roosevelt, Franklin D., *On Our Way* (The John Day Company, 1934).

Blachly, Frederick F., and Oatman, Miriam E., *The Government and Administration of Germany* (Johns Hopkins Press, 1928), chaps. xvi-xviii.

Hamilton, W. H., "Affectation with a Public Interest," *Yale Law Journal* (June, 1930), vol. xxxix, p. 1089.

CHAPTER VI

PROBLEMS IN THE REGULATION AND CONTROL OF PUBLIC UTILITIES

The Nature of Public Utility Problems

Distinction between Public and Private Utilities.—The enterprises for the satisfaction of the common needs of man may be classified as private and public. Most of man's wants are satisfied by individuals who provide commodities and perform services for the profit that may thereby be gained. When the rendering of these commodities and services becomes of interest to the public, the agencies performing them have come to be known as public utilities. Hence, it has been observed that "the public's concern about a particular business may be so pervasive and varied as to require constant and detailed supervision and a very high degree of regulation. Where this is true, it is common to speak of the business as being a public one, although it is privately owned."[1] Some of these utilities have become so important that the government has taken them over and operates them at cost or for a very slight return. Sometimes the service may even be supplied at a loss and the deficit made up by means of taxation. Among the utilities which have become public in nature, and are either operated by the state or placed under public control are carriers, wharves, telegraphs and telephones, electricity, gas, water. The guiding principle of the common law that enterprises affected with a public interest are subject to public regulation was formulated by Lord Hale more than two centuries ago when he observed that "wharf and crane and other conveniences affected with a publik interest, . . . cease to be *jus privati* only." This maxim was interpreted by Chief Justice Waite, in one of the first public utility cases before the Supreme Court of the United States affecting the grain elevator business in Chicago, to mean that "when, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest thus created."[2]

It has not been an easy matter to determine when property is so devoted to the public use as to render public regulation necessary.

[1] From the dissent of Justice Brandeis in New State Ice Co. *v.* Liebmann, 285 U. S. 262 (1932).

[2] Munn *v.* Illinois, 94 U. S. 113 (1876).

When New York State deemed the theater business in New York City to be so affected with a public interest as to warrant the regulation of the resale of theater tickets, the Supreme Court refused to permit such regulation, but there was a marked division of opinion among the judges as to whether this business was private or public in its nature.[3] There was a similar division of opinion among the judges when Oklahoma set about to regulate the manufacture and distribution of ice. In another case, Chief Justice Taft attempted to designate the type of business commonly regarded as of sufficient public interest to warrant regulation by the government. According to his view, in this class are "businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."[4]

Factors which are usually considered as placing a business within the category of a public utility center largely around monopolistic practices and control. Among these factors are natural limitations of the source of supply, such as applies frequently to water and natural gas; geographical location as applicable to grain elevators, railway terminal facilities and stockyards; the character of the service, which by its very nature becomes monopolistic, such as the selling of gas and electricity; the immediacy of the patron's need, as in the telegraph and telephone service; and cases where the mere size of the plant may render effective competition impossible.[5]

Importance of Public Utilities.—The regulation and ownership of public utilities are among the most difficult and intricate problems of modern government. For the average citizen the government renders many services. It takes care of the roads, streets, and sidewalks. It gives protection from theft, from trespass upon property, and from the spread of contagious diseases. It renders aid in case of fire or of threatened injury to life. It establishes systems of education and means of caring for the sick, the defective, and the insane. But in addition to being dependent upon all of these services, the comfort and welfare of citizens are greatly dependent upon the large public utilities owned and controlled usually by private corporations. The

[3] Tyson Bros. *v.* Banton, 273 U. S. 418 (1926).

[4] Wolff Packing Co. *v.* Court of Industrial Relations, 262 U. S. 522 (1922).

[5] William E. Mosher and Finla G. Crawford, *Public Utility Regulation* (Harper & Brothers, 1933), pp. 7-10.

citizen who lives in a city or town must rely in no small degree upon private corporations for transportation by street railways and for communication by telephone and telegraph, and in many cities he must look to private agencies for water, gas, and light. The three utilities last mentioned, however, are passing more and more under municipal control. For the general conveniences, then, the average citizen is dependent upon private corporations; for the protection of life and property, and for educational facilities, streets, and roads he is dependent upon the agencies of the government.

Few, indeed, realize the vast scope and increasing importance of public utilities. In 1927 it was estimated that the production and distribution of electrical power, including central stations, electric railways, telephones and electrical appliances, involved an investment of twenty billion dollars. Though these values have been considerably reduced, the investments of the electrical utilities alone are enormous and the problems involved are baffling. Governor Pinchot of Pennsylvania has thus characterized the problem of "Giant Power": "Nothing like this gigantic monopoly has ever appeared in the history of the world. Nothing has ever been imagined before that even remotely approaches it in the thoroughgoing, intimate, unceasing control it may exercise over the daily life of every human being within the web of its wire. It is immeasurably the greatest industrial fact of our time. If uncontrolled, it will be a plague without previous example. If effectively controlled in the public interest, it can be made incomparably the greatest material blessing in human history."[6]

It is evident that in a large city, on account of the peculiar dependence of the citizen upon the public utilities in the conduct of his business and social affairs, and on account of the investment of vast amounts of capital, the problem of the regulation and control of public utilities is one which in a certain measure overshadows all other municipal problems. To deal efficiently with, and to regulate justly, private corporations which furnish so many of the conveniences, comforts, and necessities of life, often equivalent in value to all the houses, buildings, lands, and improvements of a city; and to give due consideration to the factors of social well-being involved in operations representing so many employees and so large a wage expenditure, constitute problems which require the most careful consideration and the most thorough treatment by those who are interested in the public welfare.

These utilities in a sense perform social functions. The state might perform these functions, but under normal conditions it leaves to

[6] *Giant Power Survey*, Report to the State Legislature of Pennsylvania, 1925, pp. x-xii.

private individuals or corporations the privileges and the duties of rendering what are quasi-public services. "Under such conditions the conduct of the industry and its employees must be considered in the light of social values. The public has a right to insist that its development should not be governed entirely with respect to the stockholders, but with equal regard for the welfare of the public served."[7]

The public utilities which render such important services secure their right to do business through legislative acts or through similar authorizations granted by municipal councils. The authority by virtue of which private individuals and corporations exercise the right to use the roads and the streets in distributing commodities and providing services to citizens is commonly known as a franchise. Franchises are in the nature of special privileges by virtue of which the owners can render services to the public for private gain.

Freedom from Regulation.—The public at first had little or no defense against corruption or the evils resulting from the selfish designs of utility owners and managers. There was a proceeding known as *quo warranto* by which the charters of corporations might be forfeited, but this remedy was so difficult to apply that it was seldom called into use. It was customary not only to grant freely long-term or perpetual franchises, but also to give encouragement to corporations to begin undertakings for the benefit of the public. Communities were thought to gain in importance thereby, and the development of such utilities was looked upon as a measure of progress which the community ought in every way to encourage. The existence of these conditions, permitting the bartering away of valuable rights through bribery and other corrupt practices, and resulting in the dominance and control of politics by these recklessly created corporations, forms a discreditable story in the development of machine politics in the United States.[8]

Along with the policy of encouraging lax and indifferent enforcement of the law, the utilities developed a system of special rates and rebates which proved to be nothing short of scandalous. Gas companies, for example, rarely sent bills to influential politicians. Regular systems of rebates were provided by telephone companies. Moreover, street railways distributed passes freely to those who might in some way or other make the path easier for future stock issues or the securing of more liberal ordinances. Although the serious evils resulting from the liberal granting of passes have been abolished by

[7] *Electrical Utilities; The Crisis in Public Control,* edited by William E. Mosher (Harper & Brothers, 1929), pp. xviii, xix.

[8] Cf. C. E. Russell, *Stories of the Great Railroads* (Charles H. Kerr & Co., 1912), and statement by Albert M. Todd, president of the Public Ownership League of America, before the Committee on Interstate Commerce, Sixty-fifth Congress, Third Session, February 21, 1919.

legislation and by voluntary action on the part of the utilities themselves, the system of awarding gratuities and special privileges has by no means been entirely eliminated.

Not only did the public service corporations thus foster a system of discrimination and systematic rebating, but they also found it necessary to keep in close touch with politics because they were interested in the construction of new enterprises and in the securing of liberal grants for future extensions. They found it still more necessary to be able to rely upon a favorable attitude of the courts of justice, for it was to the courts that the utility companies had to look for the ultimate determination of their rights and privileges and their protection from aggression or interference. Thus, the companies, joining usually with allied interests, took an active part in political campaigns, contributed freely to the campaign funds and kept a close watch upon prospective candidates. A close combination was often formed by the utility owners and the political leaders of the community, and the connection between public utility corporations and politics became especially close and intimate. The basis for a certain type of machine in American politics was laid in the combination of public utilities with other interests similarly desirous of securing liberal regulations and special privileges from the government.

Finally, the freedom of corporations from regulation led to the extensive overcapitalization, or watering of stock, which has been so characteristic of corporate management in the United States. It became customary to capitalize plants on the basis of operating possibilities and to require the consumers to pay dividends on fictitious values created by the growth and development of the corporation. The advantages to be derived by the companies from copious stock watering were the paying of the promoters in stocks and bonds and the checking of legislative interference designed to reduce rates and improve service. Having greatly inflated stock issues, companies could maintain that they were either losing money or paying a low dividend on the investment.

The combination, then, of public utilities and other interests so as to form the machine with its baneful influence in American politics; the extension of the system of special fares, passes, and discriminative rebates; the overcapitalization which rendered it impossible to know when a corporation was overcharging its patrons—all combined to force upon the attention of the public the evils of an unregulated system of private ownership of public utilities.

Public Regulation of Utilities

Public regulation of utilities was undertaken first in the United States in connection with railroads. The steps in such regulation were

(1) special charters; (2) general laws; (3) permanent railroad commissions; (4) public service commissions. The building of railroads was first encouraged and subsidized by states, cities, and counties. As many of these projects proved to be financial failures there was a demand for public regulation. Efforts to secure public control took the form of special charters with requirements as to reports, issuance of stock, and safe and prompt service. As these charters were usually granted in perpetuity or for long terms and as there was no effective method of enforcing the legal requirements, the selfish, extravagant, and corrupt methods of railroad magnates were only slightly checked. In the period before and after the Civil War the policy was adopted of enacting general laws relating to railroad companies, including such matters as control over the issue of securities, and the regulation of rates, services, and consolidations. The attempt to establish direct legislative control, say Mosher and Crawford, failed for the following reasons: "The legislatures lacked a consistent policy. They were subject to the influence of powerful railroad groups and their action was more or less spasmodic, whereas new problems were arising continuously. But the most important defect of all was that no agency was provided to execute the law. Apart from occasional action the legislatures left the railroads to themselves to abide by the charter provisions, or to violate them, largely as they saw fit."[9] It was in this period that Jay Gould observed that it was cheaper to make legislatures than to buy them.

The breakdown of the sporadic attempts at state regulation led to the establishment of railroad commissions. At first the commissions were merely advisory and fact-finding bodies with authority to secure reports and to give advice to the legislature. The only recourse available to carry out any recommendation of the commission was to appeal to the legislatures or to the courts. Courts could punish only the grossest types of fraud, and legislatures could be prevailed upon rather readily to grant the special requests of the railroad owners and managers.

Public indignation at the prevailing evils and scandals resulted in 1870 in the creation of commissions with mandatory authority. The broad powers of the first of these, the railroad and warehouse commission of the State of Illinois, were upheld by the Supreme Court of the United States.[10] Commissions were now given the power to prevent unfair discrimination, to control service, and to fix rate schedules. Too stringent regulative provisions and the panic of 1873 resulted in a reaction against public control, with the result that commissions with real authority over railroads were not established until

[9] *Op. cit.*, pp. 14 ff.

[10] Munn *v.* Illinois, 94 U. S. 113 (1876).

toward the end of the nineteenth century. The general regulatory movement was facilitated somewhat by the passage of the Interstate Commerce Commission Act in 1887.

Control over other types of utilities affected with a public interest developed slowly as the furnishing of such services as electric railways, gas, electricity, water, and telephone came to be of importance to urban centers and as evils similar to those affecting the railroads made protection of investors and the public necessary. As has been said, utility companies usually secured the right to operate and use the streets through the grant of a local franchise. Municipalities operated under even greater handicaps than the states in their efforts to bring these companies under public control, for it was easier to corrupt city councils and to dominate local politics. By combinations and reorganizations the utilities extended their activities over regional, state and national areas and vied with one another in exploiting and corrupting local communities. It is not surprising that drastic remedies were proposed and sometimes applied. The failure of attempts at regulation by the cities and the inability of local authorities to deal with the utilities which extended their services beyond municipal limits brought a demand for state regulation. Responding to this sentiment, New York and Wisconsin created public service commissions.

Need of Regulation.—The regulation of utilities was thought to be necessary to protect the citizen against discrimination as to rates and services, for the individual consumer was without remedy against such discrimination and often scant courtesy was accorded to his protests. Then, too, the patron was entitled to fair and reasonable rates and services, which were deemed to be obtainable only through a system of public regulation or public ownership. Since public utilities, when controlled by private ownership, are operated with a view to profits and often to very large profits, it was believed necessary to afford the public some protection against the undue avarice of private corporations. Regulation became necessary, also, for the protection of the community in matters of health and sanitation, for the health of a community can be safeguarded only by common control over such matters as transportation, electricity, water, and gas.

Finally, regulation of public utilities was defended as a means to prevent the dominance of special interests in the management of government. Only in this way, it was believed, could be eliminated the methods whereby a few individuals might seek and secure governmental favors and assistance in operating a business run for private profit. All of these conditions led to a demand for government control over public utilities.

The results of the individualism that held sway for the greater part of the nineteenth century had been so great in commercial and

industrial fields that the nation and states were forced to take measures to check a continuation of business methods which were designed to such a high degree for purely selfish ends. Various methods of holding the greed of corporations in check and of securing a more equitable distribution of returns have been tried, but with no positive degree of success.

The ordinary means of redress that were resorted to were lawsuits, legislative control in the granting of charters and franchises, and the referendum. The method of carrying a grievance through the courts, with the possibility of receiving little satisfaction and perhaps losing everything, offered little encouragement to the individual to try to obtain justice from a corporation by means of a lawsuit. Legislative control likewise had on the whole proved inefficient, for here again it is difficult for individuals to obtain satisfactory legislation in the face of the power and influence of corporate interests. A referendum on franchises carried one advantage with it, namely, that the public had an opportunity to learn something about the special features of franchises; but once a franchise was granted there was little chance of redress for individuals against the corporation which owned and controlled the utility. Furthermore, many of the features of utility franchises were so technical and so involved in legal phraseology that the voters could render no intelligent decision on the issue. As these three safeguards of the interests of the public had proved inadequate in large part other expedients were resorted to, namely, utility commissions and public ownership.

Within a few decades every state except one established a commission for the regulation of utilities. City commissions were also established, the work of which was gradually taken over in large part by the state commissions. The Interstate Commerce Commission has been organized to settle questions which involve the management of public transportation between the states. The main functions of these regulatory bodies will be briefly described.

Regulation of Utilities by State Commissions

Although the state railway commissions declined in authority and prestige as the powers of the Interstate Commerce Commission increased, it was their experience in the regulation of railroads that encouraged the states to intrust to regulatory bodies the control over other public utilities, such as warehouses, telephone and telegraph companies, gas and electric light companies, and street railways. Some states retained their railway commissions and created a second body known as a public service commission, while others combined the

functions, with both types of control in a single board. The purposes of these commissions are to protect the public as to service and rates, to prevent discriminatory treatment, and to safeguard the utilities from radical and confiscatory legislation. It was the intention of those who favored the establishment of such commissions that the control of corporations should be taken out of politics, and that the procedure in securing redress for injuries should be made informal, speedy, and inexpensive.

The chief features of the commission acts are:

1. Provisions to regulate the granting of franchises in order to avoid duplication of utility properties and to arrange for the operation of utilities subject to control of rates and services.
2. Authority to supervise the issue of stocks and bonds.
3. Power to prevent unjust discriminations, to prescribe publicity in the making of rates, and to fix rates in accordance with certain defined principles.
4. Authority to regulate accounts and reports in order to secure the data essential to regulation.

The determination of rules of procedure and practice is left largely to the commissions. The findings of fact of the commissions are under certain circumstances made final; and this authority has in many instances been approved by the courts on the ground that commission regulation of utilities is a necessity, and that it would be impossible for the courts to retry all of the commission cases.

Though public utility commissions must follow the procedure prescribed in the acts establishing them, particularly in conducting hearings and investigations, they are not bound by the technical rules of evidence and procedure employed by the courts. In some states the courts are rather insistent that procedure approximating common law standards shall be applied by the commissions in the taking of testimony, in the conduct of hearings, and in punishment for contempt. Certain commissions are authorized to institute proceedings upon their own motion. As a rule the law specifies the conditions under which this power may be exercised. Individuals as well as groups have the privilege of filing complaints with the commission, and considerable time is given to the handling of informal complaints. Anyone served by a public utility may make an informal complaint "in regard to the service, installations, charges, or any one of the numerous relations which the consumer has with the public utility. These complaints, coming in the form of letters, post cards, or telephone calls, are investigated carefully . . . and frequently furnish the basis upon which the commission institutes formal proceedings. The commission

regards these informal complaints as an index of the manner in which the companies are performing their utility obligations."[11]

Commissions themselves often assume different attitudes toward their functions. Chairman Prendergast of New York testified in a hearing on public utility regulation that the commission in its very nature "is a fact-finding body, and is not called upon to prosecute." In his opinion commission procedure should resemble rather closely that of the courts. But the chairmen of the Massachusetts and Wisconsin commissions insist that commissions are not merely to sit as judges of evidence presented by contending parties but are to serve as aggressive fact-finding bodies.[12]

The latter view was thus defended by Max Thelen, a member of one of the best of the state commissions: "A hearing before a state railroad or public service commission is not a contest between trained intellectual gladiators, each seeking to take advantage of every technicality and both frequently trying the procedure instead of the facts of the case. A hearing before a state commission is a simple and direct investigation to ascertain the facts. The presiding commissioner is not an umpire for the purpose of seeing to it that counsel play the game in a particular way. His function is to have the facts developed as promptly and as fully as possible. His attitude is that of a co-investigator and he feels entirely at liberty to take an active part in the examination and cross-examination of witnesses."

Despite the intent in the passage of commission laws that they should act upon their own initiative as well as upon complaint, the commissions are usually inclined to assume a judicial attitude and to depend upon individuals, groups, and municipalities to file complaints and to prosecute.

The Wisconsin Public Utility Law.—A description of the Wisconsin utility law will indicate the functions performed by a representative state commission. The Wisconsin law, which was enacted in 1905, was originally intended to apply to freight and passenger traffic, express, private-car and sleeping-car traffic, and street and interurban lines. The commission was authorized to fix rates, and it was intended that it should control all phases of the problem of public utility service, including safety, convenience, and sanitation. Two years after the passage of the act, the legislature extended the powers of the commission to include light, telephone, water, heating, and telegraph companies. In 1911 toll bridges were added, and in 1915 jitneys were brought under the authority of the commission. The legislation was deliberately designed to cover rates and service, both of municipal

[11] *Annual Report* of the Railroad Commission, California, 1930-1931, pp. 19, 24.
[12] W. E. Mosher and F. G. Crawford, *op. cit.*, p. 35.

and of private plants, and the powers of the commission were stated in broad terms, as follows:

> The commission shall have general supervision of all public utilities, shall inquire into the management of the business, and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general conditions, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipments, and other property owned, leased, controlled, or operated, are managed, conducted, and operated, not only with respect to the adequacy, security, and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act and any other law, with the orders of the commission and with the charter and franchise requirements.[13]

To strengthen the powers of the commission, the legislature in 1911 repealed all of the utility franchises in the state and, in lieu thereof, granted indeterminate permits. This act was rendered possible by the fact that the Wisconsin constitution grants to the legislature the power to alter or repeal any franchise granted. No competition with an existing utility was to be permitted unless in the judgment of the commission public convenience and necessity demanded it.

One of the most difficult duties of the commission was to determine what constituted a fair rate of return upon a utility property, assuming that the value of the property could be estimated with a reasonable degree of accuracy. The commission aimed to allow a fair return, including an amount for interest and depreciation estimated according to prescribed rates. The commission found the rate of return to depend upon the character of the utility, the suitability of its business, local conditions under which the utility operates, the hazards of the enterprise, and the limitations fixed by the terms and spirit of the public utility law. The rate of interest allowed depended greatly upon the character of the utility, the rate permitted being low for certain concerns, such as water plants, and comparatively high for other investments, which are not so secure. As we have seen, another serious evil of corporate management was overcapitalization. In order to prohibit such practices the commission provided for the regulation of the issuance of stocks and bonds and the supervision of improvements which were required for safety and convenience.

Upon the commission was also placed the duty to provide for the standardization of service. To accomplish this, the commission prepared a code applicable to each of the separate utilities. A careful study was made in various states and cities before the standard of

[13] *Acts*, 1913, House Bill no. 907, sec. 8.

service was determined. However, it was difficult for companies to adhere to this standard. For example, when the gas and electric rates were first announced, few of the companies were able to comply with them without making improvements in order to bring the service up to the standard set by the commission. Regular inspection of plants was also provided for by the commission. As a result of this inspection and standardization, necessary improvements were made in the service rendered by the utilities of the state.

Perhaps the most important single step taken by the state in connection with the work of this commission is involved in the enforcement of the indeterminate permit law. The essential features of the indeterminate permit are, first, that it recognizes the monopolistic character of public utilities and prohibits competition until necessity requires the operation of a second utility; and, second, that the right to operate is indeterminate, subject to the consent of the city to purchase the property of the company at any time to be fixed by the commission. Thus this permit assures an absence of competition as long as the company serves the public satisfactorily. Moreover, it renders possible the taking over of the utility by the city at any time if public convenience and necessity seem to require it. Obstacles have been placed in the way of the enforcement of these provisions by the courts which make them much less effective than was anticipated.[14]

Powers of Other State Commissions.—Commissions in other states have, as a rule, not been granted powers as broad as those of the Wisconsin commission, though the authority vested in commissions in California, Illinois, and Massachusetts is quite extensive. Usually authority has been intrusted to the commissions to require safe and adequate service, to fix a maximum limit for reasonable rates, and to secure full information from corporations as to capitalization, stock issues, and other methods of business management.

The tables[15] on page 133 summarize the extent of the powers of commissions over different phases of utility enterprises.

The major problems presented to the state commissions, it is observed, relate largely to rates and service. To determine whether a rate is reasonable requires the finding of the cost of service. Owing to the many factors involved and the conflict of court opinions on the valuation of public utility properties, most of the time of the experts and investigators employed by the state commissions has been given to the process of valuation. Estimates or rough guesses have had to be made as to original cost, reproduction cost, going-concern value,

[14] See Superior Water Light and Power Co. *v.* Superior, 263 U. S. 125 (1923).

[15] From Bonbright & Co., Inc., *Survey of State Laws on Public Utility Regulation in the United States* (1930).

	Fairly Extensive	Limited	None
Service standards	39	4	5
Certificate of convenience and necessity	44	0	4
Uniform accounting	32	2	6
Valuation	32	0	16
Rates[a]	..	..	..
Security issues	23	2	23
Consolidations	22	0	26
Holding companies[b]	2	0	46

[a] Electric rates, 42 states; gas rates, 43 states; street railways, 42 states; telephone, 44 states; and railroads, 47 states.
[b] The chief discussion in recent years has centered around the extension of control over holding companies.

TYPES OF UTILITIES REGULATED[16]

	Fairly Extensive	Limited Authority	No Authority
Electric light and power	38	3	7
Gas	39	3	6
Street railway	39	6	3
Interurban	45	1	2
Motor vehicle	41	6	1
Telephone and telegraph	44	2	2
Water	35	1	12
Hydroelectric	35	4	9
Pipe lines	28	..	20
Heating	37	6	5
Railroads	47	..	..

development expense, market value of stocks and bonds, operating expenses, and taxation values, for all the important utilities subject to regulation. After completion of the estimate of the value of the public utility property, it devolves upon the commission to determine what is a fair rate of return upon the value of the property invested. This determination is subject to review by federal and state courts to decide whether the rate is a reasonable one and whether the utility is securing a sufficient return upon its property so as not to be deprived of its property rights under the due process clause of the federal Constitution. Not infrequently the courts hold that the rate of return allowed by the commission is too low. In the regulation of public utility services, it is observed:

It has been impossible as yet to establish any scientific standards of price-fixing. Ethical, social and economic issues are hopelessly jumbled in the arguments before, and in the opinions of, the commissions and courts. It may not be irrelevant to suggest in conclusion that until some standards are commonly accepted for the determination of what is a "fair" compensation for the service of a human

[16] *Ibid.*

being and what is a "fair" basis for the exchange of commodities, it will be very difficult to obtain through public regulation any fixing of rates, which will be accepted as "fair" alike by the private owners of public utilities and by the users of public utility services.[17]

Regulation of the Railroads by the Interstate Commerce Commission

One of the most important problems in public utility regulation is involved in the control of the system of interstate railways in the United States. For decades railroads were constructed and operated in the United States under liberal charters granted by the states and with relatively little state or federal supervision. Speedy and extensive construction was the main purpose in view. The individualistic tradition, the rush to open and settle the public lands, and the desire to aid in developing the vast economic resources of the continent, led to a liberal and non-restrictive attitude on the part of the government. But the era of "highly speculative railroad building, of irresponsible financial manipulation, of destructive competitive warfare and of fluctuating and discriminating rate adjustments" brought a reaction in the Granger legislation of the early 'seventies.

Commissions were established by the states and authorized to control the railroads in the public interest. But, as we have seen, state regulation proved weak and ineffective and the abuses of railroad management and control grew more serious. Discriminations assumed many forms, but none more vicious than the grant of personal preferences to favored shippers. Tariffs were adjusted to secure special advantages to particular localities. Speculative scandals were common and contributed to the demand for public control, and there was a deep-seated alarm over the dangers of monopoly. But resentment over the injustices that prevailed through the practices of rebating and of rate discriminations was the prime motive which led to federal legislation. The failure to a large extent of the attempts at state regulation and the growing conviction that the business of the railroads was national in character led to the passage of the Act to Regulate Commerce in 1887.

The significant features of this act were the assertion of federal authority and the provision for the establishment of an administrative commission.[18] It is neither feasible nor necessary to follow the grad-

[17] See Donald R. Richberg, "Major Problems Presented to State Commissions," in *Public Utility Regulation*, chap. v.

[18] See I. L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure* (The Commonwealth Fund, 1931), part one, chap. i.

ual steps by which the unquestioned supremacy of the federal government over railroad transportation and interstate carriers was accomplished. A summary of the present powers of the Interstate Commerce Commission in the words of a leading authority in this field will indicate the nature of that supremacy. Professor Sharfman finds, in speaking of the control of interstate carriers:

The entire cycle of their organization, financing, charges, and practices, is embraced within the ambit of the Commission's authority. The Commission's original function of preventing unreasonable and discriminatory rates has been rendered a positive and highly effective instrument for the regulation of charges and the control of returns. Under its present rate-making authority, the Commission may suspend changes in rates before they are put into effect; it may prescribe minimum as well as maximum rates for the future; it may establish joint rates and regulate their division or apportionment in the public interest; it is charged with the responsibility of prescribing such rates as will support railroad credit and maintain an adequate transportation system; it is directed to recapture from individual carriers realized earnings in excess of a fair return; it is ordered to make valuations of carrier property for rate-making and other purposes. But the Commission's powers are not confined to the regulation of rates and the limitation of profits. It is authorized to regulate safety of operation, service practices and the utilization of facilities, extensions and abandonments of lines, the issuance of securities and assumption of obligations, interlocking directorates, and pooling arrangements, acquisitions of control and actual consolidations; and it is empowered to prescribe and police carrier accounts, to require regular and special reports, and to enforce publicity of all carrier operations. While there is continuing lip worship of the doctrine that interference with management is both undesirable and invalid, the freedom of the carriers is so circumscribed in all significant directions that true managerial independence, as distinct from freedom in the affairs of internal organization and administration, is largely a matter of the past in the railroad industry. Moreover, not only does each individual carrier find practically all of its major policies and practices effectively conditioned by the legal environment resulting from the vast grants of authority conferred upon the Commission in the public interest, but from many angles the carriers as a whole, despite multiple corporate ownership and control, are conceived as a national transportation system and are made to serve general transportation needs, without regard to individual interests. The prevailing charter of administrative control involves large affirmative responsibilities as well as extensive powers of restriction. In regulating service, particularly in periods of emergency and congestion, in formulating a comprehensive consolidation plan, in fixing general rate levels, in adjusting rate divisions, and in recapturing and utilizing excess earnings, the Commission is acting

virtually as a superdirectorate for the entire railway net. In the words of the Supreme Court, the railroad systems of the country have been placed "under the fostering guardianship and control of the Commission."[19]

Thus the commission, with few substantive powers in the beginning and greatly hampered by the courts in carrying out its purposes, gradually made a place for itself as one of the most important governmental agencies.

For some time the work of the commission was rendered ineffective by the lack of authority to compel witnesses to testify and by the provision that its orders could be enforced only through equity proceedings in the federal courts. At first the courts insisted on the right to consider each case *de novo*, ignored much of the work done by the commission, and encouraged the railroads to withhold from the commission in its hearings the most significant testimony in the case. As a result the orders of the commission were frequently reversed. With the passage of the Hepburn Amendments of 1906 the commission acquired affirmative powers as to rates, services, and discriminatory practices, and an effective procedure was devised for the enforcement of its orders. The jurisdiction of the commission was extended to express companies, sleeping-car companies, and pipe lines. Commission control over carriers was further strengthened by the decision of the Supreme Court that it would deem the findings of fact of the commission final, and that review of commission orders would be limited to constitutional issues, to questions of statutory construction, and to the assertion of arbitrary authority.[20]

A long controversy was waged over the commission's power to regulate rates for intrastate commerce which affect incidentally rates for interstate commerce. This controversy was settled in favor of the commission in the famous Shreveport case, in which it was held that the commission had authority to fix rates for interstate commerce from Shreveport, Louisiana, to points within Texas, and that the railroads of Texas must refrain from charging higher rates for transportation over an equal distance from Shreveport to Dallas and Houston than are charged for the transportation of such articles from Dallas and Houston toward Shreveport.[21] It was held that though Congress did not have the power to regulate the internal commerce of the states it does have full power to foster and protect interstate commerce. In carrying out this purpose it can take all measures neces-

[19] *Ibid.*, pp. 4-5.

[20] Interstate Commerce Commission *v.* Ill. Cent. R. R. Co., 215 U. S. 452 (1910).

[21] Houston, East and West Texas Railway Company *v.* United States, 234 U. S. 347 ff. (1914).

sary or appropriate to this end, although intrastate transactions of interstate carriers may thereby be controlled. "We find no reason to doubt," said Justice Hughes, "that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms." But further legislation was necessary to permit a comprehensive and thorough plan for national control of the railroads.

Control of Railroads Since 1917.—After various efforts to organize the railroads under private ownership so as to cooperate with the government and to meet the extraordinary conditions created by the World War, the Interstate Commerce Commission recommended that the only way to achieve these ends was to bring about a complete unification of the railroads under the direction of the government. Congress therefore authorized the President to take over the transportation system, with certain designated exceptions. The President issued an order that the railroads and water transportation systems be taken over by the government and placed under a director-general, the Secretary of the Treasury having been selected to fill the position. Under the director-general the railroads were operated "as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage."

Among the changes introduced by the director-general and his staff was a general increase in wages to all laborers and employees receiving less than $250 per month, with the establishment of machinery to settle labor disputes; and a number of increases in rates were authorized. Freight rates were rearranged to eliminate circuitous routes, and to reduce cross routing and congestion. Joint use of terminals, equipment, and repair shops was instituted, as well as other measures to facilitate the most effective use of the railroad properties to meet the emergency conditions due to the war. By the Federal Control Act of March 21, 1918, the railroads were guaranteed the average annual operating income for the three years ending June 30, 1917, the amount for each road to be ascertained by the Interstate Commerce Commission. The President was accorded extensive powers to carry out the provisions of federal regulation and control. War purposes and policies of the government were accomplished with marked success. And according to the estimate of Professor Sharfman, "Notwithstanding the widely held popular belief that the twenty-six months' experience with public operation was a conspicuous failure—a belief erroneously based, in great measure, upon the financial outcome of the project, and nurtured in assiduous fashion, by the carriers and their spokesmen—federal control, taken as a whole, may

well be deemed one of the most satisfactory of the government's undertakings during the war years."[22]

Federal control over the railroads was extended by the Esch-Cummins Act of February 28, 1920, which provided for the termination of government possession of the roads during the war time. This act, after providing for the restoration of the railroads to their owners, extended federal control in certain respects. In the first place, there was established a Railroad Labor Board composed of nine members representing equally the carriers, the employees, and the public, to determine disputes not adjusted by the parties concerned and to "establish rates of wages and salaries and standards of working conditions, which in the opinion of the board are just and reasonable." Congress refused to give the necessary authority to carry out these provisions and the board was abolished in 1926.

The Interstate Commerce Commission was enlarged, and federal regulation was made to apply not only to rail transportation and to commercial and water transportation by common carriers, but also to all interstate wire and wireless transmission and to transportation of all commodities, except gas, by pipe line. In case of a shortage of equipment or a traffic congestion, the commission may order joint and common use of terminals to meet the emergency. The commission was directed to prepare a plan for the consolidation of existing roads into a limited number of systems, and upon it was placed the affirmative duty of aiding in the establishment and maintenance of adequate transportation service.[23]

But most important of all, the commission was required to establish rates which would enable each group of carriers, arranged according to districts, to secure under efficient management a fair return upon the value of their property, and was empowered to prescribe minimum as well as maximum rates. The commission determined what percentage should be a fair return. For the two years commencing March 1, 1920, a fair return was to be from 5½ to 6 per cent. Income in excess of 6 per cent was to be divided annually between the carrier and the government. New issues of capital stock or securities by the railroads must be approved by the commission. The extraordinary powers over interstate commerce granted to the commission under this act have been upheld by the Supreme Court of the United States. First, the duty to raise the level of intrastate rates when it is found that they are so low as to discriminate against interstate commerce was held valid.[24] Second, authority to make a division

[22] I. L. Sharfman, *op. cit.*, pp. 168, 169.

[23] See the opinion of Justice Brandeis in the New England Divisions Case, 261 U. S. 184, 189 (1923).

[24] Wisconsin R. R. Commission *v.* C. B. Q. R. R. Co., 257 U. S. 563 (1922).

of joint rates between groups of carriers so as to give a greater share of such rates to weaker roads in order to maintain effective operation, was approved.[25] Third, the recapture provision whereby the commission is entitled to one-half of the net income in excess of a fair return was held warranted as a legitimate regulation of interstate traffic.[26]

With changes in economic conditions and with much more active and effective competition by airplane and motor traffic as well as transportation by water, railroads have ceased to have such a monopoly of traffic as to be a menace unless checked by strict regulation. The Interstate Commerce Commission has helped to eliminate abuses, but technological factors have brought new problems and conditions to be met. Today the greatest issues do not concern regulation so much as the formulation of ways and means to keep the railroads going as operating concerns. To this end the Reconstruction Finance Corporation, created in 1932, gave aid to many railroads. And as conditions grew worse Congress on the recommendation of President Roosevelt established a federal coordinator of transportation, with authority to encourage or require action on the part of the railroads to avoid unnecessary duplication of services and facilities, to control allowances and services so that undue impairment of earnings may be prevented, to promote financial reorganization of the carriers and "to provide for the immediate study of other means of improving conditions surrounding transportation in all its forms and the preparation of plans therefor." With provisions for strengthening the Interstate Commerce Commission with respect to rate-making and the control of railway holding companies, and with the repeal of the recapture clause of the 1920 act which proved incapable of enforcement, the federal coordinator has been given the authority to improve transportation facilities as far as may be done by voluntary action, and to compel cooperation and joint action when necessary.

Federal policies relating to the management and control of railways have been summarized by Professor Sharfman as follows:

> The present legislative structure, whatever its merits or defects, is neither the precipitate expression of a temporary economic philosophy nor the special handiwork of any particular group of public servants momentarily charged with the conduct of national affairs. It is the outgrowth, through a prolonged process of trial and error, of the irresistible pressure of events, as disclosed in the functioning of a foundational industry of naturally monopolistic character. The unfolding of the principles and practices of railroad regulation is but a reflection, on the side of public policy, of the antisocial tendencies that

[25] New England Divisions Case, 261 U. S. 184 (1923).

[26] Dayton-Goose Creek Ry. *v.* United States, 263 U. S. 456 (1924).

have emerged from time to time in one important sphere of economic development under the prevailing regime of private enterprise. It may be, as is sometimes contended, that the vast scope of public interference has outrun the bounds of political wisdom and administrative technique, and is destined to collapse by its own weight; that the future may see either a substantial relinquishment of public control, or, more likely, an outright transition to public management. But whatever the ultimate solution, the established governmental attitude constitutes a deep-rooted and realistic adjustment of private rights and public interests: it represents the fruits of an evolutionary process toward the essentials of which a full generation of thought and experience has made its contributions. While the course of years has brought numerous and radical changes of policy, there has been no turning back since the federal government first asserted its authority over railroad transportation in 1887. Indeed, although authoritative control has been progressively extended in this field in sweeping fashion, there is well-nigh universal agreement today that the drastic limitations upon freedom of private enterprise imposed thereby (in their general direction if not in all specific details) are not only salutary but indispensable. The beginnings of the regulative process were entered upon feebly and with hesitancy; the attempt, after a lapse of almost two decades, to render this process an effective instrument for safeguarding the general welfare encountered bitter opposition, but without avail; and the subsequent far-reaching enactments, which have molded and defined the present affirmative regulatory scheme, were increasingly recognized as springing from the basic economic characteristics of the railroad industry and as an inevitable exercise of needed control in the public interest. Through independent action or mere acquiescence, a score of Congresses and ten National Administrations of varying political complexions and extending over a period of revolutionary economic changes, intensification of social consciousness, and momentous public events, have shared in the formulation or maintenance, as legislative charters, of the federal railroad policies which now prevail.[27]

At various times efforts were made to secure cooperation between the state commissions and the Interstate Commerce Commission, and the Transportation Act of 1920 made provision for joint conferences and joint hearings when the state control over interstate commerce is concerned. But no definite action was taken under this provision for some years and then a conference was held between five members of the Interstate Commerce Commission and eight representatives of the state commissions. At this conference it was agreed that cooperative efforts might take the form of a preliminary conference before a hearing, or a joint hearing by both commissions, or members of the

[27] I. L. Sharfman, *op. cit.*, pp. 282-283.

state commission might be invited to join with the Interstate Commerce Commission in the hearings on a case and in the preparation of the order. The Transportation Act of 1920 gave statutory sanction for the furtherance of such cooperative efforts. When any issue affecting state authority is brought before the commission, it is directed, before proceeding to a hearing, to give notice to the states interested. In the conduct of hearings the nature and extent of cooperation are left to the discretion of the commission. As a result of these developments many cases are now settled by joint action.

Problems which remain undetermined are the status and powers of state utility commissions with respect to interstate traffic, the attitude of the government toward railroads which are unable to pay any return on investment, and the ultimate prospect of public ownership. Where state governments go as far in the direction of regulation as the federal government has gone in the case of the railroads, the logic and practical aspects of the situation appear to require an extension of that control until public ownership becomes a necessity. Can the government assure a fair return on railroad properties without extending control and ultimately assuming ownership?

The relations of the nation and the states in the control of utilities and public service corporations have been complicated by the recent development of motor transportation, by aviation and by radio, all of which raise difficult interstate problems. Motor transportation of persons and freight has grown so rapidly and has wrought such a change in transit facilities that regulation has not kept pace with recent developments. Bus and trucking companies have gradually been placed under the control of the public utility commissions. Frequently certificates of public convenience and necessity are required to transport by motor carriage persons or freight for compensation. Rates and schedules are supervised and certain requirements as to insurance and financial responsibility are demanded. Because of the limitations imposed upon the states by the due process of law clause as interpreted by the Supreme Court, the states have faced serious difficulties in regulating the contract carriers engaged in the transportation of freight by trucks.

Despite the apparent need of uniform regulations for the control of air traffic, much of the legislation regarding such traffic has been enacted by the states. In 1926 Congress gave a limited control over aeronautics to the Department of Commerce, and under the direction of this department aid to air traffic has been rendered in the establishment and operation of air routes and in scientific research for the improvement of air navigation. Efforts to bring the control of aviation under the Interstate Commerce Commission have so far been unsuccessful. It is claimed that the business of aviation for the time

being needs encouragement rather than regulation and that for this reason the control should remain with the Department of Commerce.

Radio presents some new and unusual problems in the field of regulation. Because of limitations in the use of the ether it became necessary for the federal government to intervene and to regulate the licensing of stations in the public interest and convenience. In 1927 the Federal Radio Commission was established, with authority to supervise and reallocate the frequencies, power and time of operation of broadcasting stations, and soon thereafter a new allocation of frequencies was ordered. By an amendment to the radio act it was provided that "the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, bands of frequency, or wave lengths, or period of time, or of station power" among the different zones into which the country was divided.[28]

In a recent decision by the Supreme Court of the United States, Chief Justice Hughes observed: "No question is presented as to the power of the Congress in its regulation of interstate commerce, to regulate radio communications. No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities. In view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses. The commission has been set up as the licensing authority and invested with broad powers of distribution in order to secure a reasonable equality of opportunity in radio transmission and reception. The decisions and orders of the commission are subject to review by the courts but may be reversed only when its findings are capricious and arbitrary for Congress made the findings of fact of the commission conclusive, if supported by substantial evidence."[29]

Radio communications raise international problems, some of which have been adjusted in conferences at Copenhagen and Madrid. But the most serious difficulties of this kind arise in connection with conflicting interests as between the United States and Canada, Mexico, Cuba, and other adjoining countries. To resolve some of these difficulties the countries adjacent to the United States conferred in Mexico City. Since radio interests in the United States were first in the field and have taken advantage of available wave lengths and frequencies, the adjustment of controversies between competing agencies just across the border of the United States constitutes a serious issue. A step forward was taken by the Seventy-third Congress in the enactment of a law establishing a federal Communications Commission to regulate radio, telephone and telegraphic communications.

[28] Cf. W. E. Mosher and F. G. Crawford, *op. cit.*, chaps xxv and xxvi.

[29] Federal Radio Comm. *v.* Nelson Bros. B. & M. Co., 289 U. S. 266 (1933).

SUPPLEMENTARY READINGS

Holmes, Fred L., *Regulation of Railroads and Public Utilities in Wisconsin* (D. Appleton-Century Company, Inc., 1915).

Mosher, William E., and Crawford, Finla G., *Public Utility Regulation* (Harper & Brothers, 1933).

Public Utility Regulation, edited by Morris Llewellyn Cooke (The Ronald Press Company, 1924).

Bauer, John, *Effective Regulation of Public Utilities* (The Macmillan Company, 1925).

Electrical Utilities: The Crisis in Public Control, edited by William E. Mosher (Harper & Brothers, 1929).

Dimock, Marshal E., *British Public Utilities and National Development* (George Allen & Unwin, 1933).

Keezer, D. M., and May, S., *The Public Control of Business* (Harper & Brothers, 1930).

Young, James T., *The New American Government and Its Work* (The Macmillan Company, 1933), third edition, chap. x.

Keen, F. N., *The Law Relating to Public Service Undertakings* (London, 1925).

Barnes, Irston R., *Public Utility Control in Massachusetts* (Yale University Press, 1930).

CHAPTER VII

PROBLEMS IN THE REGULATION AND CONTROL OF PUBLIC UTILITIES (*Continued*)

Judicial Review of Utility Regulation

A difficult and perplexing problem in connection with the regulation and control of public utilities is the extent to which the courts will review the authority of administrative agencies in the process of regulation, whereby the regulatory policies of federal and state governments may be limited and for certain purposes effectively checked. When the process of regulation was first undertaken by the states, the general attitude of state and federal courts was favorable, and the decisions tended to leave a rather free hand to the legislatures and administrative agencies in regulating public utilities. Thus for a period of approximately twenty years after the decision of Munn *v.* Illinois,[1] the Supreme Court of the United States refused to intervene when state legislatures attempted to regulate prices, rates, and other phases of the control of public utilities. But a change in opinion was indicated when Chief Justice Waite, upholding the right of legislatures to regulate railway charges, said: "It is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not the power to destroy, and regulation is not the equivalent of compensation. . . . The state cannot . . . do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."[2]

Following the suggestion of Chief Justice Waite, the Supreme Court in 1889 held in the Minnesota Rate Case that rate regulation, although primarily legislative in character, was subject to judicial review under the due process of law clause of the federal Constitution. Justice Blatchford, speaking for the court, maintained: "The question of the reasonableness of a rate of charge for transportation by a railroad company involving as it does the element of reasonableness both as regards the company and as regards the public is eminently a question for judicial investigation requiring due process of law for its determination."[3] Despite the vigorous insistence on the

[1] 94 U. S. 113 (1876).

[2] Stone *v.* Farmers' Loan and Trust Company, 116 U. S. 307 (1886).

[3] Chicago, Milwaukee, St. Paul Railway Company *v.* Munn, 134 U. S. 418 (1889).

part of the dissenting justices that the question here involved was essentially one for legislative determination, the Supreme Court has consistently followed the holding of the Minnesota Case and has continued to review the legislative and administrative acts of the states relative to the regulation of utilities. Since this time, questions as to the reasonableness of rates, the validity of orders of commissions, confiscation of property, and related issues, have ultimately had to be solved before the supreme tribunals, state and federal.

Soon after the reversal of the court's position, bringing the control of utility regulation under its jurisdiction, the Supreme Court in the case of Smyth *v.* Ames[4] announced the famous dictum which has become the corner stone of utility regulation and the ultimate criterion of court review. Supporting the state's authority to regulate, the Supreme Court announced: "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public." The effect of this doctrine was that money devoted to the use of the public through utility corporations was entitled to a fair and reasonable return on the value of the property invested. In other words, the utility was entitled to earn a sufficient amount upon its capital investment to meet all of the necessary charges and also to pay a reasonable dividend upon invested capital. For the purpose of determining whether a reasonable return was being earned by utilities, the policy was announced that it was necessary to determine the basic value of the property in use by the utility on which a return might reasonably be earned.

Thus there was opened a fruitful field for attorneys, economists, engineers, and utility specialists in placing a valuation upon the numerous items and elements which go to make up a utility's property as a going concern. Millions of dollars have been spent in this valuation process, though it has been repeatedly contended that only a rough and approximate guess can be made as to the worth of the assets of any utility company.

The practice of the review of commission regulation of utilities by the courts was considerably affected by the dictum of the Supreme Court in the Ben Avon Case.[5] In this case the Superior Court of Pennsylvania refused to review the order of the state public

[4] 169 U. S. 466 (1898). "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." San Diego Land and Loan Co. *v.* National City, 174 U. S. 739, 757 (1899).

[5] Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U. S. 287 (1920).

utilities commission, claiming that the findings of fact of the commission were final and conclusive and that on the basis of these findings of fact the order of the commission was unimpeachable as far as the law was concerned. The Supreme Court of Pennsylvania reversed the decision of the Superior Court, insisting that it was the duty of the judiciary to examine the evidence and to determine whether the commission's order was warranted. On the basis of its own findings of fact the higher court sustained the contention of the Ben Avon Company and thereby invalidated the order of the public utility commission. On appeal to the Supreme Court of the United States the decision of the highest court of Pennsylvania was sustained, with the observation that it is the duty of the judiciary in reviewing cases under the due process of law clause of the Fourteenth Amendment not only to consider the evidence which is presented to the commission but also to form their own independent judgment upon the law and the facts. In other words, it was the court's opinion and judgment that in those cases in which the utilities contested the orders of the commission the entire record would have to be examined by the reviewing court, and where deemed necessary the court might substitute its judgment for that of the commission.

In the light of this holding, orders of utility commissions relative to rates, services, extensions, and other important matters may be deemed final only either when approved by the Supreme Court of the United States or when the utilities consider it expedient not to contest the issue further. The whole process of utility regulation and valuation has become involved in a series of investigations, reports, reviews and reversals, resulting in the end in the thwarting to a considerable degree of the regulatory process.

The most difficult issue in the review by the courts of the orders and decisions of utility commissions is the determination of the basis for valuation purposes. In the main the Supreme Court has adopted the theory of reproduction cost less depreciation. To determine present value, according to this theory, Justice Butler insisted that "consideration must be given to prices and wages prevailing at the time of the investigation; and, in the light of all the circumstances, there must be an honest and intelligent forecast as to the probable price and wage levels during a reasonable period in the immediate future."[6] Justice Brandeis, however, in a series of dissents has advocated the adoption of prudent investment as a standard for fixing the value for the determination of rates.[7] Utility commissions in California, Massachusetts and Wisconsin frequently

[6] McCardle *v.* Indianapolis Water Co., 272 U. S. 400, 408 (1926).

[7] See S. W. Tel. Co. *v.* Pub. Service Comm., 262 U. S. 276, 294 (1923).

follow the criterion of prudent investment rather than the reproduction cost formula of the federal Supreme Court.

The Massachusetts commission stated the present situation as follows: "We are of the opinion that in this Commonwealth a rate based upon reproduction value, less observed depreciation, is not only unsound legally and historically but also economically. . . . It creates a constantly varying base, which is not easily or speedily capable of determination, but, on the contrary, involves long and expensive investigations, culminating in a composite guess not based wholly upon facts but upon conjectures as to the future. And when that composite guess, called the reproduction value, is finally determined, the factors may have so changed that it can no longer be of value, and the process must be repeated."[8] Prudent investment is therefore frequently considered the principal factor in the regulation of rates, though no attempt has been made to give a definite and specific meaning to the term "prudent investment."

In this as in other matters is it not likely that too great dependence has been placed upon the courts to resolve economic and political questions? Issues relative to the regulation and control of public utilities are too complex to be resolved by simple rules and formulas; but would not the more direct process of regulation by commissions under the supervision and authority of the legislature, such as was approved by the Supreme Court in Munn *v.* Illinois, have inured to the public interest, rather than the slow and cumbersome method of judicial review superimposed upon commission authorities? Undoubtedly private interests would at times have been treated harshly by unfriendly legislatures, but would not the interests of the public have found a larger place in the whole process of the formation and control of utility corporations? Due process of law, it may be claimed, prevents any such a plan from adoption either by the state or by the federal government. But due process as originally interpreted did not interpose such a barrier. May constitutions not be so interpreted now as to permit legislative and administrative control over public utilities without judicial interposition? Or, if this procedure does not seem practicable, the same result may be accomplished by the process of amendment. Whatever method is followed, there is rather general agreement that the present system of utility regulation

[8] Irston R. Barnes, *Public Utility Control in Massachusetts* (Yale University Press, 1930), p. 112. "Despite the controlling nature of the Supreme Court decisions, the Massachusetts commissions have never . . . made any attempt to regulate the rates of public service companies under their jurisdiction in accordance with the 'present value' of the company's property." *Ibid.*, pp. 203, 204.

coupled with the necessity of court review of the main features of the process is so unsatisfactory as to require thoroughgoing changes.

Evasion of Public Regulation of Utilities by the Formation of Holding Companies

The most important factor in the field of public utility management within recent years is the holding company. A holding company may be defined as a corporation organized to control other corporations by the ownership of a majority of their voting capital stock. But the term is commonly applied to any corporation which in fact controls other or subsidiary corporations regardless of whether it owns a majority of the capital stock. The usual purposes for the formation of holding companies are:

1. To combine two or more hitherto independent companies under a centralized management or control.
2. To combine two or more companies not only under a centralized control, but also under a unified financial structure.
3. To recapitalize the financial structure of one or more enterprises through the substitution of the securities of the holding company for the securities of the subsidiary companies.
4. To pyramid the voting control so as to give to the organizers of the holding company control over the subsidiaries with a minimum amount of investment.[9]

From the standpoint of public utility corporations the functions claimed for holding companies include the following:

1. General supervision, advice, and assistance to the subsidiary companies.
2. Special engineering, accounting, and other services, usually relating to new construction work and development of plants.
3. Assistance and advice in the issuance and sale of securities.

For these services fees are charged in certain instances, based upon the gross earnings of the subsidiary company. In a statement to the Federal Trade Commission the American Gas Company claimed the following advantages from association in a holding company group: The credit of each of the subsidiaries is appreciably enhanced; the parent company advances funds to the subsidiaries as needed, being reimbursed when the time is propitious for the subsidiary to finance permanently; it serves as the agency through which the permanent financing of the subsidiaries is done; and it provides

[9] James C. Bonbright and Gardiner C. Means, *The Holding Company: Its Public Significance and its Regulation* (McGraw-Hill Book Company, Inc., 1932), p. 12.

the means by which all the subsidiary companies cooperate for their mutual advantage.

Though there are significant and readily defensible advantages in such forms of concentration of control as are exercised by holding companies, the device has been used to a large extent to secure excessive earnings upon common stock and to require the payment of unreasonable charges for services rendered to the subsidiary companies. Pyramiding one holding company upon another finally places enormous and dangerous power in the hands of a few men. The Middle West Utilities Company, an Insull holding company, was so organized that the owners of about one-third of the stock, representing a book value of a little more than $28,000,000, controlled an investment of $350,000,000 in operating companies.[10]

The holding company, "a characteristically American institution," did not come into prominence until the last decade of the nineteenth century, when New Jersey and other states passed liberal general laws for the organization of corporations and authorized intercorporate stockholdings. "When the little state of New Jersey," observed Bonbright and Means, "eager to enrich its treasury with license fees from corporate promoters, amended its general corporation law so as to permit corporations freely to hold stocks of other corporations, it took a step the economic consequences of which have seldom been equaled in the entire history of business legislation. For it thereby opened the door for the entry of the holding company as the leading device for combining enterprises under common control and management."[11] Such a device served as a means of carrying out the consolidation plans of the Pennsylvania Railroad Company and, through the Laurel Run Improvement Company, enabled the Philadelphia and Reading Railway Company to engage indirectly in the coal business, contrary to the provisions of the charter of the company. The American Bell Telephone Company, the Standard Oil Company, and General Motors Company followed the precedent established by the railroads and organized under holding companies. The movement was checked somewhat by the decisions of the Supreme Court in the Standard Oil and American Tobacco Company cases.[12] But despite the anti-trust laws there was a free field for consolidation under holding companies among concerns doing a non-competitive business not engaged in interstate commerce.

The menace of the holding company is indicated by the fact that "from ten to twelve great holding company systems have come to dominate the electric power industry of the entire United States

[10] *Senate Document* No. 213, 68th Cong., 2nd Sess., p. 258.
[11] James C. Bonbright and Gardiner C. Means, *op. cit.*, p. 337.
[12] 221 U. S. 1, 106 (1911).

and are now spreading their activities into Europe, South America and Asia"; and two large railroad holding companies have been formed in order, among other purposes, to defeat the consolidation plan of the railway transportation act and to evade regulation by the Interstate Commerce Commission. The investment trust did not secure a firm hold in this country until after the World War but in a short time such trusts have secured control of a considerable part of the entire investment funds of the country. The holding company has been used not only to defy public utility regulation but also to defeat the objects of state and national banking laws as to branch or chain banking.[13]

Telephone service is almost entirely under the control of one great holding company. Sixteen holding companies control about one-half of the gas output. But the most amazing and scandalous results of holding company control have come in the development of the electric light and power industry. The collapse of the Insull companies and the W. B. Foshay Co., with the publicity occasioned thereby and the investigations of the power business by the Federal Trade Commission, have brought to light some of the underhand and illegal methods by which huge fortunes have been built up through stock manipulations and through the filching of exorbitant sums from subsidiary and affiliated companies.

The Federal Trade Commission in its investigations of the electrical industry found evidences of arbitrary inflation of values,[14] excessive charges to subsidiary companies for services rendered, the suppression of essential information, and dubious methods of influencing public opinion. Since the publication of data by the Federal Trade Commission the utility executives have to a certain extent changed their methods and the most notorious of the propaganda organizations has been abolished. But the claim of certain officers that propaganda methods, lobbying, and attempts to influence anyone except with facts have been discontinued by the utilities scarcely conforms to actual conditions.

The pyramiding of company upon company and the method of

[13] For data regarding the growth of holding companies, consult James C. Bonbright and Gardiner C. Means, *op. cit.*, chaps. iii-iv.

[14] For amazing revelations, in the testimony before the Federal Trade Commission, of inflations of fixed capital, write-ups and improper charges, see *Senate Document* No. 92, 70th Cong., 1st Sess., part 22, pp. 183 ff., and parts 23 and 24.

As a rather discouraging commentary on public regulation, representatives of the holding companies testified that these write-ups and inflations of fixed capital had been more than offset by the excess of the fair values of the properties, based on the reproduction cost principle as approved by the utility commissions and the courts.

exercising control by the ownership of a relatively small amount of stock are shown in the formation of the Cities Service Company and the Standard Gas and Electric Company. In one instance a million-dollar issue of preferred stock formed the basis for the control of a company with assets of over a billion and a quarter dollars, and in the other instance an equity of one per cent of all of the stock was used to control one billion and two hundred millions of assets. The extent of the power exercised by a typical holding company is indicated by the Cities Service Company, which controlled directly or indirectly more than 65 public utilities rendering electricity, gas and transportaton service to more than one thousand communities located in twenty states. The mushroom growth of holding companies may be illustrated by the Associated Gas and Electrical System which reported a book value of properties in 1924 of less than 53 million dollars and in 1930 was reputed to be a billion-dollar enterprise. In 1929 the United Corporation was formed—a Morgan-Drexel-Bonbright combination, which secured minority holdings in five large power companies and secured control over assets in excess of four billion dollars.[15]

It is in the transportation business that several of the most menacing holding companies have been formed. When the Pennroad and Allegheny Corporations were formed with the obvious purpose of defeating the objects of the Transportation Act and limiting the control of the Interstate Commerce Commission, the commission presented to Congress the problem as to what shall be done about the railroad holding company. The real danger to public regulation was apparent when the Van Sweringens, through the Allegheny Corporation, with a relatively small investment, gained control over nearly thirty thousand miles of railway, or more than 11 per cent of the total railway mileage.

State commissions now exercise an indirect control over holding companies through the supervision of contracts between such companies and their affiliates, through the supervision of payments for special services and the issuance of securities, and through the authority to disapprove the purchase of the stock of a utility by the holding company. But these companies have succeeded to a considerable extent in escaping control over their service charges, financial practices, and accounting methods. According to various commission reports, these companies have been notoriously uncooperative in their dealings with legislatures and public utility commissions. In view of the liberal charters granted under the general incorporation laws of New Jersey, Delaware, and Maryland, and of the fact that these com-

[15] James C. Bonbright and Gardiner C. Means, *op. cit.*, pp. 101 ff.

panies are engaged in interstate business, state control is rendered largely impotent. In fact, the recent Delaware laws which "were drafted by a group of New York lawyers on behalf of their wealthy clients, are shocking examples of the failure of modern state legislation."[16] Perhaps federal incorporation and thoroughgoing national control will offer the only satisfactory solution of the problems involved. The question is frequently asked, how long will the people of the United States submit to an economic dictatorship wielded by a few individuals acting through private agencies and organizations largely exempt from public supervision and control?

New York passed two laws in 1930 bearing on the control of holding companies. The commission is given jurisdiction over all holders of one per cent or more of the voting capital stock of any utility, and over every affiliated interest having transactions with a utility company other than the ownership of stock. And a procedure is devised for securing information as to the interests of those owning or controlling one per cent or more of the voting stock of a utility company. Similar laws have been enacted in other states. These acts, it is claimed, contribute little toward meeting the underlying difficulties and problems involved in the control exercised by holding companies over utilities. The issue is clearly raised whether the present system of commission regulation of public utilities can be successfully operated unless additional powers are given to the state commissions to control holding companies and unless some form of federal regulation is developed to deal with the interstate phases of the control exercised by such companies.[17]

Public utility magnates, facing an increasing demand for a limitation of the opportunities afforded for monopolistic profits through holding companies and similar devices, have changed their attitude toward regulation. Their efforts are now directed toward reducing to a minimum the restraints upon their profit-making opportunities. They hope to accomplish their ends by placing high valuations upon operating plants and by insisting that part of the business be placed beyond commission control.

There is a serious defect in an economic system which permits those in control of public utility companies to devise schemes for inordinate profits from the management of enterprises which they dominate. With an insistent demand that holding companies be outlawed or brought under rigid government control, the problem is whether this form of industrial organization can be subjected to such effective regulation as to render it a useful social instrument. There

[16] *Ibid.*, p. 316.

[17] Cf. W. E. Mosher and F. G. Crawford, *Public Utility Regulation* (Harper & Brothers, 1933), chap. xxiv.

is a law of diminishing results which places a limit upon the advantages to be gained by holding company control, namely, that the advantages of centralized management which supervises at a distance grow less and less as the size of each operating unit grows larger. Indeed, it is believed that "the time has come when a lower premium should be paid for speed of development and a much higher premium for carefully evolved plans of coordination dictated in the interest of engineering efficiency and of the requirements of the community, rather than primarily in the interest of large profits for utility financiers."[18]

Appraisal of Public Regulation of Utilities

Whether the control of public utilities by commissions is satisfactory is a question upon which opinions greatly vary. That this method has proved better than the policy of no regulation previously tried is generally conceded by those who have the interests of the public uppermost. That the best results have been obtained is denied, especially by those who contend that public ownership is the final solution. Those who favor the commission plan claim that it is only through such an agency that public utilities may be regulated. It is through commissions alone that the necessary information for intelligent and adequate regulation can be secured; that definite inspection and supervision of franchise provisions can be assured; that informal and inexpensive redress for individual grievances can be furnished; and that adequate protection to the investor and to the utility owner can be guaranteed.

Those who are dissatisfied with results assert that utility commissions have not given relief to the public in the way of lower rates and better service. They have shown, it is charged, a strong leaning toward the interests of the utilities as against those of the public, and have placed obstacles in the way of public ownership.[19]

There is at the present time rather general dissatisfaction with the state public service commissions. Intended originally to protect investors and the public against the rapacity and selfish designs of utility managers, they are now considered to be the tools of the utilities. Investigations in a dozen or more states have revealed the extent of criticisms and disapproval of the work of the commissions. Governor Pinchot of Pennsylvania expressed a rather common sentiment in the observation that "whenever as in Pennsylvania the public

[18] James C. Bonbright and Gardiner C. Means, *op. cit.*, p. 221.

[19] For a summary of the defects in the system of control of utilities by state commissions, consult Frank William Hauft, "Control of Public Utilities in Minnesota," *Minnesota Law Rev.* (April, 1932), vol. xvi, p. 457.

service commission is the cat's-paw of the corporations instead of the protector of the people, widespread injustice is inevitable." Speaking for the minority commissions investigating regulation by utility commissions in New York, Mr. Walsh said, "We find that effective public utility regulation in the state of New York has broken down and that the consumers of the state have been abandoned to the exploitation of the public utility companies without any effective restraint by the Public Service Commission."[20]

Drastic reorganizations have been proposed in a number of states and there is a tendency to replace commissions by a single commissioner. Similar feelings of discontent have been in evidence between Congress and the President over the exercise of discretionary powers by federal commissions. Reflected in controversies over confirmation, this disaffection has at times led to the proposal for a recess congressional committee which would investigate the use of powers delegated by Congress to prevent abuse of the authority granted.

Criticisms of Commission Procedure.—The most common criticisms of commission practice and procedure relate to the failure to initiate proceedings against the utilities, to the tendency to overemphasize the judicial phases of the commission's work, and to the lack of effective control over rates. Statutes frequently do not give commissions sufficient authority and direction to initiate cases against utilities where evidence is available as to defects of service, unfair discriminations, or unreasonable rates; but whether or not such authority is granted, the usual practice of the commissions is to wait until a person, corporation, or a municipality presents a complaint. As few individuals can take the time or bear the expense necessary to carry a case through its various stages before the commission and possibly the courts, many discriminations and inconveniences are endured in preference to the initiation of a complaint. The desire and belief that the public service commissions would be aggressive advocates of the interests of the public have not been realized.

"When I became Governor of the State of New York," said President Roosevelt, "I found that the Public Service Commission of the state had adopted the unwarranted and unsound view that its sole function was to act as an arbitrator or a court between the public on one side and the utility corporations on the other. . . . I declared that the Public Service Commission is not a mere judicial body to act solely as an umpire between complaining consumer or complaining investor . . . and the great public utility system. . . . I declared that, as the agent of the legislature, it had delegated authority to act

[20] *Report of Commission on Revision of the Public Service Commissions Law* (Albany, 1930), p. 258.

as the agent of the public; that it is not a mere arbitrator . . . but was created for the purpose of seeing that the utilities do two things —give service and charge reasonable rates. I told them that, in performing this function, it must be an agent of the public upon its own initiative as well as upon petition to investigate the acts of public utilities relative to service and rules and to enforce adequate service and reasonable rates. . . . The regulation commission must be a tribune of the people. . . . This means positive and active protection of the public against private greed."[21]

Moreover, the evident intention, when commissions were established and their powers enlarged, was that they would aid the legislature in developing effective policies and methods of procedure in regulating utilities; this has not been accomplished, because the commissions have deemed their function too largely as the hearing of cases and rendered decisions as a judicial tribunal. "Such withdrawal of the public service commissions from the field of active and at times militant supervision to an impartial plane of judicial service," it is observed, "leaves the public without the effective guardianship to which it is entitled."[22]

In the hearings especially in rate cases the public interests are frequently represented by amateurs who have no special training or qualifications to deal with the complicated facts and issues involved, whereas the utilities employ the ablest experts, pay them large fees, and charge the exorbitant expenses incurred to the consuming public. A notorious instance of unreasonable expenses charged to rates was revealed in testimony relating to a gas company in New York City which paid more than a million dollars to secure tax reductions. And another company is reported to have spent on a single case more than four million dollars for accounting, engineering and legal fees, all of which must eventually be paid by consumers.

Since the World War there has been a strong tendency to speculate in utility stocks, securities, and utility properties. Commissions have been liberal in their scrutiny of evidences of value offered in such cases. An investigating committee of the House of Representatives in Pennsylvania reported that, due to excessive valuations, the utility companies in Pennsylvania have been permitted to enjoy an income which far exceeds a fair return on invested capital.[23]

[21] Franklin D. Roosevelt, *Looking Forward* (The John Day Company, 1933), pp. 143-144.

[22] *Electrical Utilities,* edited by W. E. Mosher (Harper & Brothers, 1929), p. 21.

[23] See *House Report* No. 10, 1931, p. 3. For other instances of excessive earnings approved by a state commission, see the evidence in the minority report on the New York State Commission, 1930, *Document* No. 75.

Overvaluation, which in its various forms is defeating efforts at public utility regulation, is an attempt to determine capitalization on the basis of profits. Attempts to keep profits down to a basis which would seem reasonable to utility commissions and at the same time would predicate a basis for an increase in rates resulted in the device known as a "write-up." By means of this device securities and properties were capitalized at two or more times the original cost and much higher than the court standard of reproduction cost new less depreciation. Only a few state commissions such as those of California, Massachusetts, and Wisconsin have succeeded in checking this practice of overcapitalization.[24]

The weakness and futility of state regulation of public utilities responsible to a considerable degree to the unfriendly attitude of courts, the reversal of the doctrine of complete legislative control as announced in the case of Munn *v.* Illinois,[25] the adoption of the rule of Smyth *v.* Ames[26] and its continuous process of valuations, and the principle of the Ben Avon Case[27] that the court must give its own independent judgment on the law and the facts, all have resulted in placing in the courts the ultimate control of the entire procedure of utility regulation. Whether the regulation of utilities by commissions would have succeeded if the courts had kept their hands off, one can only surmise, but certainly state regulatory bodies have had no fair opportunity to test administrative control. Amazing revelations of recent years have shown how the courts have given sanction to valuations which permitted stock speculations and manipulations of management in wanton disregard of the interests of the public.

The chief difficulty in regulation is the advantage which the combined utilities have in dealing with the commissions. While the advantages are not so great as under the former method of regulation by lawsuit, the favorable position of the utilities in dealing with the commissions has made the friends of the public interests almost despair of the success of this method of control. This difficulty has been well expressed in the language of D. F. Wilcox:

The principle of state regulation by permanent commissions was put forward in this country a few years ago as a statesmanlike method of protecting the people from the exactions of the public service corporations, while at the same time giving the corporations a fair deal. We now find that all the corporations have been converted to the idea of regulation. They not only welcome it, but insist upon having

[24] *New York State Report on Public Service Commission Laws,* 1930, pp. 320-323.

[25] 94 U. S. 113 (1876).

[26] 169 U. S. 466 (1898).

[27] 253 U. S. 287 (1920).

it. They are so enthusiastic over it that they help write the laws and appoint commissioners.[28]

Regulating commissions have, as in New York, become the tool of partisan machines and of designing politicians. They have at times failed to give the expected relief in the way of lower rates and better service; they have in some instances placed obstacles in the way of public ownership; and they have occasionally allowed exorbitant rates of interest and profit.[29]

But despite all of these discouraging failures of commission regulation, the utility commissions have brought about an improvement of conditions in both rates and service. Furthermore, an injured user of a utility now has a recourse in obtaining justice that formerly was denied him.

The attitude toward public utility regulation through state commissions varies greatly in the different states. Discussion has centered largely around the following issues: Shall the commission be abolished? Shall home rule over local utilities be granted to the cities? Shall the powers of the commission be extended? The general conclusion from an extensive survey of opinions pro and con relative to commission regulation is that there is widespread discontent with the practical workings of public service commissions. This discontent has arisen in part from the demand of the larger cities to be permitted to regulate their own utilities; from a feeling that utility commissions have not been aggressive protectors of the public interest; and, finally, from a preference for public ownership as against public regulation.

Although public utilities as now regulated by commissions are more disposed to favor the public than was previously the case, yet in the conflict which is going on between the public on the one side and the private owners of utilities on the other, the odds are most likely to be in favor of the corporations. Regulation may safeguard the interests of the public to a certain extent by preventing the extremes in profit-making and indifference to the demands for better service and greater comfort. But, holding as they do the upper hand, the corporations are difficult to control, and even the commissions appointed as governmental officials are more or less powerless to give the general public a square deal. Hence experience with utility commissions is leading many to feel that nothing short of public ownership will prove satisfactory. But notwithstanding that to many persons

[28] *The Annals* (January, 1915), p. 8.

[29] Cf. Morris L. Cooke, "The Public Service Commissionership as a Factor in Government," *Public Utility Regulation*, chap. x, for a consideration of the factors necessary to secure capable and efficient commissioners.

public ownership may be the ultimate goal, complete ownership and control of all utilities are a long way off. Moreover, public ownership may not prove desirable for certain utilities; hence, in the meantime, reliable and adequate protection of the public can be secured, if at all, only by some form of public regulation of utilities.

Conflict between State and Municipal Regulation of Public Utilities

In some respects the most difficult of all problems in the regulation of utilities has arisen in connection with the management and control of municipal utilities. It is in the cities that many of the worst evils of liberal franchises and no regulation have developed. The large municipalities were among the first government units to attempt, by stricter and more explicit franchises, to remove some of the grosser forms of favoritism and corruption. When states began to enter the field of utility regulation, a controversy arose immediately over the relative spheres of state and municipal control. The larger cities, aiming to secure more complete home rule, wished to be entirely free from state regulation. On the other hand, smaller cities, unable to maintain effective regulatory commissions, desired assistance from a state agency. The utility interests first opposed the commission movement; but later, to check radical tendencies in the large cities toward municipal ownership or very strict franchise regulations, they joined with the smaller cities in the movement for a state utility board. With the establishment of state commissions the problem of the relation of these commissions to the large cities has become increasingly difficult.

While a useful purpose can be served by a city utility commission, many matters are of such a nature as to extend beyond the confines of the city and to require regulation by a more general authority, coming from either the state or the federal government. For most purposes regulation can be most effectively accomplished through state commissions. The advantages of a state commission for the purpose of the general regulation of public utilities are: (1) A state commission can secure from a number of communities data sufficient to render intelligent regulation practicable. Because of the extensive relations of municipal utilities it is only through state commissions that adequate information can be secured as a basis for effective regulation. (2) Uniformity in regard to issues of stocks and bonds can be required. (3) A state commission alone can deal with the interurban service. (4) More adequate protection to the investor and to the public can be accorded by a state commission. (5) The state commission alone has plenary powers, acquired, as a rule, from legislation, to

regulate rates, services, and extensions for utilities. Without state aid a city finds it difficult indeed to secure information and to provide adequate regulation. The general power and authority of a state commission are deemed indispensable to effective local regulation.

There are, then, two conflicting tendencies in public utility regulation. The large cities regard the regulation of public utilities as one of the legitimate municipal functions; and there is a distinct tendency in such cities, by means of purchase clauses and amortization provisions in franchises, to prepare the way for the ultimate municipalization of the utilities. Prevailing practices are based on the theory that the state is not primarily interested in the change from private to public ownership, but should assume control of rates and services to the exclusion of local authorities. The legislature, in the absence of specific constitutional guaranties of municipal home rule, has unrestricted authority to exercise the police power, or to delegate its exercise to a state commission, without regard to the public utility policies which may have been formulated by local authorities and sanctioned by local contracts.

Though attempts have been made to secure better terms as to rates and services from privately managed utilities either by taking steps to purchase them or by starting competing plants, in most instances these devices have been thwarted by the state commissions or by the courts. That competition is at times more effective than regulation in the control of rates is indicated in the testimony of an engineering consultant of Cleveland:

> We do not have many rate cases in Ohio, except for some few telephone and natural gas cases. We hardly ever have an electric rate case, because the cities of Ohio have home rule. The constitution of the state provides that every municipality may own and operate a municipal plant. The municipal councils of the cities are the fundamental rate-making bodies. They can pass an ordinance fixing and establishing the rates that any utility company may charge for service. If the company accepts that rate it becomes a contract and a binding contract for the period of the ordinance. If they choose not to accept it they can appeal to the public utilities commission. Then they have a rate case. Very seldom is there a case going to the federal court out of the utilities commission.
>
> We haven't had a large electric rate case to my knowledge for a good many years, because,—I am saying this with knowledge, the municipalities have found that competition was a better regulation than the commission, and the threat of competition is as good a regulation as they need, and if the municipal authorities find that they are paying too high a rate, in place of making a rate case before the commission, they propose to build a municipal plant, and, by the way, the constitution of Ohio also provides that this plant may be

financed by the sale of mortgage bonds, which are not a liability upon the taxpayers, which are over and above the limit of indebtedness prescribed by law.[30]

"It is not possible to say with any degree of finality," Professor Kneier maintains, "that either state or local regulation of public utilities is the only proper course to pursue. The advocate of home rule must recognize that even though there is a local commission there are certain things that can probably be better left in control of the state commission."[31] Thus the control of the formation of the corporation, the regulation of its security issues, and the supervision of its accounts and reports may be proper subjects for the consideration of a state commission. On the other hand, there is a strong case for a local commission where a large city like Chicago contains approximately one-half of the population of the state. Where the law provides for state and local commissions the problems of overlapping jurisdictions and conflicts of authority can best be determined by the state commission, with an ultimate delimiting authority in the courts.

Regulation which was defended as a means of aiding the cities in their attempt to control the private corporations engaged in public service has turned out to be one of the chief obstacles to an effective system of control over utilities operating in municipalities. With the taking over of the regulatory authority by the state came the holding of the courts that cities could not, unless specifically authorized by the constitution or legislative grant, enter into any contracts for rates or services; and thus the utilities were often relieved of the responsibilities they had assumed in the franchises under which they were operating. The conflict between state and local regulation of utilities in metropolitan centers remains as yet to be determined satisfactorily.

Special Power Districts.—A number of states have now been authorized to establish power districts. In this way the cities may combine to secure the management and control of power plants and thereby gain the advantages of large-scale production. Under the leadership of Hiram Johnson, a law was enacted in California in 1910 permitting the formation of public utility districts. This law has been amended at various times to extend the authority granted to districts, the most recent act providing for the formation of the Metropolitan Water District to secure water from the Colorado River for Southern California. As a result of these acts more than twenty projects for furnishing light and power are in successful operation

[30] Stephen Raushenbush, *The Power Fight* (New Republic, Inc., 1932), p. 223.
[31] Charles Mayard Kneier, *State Regulation of Public Utilities in Illinois* (University of Illinois Studies, 1927), pp. 178, 179.

in California, including such large centers as San Francisco, Los Angeles, and Pasadena.

In 1930 the electors of Washington approved a district power bill for the purpose of owning and operating electric power, irrigation, and water supplies. These districts may be established on a popular referendum and when approved are placed in charge of three commissioners chosen by the voters. The broad scope of authority granted to such a district may be realized by considering the following section of the district act:

(1) To survey hydro-electric power, irrigation, and domestic water supply resources within and without the district, and to make recommendations as to their development and coordination into a systematic whole; (2) to construct, condemn, purchase, lease, and operate electric power, irrigation, and domestic water production and distribution systems and facilities both within and without the district; in pursuance thereof to take, condemn, purchase and acquire public and private property, franchises and property rights, including state, county and school lands, and littoral and water rights; (3) to acquire by purchase, or condemnation and purchase, the right to divert, take, impound, and use the water of any lake or watercourse whether navigable or non-navigable, privately or publicly owned, or used by the state, or any subdivision thereof; (4) to buy, sell, regulate and control the price, use and distribution of water (domestic or irrigation use) and electric current free from the jurisdiction and control of the director of public works and the division of public utilities; (5) to inter-connect its power systems with any other public utility district or municipal corporation, and to sell electric energy to any individual, public utility district, city or town, and to have the use of public highways, roads, and streets for the purpose of distributing electric energy; (6) to exercise the right of eminent domain to effectuate the foregoing purposes; (7) to contract indebtedness for corporate purposes through the issuance of general obligation or utility bonds at interest rates not to exceed six per cent, and which must not be sold for less than par and accrued interest; (8) to raise revenue by the levy of an annual tax in the district, which must not exceed two mills, exclusive of interest and redemption of general obligation bonds; (9) to establish the boundaries of local assessment districts, and to levy special assessments; and (10) to sue and to be sued.

In the same year a similar law was approved by the voters of Oregon, with Nebraska and Wisconsin also taking steps in this direction. It is problematical to what extent communities may gain the advantages of public ownership and large-scale production through such districts.

To a certain extent these districts are modeled after the Ontario plan. One of the most noteworthy public ownership enterprises is

the Ontario Hydro-Electric Power System. Under the direction of a Power Commission appointed by a group of municipalities, a successful public service enterprise has been in operation since 1908. This enterprise has been called "a public service institution organized by and for the municipalities under government supervision and with its cooperation. It is in a sound financial position and apparently on the road to the ownership of its property without encumbrances of any kind. Except for grants-in-aid for the extension of rural lines it enjoys no subsidies from the government in the form of money, office space, or perquisites."[32] On the whole, electrical power is furnished to consumers at a lower rate than is charged in most American cities.

To a limited extent American states and cities are moving in the direction of rather extensive programs of public ownership. Upon the success or failure of these experiments depend future policies in relation to the control of public utilities.

Public Ownership of Utilities

Advantages and Objections.—There are advantages in public ownership which render its adoption in the management of certain utilities probable in all countries. First, the state or city can secure money at lower rates of interest. Second, there is no incentive to overcapitalization and there is no need of paying high dividends. The service may be rendered at cost, or at slightly more than cost in order to bring in a small return in profits to the government. It is thought by some that public ownership is inevitable, for it is claimed that "private ownership of a public utility is fundamentally hostile to and inconsistent with the public welfare." The reason for this appears to be that under private ownership of public utilities the owners are interested primarily in the making of money and only secondarily in the serving of the public. They bend their efforts as far as possible toward the achieving of the former object and vouchsafe to the latter only the necessary minimum of consideration. A conflict naturally arises between the demands of the public and the financial ambitions of the owners of the utility. Public ownership, it is maintained, removes the conflict between the owners and the public because the latter becomes the owner. Under such a policy, the members of a city are working on a cooperative basis for the same end, namely, the best service for the least expenditure of money.

There is, of course, the danger that the public-owned utilities may be mismanaged through the influence of spoils politics. And there are

[32] W. E. Mosher (ed.), *op. cit.*, p. 231.

some discouraging failures on this account. But the success of the management of certain municipal utilities is in marked contrast with the waste, corruption and mismanagement of particular private companies. There is little justification today for the general condemnation which propagandists on behalf of the private utility companies have fostered against the practice of public ownership and operation of utilities.

Comparing the difficulties in the way of effective regulation of utilities under private management with public ownership, Joseph B. Eastman of the Interstate Commerce Commission claims that "at one stroke this would eliminate the troublesome question of valuation, greatly simplify financing, largely eliminate the courts as a time-consuming factor in the situation, and reduce cumbersome judicial procedure in connection with questions of management to a minimum. Such matters as service, issue of securities, accounting, new construction, and the general level of rates could ordinarily be handled in normal administrative routine."[33]

It is difficult to secure a fair and unbiased presentation of the cause of public ownership. Many of those who undertake to inform the public are biased on one side or the other. Furthermore, the conditions vary so much in the separate countries that comparisons often have relatively little weight. For the citizen the problem is one on which reliable information should be demanded in order that an intelligent and fair-minded judgment may be formed. In this as in numerous other government problems the matters involved are of such a complex character that specialists alone can form really intelligent judgments.

Numerous objections have been advanced by the opponents of the policy of government ownership of public utilities. It is claimed that such a policy is contrary to the fundamental principles of our system of government, and that our political institutions, as they now exist, are not adapted to the management of large economic concerns. Moreover, it is maintained that the assuming of the proprietorship of public utilities by the government would mean a great financial loss. Especially would this be the case if the railroads should be taken over and operated by the national government. Extravagances incident to the management of large business projects by persons holding their positions through political appointment or through popular election have been contrasted with the economical methods used by business experts employed by large utility corporations. But recent investigations have shown unreasonably high salaries and exorbitant bonus

[33] "A Plan for Public Ownership and Operation," *The Annals* (January, 1932), p. 114.

payments in cash and stock to managers of privately controlled industries, so that the waste due to political preferment and influence would appear to be relatively small.

The basis for these objections which have been given somewhat in detail, is that the fundamental principles of our system of government require frequent changes, in both the executive and law-making bodies. From these periodical changes, after the advent of government ownership of utilities, would follow undesirable if not deplorable conditions. It is conceded that frequent changes in the administration of great economic concerns are invariably accompanied by inertia and hesitancy, due to conflicting policies and inexperience and to the critical attitude assumed toward the methods which are in operation at the time of the change in officials. The final outcome of this vacillation is great financial loss. Moreover, the legislature—or, in the case of a city, the council or commission—through its power to prescribe by law or ordinance the regulations governing the management of utilities, has an opportunity to place hampering restrictions and limitations upon executives or managers. These restrictions or limitations would prevent prompt action in emergency or in the disposition of important questions of policy which frequently arise in the handling of large economic enterprises.

In addition to the extravagances already mentioned, serious loss and inefficiency would likewise result from the failure of the law- or ordinance-making bodies to make adequate appropriations for the general upkeep and betterment of the utilities. It is maintained that, as a rule, when a public utility has been taken over by a local government, there has resulted, through lack of funds and the failure of the public to realize the legitimate needs of efficient management, a deterioration in the service rendered by the utility. Successful managers of private enterprises adopt the policy not only of keeping abreast of the times in the management of economic enterprises, but also of looking ahead toward the future development of the projects. Governments, owing to their political organization and the fact that they are backed by a prejudiced or conservative public opinion which is loath to support large expenditures, however necessary, are accused of lagging behind in the adoption of up-to-date methods in the management of public utilities.

Public Ownership in Europe.—The extent to which municipalities may engage with profit in the ownership and regulation of public utilities is best illustrated by some of the leading cities in Europe, where such ownership and regulation have progressed much further than they have in the United States. European cities frequently operate at a small profit water-works, electrical and gas plants, and street railways. The water fronts of rivers, canals, lakes, and inland water-

ways are almost invariably owned by the cities. The profits of these utilities are used toward defraying the expenses of the municipalities and lowering the tax rates.

Many of the activities connected with municipal life other than public utilities are publicly owned and controlled by the leading cities in Europe. For recreational purposes, cities provide promenades, gardens, and parks. Other enterprises engaged in by certain cities are forests, vineyards, bathing establishments, burial grounds, pawnshops, savings banks (providing particularly for small deposits from the poor), and employment offices for laborers and domestic servants. At the municipal market place most of the provisions of the household may be secured at moderate prices. In behalf of the public, cities own and operate theaters and opera houses, and contribute to the maintenance of libraries, picture galleries, and zoological gardens. The outlays in support of these activities are regarded as indirect methods of increasing the efficiency of the citizens.

Recently European cities have begun the purchase of land and houses in order to assist in providing satisfactory homes for the poor and to control the development and expansion of the city. This land is usually leased for long terms of years at a low yearly rental. Arrangements are made by which buildings may be erected on the land which the city owns, the city furnishing a large portion of the money at a low rate of interest.

The controversy between public and private ownership has been solved in England, on a basis which seems satisfactory for the present, by a compromise which recognizes a legitimate place for each type of ownership; and this is particularly true of the national plan for the development of the electrical industries. After the production of electricity had suffered at the hands of the private producers, the stock speculators, and the politicians who sought to reduce municipal taxation, Parliament passed an epoch-making law in 1926. The purpose of the act was to establish a national scheme of generation and transmission. It was made the duty of a newly created agency—the Central Electricity Board—"to envisage the problems of electricity supply purely as to national requirements and for the benefit of the community as a whole."[34] It was possible to carry out such a plan since the principle of limited profits in both public and private enterprises is generally accepted in England. Since public and private systems for the production and transmission of electricity are well established in England, with about 60 per cent of the electricity undertakings being publicly owned, it was necessary to recognize both types of produc-

[34] From *World Power* (September, 1931), pp. 204, 207. Cf. Orren C. Hormell, "Ownership and Regulation of Electric Utilities in Great Britain," *The Annals* (January, 1932), pp. 128 ff.

tion in an integrated scheme. Municipal plants have been managed by industrial cities such as Manchester, Liverpool, Birmingham, Glasgow, and Edinburgh as successfully as any plants operating under private management.

With the establishment of nine power zones or districts, the government inaugurated a policy to take over gradually the generation and main-line transmission of energy, leaving the distribution to a large extent in the hands of the existing owners, public and private. Summing up the results thus far accomplished, Professor Hormell believes that the British have launched "a bold experiment in cooperation between government agencies and private capital. They believe they have discovered for the electricity industry, a workable mean between *laissez-faire* capitalism on the one hand and complete socialistic nationalization on the other. They believe that, through such combination and cooperation, leadership is being created which will be competent to forecast demands and effectively adjust productive capacity to potential consumption."[35]

Between the private company chartered by the state and under public control and that under direct public ownership there is, particularly in Great Britain, a third type of utility known as the public utility trust. As exemplified by the Central Electricity Board, the British Broadcasting Corporation, and the Port of London Authority, the public utility trust is hailed as an "effective instrument which will bring about a successful compromise between *laissez-faire* and socialism."[36] This form of utility enterprise is usually placed in charge of directors appointed by the government or selected by the users of the service, with the creditors as stockholders and with a statutory limit upon earnings and profits.

Public undertakings such as the above in Europe and elsewhere are not always successful. Nor do they usually, as in some European cities, add to the municipal income. Furthermore, the successful management of such enterprises requires a staff of experts specially trained for their work, and permanence of tenure as long as efficient service is rendered. The separation of politics and administration which prevails throughout Europe, particularly in local administration, renders it possible to secure and retain experts to manage the public utilities. Where politics and administration are not separated and where offices are filled on a partisan basis for short terms, public ownership is likely to lead to wasteful expenditures and correspondingly poor service.

[35] *Ibid.*, p. 139.

[36] Marshall E. Dimock, *British Public Utilities and National Development* (George Allen & Unwin, 1933), p. 44.

Public Ownership in the United States.—But the record of cities engaging in public ownership ventures in the United States is not encouraging. The number of public plants serving various municipalities with gas has steadily declined since 1914. With only a few exceptions, municipal gas plants are now found in the smaller cities and serve relatively a minor part of the public living in cities. For street railways public ownership has been attempted in a few cities only, such as Detroit, Seattle, and San Francisco. Boston, New York, and Philadelphia either own or operate elevated and surface lines, but the most distinct decline in public ownership was manifested in the production and distribution of electricity. During the past decade there has been a decline of approximately 30 per cent in the publicly owned plants. In the distribution of water alone has there been an increase of public ownership within recent years.

The main reasons for the decline of public ownership during the past few decades are, first, the adoption of large-scale centralized methods of production; second, the growth and dominance of holding companies; and third, the publicity and propaganda methods of the private utility corporations. The marked decrease in publicly owned plants in the field of electricity and gas production was due largely to the consolidation movement which reached a peak in 1929. According to Mosher and Crawford, "Public ownership on a broad scale—i.e., apart from certain areas where it has already gained headway, does not seem to be probable in the near future. This prediction is due to the systematic 'conditioning' of the minds of the people as to the undesirability of permitting the government to go into 'business,' to the widespread conviction that government is more or less inevitably inefficient, to the already established interconnected systems covering extensive areas and representing so large an investment that to dispossess the owners, either through purchase or by condemnation proceedings, would require staggering bond issues by a combination of public authorities. Any such program is at present not easily conceivable, particularly under current methods of valuation,"[37]

The failure of some of the holding companies, such as the Foshay and Insull interests, and the *exposé* of scandals connected with other utility organizations through the investigations of the Federal Trade Commission have temporarily checked the tide against public ownership which was characteristic of the decade from 1920 to 1930. There are reasons to doubt the great advantages which are claimed for the consolidation movement. The evils connected with the internal management of large companies and the efforts to control the different agencies of government, as well as to influence public opinion, have,

[37] *Op. cit.*, p. 543.

temporarily at least, discredited the consolidation movement and the insistence upon private management of utilities in preference to public ownership. Whether these indications point to a revival of interest in the public ownership movement or a mere delay in the extension of centralization in these industries remains as yet uncertain.

A notable development, however, along the line of public ownership is the entrance of the federal government into the field of the production and transmission of power and the development of a few large-scale power projects. The most important of these are the Boulder Dam and Muscle Shoals projects. After the failure of the states of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to agree on a compact for the development of hydroelectric power on the Colorado River, Congress passed a law authorizing the construction of the Boulder Dam. The Secretary of the Interior was authorized to build a dam 550 feet high with a storage capacity of twenty-six million acre feet of water, to build a canal seventy-five miles long to connect Laguna Dam with the Imperial and Coachella Valleys of California, and to construct a power plant of ten-million horse-power capacity. The total expenditure for the project, including interest, is expected to be $165,000,000, and a plan of financing is provided whereby in fifty years the full amount with interest is to be repaid to the government. Cities within the range of this dam are making plans for the use of the water and for the purchase of power. The project has vast possibilities for the development of agriculture, industry, and other commercial interests within the area of the Pacific Southwest, and water will be rendered available for cities whose supply is now inadequate.

During the war the government built a dam and nitrate plants at Muscle Shoals, which were erected primarily for the purpose of national defense. Efforts to lease these plants and the power project to private individuals having failed and two attempts to provide government operation of the project having been vetoed by Presidents Coolidge and Hoover, the government under President Roosevelt took over the control and operation of the Muscle Shoals plant and extensive developments in connection with it, through the enactment of the Tennessee Valley Authority Act. The program envisaged by the act includes such matters as the improvement of navigation, reforestation, flood control, and a reconstruction of farm life within this area. The Muscle Shoals project involves a development of the entire Tennessee River system into a huge interconnected arrangement of dams, power houses, and transmission lines. Under the authority of Congress the commission in charge of the Tennessee Valley Authority is engaged in the construction of several large dams.

Through this and similar power projects it is the intention of the

government to stimulate agriculture and industry, and to improve the rural life of the entire population throughout the districts which may be served by the project. Assuming that the transmission of power is feasible for a distance of at least 300 miles, the Muscle Shoals project can serve sections of Alabama, Georgia, Tennessee, Kentucky, and Mississippi, as well as smaller areas in Arkansas, Missouri, Illinois, North and South Carolina, Florida, Louisiana, Indiana, and Virginia. The government has, indeed, engaged upon what President Roosevelt called "the widest experiment ever conducted by a government." According to Professor Lilienthal, a member of the commission in charge of the project, the government is trying in its power program to set up an area for operations which will be on a comparable basis with typical private utilities. It is the government's purpose to establish a "yardstick" by which reasonable service and fair rates may be tested for both private and public utilities. In these power projects an effort is being made to develop electrical production and transmission under conditions where private initiative and development could not operate to advantage.

What the ultimate outcome may be of the entrance of the federal government into the field of the production and transmission of electricity no one can predict at the present time. The serious and menacing authority of a few private holding companies and the threats regarding the tying up of the power facilities and industry of the United States have rendered it imperative for the government to enter the field, at least to a limited extent. Perhaps a few large government plants serving as equilibrating factors in certain areas may result in the adjustment of rates and services by private companies so as to render further government extension into the field unnecessary.

If a judgment may be formed on the basis of the experience of other countries, it is probable that a combination under which the government and the private companies divide the field will be the desirable solution for the future control of the power industry, subject, however, to definite limitations and restrictions which can be determined only through some form of public supervision or control.

Though public ownership may be combined with public operation, it is not necessary, for it is possible to contract for private management with definite safeguards to protect the public interests. With this end in view, Mr. Eastman recommends for the operation of the railroads a corporation to conduct the industry, separate and distinct from other governmental agencies. A group of trustees would be selected to act as a board of directors and to be solely responsible for the management of the corporation in accordance with the terms agreed upon. Such a plan was adopted for the operation of the Boston Elevated Railway Company and the Canadian National Railway.

Public ownership with private management has been applied successfully in England for many years and has been adopted for such agencies as the Central Electricity Board and the British Broadcasting Company. Public sentiment in England favors an arrangement whereby utility managers are free to settle current questions on their own responsibility, with the government retaining the right to criticize and to change the managing board when results are regarded as unsatisfactory.

The problems, then, which have developed in connection with the ownership and regulation of public utilities are at present unsolved. Though it is generally acknowledged that under existing conditions some form of public control or regulation is desirable, the nature of that control and the proper extent of public regulation remain to be determined.

The utility owners themselves have recognized the need of proper and effective regulation and have become advocates of the policy of regulation by commissions. But the establishment of the commission, the determination of its powers, the relation between state and local commissions, are still in the experimental stage. Judging from the experience of New York, the commission may become the tool of the very interests for the regulation of which it has been established. In fact, it is openly charged that the great public utilities have directed and influenced the appointment of commissioners who were known to favor corporate interests. The few striking instances of this character which have come to light, and the fact that the utilities have become such ardent advocates of utility commissions, have led some of the leaders interested in the public welfare to question the usefulness of state commissions. It has not yet been satisfactorily determined how a commission may be constituted and empowered so as to deal fairly by the capitalist and the investor and at the same time attain its main object, namely, the protection of the interests of the public.

Though there has been a steady growth of sentiment in favor of public ownership, evidence as to the superiority and effectiveness of such ownership is still inconclusive. The usual private ownership argument is as follows: "It is urged that the government is bureaucratic and inefficient, lacks initiative, is often corrupt, would be controlled by political expediency rather than sound business principles, and would convert these utility services into mere parts of political machines."[38] Though some public utilities under private management have been operated soundly and economically, many have been ruined by financial exploitation and their managers have engaged in the

[38] Joseph B. Eastman, *op. cit.*, p. 115.

basest forms of political corruption. The advantages of private ownership and management are likely to be exaggerated, in contrast with the real and supposed defects of government ownership and management.

A great deal has been written to demonstrate the superiority of private ownership; but much of this is inspired, if not actually subsidized, by those in control of the utilities, who are using this method for what they call "accelerating public opinion" favorable to private interests. The *exposé* of utility propaganda methods by the Federal Trade Commission thoroughly discredits much of the anti-public ownership campaigns of the utility managers and magnates. The methods of public accounting are such as to make it extremely difficult to secure data which can be safely used for purposes of comparison. It will be a long time before comparisons may be made which will be sufficiently accurate to form a basis of sound conclusions. However, in making such comparisons, it is necessary to remember that the aims of the two methods are so fundamentally different that, while it may be hard to figure a gain in dollars and cents from public ownership, other compensations and advantages may more than balance what may at times seem a financial loss and a decrease in efficiency. In fact, each may be judged by a different standard and may be found superior in its own sphere. The modern problems are: How may public-owned utilities be made more efficient? How far is it advisable for the state to go in extending public ownership?

A few principles are rather generally approved, namely, that public utilities, whether in public or private hands, are best conducted under a system of legalized and regulated monopoly; that utilities in which the element of sanitation largely enters should be operated by the public; and that municipal operation is likely to be successful when

1. There is an executive manager with full responsibility, holding his position during good behavior.
2. Political influence and personal favoritism are excluded from the management of the undertaking, and
3. Finances of the undertaking are separated from the rest of the city finances.

Under such conditions there appears to be no good reason why public operation of utilities should be less efficient than private operation. The most significant requirement at the present time is that the states give to municipalities, upon popular vote under reasonable regulation, the authority to build and to operate public utilities, or to build and to lease them, or to take over works already constructed. The effect of such authority would be that public utility companies would be more inclined to furnish adequate service upon fair terms

and would thus make it unnecessary for the public either to take over existing utilities or to acquire new ones.

SUPPLEMENTARY READINGS

Consult readings suggested for chap. vi, and also the following:

Bonbright, James C., and Means, Gardiner C., *The Holding Company: Its Public Significance and Its Regulation* (McGraw-Hill Book Company, Inc., 1932).

Thompson, Carl D., *Public Ownership* (Thomas Y. Crowell Company, 1925).

——— *Confessions of the Power Trust* (E. P. Dutton & Co., Inc., 1932), especially part vii, "The War on Public Ownership."

Gruening, Ernest, *The Public Pays: A Study of Power Propaganda* (Vanguard Press, Inc., 1931).

What Electricity Costs, edited by Morris L. Cooke (New Republic, Inc., 1933).

Bird, Frederick L., *The Management of Small Municipal Lighting Plants* (New York, 1932).

Bird, Frederick L., and Ryan, Frances, *Public Ownership on Trial* (New Republic, Inc., 1930).

CHAPTER VIII

FORMS OF GOVERNMENT

"THE time-hallowed classification of forms of government," maintained Lord Bryce, "divides them into monarchies, oligarchies, and democracies. In reality there is only one form of government. That form is the Rule of the Few. The monarch is always obliged to rule by the counsel and through the agency of others, and only a small part of what is done in his name emanates from his mind and will. The multitude has neither the knowledge nor the time nor the unflagging interest that are needed to enable it to rule. Its opinions are formed, its passions are roused, its acts are guided by a few persons —few compared with the total of the voters—and nothing would surprise it more than to learn by how few."[1]

CLASSIFICATION OF STATES

Most modern classifications of states start with the well-known analysis by Aristotle that a monarchy is a state in which power is vested in a single person; an aristocracy is a state in which authority is in control of a small group of persons; and democracy is a state in which power resides in the general mass of the people. Aristotle distinguished between the "normal" forms of the state such as monarchy and aristocracy, when the rulers governed for the good of the community, and the "perverted" forms of the state such as tyranny, oligarchy, and democracy as when a single ruler, a small clique or the majority of the people ruled with their own selfish interests chiefly in mind. Though such a classification is applicable to modern states only to a small degree, so much political thinking has been predicated upon it that it deserves mention. And phases of the Aristotelian analysis have a permanence which endures throughout political life.

Some writers attempt to distinguish between the forms of the state and the forms of government—a distinction which is difficult to sustain and one which has relatively little significance from the standpoint of the study of politics and law. The maintenance of the affairs of a state both for internal operations and for international negotiations requires a type of permanence and continuity which renders it desirable and necessary at times to conceive the state as separate from any particular form of government. Some writers have generalized

[1] *American Political Science Review* (February, 1909), vol. iii, p. 18.

this necessity for permanence and continuity into an abstraction—the idea of the state. But in the more concrete sense states concern us as functioning political units in carrying out national and international purposes. A few classifications are presented for comparison and criticism.

Though the essential attributes of a state are territory, population, and an organization which exercises supreme powers or what is ordinarily termed "sovereignty," there are wide differences in the political units designated as states. In the first place the term "state" as used in the field of international relations is a broad and comprehensive term.

States have been classified, from the point of view of national and international political units,[2] as

1. *Simple or unitary states,* with a single supreme central government representing the will and authority of the state.

2. *Composite states,* such as unions or associations of two or more states with certain common functions and organs of government,[3] comprising

(a) *Confederacies*—a permanent association of states joined for the purposes of common defense and general welfare. The union government exercises certain functions of its own but each state retains its sovereignty and independence. In the Articles of Confederation, the principle was formulated that "each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled."

There are no confederacies in existence today, but historically this form of organization has been an important factor in the formation of states. Recent examples of confederacies are the Union of the American states under the Articles of Confederation from 1781 to 1789; the Swiss Confederacy, 1815 to 1848; and the Germanic Confederation from 1815 to 1866. The British Commonwealth of Nations is sometimes called "a confederation in spirit."

(b) *Federal Unions*—permanent unions of non-sovereign states, possessing certain inherent and original powers of their own. Effective sovereignty or supremacy resides with the federal or national government, though the states are regarded as having a qualified supremacy within their respective spheres. Among existing federal unions are the Argentine Republic, Australia, Brazil, Canada, Mexico,

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[2] Amos G. Hershey, *The Essentials of International Public Law and Organization* (The Macmillan Company, 1927), revised edition, pp. 178 ff.

[3] Certain types of personal unions resulting from a temporary union under a single ruler or so-called "real unions" such as formerly prevailed between Norway and Sweden and Austria and Hungary, have been dissolved.

Switzerland, the United States and Venezuela. Austria and Germany in their post-war constitutions were organized as federal structures, but recent developments have so seriously interfered with the arrangements between the national government and the states that it is doubtful whether federalism will be continued in these countries.

3. *Dependent or Semi-sovereign States*—states which retain a certain degree of sovereignty and international personality, with their foreign relations partially, at least, subject to the control of another state; such as

(a) *International Protectorates*—a status whereby a weak or dependent state has through treaty or otherwise been placed under the legal protection of another state. Such protectorates are exercised by Great Britain over various islands in the Pacific area, by England and France in parts of Africa, and by the United States over Cuba and Panama.

(b) *Mandatory System*—the government of colonies and territories deemed unable to stand by themselves under the supervision of the League of Nations.[4]

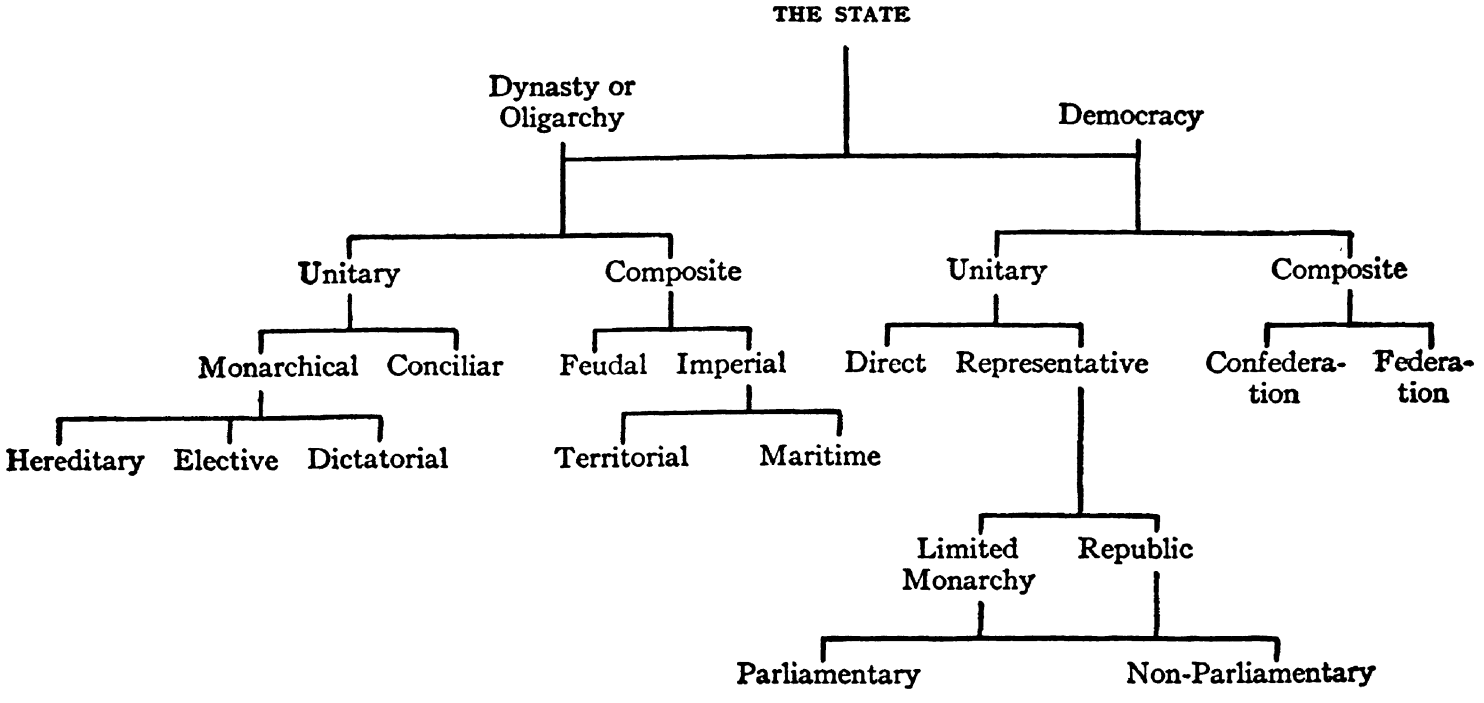
The type of state whose neutrality, independence or territorial integrity is permanently guaranteed by an international agreement on condition that it agrees not to go to war or to enter into a military alliance, is known as a neutralized state. Since the violation of the neutrality of Belgium during the World War, treaties establishing neutralized states have been deemed to furnish relatively little protection. Switzerland is the only existing neutralized state, and its entrance into the League of Nations has to a certain extent modified its status in this respect.

MacIver divides existing states, largely from the standpoint of their internal polity, into *dynastic states*, including empires and class-controlled political units; and *democratic states*, comprising societies in which the general will of the people is "the conscious, direct and active support of the form of government." According to his view, the dynastic state idealizes power, encourages emotional loyalty and tends toward essentially oligarchical control of government, whereas in the democratic state control may be either direct or indirect and the popular will is rendered effective through the principle of representation. Both dynastic or democratic states may be unitary or composite.

States may also be classified, according to the source and basis of authority, as despotic or dictatorial and democratic; according to the distribution of governmental powers, as unitary and federal; and

[4] For an account of the Mandatory System established by the League, see *infra*, chap. xxiv.

MacIver's Classification[5]



[5] This classification is made on the bases of (1) extent of the general will; (2) external structure; (3) distribution of power; (4) derivation of power; and (5) character of power. See R. M. MacIver, *The Modern State* (Oxford University Press, 1926), p. 363.

according to the criterion of the separation of powers, as parliamentary or non-parliamentary. In the non-parliamentary group those states which to a considerable degree follow the model of the national government of the United States, whether unitary or federal, are commonly designated as presidential forms of the state. The use of modern dictatorships and the extraordinary expansion of executive authority in presidential governments make all former classifications somewhat formal and impractical. But if, as Professor MacIver claims, the ultimate end of the state "is some form of democracy, if we understand by democracy not necessarily the rule of the many but the active functioning of the general will, giving direct support, and not merely passive acquiescence, to a government chosen by itself,"[6] then we may look forward to the gradual decline of dictatorships and the placing of limitations on the now seemingly inordinate executive powers. From the standpoint of modern tendencies in the development of government and of current problems in political organization, the foremost divisions of governments are the unitary and federal, the cabinet and presidential, and the democratic or representative and dictatorial forms of government. Whether the prevailing trend toward dictatorial methods in many states is a temporary political phenomenon; whether it is merely a reversion to despotic or dynastic practices to meet the emergency political conditions of a major economic depression; or whether it is an indication of a breakdown in democratic and representative institutions which only radical plans of reconstruction can rehabilitate, remains to be determined.

Federal Form of Government

The federal form of government is a comparatively modern kind of political organization. Those who framed the Constitution of the United States had few precedents to guide them. There were leagues of cities in ancient Greece, particularly the Bœotian and the Achæan Leagues, with the control of foreign affairs in the hands of a central government. A few leagues of a similar nature were also formed in Italy during the period of Rome's rise and development. The federal idea, however, did not have so active a growth in Rome as it did in the more free and diverse conditions of Greece. During the Middle Ages there came into existence various unions of cities, such as the Lombard and Hanseatic Leagues. These leagues are scarcely comparable with modern federations since most of them were confederations with rather loose political ties between central and local authorities.

[6] *Ibid.*, p. 339.

The growth of the federal form of government began in its modern sense with the formation of the Constitution of the United States. Since this time federal principles have been extensively applied in Europe and America. Furthermore, in the various plans for international peace and for the establishment of leagues to enforce peace, the federation of the world is one of the pervasive ideas of modern times.

The primary characteristic of federal government is the division of powers between a central government on the one hand and local divisions or states on the other. In recent times this division has been made definite by means of a written document which prescribes the authority allotted to each government. Usually certain powers are exclusively granted to the central government, while others are exclusively vested in the local authorities or states. As a rule, there is a field in which power may be exercised concurrently by both governments. In certain instances conflicts which arise between the different authorities in carrying out their powers are resolved by the courts, and it is often deemed the very essence of federalism that a judicial tribunal be authorized to settle such controversies. Among the federal governments which conform to this practice are those of the Argentine Republic, Australia, Canada, and the United States. Federal systems established in European countries usually do not provide for the delimitation of powers by the judiciary, and less authority is normally granted to the states or provinces. With the limited authority exercised by the states and the privilege of the national authorities to extend their functions, these governments tend in the direction of centralized or unitary forms of political organization rather than a strictly federal form.[7]

Federal Government in the United States

The United States as organized under the Constitution in 1787 has been described as a federal republic based on the principle of government by representatives. The form of government described by Madison was to be a democratic republic whose authority was to rest upon the will of the people, but whose functions were to be performed by regularly chosen representatives who were to be subject to constitutional restrictions and requirements.

Distribution of Powers.—The primary principle of federal government in the United States is that enumerated powers are granted

[7] We are indebted to Eric A. Beecroft, Lecturer in the Department of Political Science in the University of California at Los Angeles, for data and useful suggestions regarding the operation of federal government, particularly in Canada and Australia.

to the federal government. Within the scope of the powers granted, the federal government is supreme, but the remaining powers are presumed to be retained by the states.

In the consideration of the powers of Congress during the Philadelphia Convention, Alexander Hamilton proposed that Congress should have the authority "to legislate in all cases for the general interest of the Union." Failing to secure approval for such broad powers, Hamilton believed that in essence the same authority might be interpreted as comprehended within the phrase included under the taxing powers of Congress, "to provide for the common defense and the general welfare." In his report to Congress on manufacture in 1791, Hamilton wrote as follows: "It is therefore of necessity left to the discretion of the national legislature to pronounce upon the objects which concern the general welfare, and for which under that discretion an appropriation of money is requisite and proper, and there seems to be no reason for doubt that whatever concerns the general interests of learning, of agriculture, of manufacturers, and of commerce are within the sphere of the national council *so far as regards an application of money.*"[8]

Hamilton's doctrines did not meet with general approval in his day. Justice Story, for instance, contended that the general welfare clause of the Constitution did not constitute a substantive grant of power, but authorized Congress merely to "lay and collect taxes thereby, and specify the purpose for which taxes may be levied." Madison also repudiated the Hamiltonian doctrine in his veto message on the bill for internal improvements of March 3, 1817. Jefferson adopted the same view as Madison in his opinion on the national bank.

It was in the discussion of the question as to the authority of Congress to establish a national bank that Jefferson and Hamilton presented opposing views on what has come to be the central issue of American constitutional law relative to the extent of the powers which may be exercised by the federal government. Outlining the powers which were to be granted to the national bank, which included the usual authority exercised by such corporations, Jefferson said: "I consider the foundation of the Constitution as laid on this ground, that 'all 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.' "[9] To take a single step beyond the boundaries thus specifically drawn around the powers of Congress

[8] Henry St. George Tucker, "The General Welfare Clause," *Virginia Law Review* (January, 1922), vol. viii, p. 167.

[9] See Amendment X.

is to take possession of a boundless field of power no longer susceptible of any definition. The national bank not being a necessary instrumentality to carry out any of the delegated powers of Congress, Jefferson's judgment was that the federal government could not establish such a bank without an amendment to the Constitution. Hamilton, who had prepared the bill for the establishment of a bank, contended that there are implied as well as expressed powers which may be exercised by Congress and that the former are as effectively delegated as the latter. The criterion of what is constitutional then, he maintained, is the end to which the measure relates as a mean. "If the end be clearly comprehended in any of the specified powers, and if the measure has any obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority." As to whether a power might be implied as necessary to carry out an end prescribed by the Constitution, Hamilton indicated the standard to be adopted. "Necessary, in this connection," he said, "often means no more than needful, requisite, incidental, useful, or conducive to."

If Hamilton's doctrine had been accepted authorizing the federal government to enact regulations for the general welfare and common interests of the United States and if the authority granted to the federal government to regulate interstate commerce and grants of similar powers had been given a broad interpretation, the general effect would have been to extend gradually the powers of the federal government and to delimit those of the states. Eventually Hamilton's belief that the states should become merely administrative districts would have been realized. The opposition to such a development came not only from those who supported the rights of the states as semi-independent sovereignties, but also from many who deemed the states an essential and ineradicable part of the system of government.

The doctrine which came to prevail has sometimes been called "Dual Federalism." This doctrine was best formulated by James Madison. In a criticism of the decision of Chief Justice Marshall in McCulloch *v.* Maryland,[10] Madison expressed the fear that the Supreme Court had sanctioned an unlimited field of legislative power for the national government. In a system having for its object the national welfare, he argued, everything is related immediately or remotely to every other thing, and consequently a power over one thing, if not limited by some precise restriction, may amount to a power over every other. The court's argument in favor of general sovereign powers in the federal government was answered by the contention that "there is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law or other

[10] 4 Wheat. 316 (1819).

ordinary statute, and expounding it with a laxity which may vary its essential character and encroach on the local sovereignties with which it was meant to be reconcilable." Thus there was formulated the canon of constitutional interpretation that *the coexistence of the states and their powers is of itself a limitation upon national authority.*[11]

According to this theory, the Constitution clearly envisages two spheres of governmental activity, that of the states and that of the United States; and while the national government is supreme when the two are in conflict with each other, such conflicts are considered as exceptional in the operation of the dual character of the federal system.

Dual federalism, then, is the principle which stands in the way of the conversion of a real federal system into what would practically be a unitary type of government by means of the extension of a few of the broad grants in the Constitution. And though there have been tendencies in the direction of the adoption of the Hamiltonian method of interpretation, the essence of the American system has been retained by insistence upon the dual federalism doctrine of James Madison.

A principle clearly stated in the Constitution is to the effect that the Constitution, laws, and treaties of the United States shall be the supreme law of the land. This principle has been taken to support the doctrine that the federal authority is superior to that of the states and that the Supreme Court of the United States is the final interpreter of this supremacy. The Supreme Court has uniformly supported the view that no state government can interfere with the exercise of any authority conferred upon the federal government by the Constitution, nor obstruct its officers, nor in any way interfere with the performance of duties by federal officers when acting within legal authority. All the powers not expressly or impliedly granted to the federal government are reserved to the states, which have control over private law, including the criminal law, and the civil law, comprising contracts and torts, personal and property rights, and domestic relations, as well as all internal affairs. The states have a wide range of powers which have been curtailed to a certain extent by the growth of a virile nationalism.

The Supreme Court and the Development of Nationalism

It is generally conceded that among all the features of the Constitution of the United States the Supreme Court is the most unusual

[11] Edward S. Corwin, "Congress's Power to Prohibit Commerce; a Crucial Constitutional Issue," *Cornell Law Quarterly* (June, 1933), vol. xviii, pp. 481 ff.

and its success the most noteworthy. But the Supreme Court was not an important body when the Constitution was formed and very few cases were brought to the court in the first years of its existence. The state courts were regarded as superior to the federal courts, and after ten years' service Chief Justice Jay resigned with the observation that he did not regard the office of sufficient importance to call for the ability of able men. Justices looking for preferment decided to accept positions on the state judiciaries instead of the federal courts. It was not until the accession of John Marshall to the bench and the announcement of the independent position of the court, with the right to declare legislative acts invalid, in the famous Marbury *v.* Madison Case,[12] that the Supreme Court began to establish its right and position as an independent branch of the federal government.

With the right asserted to a position independent from that of Congress, it remained for the Supreme Court to establish its power and authority as over against the state judiciaries and to uphold the powers of the federal government as against state action. This position was maintained in a series of striking precedents delivered by Chief Justice Marshall and other justices of the Supreme Court in the years from 1810 to 1825. Chief among these precedents are Martin *v.* Hunter's Lessee[13] and Cohens *v.* Virginia,[14] in which the Supreme Court resisted the right of final judgment in the state courts and thereby established the doctrine of federal supremacy in the determination of national constitutional questions. Other precedents of importance are McCulloch *v.* Maryland,[15] Brown *v.* Maryland,[16] Dartmouth College *v.* Woodward,[17] and Gibbons *v.* Ogden.[18]

In a series of epoch-making decisions the Supreme Court asserted the right to declare acts of Congress invalid when regarded as contrary to the Constitution. It had also pronounced and effectively maintained the right to set aside the laws of the states when those laws were regarded in conflict with some federal enactment. More important still were the announcement and the successful defense of the principle of implied powers. Though the cases in which the Supreme Court has interfered with the will of Congress are relatively few, the number of state statutes set aside by the court has been large; and an effective supervision has been exercised over state

[12] 1 Cranch 137 (1803).
[13] 1 Wheat. 304 (1816).
[14] 6 Wheat. 264 (1821).
[15] 4 Wheat. 316 (1819).
[16] 12 Wheat. 419 (1827).
[17] 4 Wheat. 518 (1819).
[18] 9 Wheat. 1 (1824).

legislation affecting taxation, commerce, and business, and such acts as arbitrarily interfere with rights of person or property.

Within recent years, an extraordinary development of the authority of the Supreme Court has come through the extension of the clause of the Fourteenth Amendment relating to due process of law and the equal protection of the laws. This clause, although originally strictly interpreted by the Supreme Court as intended to apply to the protection of the Negro race, was gradually extended to include the protection of all citizens and corporations from any unjust or oppressive act which interfered with life, liberty, or property. The amendment has thus come to be a device by which the court maintains a censorship over state governments as to the justice, fairness, and equity of state legislative acts.

Finally, Congress and the Supreme Court, under the commerce clause, have given an impetus to the growth of nationalism. Commerce, originally interpreted to apply merely to navigable waters over which Congress might legislate, has been extended to the control of the sources of these waters, particularly as affected by irrigation, and to the preservation of forests. The term has also been extended to include a prohibition of the manufacture and sale of certain articles, such as lottery tickets and narcotic drugs. By the passage of the Interstate Commerce Act, the Sherman Anti-Trust Act, the Federal Trade Commission Act, and a series of acts carrying out the policy of "The New Deal," along with the decisions of the Supreme Court supporting control of commerce, economic and commercial relations in the United States are in the process of being placed gradually under the federal government. It seems to be merely a matter of time until the United States will be in a position to establish complete and uniform commercial regulations affecting all organizations and individuals engaged in commercial transactions involving more than one state.

If Congress can decide what shall proceed in the course of interstate commerce and what shall be prevented access thereto, and can thoroughly regulate all articles and means of transmission through the channels of commerce, the powers of the states which to Madison were essential to the federal system itself would be seriously curtailed. And if the proposals in recent legislation were fully carried into effect, it is doubtful whether much of the dual federalism principle would be retained. According to the theory of such men as the late President Theodore Roosevelt and former Senator Elihu Root, the United States Constitution should be expanded through legislation and interpretation as the needs of the time demand, and those things should be nationalized in which national control seems necessary. "I declined," Roosevelt said, "to adopt this view that what was im-

peratively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power but I did greatly broaden the use of executive power. In other words, I acted for the common well-being of all our people whenever and in whatever measure was necessary, unless prevented by direct constitutional or legislative prohibition."[19] At any rate, it has been determined by continued practice that the Constitution may grow and expand without formal amendment, and that federal powers may be extended by the process of interpretation to include federal regulation of matters formerly belonging to the states.

In addition to the federal laws which center primarily around commerce and business relations among the states, the power of the national government has been strengthened and extended by the passage of acts relative to subjects not within the scope of congressional action a decade or two ago. The federal government, except in time of war, formerly raised its money through tariff and internal duties, but the enactment of the income tax and inheritance tax acts broadened its revenue-raising power. The control of food and drugs, at one time considered a local, if not entirely an individual matter, passed to a certain extent into the hands of the central government when the Federal Food and Drug Act, as well as the Meat Inspection Act, went into effect. Beginning with the National Bank Act of 1863, the federal government began a form of control over banking investments and currency which has been greatly expanded by the World War and subsequent developments.

Another type of national legislation is that which aims, by granting subsidies or by rendering other assistance, to stimulate action on the part of the states in handling affairs which heretofore have been regarded as only of local concern. Examples of such acts are the Morrill Acts which provide for agricultural education, and the Vocational Education Acts, as well as the Federal Good Roads and Public Health Acts. Laws which provide for subsidies affect the relation between the nation and the states to a greater extent than is likely to be the case in federal legislation which offers no financial aid. Subsidies carry with them requirements and obligations on the part

[19] William Howard Taft, *The Presidency: Its Duties, its Powers, its Opportunites, and its Limitations* (Charles Scribner's Sons, 1916), pp. 125, 126.

of the state which accepts assistance, and the administration of the particular activity is usually placed, to a certain degree at least, under the control of the nation. The acts to which reference is here made are examples of national legislation, which within the last few decades and especially the last decade has deviated from the course originally prescribed by the Constitution. They serve to show the general tendency of the national government to extend its powers and to encroach on functions formerly exercised by the states.

Legislation enacted in the first year of the administration of Franklin D. Roosevelt is to a considerable degree also predicated upon the basis that it is the function of the federal government to promote the general welfare of the country, and in so doing to undertake functions which normally belong to the states. Whether the trend in this direction is a temporary one as an incident of a serious economic depression, or whether it is indicative of a permanent shift toward greater centralization in the administrative and financial phases of government operation the future alone can give an answer.

American Federal Government Compared with Other Federal Systems

In the determination of the relation between state and federal authorities the various federal systems follow different lines of procedure. The national government, both in the United States and in Australia, is granted enumerated powers which are specifically defined in the Constitution, and the reserved powers are left with the states. In Canada, in order to avoid difficulties which led to controversies in other federal systems, the framers of the British North America Act granted wider powers to the national government. The federal government and each of the provinces in Canada have certain enumerated powers and a group of unenumerated or residuary powers, with a general grant to the Dominion "to make laws for the peace, order, and good government of Canada." In all of the recent federations more powers are granted to the federal authorities. Australia, for instance, places under national control telephone and telegraph services, banking and insurance, marriage and divorce, invalid and old age pensions, and conciliation and arbitration, though some of these fields such as marriage and divorce have not been brought under the control of the Commonwealth. Whichever plan has been adopted—that of enumerated or that of general powers in the national government—there has been a tendency to extend federal authority and to have the national powers grow at the expense of those of the states. So marked is this tendency that some believe that the federal form of government is merely temporary and that

national governments will eventually absorb the powers of the local divisions. This would make the states merely administrative districts, doing away with independent and separate political organizations.

Canadian Federal System.—There are certain important differences between the federal system of Canada and that of the United States. In the first place, an attempt was made to distribute more fully the powers between the federal parliament on the one hand and the provincial legislatures on the other. There was to be no reserve of legislative power vested as in the United States, in the people, the whole area of self-government being covered, as Lord Haldane asserted, subject to a few minor exceptions. At the time of the framing of the Canadian constitution, there was a strong bias toward a unitary system of government. And through the provision that the Dominion could enact and enforce laws made "for the peace, order, and good government" of the Confederation, it was deemed that conflicts over jurisdiction could ultimately be resolved in favor of the Dominion. For the first few decades the British North America Act was interpreted to place the Dominion legislature in a dominant position. But in a series of decisions by the Judicial Committee of the Privy Council, which acts as a final court of appeal on constitutional questions, it was held that "peace, order and good government of Canada" was confined to matters arising out of some extraordinary national peril, where legislation may be required beyond provincial competency.[20] From this and similar reasoning it appears to follow that the real residuum of powers, except in cases of national peril and calamity, either rests with the provinces under their exclusive power over "property and civil rights in the province," or is unprovided for in the British North America Act.[21]

In the second place, through the appointment of the lieutenant-governors of the provinces by the government of the Dominion and the power to disallow provincial acts, there was supposed to be sufficient central control over the provinces to keep them subordinate to the central government. And during the early years of the Confederation both of these powers were used to assert control over the provincial governments. Provincial acts were disallowed or vetoed if regarded as unjust, unsound in principle, or destructive of private rights. But gradually this practice has almost ceased to be exercised, provincial acts being regarded as valid unless checked by the courts under the formal procedure of judicial review. Furthermore, the lieutenant-governors, instead of becoming instruments of the federal government to carry out national policies in the provinces, have come

[20] See *In re* Board of Commerce Act [1922] 1 A. C. 191.

[21] "Law and Custom in the Canadian Constitution," *Round Table* (1929-1930), vol. xx, pp. 143 ff.

to enjoy an authority and independence within the scope of their power comparable with that of the Governor-General as the executive of the Dominion. In the third place, the Canadian constitution does not contain a bill of rights or similar limitations on legislative powers. There is no special realm of protection to the individual or to property interests, such as are comprised within the so-called guarantees of civil liberty in the United States. This characteristic is referred to as the omnipotence of the Canadian legislatures within their respective spheres, and is frequently commended as one of the best features of the Canadian government.

When the Canadian constitution was formed there was a strong sentiment in favor of creating a real and effective national government. Fear of possible invasion or interference from the United States seemed to render strong government necessary. In the course of time as this feeling has disappeared there has been a tendency to accord greater powers and authority to the provinces. As a result of this change of sentiment certain matters which would normally come within the range of the Dominion are permitted to be determined by the provinces. In place of the strong pressure which prevailed for unification, there is now a tendency to urge and support provincial autonomy. This point of view accounts in part for the fact that the power of disallowance of provincial acts is practically inoperative. In practice there has grown up a usage which virtually prohibits the Dominion government from exercising its constitutional power of disallowance.

As in the United States, judicial decisions, political customs, and unwritten rules and regulations have wrought profound changes in the Canadian system of government. An observer of the course of development in the United States and in Canada points out: "The American republic began with a theory of state rights. Today, we watch the ever-increasing growth of federal power. Canada began its political existence with the scales heavily weighted in favor of the central authority. Today, the Canadian provinces enjoy powers greater than those of the states of the American Union. In both federations the most cherished aims of the founders have been nullified."[22]

Australia.—The constitution of Australia establishes a federal form of government with a combination of American and Canadian features.[23] A government of limited and enumerated powers was established, with the parliaments of the states retaining the residuary

[22] *Ibid.*, p. 144.

[23] Cf. C. G. Haines, "Judicial Review of Legislation in Australia," *Harvard Law Review* (April, 1916), vol. xxx, p. 595.

powers of government. In this respect, the American, rather than the Canadian, plan is followed. There is no general supervision of the state in the exercise of the powers belonging to it as is enjoyed by the Dominion government over the provinces of Canada. Declarations of individual rights and the protection of liberty and property against the government, such as exist in the United States, are conspicuously absent from the constitution; the individual is deemed sufficiently protected by that share in the government which the constitution insures him. The theory of the separation of powers after the model of the United States was adopted, but with certain well-understood limitations and modifications. In the distribution of powers, the Australian constitution is more specific than the Constitution of the United States.

The establishment of judicial review of legislation by the High Court as to federal constitutional questions is the most striking feature of the Australian constitution. On this point the citizens of Australia decided to follow the American model, and despite the determined opposition of the home government, they have persistently maintained the right to have the final interpretation of the Australian constitution vested in the judges of the High Court. With no detailed bill of rights containing numerous reservations of government powers, and with no general clauses like "due process of law" to guide the courts, the judges of Australia have much less opportunity than the judges of the United States to pass upon the validity of legislative acts.

During the early years of the Australian federation, the High Court rather jealously maintained the rights of the states. To this end the justices adopted Chief Justice Marshall's reasoning in McCulloch *v.* Maryland,[24] to the effect that the Commonwealth government could not tax the instrumentalities of the state governments. But when in 1920 immunity was sought for state trading concerns, the former decision was reversed.[25] Federal instrumentalities are now protected from taxation by the constitution, but the states are liable to encroachments from the federal government. On the other hand, a principle which has caused the Supreme Court of the United States much concern and which has become a formidable obstacle to the development of an equitable program of taxation has been discarded as a feature of Australian federalism. As in the United States the pressure of nationalizing forces has seriously threatened the equilibrium between the states and the Commonwealth. Conferences of premiers or other representatives, like those held by the governors of the Amer-

[24] 4 Wheat. 316 (1819).
[25] Amal. Soc. of Engineers *v.* Adelaide S. S. Co., 28 C. L. R. 129.

ican states, meet frequently to discuss and reach agreements on matters of common concern.

The sentiment toward a unitary form of government appears to be gaining ground in Australia. A royal commission appointed to investigate the powers of the Commonwealth and the working of the constitution supported the federal system in its report, but by a divided vote—four favoring a federal and three a unitary system of government. The minority suggested a plan by which all major national questions could be dealt with by a central parliament, with the administration of federal laws as well as matters of local import to be carried out by local agencies. It is as yet uncertain whether the federal form of government can be adjusted to meet the needs of the people of Australia.[26]

Switzerland.—A constitution which is of peculiar interest to citizens of the United States and one which exhibits some marked contrasts with the American federal system is that in operation in the republic of Switzerland.

The Swiss constitution is a longer document than the Constitution of the United States, largely because the powers of the federal government are defined in greater detail and the division of powers between nation and states is more explicitly stated. For this reason, maintains Professor Brooks, "such controversies, constitutional, political, and economic, as have raged about these subjects in our country would be impossible in Switzerland. Americans are accustomed to make a great deal of the distinction between 'express' and 'implied' powers. Of the Swiss Constitution it may be said that much of the power it confers is expressed, and correspondingly less implied, than is the case with the Constitution of the United States."[27]

Considerable power has been conferred upon the federal government in the provision that "in case of differences arising between cantons, the states shall abstain from violence and from arming themselves; they shall submit to the decisions, to be taken upon such differences by the federation."[28] The satisfactory settlement of a number of important controversies involving internal disturbance and conflicts between cantons has demonstrated the efficacy of this provision and has shown federal intervention to be more successful in Switzerland than in the United States.

One of the marked differences between the American and Swiss federal systems is found in the distribution of administrative func-

[26] See A. P. Canaway, *The Failure of Federalism in Australia* (Oxford University Press, 1930).

[27] R. C. Brooks, *Government and Politics of Switzerland* (World Book Company, 1918), pp. 48-49.

[28] Article 14.

tions. Though it is true that certain functions are wholly federal and others belong entirely to the cantons, the general principle which prevails in the United States and which draws a sharp line of demarcation between federal functions executed by federal officials and state functions executed by state officials, does not exist in Switzerland. Instead are found, in the words of Professor Brooks, "many curious and involved combinations of federal and cantonal actions."[29]

Notwithstanding the functions which the federal government shares with the cantons, there are many administrative powers which are exercised exclusively by the former. And these powers have been augmented by the recent tendency on the part of the federal government to enter the fields of business projects, and by the enactment of social insurance laws. But the centralization of administrative powers in the federal government has been accomplished largely through the compromises made with the cantons in the way of sharing the profits from the alcohol monopoly and from revenues administered by federal officials.

The constitution of Switzerland also places greater legislative power in the federal government than does the Constitution of the United States. Among these powers are legal jurisdiction over criminal and civil affairs, the right to impose export as well as import duties, the control of the construction and operation of railroads, and unrestricted jurisdiction over commerce. Furthermore, the legislative power of the central government is extended over federal monopolies, such as telegraph, telephone, railroads, gunpowder and alcohol, and includes the subsidizing of institutions of higher education.

The intertwining of the administrative functions of the federation and the cantons indicates a practice of cooperation which, in some of its features, is worthy of careful study in the United States, where separate officials are necessary for the administration of federal, state, and local functions. As is the case in the United States, the cantons are supreme as far as their powers are not limited by the federal constitution, and they exercise all the rights which are not delegated to the federal government. Furthermore, by the constitution "the federation guarantees to the cantons their territory, their sovereignty, within the limits fixed by Article 3, their constitutions, the liberty and the rights of the people, the constitutional rights of citizens, and the rights and powers which the people have conferred on those in authority."[30]

Federalism in Europe.—To a certain extent the federal principle has been followed in the somewhat tenuous arrangements which

[29] R. C. Brooks, *op. cit.*, p. 59.

[30] Article 5.

have been adopted in establishing the relations between the British government and the Self-Governing Colonies. A status which rests on convention rather than on law was defined by the Balfour Report of 1926 as follows: "They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another, in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations." The principle of independence of the Dominions was recognized in the proviso of the Balfour Report: "It would not be in accord with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom in any matter appertaining to the affairs of a Dominion against the view of the Government of a Dominion." Accordingly it was agreed that the power of disallowance or veto can no longer be exercised in relation to Dominion legislation.[31]

Recent constitutions adopted in Europe have been based on the principle of unitary organization of government, with the exception of those of Germany and Austria where a partial type of federalism was approved. The continental plan of federalism was followed, by which most of the important phases of legislation are granted to the central government, with powers of administration primarily residing in the states. Though under such a plan duplication of administrative machinery is avoided and laws are administered by officials who are familiar with conditions in the several communities, it involves a subordination of the local governments to the national authorities in striking contrast with the independent position of the states in the American and British forms of federalism. "The serious inroads which have been made by the central government upon the legislative competence usually assigned the local jurisdiction," notes Professor Zurcher, "has produced a relationship between the center and the part not unlike that existing in the unitary regime."[32] Under the Hitler regime in Germany, the Länder have become in fact only administrative provinces of the central government.

[31] Cf. Robert A. Mackay, "Changes in the Legal Structure of the British Commonwealth of Nations," *International Conciliation* (September, 1931), no. 272. It has been reserved to the Anglo-Saxon race, claims Professor Adams, "to be the first to demonstrate the possibility of an empire, embracing wide varieties of conditions and interest, but maintaining a single, firm, and everywhere efficient government while leaving all distinct divisions independent but absorbed in the national whole, in which they have their proper voice and share. This is the democratic solution of the problem, and this is federal government." George Burton Adams, *The British Empire and a League of Peace* (G. P. Putnam's Sons, 1919), p. 55.

[32] Arnold John Zurcher, *The Experiment with Democracy in Central Europe* (Oxford University Press, 1933), pp. 43, 44.

A rather unique proposal to apply the federal principle in a more extensive way to the adjustment of international difficulties was involved in the memorandum which M. Briand, as Foreign Minister of France, submitted to twenty-six governments of Europe, suggesting the organization of a European federal union. Among European peoples a federal bond was to be established which would facilitate immediate contact for the discussion and solution of common problems. The union was to be based on the doctrine of absolute sovereignty and the complete political independence of the separate states —a condition which would have rendered a real union impossible. But the European nations were unwilling to take even the preliminary steps toward union which Mr. Briand proposed and have turned rather to the direction of a more insistent nationalism.[33]

Though federalism as a political principle has aided in the unification and development of a number of states, it has not fulfilled the high hopes of its advocates during the nineteenth century. In 1863 Proudhon declared: "Only federalism can solve in theory and practice the problem of an adjustment between the principles of liberty and authority by leaving to everyone his proper sphere, his true competence, and his full initiative." It was thought that federalism would replace compulsion by central authorities with reciprocity, understanding and adjustment. When pluralistic ideas of political organization were popular federalism was lauded as combining pluralistic tendencies with the regulative principle of solidarity.

Problems of Federal Government

Notwithstanding the success with which the federal system of government has met in such countries as the United States, Switzerland, Canada, Australia, and certain South American countries, it is still a problem whether federalism is a permanent or a temporary form of government. The tendency in federal systems, with but few exceptions, for the central authorities to gain powers and to extend their jurisdiction at the expense of the states appears to bear out the contention that federal government tends toward unitary government. In this respect the states become more in the nature of administrative districts and less of independent and autonomous government units. It has been well said that "the phase of sentiment, in short, which forms a necessary condition for the formation of a federal state is that the people of the proposed state should wish to form for many purposes a single nation, yet should not wish to surrender the in-

[33] For data on a European federal union, see Bulletins, *International Conciliation*, June, 1930, and December, 1930.

dividual existence of each man's state or canton."[34] But the political and economic conditions which formerly tended to separatism and states' rights have been profoundly modified by modern industrial developments. The interests of separate states are becoming so intertwined with the welfare of other states that the sentiment of nationalism practically everywhere gains a dominant interest. This does not mean, however, that federalism need disappear. In fact, the extraordinary growth of government functions makes it necessary to maintain and foster the active participation of local units in political affairs.

According to Professor Dicey, the three leading characteristics of federalism are:

1. The supremacy of the constitution.
2. The distribution among bodies with limited and coordinate authority of the different powers of government.
3. The authority of the law courts to act as interpreters of the constitution.[35]

In amplification of these characteristics it is contended that federal government requires something in the nature of a formal written constitution which stands above ordinary law and serves to delimit the relative spheres of the nation and the states. The more clear and explicit this delimitation is made, the less likely that serious controversies will arise which may interfere with the stability of the federal regime. Other federal governments have profited by the defects of the American system in this respect and more care has been exercised in the definite distribution of governmental functions.

The third characteristic, the authority of the courts to act as interpreters of the constitution, is not an invariable requirement of federal government. American courts have greater authority in this respect than those of other federal systems, although the courts of Australia and Canada are charged with the duty of keeping watch that the limits prescribed by the constitution are preserved. The Swiss people after a careful review of American experience discarded the judicial prerogative to expound the constitution in favor of interpretation by the legislature.[36] Though federalism requires something in the nature of a written instrument in which the spheres of governmental functions are carefully delimited, the upholding of the constitution and the preservation of these limits may be placed in the hands either of the judiciary or of the legislature.

[34] A. V. Dicey, "Federal Government," *Law Quarterly Review* (January, 1885), vol. i, p. 81.

[35] *Ibid.*, pp. 82 ff.

[36] See Constitution, Article 113.

Some of the defects of federalism were becoming increasingly apparent at the same time that enthusiasts were urging the adoption of the federal principle for national and international organization. The growing complexity of political functions often led to an overlapping of functions and a confusion as to the purposes to be accomplished as between central and local authorities. Owing to the necessities of the situation, the distribution of authority between national and local units in a federal system must be definite and detailed. This requirement leads to the formation of an excessively rigid mold into which political action must be poured, and the distribution of powers frequently leaves gaps which render government impotent to cope with conditions calling for urgent and untrammeled action. Though there is a lack of unity and effectiveness in public administration in a federal system, the federal principle is by no means particularly favorable to autonomous action by local political divisions. The notorious "twilight zone," as it was called in the United States, whereby corporations could engage in interstate business with relatively little regulation by either state or federal agencies indicates the weakness of a distribution of powers which lacks in definiteness and comprehensiveness. It appears to be a characteristic of federal systems of government to avoid straight-forward and direct attacks on economic and industrial problems. The usual division of powers between governmental agencies offers special opportunities for private interests to protect themselves against the inconveniences of political control. Issues of social policy are likely to be suppressed or confused with arguments on constitutional law.

It has been practically impossible to arrange a satisfactory distribution of powers in dealing with the intricate problems of modern economic and industrial life. Either the powers and functions overlap, with resulting conflicts and confusion, or a meticulous separation leaves areas of public regulation outside of the constitutional allocations, with so-called "spheres of anarchy." The presumed advantage of a federal form of government in permitting experimentation and the adaptation of laws to local circumstances is in part counteracted by the influence of competitive practices tending in the direction of unreasonably low standards. Though there are indications in most federal systems which point to the broadening and strengthening of national powers and the consequent reduction of the functions of the states, there are still good reasons to believe that the federal form of government has proved the best plan yet discovered to secure unity and efficiency in national affairs and to retain a virile and active local self-government.

SUPPLEMENTARY READINGS

Burgess, John W., *Political Science and Constitutional Law* (Ginn and Company, 1902), vol. i, book ii, chap. iii.

Thompson, Walter, *Federal Centralization* (Harcourt, Brace and Company, 1923).

Laski, Harold J., *Grammar of Politics* (Yale University Press, 1919), chap. vii.

Kennedy, W. P. M., *The Constitution of Canada* (Oxford University Press, 1922).

Kerr, D., *Law of the Australian Constitution* (Carswell Company, 1925).

Finer, H., *Theory and Practice of Modern Governments* (Dial Press, 1931), especially vol. i, chaps. ix and x.

Report of the Royal Commission on the Constitution of the Commonwealth, Australia, 1929.

Canaway, A. P., *The Failure of Federalism in Australia* (Oxford University Press, 1930).

Smith, Herbert Arthur, *Federalism in North America* (The Chapman Law Publishing Company, 1923).

Rowe, Leo S., *The Federal System of the Argentine Republic* (Carnegie Institution of Washington, 1921).

Brooks, Robert C., *Government and Politics of Switzerland* (World Book Company, 1918).

Buell, Raymond Leslie, *International Relations* (Henry Holt and Company, Inc., 1929), revised edition, chap. x.

Zurcher, Arnold John, *The Experiment in Democracy in Central Europe* (Oxford University Press, 1933).

Vinacke, Harold M., *International Organization* (F. S. Crofts & Co., 1934), chap. iv.

CHAPTER IX

FORMS OF GOVERNMENT (*Continued*)

THE relation of the executive, with its divisions and departments, to the representative assembly constitutes one of the greatest problems of modern democratic governments. In order to appreciate and understand the difficulties involved in the organization of the legislative and executive departments in their relation to each other, it is necessary to describe in detail the essential features of the two leading forms of representative and democratic government. The one form, the parliamentary system, is exemplified in England, Canada, Australia, and South Africa; the other form, the presidential system, is found in the United States and in a number of the South American countries. Each of these forms has certain principles which can be clearly understood only by means of comparison. As the tendency in democratic countries has been in the direction of parliamentary government, it seems desirable to present first the features and principles of this form. By so doing, not only the presidential system of the United States is rendered more intelligible, but also certain recent changes and modifications are explained. Parliamentary government is the forerunner and prototype from which other forms of democratic government have developed.

THE PARLIAMENTARY SYSTEM OF GOVERNMENT IN ENGLAND

Parliamentary government had its origin in the long contest in England between the King and the representatives of the nobility and of the landed estates. These representatives, with the higher nobility in the House of Lords and the lesser nobles in the Commons, as defenders of the rights of the people set an effective check upon the exercise of the royal prerogatives by the King. Under the leadership of a few strong Ministers who had the support of the nation, the rights of the monarch were gradually reduced, the participation of the people in the government was extended, and the cabinet or parliamentary system was evolved. Parliamentary government in England is conditioned by the customs, conventions, and understandings which are commonly referred to as the English constitution, and which are not embodied in a single written document.[1] The English constitu-

[1] For details on English constitutional development, see Frederic Austin Ogg, *English Government and Politics* (The Macmillan Company, 1929), chaps. i

tion is nothing more than a convenient name for those acts, customs, and conventions by which, for the time being, the various departments of government are guided. In theory, the government of England is the rule of the King, Lords, and Commons, and acts are not regarded as binding unless all three of the powers combine in sanctioning them. Exceptions to this are money bills, which no longer require the assent of the House of Lords; and other bills which may become laws without the Lords' consent, provided they are passed by the House of Commons in three successive sessions. Moreover, the King has ceased to exercise the veto power, and participates only indirectly in legislation by advice and counsel before laws are enacted by the Houses of Lords and Commons. The practices and conventions which have come to be known as the parliamentary system will be thus briefly summarized.

Legislative and Executive Departments Combined.—The Cabinet is at the head of the government and is the director of the affairs of the King, Lords, and Commons. The Prime Minister is the real executive. All acts of the King must be countersigned by a Minister, the Minister becoming responsible for the act. The ultimate responsibility rests with the Prime Minister and the entire Cabinet. Cabinet members as department heads have extensive functions. For this purpose, each Cabinet member must have a seat in Parliament, and it is his duty:

1. To direct one of the great departments of government as an executive and administrative officer.
2. To participate in legislation by preparing bills and supporting them before the Cabinet and in Parliament, and in general to guide legislation within his province.
3. As a confidential adviser of the Crown, to help formulate national policies, and as a member of the Cabinet to uphold the government.

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and ii. Explaining the English constitution, Professor Ogg says: "What, then, is the English constitution of today? Briefly, it is the general body of rules and principles controlling the distribution and regulating the exercise of governmental power and defining the relations of the governing authorities with the people. Some of these rules and principles have been reduced to writing. Indeed, as the practice grows of settling great disputes or problems in documents rather than merely by word of mouth steadily increasing proportions of the fundamental law take on written form; and to that extent Britain slowly approaches the position of a state with a written constitution. No attempt has ever been made, however, to bring together even the most weighty of the constitution's principles in a single document, or in a group of documents, and consequently the greater part is still simply carried in men's minds as precedents, decisions, practices, and habits." *Ibid.*, pp. 62, 63; by permission of the Macmillan Company, publishers.

All of these functions are performed under the direct guidance, criticism, and control of the House of Commons. "It is a cardinal axiom of the modern British Constitution," said Gladstone, "that the House of Commons is the greatest of the powers of the state."

The Cabinet a Directing Committee for the Majority Party.—The Prime Minister and the Cabinet lead the majority party and for the time being run the government in accordance with the principles for which the majority party stands. The minority is known as the Opposition. All of the acts of the government are looked upon as acts of a party which is responsible to the House of Commons, the House, in turn, being responsible to the electors of the nation. As long as the majority retains the confidence of its supporters, the Prime Minister and the Cabinet may continue in power. A dissolution of Parliament may be caused by a vote of a lack of confidence, in which case the Cabinet may resign and turn the government over to the Opposition or ask for a dissolution and a general election to determine whether the nation will support the Cabinet. The party sustained by the vote of the people takes charge of the government.

There is, then, in England the practical supremacy of the House of Commons, with the Cabinet as the directing committee and with the legislative and executive powers concentrated in the hands of Parliament and the Ministry. The organization and the procedure of the House of Commons, the most ancient and most important of the legislative bodies, differ materially from those of most legislative assemblies. In the first place, the assembly conducts its work in large part through the Cabinet as the directive committee, and hence the assembly is not split up into subcommittees as is customary in most legislatures. There are some committees, such as the committee on selection of officers and committees, and those which deal with private bills; but the greater part of the business of the House of Commons is considered and enacted in the committee of the whole, which means the entire House, with the result that public business is conducted largely under the direction of the Cabinet with the assent of the chamber.

The business of the House of Commons is greatly facilitated by the distinction made between public bills and private bills, for which there are differences in methods of procedure. Public and private bills are enacted by apparently the same procedure, but certain restrictions render the progress of private bills rather difficult and subordinate their consideration to that of public affairs. The chief restrictions are that these bills must originate in petitions and that they must be submitted in advance of the opening of the session. The progress of private bills is determined by stringent regulations, and fees are required from proponents and opponents. The most important legisla-

tion of a public nature originates with the Ministers and is entirely in their charge. Private members may bring public bills before the House, provided they are afforded a chance by the Cabinet to do so. In the meager allowance of time at their disposal, there is not much opportunity to urge the cause of private measures.

The control over the Cabinet by the House of Commons is in the form of questions, criticisms, and occasionally a vote of censure. In the main, the Cabinet conducts the executive and legislative business of the British Empire, subject to the public scrutiny of members of the House of Commons, who bring to the light of public opinion the grave matters of public interest involved in legislative and administrative procedure.

The Cabinet Acts in the Name of King.—No part of the English government is more difficult for the American to understand than the English Crown. While the government has grown more and more democratic, becoming increasingly responsive to the public will, the monarchy has increased in popular esteem. There are certain characteristics which belong to the English King which condition his power and position. In the first place, the nation has adhered to the early theory, established at the time when the King was both ruler and sovereign, that the King can do no wrong. To carry out this theory and apply it in a government which was becoming democratic in practice, it was necessary to provide that a Minister should become responsible for every official act. The result is that the King of England cannot move in an official way, cannot make an appointment or issue an executive order to participate in any act of government, without the assent of a Minister, who thereby becomes sponsor for the act and thus binds his associates, rendering the Cabinet responsible and, through the Cabinet, the House of Commons.

The name of the King is not brought into public controversies. He stands as an executive head above party lines. Within and behind the party, conditions are constantly arising which call into exercise royal advice and discretion. It is regarded as the function of the King to consult, to advise, and to warn. What part the King of England plays in this process is largely a matter of mystery, for in no way may his power and influence be publicly announced. There is no question but that he quietly and unobtrusively plays a much more prominent part in public affairs than the information which we possess would lead us to believe. Though in theory the prerogatives of the Crown include the right to participate in legislation, to make ordinances which have the force of law, to appoint a considerable number of officials and dignitaries, to act as head of the Established Church and of the army and navy, to "represent the Empire in all external relations and in all dealings with foreign powers, to declare

war, make peace, and conclude treaties," nevertheless none of these acts can now be performed except through a Minister, who thereby assumes responsibility for himself, his colleagues, and the government.

The most significant feature of the English Crown is that it is an institution which stands as a symbol of unity and an object of patriotic sentiment. All of the acts of the state issue through the name and under the authority of His Majesty. Loyalty to the King's person as concentrating and embodying the essential unity and purpose of the government is one of the great characteristics not only of English public opinion, but also of the Self-Governing Colonies and of the outlying territories and dependencies under the British dominion. The kingship has been a strong factor in binding the different parts of the Empire. The Canadians and Australians are intensely loyal. The former not only support the English King, but give great deference and adoration to his representative, the Governor-General, who resides in Canada. With all its limitations, the Crown fills a useful and important place in the cabinet system. And the office is not, as is often assumed in the United States, a mere title, but stands as the symbol of unity, permanence, and the endurance of historic traditions in a government which has by progressive steps become one of the great democracies of recent times.

The executive department of England centers around the historic organizations known as the Privy Council, the Ministry, and the Cabinet. Composed of members appointed by the Crown, the Privy Council is the central executive body to which all Cabinet members must receive appointment. The Council, however, as a body exercises few special functions and participates very slightly in governmental affairs. Government is conducted by the Ministry, which includes the heads of all the executive departments, and by the Cabinet, which is composed of those members of the administrative staff who are called upon to sit with the Prime Minister and to have a voice in the determination of public policies.

Under parliamentary government it is necessary not only that the executive and legislature be combined, but also that the courts exercise their powers and functions under the direction of this combined executive and legislative unit. They have no power to declare legislative acts invalid in England, and only a very limited power to do so in the Self-Governing Colonies. The courts become an adjunct through which the legislative and executive will is enforced. Courts are thus made subordinate to the other branches of government. It would be a mistake, however, to assume that the courts do not occupy an important place in the English system of government. It is their duty to protect the liberties of the individual from illegal interferences and

to guide all official acts along legal and established lines. The courts thus exercise a restraining power and a directive influence which is subject to reversal only by Parliament.

Cabinet Government Compared with Presidential Systems[2]

Formerly, political scientists were inclined to criticize the American theory and practice of the separation of powers in the federal and state governments and to commend instead the cabinet or parliamentary form of organization. Thus, Walter Bagehot, Sir Henry Maine, Woodrow Wilson, and Frank J. Goodnow, along with many others, pointed to the advantages of cabinet or parliamentary government over presidential government as developed in the United States.[3] A consensus of opinion was expressed by Wilson, who said that "as at present constituted, the federal government lacks strength because its powers are divided, lacks promptness because its authorities are multiplied, lacks wieldiness because its processes are roundabout, lacks efficiency because its responsibility is indistinct and its action is without competent direction."[4]

At one time the American plan of separation of powers was compared unfavorably with the French system, in which governmental powers were divided into two branches—a policy-forming branch or "Politics," and a policy-executing branch or "Administration."[5] On another occasion the tripartite system of the separation of powers was charged with responsibility for much of the political corruption prevalent in American politics.[6] The same theory of separation has often been condemned as requiring too many checks and balances and as involving a do-nothing policy for legislative and executive officers.[7] It has not been uncommon for practical statesmen, for teachers of government, and others interested in public affairs, to recommend the adoption of a modified form of cabinet government for federal and state governments in the United States.

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[2] The following pages have been taken in part from an article by Charles Grove Haines, "Ministerial Responsibility Versus the Separation of Powers," *American Political Science Review* (May, 1922), vol. xvi, with the permission of the editors of the *Review*.

[3] For an account of the President's powers and responsibilities, consult one of the standard texts on American government.

[4] Woodrow Wilson, *Congressional Government* (Houghton Mifflin Company, 1925), p. 318.

[5] Frank J. Goodnow, *Politics and Administration* (The Macmillan Company, 1900).

[6] Henry Jones Ford, *The Cost of the National Government* (Columbia University Press, 1910), chap. vi.

[7] Frederic C. Howe, "The Constitution and Public Opinion," *Proceedings* of the Academy of Political Science (October, 1914), p. 7.

Although the lack of direct connection between the legislative and executive departments of the federal government has resulted in such obvious weaknesses and incongruities that many public men have urged important modifications of the present arrangements, and although the same conditions were, in part, responsible for the failure of the federal government to deal effectively with the problems of peace and reconstruction, political developments of recent years have tempered somewhat the opposition to the American plan of separation of powers and have dulled the enthusiasm of the advocates of cabinet government. For example, it was freely predicted in England that even before the World War, cabinet government was breaking down and that something of a radical reorganization was necessary. The Cabinet, said Lord Lansdowne, "became an unwieldy body. . . . If only a few of them took part, the Cabinet ceased to be representative. If many of them took part, the proceedings tended to become prolix and interminable, and it is a matter of common knowledge that reasons of that kind led to the practice of transacting a good deal of the more important work of the government through the agency of an informal inner cabinet."[8]

It is a matter of common observation that the weaknesses of cabinet government revealed before the war were greatly augmented and resulted in an almost complete breakdown of the cabinet system during the war. The gradual evolution of the inner Cabinet and the construction of an imperial Cabinet left comparatively little of the former system in effect in the last years of the conflict. In the light of this experience Englishmen have seriously considered whether, with the former cabinet system restored, it would be advisable to provide that in time of war cabinet government should give way to a dictatorship modeled somewhat after the presidential office in the United States.[9] In other respects Englishmen have been considering some transformations of cabinet government which would bring their governmental machinery nearer to the form prevailing in America.[10]

Cabinet government, it is well known, has not worked satisfactorily in France, and some French writers have been uncompromising critics of the system. But these criticisms savored of an academic flavor until the trials of war and reconstruction emphasized anew the defects of this form of organization. From these experiences, as well as from the trend of politics prior to 1914, certain Frenchmen have

[8] J. A. R. Marriott, "The Machinery of Government," *Nineteenth Century* (December, 1920), vol. lxxxviii, p. 1086.

[9] A. V. Dicey, "A Comparison between Cabinet and Presidential Government," *Nineteenth Century* (January, 1919), vol lxxxviii, p. 85.

[10] Cf. *Report* of the Machinery of Government Committee, Lord Haldane, chairman (1918).

come to favor two proposals which would inaugurate in France a separation of powers modeled in certain essential respects after the American plan. The first of these proposals, expressed in the language of former President Millerand, is that the nation's will, "manifested by the voice of its representatives, needs, in order to be accomplished and respected, a free executive power under the control of Parliament." It was the express intention of President Millerand to participate on his own initiative in the foreign affairs of the nation and to exercise in other respects a "free executive power," a policy which, if it had met with success, would have changed the government of France in the direction of presidential government. Presidents have been either unwilling or unable to carry into effect Millerand's proposal, but many Frenchmen believe that a strong and forceful president is a requirement to assure stability and continuity in the administrative services.

The other proposal, also referred to in an address of President Millerand, is the establishment of an independent judiciary with the power to review legislation along lines similar to the practice of American courts. Those supporting this proposal are in control of the French government, and it is thought to be only a matter of time until either by amendment to the constitution or by judicial interpretation based on the former declaration of rights French courts will be exercising the power of judicial review of legislation.[11] Certain constitutional lawyers, such as Hauriou, insist that steps to establish judicial primacy have already been taken in decisions of French courts. With a free executive power and an independent judiciary, each modeled somewhat after the American system, the French government would no longer have real parliamentary government.

Different Theories of Separation of Powers.—The principle of the separation of powers in practice has resulted in three points of view and methods of interpretation which have led to different practices and procedure. These are the French theory, the English theory, and the American theory.

Although the government of France was affected by the eighteenth-century theories of the separation of powers and particularly by the proposal of Montesquieu in this connection, the interpretation of these early theories led to the proposition that courts ought not to interfere in the exercise of legislative powers and are not privileged to suspend the execution of the laws. The French have therefore denied to the courts the right and duty of passing on the validity of legislative acts, claiming that this would be an interference with the

[11] See Edouard Lambert, *Le Gouvernement des Juges et la Lutte contre la Législation Sociale aux États-Unis—L'expérience Américaine du Contrôle Judiciare de la Constitutionnalité des Lois* (Paris, 1921).

independence of the other departments. Under the present constitution France has continued this interpretation and has adopted parliamentary government, with the result that she is governed under what is known as legislative supremacy. But because the French system of government is based on the Roman civil law, and because Frenchmen are accustomed to methods and practices whereby executive and administrative officers perform a much larger part in the making and enforcing of law than is customary in Anglo-American countries, the legislature is much more limited in its scope of action and the administration consequently enlarged in its functions. In fact, in all countries which have adopted the Roman civil law as a basis for government, executive and administrative officers participate to a much larger extent in the forming of government policies than is customary in either England or the United States, having almost complete initiative in the framing of laws and in determining the details of administration. Although the legislature, in accordance with the principles of parliamentary government, is supreme in France, its supremacy applies to a more restricted field than in Anglo-American countries.

In England there has never been a clear and well-marked division of powers such as was suggested by Montesquieu. Since the development of parliamentary government and the assurance of legislative supremacy with the dominance of the House of Commons, legislation and administration have been combined to such an extent that no strict separation between these functions is practiced in the English government. The courts in England, although in the final analysis subordinated to the functions of making and applying the law, have, under what is known as the rule of law, a semi-independent status. They are privileged, unless specifically denied this power by the acts of Parliament, to restrict, limit, and, under certain circumstances, to set aside the acts of executive officers. Thus the English courts refused to allow the Crown to ignore certain well-accepted rules of international law or to appropriate for public use the private property of citizens without compensation unless authorization for such acts was specifically granted by Parliament.[12] Although the courts are not privileged to declare acts invalid, they may, by the process of interpretation, have a controlling effect on the application of the various branches of law in England. This exception does not seriously affect the general principle that England is ruled under legislative supremacy,[13] with the combination of legislative and executive pow-

[12] Cf. The Zamora [1916] 2 App. Cas. 77, and Attorney-General *v.* De Keyser's Hotel [1920] App. Cas. 508.

[13] For a consideration of the distinction between legislative and judicial supremacy, see chap. xv.

ers vested in the Cabinet and Prime Minister. The English system of government is government by a few—an executive committee—under an arrangement of direct responsibility and of constant pressure of public opinion.

The English system of cabinet government, modified in certain instances through French influence, has been adopted extensively in Europe and elsewhere. It is now in operation in the Self-Governing Colonies of Canada, Australia, and South Africa, and in Belgium, France, Netherlands, Norway, and Chile, and it has been partially applied in Denmark and Sweden. It has recently been incorporated in a modified form in some of the new constitutions of Europe. These constitutions usually provide for a president and premier, each exercising independent powers. Ministers become responsible for the political acts of the president. As under the parliamentary regime, they are given the privilege of the floor in the legislature to present and debate measures and, if members, to vote. They also prepare the budget and it is their duty to submit important bills to the legislature. The German constitution makes the executive an independent force in legislation and administration modeled in part after the Presidency of the United States. Subsequent developments have shown how easily, notwithstanding written constitutions, dictatorial powers may be assumed, as they have been in Italy, Hungary, Germany and in other European countries.

The theory of the separation of powers which was evolved in the United States assumes three more or less independent organs of government. Each of these organs is regarded as within its sphere to be beyond the control of the other organs. Each is assumed to have certain discretionary rights, privileges, and prerogatives. Since the powers and the duties of the legislative and executive departments are usually more clearly delineated, and since it is the duty of the courts, as developed in American practice, to define the limits of these authorities, the judiciary becomes the guardian of the liberties and privileges of the citizens when the powers outlined in the fundamental law are exceeded. The American principle of the separation of powers has prevented the combination of the legislative and executive departments which is characteristic of most European governments.

A marked difference between the American and the English-French systems arises from the fact that under cabinet government the Prime Minister and the other members of his Cabinet may be members of the legislature; whether members or not, they have the privilege of participating in the activities of the legislative body. In fact, the Ministers are expected to prepare legislation affecting their departments, to present the measures to the legislative body, and to defend them when under consideration. The peculiar theory adopted

in the United States has prevented this arrangement, with the result that, with the exception of the reading of the annual message to Congress by the President, he and his Cabinet officers cannot visit and participate in the proceedings of Congress and can only deal with the legislative body in an indirect way by appearing before committees, by sending communications, by trying to influence Congress through the press, or by patronage and other roundabout methods. A similar practice prevails in the state governments. In the American system the lack of unity in action and execution renders the processes of government invisible and makes the lines of responsibility indirect and covert. The contrast between the presidential and cabinet systems of government has been characterized by Professor Dicey as follows:[14]

The President is the real American executive, but his executive powers are limited by his being elected only for four years, by his being through unbroken custom not re-eligible for more than once; by the vast amount of power left to each of the states of the Union; by his having no right to dissolve Congress; by his having no legislative authority whatever,[15] except that of vetoing any bill when his objection thereto is supported by a minority of over one-third of either House of Congress. Cabinet government, on the other hand, means at bottom, and, as practiced in England, the fusion of the executive and of the legislative authority, and the power of the Cabinet in many circumstances to dissolve the Parliament which has created or supported it. A Cabinet, in short, supported by the House

[14] For a summary of the respective merits of each system, see A. V. Dicey, "Cabinet or President: A Comparison," *Nineteenth Century,* vol. lxxxv, pp. 30 ff.

[15] This statement fails to recognize the fact that Presidents always have considerable authority with respect to legislation in its formative stages and not infrequently exercise a dominant influence over Congress, and that the delegated legislative or ordinance-making powers of the President are now very extensive.

"As the business of the government becomes more and more complex and extended, . . . the President is becoming more and more a political and less and less an executive officer. His executive powers are in commission. . . . Only the larger sort of executive questions are brought to him. Departments which run with easy routine and whose transactions bring few questions of general policy to the surface may proceed with their business for months or even years together without demanding his attention; and no department is in any sense under his direct charge. Cabinet meetings do not discuss details. . . . If he is indeed the executive, he must act almost entirely by delegation, and is in the hands of his colleagues. He is likely to be praised if things go well, and blamed if they go wrong; but his only real control is of the persons to whom he deputes the performances of executive duties." From Woodrow Wilson, *Constitutional Government in the United States* (Columbia University Press, 1911), pp. 66-67, reprinted with permission.

of Commons which can also count upon the support of the electorate, has as much authority as can well fall to any government. It is, however, a kind of government which can never be secure of its existence unless it continues to have the support of the House of Commons, and this in modern circumstances cannot long be relied upon by any Cabinet which has definitely lost the support of the electors.

It is worthy of note that the familiar independent-unit, close-compartment plan of separation of powers was not incorporated in the early state constitutions, where the legislature was given a dominant position with the executive and the courts subordinate. Neither was the theory followed in the general plan of the national government which intermingles the powers at many points. The failure to incorporate a definite theory of separation in the Constitution left the way open, President Washington thought, to consult the Senate freely as an executive council. He also felt at liberty to secure the advice of the judges in advance of the formulation of government policies. Rebuffed in both efforts, owing to the curious notions of their privileges and prerogatives held by the legislators and the judges, Washington was obliged to accept a view of the separation of powers quite different from what he conceived the Constitution to establish. Similarly, the first state constitutions neither made definite provision for an independent judiciary nor included any obstacles to free consultation of executive officials with legislative departments. It was, then, not the laws and the constitutions of the eighteenth century which formally established a tripartite system which renders cooperation extremely difficult, but the peculiar concepts of independence held particularly by those in legislative and judicial positions.

The presidential system, as it prevails in the United States, is applied, with modifications, in certain Latin-American countries. Executives in these countries are given greater authority than is allotted in the countries with cabinet government. Where the constitutions attempt to establish parliamentary responsibility, this provision has been ignored in practice.

Intermediate between the cabinet and the presidential systems of government is the Swiss system, which places the executive authority in a board selected by the federal assembly and required to work through and with the assembly, but selected for a given term and not subject to removal by a vote of lack of confidence. Members of the federal council are usually members of one of the chambers and the relations between the councilors and the legislature are very intimate. As in other European countries, the councilors as ministers

take the initiative in preparing measures for consideration by the houses.

The question of the separation of governmental powers and their distribution among the various branches of government remains, then, one of the foremost issues of modern politics. A number of countries are in the process of adopting some form of cabinet government, whereas others are inclined, in part at least, to introduce certain features of the American presidential system. Each system appears to have certain advantages which appeal to the proponents of the other system. It will be well, therefore, to consider some of the issues which have arisen in connection with the distribution of powers and to discuss briefly their effect on the organization and administration of modern governments.

Issues Concerning the Distribution of Governmental Powers

Among these issues are the growth of executive powers and discretion, the decline of legislative authority in relation to the making and adoption of the budget, the necessity of government by permanent, professional officers with the consequent effect upon the making and the execution of the law, and the criticisms of parliamentary and representative types of government.

Growth of Executive Powers.—One of the striking facts with regard to the development of modern governments is the extent to which executive powers have been increased and executive discretion in the administering of law has been enlarged. This process has been carried to its greatest extreme, of course, in connection with war powers, under which government by law and by rule becomes in large part government by the wish and discretion of administrative officers and military leaders.[16] And modern dictatorial forms of government approximate if they do not exceed the practices of the war period in concentrating governmental forms in the hands of the executive.

The way a forceful leader is disposed to interpret executive discretion is shown in the following statement of Theodore Roosevelt:

> The most important factor in getting the right spirit in my administration, next to insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers. My view was that every

[16] See W. W. Willoughby and Lindsay Rogers, *An Introduction to the Problem of Government* (Doubleday, Doran and Company, Inc., 1921), pp. 95 ff., for a brief summary of the modifications of the rule of law in England during the great war.

executive officer, and above all every executive officer in high position, was a steward of the people, bound actively and affirmatively to do all he could for the people and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt this view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws.[17]

Though President Taft deemed this an "unsafe doctrine" and one which might lead to results of an arbitrary character, it is a doctrine which has not infrequently been acted upon by Presidents of the United States. It is one of the chief arguments for the extensive powers granted to the President in the emergency legislation enacted by Congress in the special session of 1933.

Furthermore, the modern practice of granting authority to the heads of departments to issue rules and ordinances, and to create various boards and commissions chiefly executive in character, but with powers that are legislative, executive, and judicial in scope, all tend to emphasize this fact, namely, that modern governments are going in the direction of greatly enlarged executive powers.[18]

Dean Pound, speaking of the tendencies in modern governments, has recently pointed out that, as far as the American governments are concerned, we have passed through three periods: first, one in which there was a tendency to place great responsibility and authority in the hands of legislative bodies; second, when the legislative bodies declined in power and esteem and many limitations were placed upon the exercise of powers, the judiciary, as the protector of constitutions and the guardian of these limitations, was given extraordinary powers and duties; and third, when legislative supremacy and judicial supremacy have declined and instead we find ourselves in the process of elevating to an extraordinary place the executive departments of the government. No doubt the process of shifting authority from one department to another will vary according to the peculiar conditions prevailing at certain times, yet the fact remains that the theory of the separation of powers in its former sense of real separation and independence appears to be applicable only to a primitive and undeveloped society. The modern complex and greatly expanded functions of government require an enormous extension of the executive

[17] William Howard Taft, *The Presidency: Its Duties, its Powers, its Opportunities, and its Limitations* (Charles Scribner's Sons, 1916), pp. 125, 126.

[18] Cf. John A. Fairlie, "Administrative Legislation," *Michigan Law Review* (January, 1920), vol. xviii, p. 18; and Roscoe Pound, "The Growth of Administrative Justice," *Wisconsin Law Review* (January, 1924), vol. ii, p. 321.

functions and a consequent limitation, by comparison, of the functions of the other two departments.[19]

Decline of Legislative Control over Budgets.—The passing upon the budget, which involves the voting of taxes and the appropriation of public money, was once regarded as the very essence of the power of legislative assemblies and the fundamental basis of representative government. To Edmund Burke, liberty from a governmental standpoint inhered in a large part in the control of the purse strings. But the situation has changed and the observation of Burke appears no longer to be applicable. The voting of appropriations and the levying of taxes by legislative bodies alone have resulted in what is commonly known as "pork-barrel" methods, logrolling, and governmental extravagance on a scale heretofore unknown. The recognition of this weakness in legislative-made budgets has in many countries resulted in the turning over of this function to the executive and in the placing of the responsibility for the making of the budget on the ministry.

The chief budgetary function of the legislature then becomes the turning of the light of publicity upon ministerial action. And even the function of publicity is being taken over by the press and other agencies. This practice has been carried to its furthest extent in England, where the Cabinet prepares the budget and where the House of Commons has in practice given up its function of making any changes in the items as prepared by the Ministry. The tendency has been to weaken the authority of the legislature in this field and to strengthen the position of the executive wherever an attempt has been made to increase governmental efficiency and to reduce the extravagance of legislative bodies in which individual members are dominated by private and local interests and by logrolling methods.

Necessity for Permanent and Professional Administrators.—The extraordinary enlargement of governmental functions and the increasing complexities of the problems involved in public administration have rendered it necessary to modify seriously many of the principles and practices applicable to primitive agricultural and undeveloped societies. The complexity of governmental operations and the many technical and intricate issues concerned have made it indispensable to secure for the operation of government a large number of specialists or professional officers. The advice and assistance of such experts, it is thought, can be secured to the best advantage when the processes of legislation and administration are combined. In most governments either the ministers or the officers connected with the government have control of the preparation of bills and their presentation to the legislative bodies. Executive initiative in this process

[19] For the weaknesses and limitations of the theory of the separation of powers, see also chap. xiv.

tends to place the matter under the control of professionals who develop standards and a technique of legislation with which the American practice compares unfavorably.

In England and in France a permanent and professional class of administrators has been developed who by training and experience are qualified to deal with the complexities of administration. To an increasing degree affairs of the federal and state governments in the United States are placed in charge of men and women professionally trained and who secure their positions on the basis of meritorious public service. Reference of intricate and complex governmental problems to advisory boards or committees before administrative policies or procedure are decided upon is now a common practice. Though the methods of securing these permanent professional administrators differ, the general result upon the conduct of public affairs is similar. It is rather difficult to secure and retain permanent and professional officials under a system of strict separation of powers and with the departments possessing independent authority.

Criticisms of Parliamentary and Representative Government. —The distrust and dissatisfaction with present legislative bodies is one of the noteworthy characteristics of modern political thinking. Representative government, which was once looked to as the panacea and as an indispensable requisite of the development of democracy, is now on trial. There is a profound dissatisfaction with the functions of representative bodies in countries like England and France, which have the parliamentary or cabinet systems, and there is the same and perhaps more serious dissatisfaction with legislative bodies in presidential countries, such as the United States. It is claimed that legislative bodies are not really representative; that certain classes only, chiefly the money and property and professional interests, are represented in existing political assemblies, and that the great mass of workers and other large classes are not represented. These objections are leading to a movement to create assemblies based upon industries and professions which would be given authority to deal with many of the questions relative to work, hours of labor, sanitary conditions, prices, wages, and matters of this kind which are not dealt with satisfactorily by the present political assemblies. Representative bodies, it is frequently charged, are inefficient, wasteful, or corrupt, and in some instances the claim is made that all three of these weaknesses are apparent in our present legislative bodies.

Tendencies Toward Dictatorial Types of Government

Modern representative assemblies and the parliamentary regime which developed through their operation have been subjected to at-

tacks so serious and so fundamental as to raise a major problem, sometimes called the crisis of the parliamentary system. The parliamentary system, after the English model, is in disfavor in the minds of increasing numbers in most European countries. Anti-parliamentarism has taken its definite shape in France where it may assume "the form of violent antipathy, supercilious disdain, or regretfully admitted criticism; but enthusiasm, or even mild popularity, seems not to exist."[20] Speaking of the present parliamentary system, Professor Larnaude of the University of Paris says: "It cannot continue. The parliamentary regime, as practiced, must reform or perish. If it does not reform itself it risks being replaced by a leap in the dark." And commenting on the solution of modern perplexing problems, he observes, "In regard to these difficulties we have never believed that a numerous assembly in which one speaks to the gallery and whose hall is made a place of public entertainment, could solve them."[21]

What are the reasons for this prevalent change in attitude toward representative bodies and parliamentary methods? As far as France is concerned, much of the opposition centers around the dominance of the legislature and certain objectionable practices which have developed in its operation. Some of these have been described as follows:

> There exists unlimited individual initiative of measures; there is no effective closure; and grand committees play an inordinate part in the legislative process. An imperfect machinery for dissolution has fallen into disuse. Parliament and its members do not hesitate to concern themselves with any or all of the details of administration. The chambers are almost constantly in session and there are often more than daily sittings. Much time is undoubtedly wasted. . . . Lack of discipline causes small groups rather than large parties to be the rule. Ministries must depend for support on various combinations of these groups rather than on a compact majority.[22]

Though many proposals for the reform of the French parliamentary regime have been thoroughly discussed, such as the reestablishment of a stronger executive, the revision of the election laws, and the improvement of legislative procedure, so far these and other suggestions have had only indifferent and ineffective support.

Professor Laski seeks to explain the grounds for similar views

[20] Cf. Robert K. Gooch, "The Anti-parliamentary Movement in France," *American Political Science Review*, vol. xxi (August, 1927), p. 553.

[21] *The Development of the Representative System in our Times* (Inter-Parliamentary Union, 1928), pp. 39 ff.

[22] Robert K. Gooch, *op. cit.*, pp. 563, 564.

regarding the weaknesses of the English parliamentary system. As he sees the situation, parliamentarism in England was based essentially upon two points of view or attitudes regarding private property and the relations of the government to industrial and social affairs, but both parties predicated as the basis of their policies and programs a fundamental condition of society involving the private ownership of the means of production and profit-making as the chief incentive for the *entrepreneur*. Neither of the parties has been willing or able to adjust the viewpoint to a condition of society tending in many respects in the direction of socialism. Both liberals and conservatives have had to give way to labor leadership at various times because of the inability to adjust their attitude to the social and industrial upheaval which has profoundly affected modern governments. The very nature of the rapid changes through which society is passing, Professor Laski observes, gives "decreased significance to historical representative institutions; it leads one to inquire whether political democracy has not, so to say, arrived too late upon the scene to control the total processes by which it is confronted. For the leisurely processes of parliamentary debate are far too slow for the requirements of economic decision; they tend merely to register agreements arrived at outside the legislative assembly."[23]

The unusual success of the British parliamentary system which made it a model for many other countries, Professor Laski believes, was due to the privileged economic position gained by Great Britain in the course of the Industrial Revolution. With the decline of that privileged position and with the growing insistence on the part of the laborers and other social classes for government aid, the fundamental background on which the parliamentary system rested has largely disappeared, and with it Parliament as an effectively functioning institution has lost much of its former high position and prestige. The chief difficulty with representative democracy, then, is deemed by Professor Laski to be the fact that the governing classes are not willing to alter the essential characteristics of capitalist society sufficiently to meet the insistent demands of classes seeking governmental aid and protection.

It is not surprising, then, that those who looked forward to the extension of the parliamentary system to all countries and who had faith in what seemed to be the universal progress toward democracy are "more than ordinarily perplexed" in viewing the present-day situation in Europe. With Mussolini ruling with an iron hand in Italy and ridiculing the decline of political liberty; with Russia pass-

[23] Harold J. Laski, "The Present Position of Representative Democracy," *American Political Science Review* (August, 1932), vol. xxvi, pp. 636, 637.

ing off the mere show and pretense of parliamentary government; with dictators ruling at various times in Spain, Poland, Jugoslavia, Austria and other countries, and with the gradual development of uncontrolled executive power in Germany, the gloomy warning of Lord Bryce seems to have been fulfilled. "Popular government," said he, after some of his early optimism regarding democracy had waned, "has not been proved to guarantee always and everywhere good government. If it be improbable, yet it is not unthinkable that as in many countries impatience with tangible evils substituted democracy for oligarchy or monarchy, a like impatience might some day reverse the process." The repudiation of representative or parliamentary government is one of the primary policies of Bolshevism, Fascism, and Hitlerism.[24] And the essence of democratic government and representative institutions, namely, the right to discuss public affairs freely, is destroyed by the dictators who control the usual channels and means for the expression of public opinion.

Though dictatorships vary, as they have arisen from markedly different conditions, they have certain characteristics in common, as described by Professor Spencer:

> . . . power, once seized, has to be maintained by extra-constitutional measures, a secret political police, and a military force. The latter may be the regular army perverted to dictatorial uses, or an extraordinary pretorian guard created by the dictator and owing him a special obedience. The sinews of such rule may be secured by favors to the wealthy, i.e., financial or administrative privilege, which may be compensation for sufferings under a post-war Red Terror, and sometimes goes so far as to constitute a vengeful White Terror. Sometimes, however, the dictator looks also to the Left and seeks popularity by a demagogic policy suited to the occasion, possibly anti-Semitism, sometimes even Legitimism combined with church orthodoxy. Frequently there is a policy which causes no internal opposition, a raucous, chauvinistic patriotism. National unity is made a fetich; order is secured by rigorous repression of dissenting thought.[25]

The crisis through which representative systems of government are now passing and the criticisms and attacks to which they are subjected require an analysis of trends and tendencies.

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[24] "In the parliamentary system the actual work of the state is done behind the scenes, and is carried out by the departments, the chancelleries and the staffs; Parliament itself is given up to talk for the special purpose of fooling the 'common people.'" N. Lenin, *The State and Revolution* (English translation), pp. 38 ff.

[25] Henry R. Spencer, "European Dictatorships," *American Political Science Review* (August, 1927), vol. xxi, pp. 548, 549.

Present Trends in Governmental Organization

As a result of rapid changes in economic and political conditions specially accelerated by necessary war and post-war adjustments, modern legislatures have been affected by the following developments: First, the increasing predominance of the executive is apparent, with the modern assembly itself ceasing to legislate on important matters, and merely approving measures prepared by the executive. Carried to the extreme, this tendency leads to a dictatorship with the legislature not actively participating at all in the processes of government or serving only as an agency to approve the dictator's program. Second, the influence and the prestige of private members have declined. Party discipline has been strengthened; debates are limited and often closed off arbitrarily. The complexity and multiplicity of business overwhelms the average member and makes him a willing follower. Frank, open and effective discussion of proposed measures seldom takes place. Third, there has been an extraordinary growth of administrative discretion. This tendency is indicated in the extension of the ordinance-making powers of executive and administrative officers. The change is everywhere significant, says Professor Laski, because "it increases the authority of the civil service to make each department a legislative machine in itself over which it is increasingly difficult for the central legislature to exercise either watchfulness or control. It should be added that this growth of administrative discretion is inevitable, but no proper safeguards against its abuse have been developed."[26]

Accompanying these major tendencies apparent in varying degrees in all countries are others of special significance, applicable to the United States and to certain European states. To an increasing extent members of legislative assemblies represent particular business or industrial groups or local interests. And to emphasize the same trend, almost every important interest which seeks legislation or political favors now maintains a staff of press agents and lobbyists not only to keep track of legislators but also to see that the interests of their organizations are duly fostered. In this atmosphere a member who owes his election to the efforts of a special interest is not likely to show marked independence in either speaking or voting.

All of these factors in the present situation are complicated by obvious results of modern political and economic developments which place most of the important issues to come before legislative as-

[26] *The Development of the Representative System in our Times* (Inter-Parliamentary Union, 1928), p. 9.

semblies outside of the range of information, ability and interest of any but a few of the members of any legislative assembly. When the railroads of the United States are to be rescued from bankruptcy, to be coordinated, and to be continued as effective instruments of transportation along with the motor carrier and the airplane, and when the question of retaining the gold standard or adopting a huge inflation scheme is to be determined even in broad outlines in a legislative program, how many legislators know enough about the intricate problems involved to take an intelligent part in the legislative process?

These and other problems which all governments have had to face have brought about a reexamination of the general organization and functions of government, whether presidential or cabinet in form. Numerous reports and investigations have been made, such as the Haldane Report in Great Britain, and reports by committees on the reorganization of administration in the United States, in which the present organization of the Cabinet and administrative functions and duties are criticized, with suggestions for reform. A few conclusions seem to follow from the reexamination which is under way. First, it is taken for granted that, whether the government is parliamentary or presidential, there will necessarily be a government by a few, either by a President and a Cabinet or by a Prime Minister and a Cabinet. It is also conceded that an elective body can serve effectively only as a board of advisers and critics, and that for this purpose the present large assemblies are cumbersome and unwieldy. A relatively small body elected for long terms on some plan of proportional representation, for which would be selected those who are familiar with local conditions as well as with some of the essential principles and practices of government administration, seems a requirement if government is to keep pace with the increasing complexity of the conditions with which it must deal. It is also realized that governments are acquiring new and more complex functions and that a large part of the time of those connected with the government must now be given to the collection of information, in the form of investigation and research, in order that legislative and administrative officers may deal intelligently with the very difficult problems that arise.

To meet this situation, the Haldane Report included among the suggested executive departments one on research and information. Perhaps an even better arrangement would be to have research divisions and bureaus connected with all the departments in proportion to the need of technical assistance and information. In the light of these principles the American theory of the separation of powers appears largely as a device for a policy of inaction—an excellent plan to encourage politicians to escape responsibility and to permit

private individuals and corporate organizations to defy public powers with impunity. In the words of a caustic foreign critic, if the desire is to secure an effective check on radical and progressive movements, if the intention is to place corporate organizations in an impregnable position as far as government regulation is concerned, the American theory of the separation of powers is undoubtedly a well-conceived device for this purpose.[27] From the standpoint of responsible government, the separation of powers stands as an obstacle which must be removed if the government of the United States is to make progress in the development of an efficient administration and is to be prepared to meet conditions both domestic and foreign. Recognizing modern trends, President Franklin D. Roosevelt in his message to Congress on January 3, 1934, spoke of the fine spirit of cooperation which characterized the special session of Congress during 1933, and then said: "Out of these friendly contacts we are, fortunately, building a strong and permanent tie between the legislative and executive branches of the government. The letter of the Constitution wisely declared a separation, but the impulse of common purpose declares a union."

A large part of this difficulty could be overcome if the President and his Cabinet were made directly responsible for the formulation of legislation in respect to the administration, and the Cabinet members were free at any time to appear and debate in the Houses.[28] It seems advisable, therefore, that the extreme form of separation of powers, such as exists in the United States, and which was largely the result of interpretation, be modified in order to make the government more responsible and more efficient. This could be done by

[27] See Edouard Lambert, *op. cit.*, p. 224.

[28] "Without any violation of constitutional limitation, Congress might well provide that heads of departments, members of the President's cabinet, should be given access to the floor of each house to introduce measures, to advocate their passage, to answer questions, and to enter into the debate as if they were members. This would impose on the President greater difficulty in selecting his cabinet, and would lead him to prefer men of legislative experience who have shown their power to take care of themselves in legislative debate. It would stimulate the head of each department to more thorough investigation into its actual operations and to closer supervision of its business. On the other hand, it would give the executive what he ought to have—some initiative in legislation, and an opportunity for the presence of competent representatives who could keep each house advised of facts in respect to the operation of existing legislation and to what is actually doing in the government, which it seems impossible for Congress easily to learn either through the investigation of committees or by formal request for papers and information. The time lost in Congress over useless discussion of issues that might be disposed of by a single statement from the head of a department no one can appreciate unless he has filled such a place." William Howard Taft, *op. cit.*, pp. 28-30.

a general agreement, just as the existing theory is largely based upon the peculiar conception of officers who were responsible originally for the interpretation and application of the state and national constitutions.

While defects in the present system of separation of powers and the lack of ministerial responsibility are apparent, it is significant, nevertheless, that certain advantages exist, such as the ready and easy concentration of power in time of war which the political leaders in foreign governments would like to adopt. And the American government need not abandon the essential principles of its separation of powers. Practices and procedure prevailing in the United States may be modified to secure easy and open access of the President and his Cabinet members to the Houses of Congress, and a more definite correlation of legislation and administration in the states. This can be done without breaking down the essential features of the existing governmental order, which despite its defects has commendable features. It is evident, from a comparison of the cabinet and presidential governments, that cabinet government can be improved by the application of principles which are a definite part of the presidential system, and that presidential government can be improved by taking advantage of the well-known practices which have proved successful in the countries with a cabinet government. Whether either of these forms of government will survive the trials and difficulties through which all political institutions are passing is not within the range of reasonable prediction. It is, indeed, obvious that any view which places confidence in the power of universal suffrage and representative institutions, unaided and of themselves, to secure a permanently well-ordered commonwealth is seriously underestimating the complexity of the issue.[29] But do modern tendencies portend, as some believe, the end of democratic and popular institutions, or do they merely represent abnormal conditions which in part will disappear as economic distress becomes less acute and to which popular government may gradually be adjusted so as to preserve its humanitarian and liberal features?

SUPPLEMENTARY READINGS

Lowell, A. Lawrence, *The Government of England* (The Macmillan Company, 1916).

Ogg, Frederic Austin, *English Government and Politics* (The Macmillan Company, 1929), chaps. iv-ix.

Willoughby, W. F., *The Government of Modern States* (D. Appleton-Century Company, Inc., 1919).

[29] Harold J. Laski, *op. cit.*, p. 629.

Finer, Herman, *The Theory and Practice of Modern Government* (Dial Press, 1932), chaps. xxii and xxiii.

Dicey, A. V., "Cabinet Government *vs.* Presidential Government," *Nineteenth Century* (January, 1919), p. 85.

Bryce, James, *Modern Democracies* (The Macmillan Company, 1921), vol. ii, chap. xxiii.

Taft, William Howard, *The Presidency: Its Duties, its Powers, its Opportunities and its Limitations* (Charles Scribner's Sons, 1916).

Zurcher, Arnold John, *The Experiment in Democracy in Central Europe* (Oxford University Press, 1933), chap. x.

Marriott, J. A. R., *Mechanism of the Modern State* (Oxford University Press, 1927), vol. ii, chap. xxv.

CHAPTER X

POLITICAL PARTIES

Political Parties in Modern Governments

Definition and Functions of Political Parties.—Modern governments in all but a few countries are under the control and direction of political parties. Political parties as we find them today are a comparatively recent phenomenon and have been an outgrowth of the increase of popular participation in public affairs. The electorates of modern democratic countries are formed into fairly well-defined groups of those who for various reasons think along similar lines and who unite into highly organized parties in order to secure control of the government. A political party, from the American standpoint, may be defined as a more or less permanent organization of individuals, or groups of individuals fluctuating in personnel and numbers, united by common principles and interests or a common policy, and having for its immediate end the control of government through the carrying of elections and the possession of office.

All countries accepting democratic institutions have found it necessary to form something in the nature of a party system, and constitutions frequently have made definite provisions for the cooperation of parties in government. The functions of political parties are many. In general, they are the means by which governmental action is obtained to meet the economic and social needs of the country. In particular, political parties are the agencies through which groups of people seek governmental assistance which will operate favorably toward their own individual needs or interests. Political parties are also the great policy-forming agencies in both a national and an international sense. The range of party functions, then, may extend from purely individual or group motives to those of broad, general policies such as questions of currency, transportation, regulation of economic interests and social welfare, and to those of international policies involving such matters as tariff, disarmament and war debts.

Many lines of human activity are directly or indirectly under government control or sanction. It is through political parties that citizens of a country are able to determine to what extent that control shall be exercised or what assistance the government may or may not lend to the specific interests of contending groups. The political parties through their leaders are constantly trying to ascertain the underlying forces at work in the industrial, commercial, and social

life of the country. It is through political parties that the needs of these interests become articulate and in turn it is through the control of the government that a party seeks to satisfy the desires of its constituents. In addition, through propaganda and criticism the parties play no small part in forming public opinion on questions of party interests. When in power other functions of political parties include giving assistance in the selection of persons for appointive offices, in directing the process of legislation, and in determining administrative and judicial matters.

Because of the division of the powers of government among three departments in the states and in the nation, and because of the division of powers between the federal and the state authorities, party government has proved indispensable in the operation of the government of the United States. It is necessary, therefore, for any party which desires to carry out a policy to secure unity in the three departments of the federal government and also in the state governments where supplemental legislation is often required and where effective action can be secured only by party harmony. Thus the theory of the separation of powers has tended to render party control necessary to secure harmony between the legislative and executive branches of the government. Without such cooperation the machinery of government cannot be successfully operated.

The legislative and executive departments in England are combined, and with the aid of the Cabinet unity is secured in legislation and administration. In the United States, such coordination must be obtained outside of the law. Instead of unity and harmony being established in a formal and constitutional manner, they are obtained in an informal and extra-constitutional arrangement. The possibility of a break between the executive and the legislature is thus prevented, except occasionally, by political parties. In accomplishing this unity, the party system fulfills its best end and thereby prevents the discord which would result from a lack of harmony between the legislative and the executive authorities.

The political parties, in addition to the functions enumerated above, also add to their control of governmental operations through the influence which they exert on appointive officers. Even though many important public offices which involve varying degrees of technical knowledge have been placed under the civil service system and are to a great extent thus beyond the influence of partisan politics, there still remains a very large number of appointive positions the incumbents of which are changed as one party goes out of power and the opposing party assumes control of the government. These positions are largely used to reward faithful and loyal party service. The extent to which the shifting of the personnel of the government with

each change in political party interferes with the economy and efficiency of governmental operations is an open question.

Party Divisions

In England and Contemporary Europe.—Party organization had its first and most effective development in England when the cabinet and party system developed outside the formal machinery of government. The cabinet or parliamentary system of government as it evolved in England normally presupposes two great parties, one known as the government, and the other as the opposition. Although political cleavage in England has been very definitely along a bipartisan line, within recent years there developed a tendency for the major parties to break into smaller groups. The Labor party in particular gained in numbers and strength and since the war succeeded twice in overthrowing the government. But still more recently party divisions have again been drawn along the lines of conservatism and liberalism, with the conservatives dominating. The political grouping in England is usually designated as Right, Center, and Left, which represent opinions ranging from extreme conservatism to extreme liberalism or radicalism. The political parties are responsible for the policies and action of the government and when the party in power ceases to be in harmony with the will of the electorate it gives way to the party in opposition.

Unlike that in England, the development of political parties in the leading countries of continental Europe has not been along the bipartisan plan. The tendency has been for the electorate to divide into many small groups which join temporarily to obtain definite political ends. This was especially true of France prior to the World War, but since the war her political parties have experienced new splits and have discarded old titles. At the same time political divisions have decreased in number, the trend being toward fewer but larger and more inclusive ones.

Germany also, since the downfall of the monarchy—and during the democratic regime—had a multiple-party system, with as many as thirty-two in 1932. With the overthrow of the German Republic and the holding of the government by the Hitlerites, the political parties have been submerged under the will of a dictatorship and for the time being have become practically inarticulate. Many small political groups were formed in Italy also, but since the establishment of the dictatorship of Mussolini they have had little or no influence on the government. There is a lack of party organizations, and what political interest is shown centers not so much in political issues as in individual leaders.

The only legally recognized party in Russia is the Communist party. In Italy, Germany, and Russia the ruling dictatorship groups represent only a small percentage of the population but, due to the strength of the dictators and the power of rigid legal systems of police control and regulation of their respective governments, their usurpation of governmental functions has been complete and at least for the present has been unassailable by any political group or any combination of groups.

In the United States.—In the United States, as in England, the conspicuous fact with regard to political parties is the dominant control exercised interchangeably by two leading parties. The Constitution makes no provision for political parties and their formation was strongly advised against by Washington and other public men of the early period of American history. But the division of the electorate into definite political groups was inevitable and differences of opinion on important issues and governmental policies caused the formation of two dominant political parties. The very structure of the government necessitated the division of the voters into groups and the maintenance of strong organizations under the guidance of experienced leaders and with local organizations and committees in every part of the Union.

Unlike England, political parties in the United States from the first controlled the functions of the government through party organization. In another respect, also, the political parties in the United States differ from those in England in that they do not assume responsibility for political action or policies nor is the party in power overthrown when the electorate becomes out of sympathy with the governmental policy; instead, the party retains its control of the government for a definite period of time. And even then the change in parties, with a few exceptions, is apt to be based not so much on a lack of harmony with the policy of the party in power as it is on the desire of the outs to get in, or on personalities, or on the matter of political aggrandizement. Two important recent exceptions to the above may be noted in the defeat of the Democratic party in 1920 and again in the defeat of the Republican party in 1932. These overwhelming defeats were due largely to a widespread dissatisfaction and a desire above all else for a change in administration.

Moreover, political cleavage in the United States is not along conservative or liberal lines. Both elements are found in each dominant party and occasionally the conservatives or liberals of both parties will join for a definite purpose, but not for any length of time. The attempts which have been made by LaFollette, Dewey, and others to draw the liberals and radicals from the two leading political groups to form a liberal party in opposition to the remaining conservative

elements of the existing parties have proved unsuccessful. When conservatives, liberals, or radicals are spoken of in relation to political parties in the United States it is taken for granted that, excepting the Socialist and the recently formed Communist parties, the terms are applied to groups within either of the major party divisions. Within recent years, those nolding progressive and radical views have at times bolted the Democratic and Republican parties. In 1912, such a radical wing, known as the Progressive, left the Republican party and stood for its own candidate, thus assuring the election of Woodrow Wilson. There is lacking in the United States an effective labor party such as is found in England, for the American Labor party has never been able to attain the importance and solidarity of the corresponding organization in England. It is true that labor organized in unions has at times approved concerted political action, but at no time has it reached proportions capable of success at the polls. At the same time, it has never shown a tendency to join the forces of the Socialist party to gain political or election advantages.

Just why the political parties of the United States should have developed so differently from those of England is problematic. Why are parties in the United States not as responsible to the electorate as they are in England? Why has party cleavage been along lines of conservatism, liberalism and radicalism in England and not in the United States? Why has the Labor party been unable to get control of the government in the United States when it has been possible for the Labor party in England twice to put itself in power? These are but a few of the questions which may be raised in comparing the party divisions and functions of the two countries.

Major Parties.—The origin of the two major parties is to be found in the political and economic differences which arose during the colonial and revolutionary periods. The discussion which followed over the adoption of the Constitution occasioned the continuance of the division of the people and their leaders into two factions, namely, the Federalists and the Anti-Federalists. After the adoption of the Constitution it was the opinion and wish of a number of the statesmen of the day, including Washington, that there should be no definite party alignments. However, the traditional characteristics—social, economic, and political—of the two very different sections of the nation again appeared in the interpretation which was to be given the new Constitution and in the policies to be followed by the government in the opening up and the development of the country. The formation of two major parties was thus made inevitable, and a political alignment of the members followed on questions of strict and liberal interpretation of the Constitution, a national bank, funding of the debts, internal improvements, tariff, expansion and imperial-

ism; and later a further alignment as it became obligatory for them to include in their party platforms matters of social and economic welfare.

The present Democratic party is the successor of the old Anti-Federalist, Jeffersonian-Republican party. It has followed in the main the doctrine of a strict interpretation of the federal Constitution, the principle that the rights of the states should be preserved and interfered with as little as possible, and that government should be limited so that the individual may be allowed a large measure of freedom. The party has recently been opposed to a high protective tariff, to imperialism, to commercial diplomacy, and to the extension of the powers of the federal government by means of executive and judicial constructions.

The Democratic party was in control of the government, with but two one-term exceptions, from the incumbency of Jefferson to that of Lincoln. From Lincoln's Presidency to the present time, the party has been in power only three times. Cleveland and Wilson each served two terms; and Franklin D. Roosevelt, now in office, is the third Democratic President since the Civil War.

As a result of the national and international economic upheaval with its accompanying collapse of the financial structure of the world and the general depression which followed, the people of the United States sought through a change in administration "a new deal," as expressed by the slogan of the Democratic party during its presidential campaign. Many persons shifted their customary affiliation to join with the Democratic party to insure a change in governmental policies.

Since the Democratic party has taken over the government, measures and policies have been put into effect which have been unknown to the practices of either party except during war times. Congress placed in the President's hands unlimited power and gave him the support necessary to put into effect plans for the economic and industrial recovery of the country. Relief for the farmer was attempted through the Farm Loan Act, Security Act, and Banking Act. The National Industrial Recovery Act, using war-time tactics and slogans, aimed to control industry in a manner to relieve unemployment and increase the purchasing power of the consumer by giving employment to larger numbers of people, with increased wages and shorter hours. At the same time prices were kept up and in many instances increased to encourage industry to resume its work.

How much of the control which the government has been wielding over industry, agriculture, and the basis of employment will become a permanent policy of the political parties remains to be seen. It has been generally understood that the drastic measures adopted have

been put into effect to meet emergency conditions. Whether it will be advisable for the government to continue to exercise control of business after the period of depression is over or whether a return to the *laissez-faire* policy of former days will be satisfactory is worthy of thought and discussion.[1]

The Republican party, which is the successor of the old Federalist and Whig parties, has favored a liberal and rather loose interpretation of the Constitution and, as a consequence, an extension of the powers of the federal government by legislative acts, by executive authority, and by judicial construction. It has stood for the rights of the nation as against the states. The party has been the champion of a protective tariff, of national improvements under the authority of the federal government, of colonial expansion, of liberal pensions, of Negro suffrage, and of a gold monetary standard. The position of the Republican party was strengthened and made more secure by the advocacy and adoption of measures tending to benefit commercial and capitalistic enterprises. It is a notable fact, however, that parties change their policies when placed in charge of the government; and, despite former party principles, such policies are adopted as appear to accord with the prevailing public sentiment.

Nevertheless, in spite of inconsistencies on the part of both parties, and the overlapping of policies, the fact remains that there exist in the United States two major parties which have intrenched themselves politically with the people. The contest between the major parties on the whole has been a continuous and comparatively definite one from the adoption of the Constitution to the present day. Moreover, at no time have the major parties been seriously threatened by a third party equal to obtaining, much less holding, control of the government.

Minor Parties and Their Function.—Although one or the other of the two major parties has held control of the government throughout the history of the nation, minor parties and third-party movements have had at least an important influence in sponsoring issues and not infrequently in compelling their acceptance by the major parties as planks in their political platforms. Minor parties have been called protest groups organized for the purpose of spreading information or propaganda relative to social and economic needs with the desire for redress through political means.

As colonization extended westward the traditional policies and issues of the two major parties were carried into new sections of the West following more or less parallel lines. However, in the actual

[1] For further consideration of the program and policies of the administration of Franklin D. Roosevelt, see *supra*, pp. 110 ff.

settlement of the middle and western sections, in the development of the country, and in the adaptation of the settlers to new conditions, together with the advances made through the application of science to industry and farming, there arose conditions the control of which necessitated new political concepts. The growth of large corporations with their attendant industrial problems, the great amassing of wealth by a few individuals, the needs of the newly developed agrarian sections, all brought with them problems of political control. In crystallizing these issues and in bringing them before the people, the minor parties have played an important rôle.

For a number of reasons the Middle West and West have been less dominated by a single party than have the East and South, and hence the former sections have been the regions most fertile and conducive to the rise of minor parties. The conservative attitude of the two major parties toward incorporating into their political platforms and policies planks relative to the increasing economic and social needs and the concurrent discontent, has fostered from time to time the formation of minor parties which in turn have succeeded in forcing the adoption of their issues upon one or both of the major parties. The chief parties which have been formed by such protest groups have been the Prohibition party, and those which have been organized by the agrarian and labor factions. The agrarian political agitation began first with the Grange movement, from which developed the Greenback party of 1876, which was superseded by the Union Labor party in 1888. Still later the agrarian cause was espoused by the Populist party and again by the Non-Partisan League. More recently the influence of agrarian protest, together with that of the Labor party, was manifested in the rise of Progressivism under Roosevelt and the subsequent split in the Republican party in 1912. Among the demands of the agrarian parties have been the free coinage of silver, government control and ownership of railroads and of telegraph and telephone lines, a graduated income tax, postal savings banks, a farm loan scheme, control of currency and the national banking system and of corporate wealth.

With the growth of mass production as the result of the application of modern machinery to industry under the control of increasingly highly organized corporations, agitation was begun in 1872 by the labor reformers for better working and living conditions. The cause of labor was united with that of the agrarian groups in the Union Labor party of 1888, although as early as 1876 the Social Labor party was organized. It, however, was composed principally of foreigners, its platform represented an extreme type of industrial socialism, and its policies embodied the radical phase of socialism. In 1901 a new Socialist party was formed when the less radical of the Social

Labor party united with the Social Democratic party. The Socialist party thus formed represents the conservative side of socialism and favors social, economic, and political changes through peaceful means. It advocates state ownership and operation of public utilities, including means of transportation and communication.[2]

Among issues advocated by the various minor parties which have been adopted by the major parties and have ultimately been put into effect are the income tax, woman suffrage, and popular election of Senators. A number of reforms supported by minor parties are to be found in the recent platforms of the Republican and Democratic parties, such as government relief for the unemployed, abolition of child labor, old age pensions, and insurance against unemployment, industrial accidents, and sickness. As to the relative position and importance of the minor parties or the possibility of a third-party movement acquiring enough strength to threaten the defeat of the major parties an interesting question arises as to the cause for the lack of success on the part of third-party movements. Why is it so difficult, or rather seemingly impossible, for a third party to gain control of the national government as the Labor party did twice recently in England?

Party Affiliation

In addition to the general and special political and economic issues which naturally divide people into opposing factions, other elements appear to foster an adherence or opposition to a particular political party. The individual's reasons for belonging to one party in preference to another are frequently vague or indefinite, even to himself. This is particularly true of those whose membership in one party or the other is constant. Within each of the major parties there are to be found a large number of persons whose severance of allegiance could scarcely be thought of. They give a solidarity to party organization and perpetuate the traditions and habits of political thinking from one generation to another. On the other hand, there are those who readily shift from one party to another or even become instrumental in forming new parties. Party affiliation includes varying degrees of loyalty and interest. The active leaders constitute an inner circle, and it is they who place the success of the party uppermost. Another class is to be found in the persons who make a profession of politics and derive their livelihood therefrom. In the rank and file of party adherents are those who for the reasons stated above are

[2] For an interesting consideration of minor parties, see Viva Belle Boothe, *The Political Party as a Social Process* (Philadelphia, 1923).

strongly partisan while others are less so. Lastly, there are some individuals who maintain a political independence which enables them to drift from one party to another.

What are the influences at work which largely determine the individual's political affiliations with a specific party, or, it might be said in many cases, has predetermined such allegiance? Without a doubt inheritance, early environment, and training play an important part, especially when economic and social interests are associated with inherited prejudices. Sectionalism due to a special adaptability to a certain industrial and economic development as well as to racial differences and prejudices has had in the past and continues to have a profound influence. In smaller communities or rural sections and among the foreign born, class, race, and sometimes even religious ties may influence party affiliations.

Within the political parties there are exceptions to any general conclusion relative to the reasons for party allegiance. Nevertheless, there are to be found within the major parties, and also within the minor parties, definite groups whose reasons for their party loyalty would, to say the least, furnish an interesting study. There is a large number of persons predisposed to belong either to the Republican or Democratic party, or to the protest groups or minor parties as they arise. Political parties have been the means by which various groups have made their needs and political policies known, and they are the agencies through which these needs and policies are translated in terms of governmental assistance or action. Loyalty to a particular party in such instances becomes more or less a personal matter or one of selfish aggrandizement. Although there have been periods when little difference was evident in party platforms or legislative programs, nevertheless throughout their history the political parties have stood for definite policies and action so as to attract to them persons to whom they appeal in theory or to whom they prove beneficial or those whose heritage and training make allegiance seemingly obligatory.

Party Technique

Development of Extra-legal Party Machinery.—In no other country have party organizations and machinery been developed to such a degree as they have been in the United States. This remarkable growth, as has been previously noted, has taken place contrary to the intentions of the makers of the federal Constitution, who believed that political parties were undesirable. But notwithstanding the fact that the Constitution and the laws were designed to operate without parties, the advisability and the necessity of some form of

political organization for the purpose of controlling the government were early admitted and acted upon by the leaders of opposite interests and diverse habits of political thinking. The machinery which was to put into operation this extra-legal method of directing the government, and which has continued to function as such, involves some of the most interesting and important phases of popular government. Just how this extra-legal machinery may best be made to serve the purposes which occasioned its incipiency is a matter of moment to persons prominent in public affairs and should also be of much interest to the average citizen.

The characteristic phases of this informal although highly organized party machinery are found in caucuses, conventions, committees, and primaries. Each had its origin in an informal manner and was in no way provided for by the Constitution or by legal foresight. With the exception of the caucus, the machinery of the political parties now receives legal recognition through statutory control.

The Caucus.—Informal and semi-secret caucuses seem to have been held frequently in colonial and revolutionary times, and were used as party devices early in the political history of the United States, as is evidenced by the comment of John Adams relative to the Caucus Club of Boston.[3] At first, the chief purpose of the caucus as a form of party organization was the nomination and election of candidates to offices, for which no provision was made in laws and constitutions. A caucus, as it originally functioned and as it later developed, consists of a few self-delegated individuals who represent informally a political unit or legislative body and who meet for the purpose of selecting party candidates for office, and of formulating party policies, prior to action taken by the duly authorized bodies. The informal caucus, which, according to Adams, met and nominated party candidates, was superseded by the more definite system of nomination provided by the congressional caucus for the Union and by the legislative and mixed caucuses for the states. The nominations were made, as a rule, by similar methods, each party in the legislature gathering in the caucus and selecting candidates for the various national and state offices.

Because of the secret methods which were practiced and because the caucus was clearly not in line with the constitutional provisions for the election of the President, it proved unpopular from the be-

[3] "In the garret of Tom Dawes," said Adams, "they smoke tobacco until you cannot see from one end of the garret to the other. There they drink flip, I suppose, and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, fire wardens, and representatives are regularly chosen before they are chosen in the town." John Adams, *Works* (C. C. Little and J. Brown, Boston, 1856), vol. ii, p. 144.

ginning. It became the center of attack by the growing Democratic party of the pioneer states of the West, and was the issue in the campaign for the election of Jackson when he rallied his supporters on a platform to overthrow King Caucus.

Although it is supposed to have been abolished officially, the caucus as a device for the conduct of business within the party continues as one of the most powerful agencies of government. Not only does a small group in each party prepare the program of action for the party and submit it for adoption, but some very important government functions are, in actual practice, performed by the caucus, after which mere formal approval is publicly accorded. The caucus selects the Speaker of the House of Representatives, approves the selection of the chairmen of all the important committees in Congress, and outlines the main policies to be formulated into law before a regular session of Congress convenes. And then, in solemn and formal manner, the acts of the majority caucus are passed as the acts of each House of Congress, the minority usually registering its opposition, the main lines of which have also been determined in the caucus of the minority members. Likewise, the party program in state, county, and city is prepared in local party caucuses. Thus the effort to kill King Caucus resulted merely in checking some of the power of this ancient political device.[4]

The caucus as a regular method of nomination in both state and nation was overthrown, however, in the latter part of the decade from 1820 to 1830. For a while there was no definite system of party organization, and a rather informal method of nomination was pursued. Candidates were placed in nomination by local or state conventions or by mass meetings. With the decline of the legislative caucus came a feeling of distrust for party leaders and a refusal to do their bidding. There was an urgent demand for a more democratic organization of parties, and the process of nomination then in use was objected to as being unauthoritative. This general dissatisfaction with the congressional caucus and with the informal methods of nomination which followed after the abandonment of the formal caucus led to the formation of the nominating convention which has since become so important a factor in American politics.

The Convention System.—A convention may be described as an authorized body composed of delegates sent by the voters of a definite political area to represent them in party deliberations. The three main functions which the convention performs are, first, to formulate party rules and procedure and to select candidates for the important offices

[4] Report on the work of the caucus preceding (1) the last session of a state legislature, (2) the last regular session of Congress. Consult newspapers.

in the state and in the nation; second, to adopt statements of principles and policies, commonly known as the party platform; and third, to choose permanent party officers and the committee or committees to direct the campaign for the election of a party ticket, and to provide for the calling of subsequent conventions.

The first national convention was held by the Anti-Masonic party in 1831. The idea proved to be so popular that in 1832 both of the leading parties, National Republicans and Democrats, called conventions. From this date, with few exceptions, the candidates of all parties for the Presidency and the Vice-Presidency have been nominated by conventions. The convention system, which proved to be advantageous for national political purposes, was soon employed for similar purposes in state and local organizations, and these local conventions became closely connected with the national conventions. The convention system soon exercised control over the important offices, divisions, policies, and administration of government in the United States.[5] Though the convention system succeeded the informal and formal caucuses of an earlier period, the direction and the control of the conventions still remained within the domination of an inner circle not so vitally different from the old-time caucus.

The National Convention.—The convention system, together with the presidential primary, functions for the political parties as a means for the selection of candidates for the Presidency and the Vice-Presidency of the nation. Just as the convention system superseded the caucus for presidential nominations, a combination of the convention and the direct-primary method has taken the place of the former hierarchy of conventions. A large percentage of the delegates to the national convention is now selected by the direct method. The remainder of the delegates are still selected by state and congressional district conventions. The state convention selects the delegates at large, and the congressional district convention, the district delegates.

The number of delegates to which a state is entitled differs with the political parties. Each party within the several states has twice as many delegates at large as there are Senators, and two for each Representative at large. In addition, the Democratic party has six each from the District of Columbia, Alaska, the Philippine Islands, Hawaii, Porto Rico, the Virgin Islands, and the Canal Zone. The Republican party has two delegates from each of the above territories and insular possessions excepting the Canal Zone and the Virgin Islands. The Democratic party has two delegates from each congressional district and the Republican party has but one. To meet the

[5] Since the general acceptance of the direct primary system the convention for local or district purposes has been abandoned by the states, with some important exceptions, such as Texas and other southern states.

dissatisfaction occasioned by the unequal representation between the northern and southern states, the Republican party has an additional delegate from each district where the total vote at the preceding presidential election or congressional election was 10,000 or more. The Democrats also elect four delegates at large for each Senator with one-half vote for each with the proviso that half of these delegates are to be women. Many of the states followed this plan. For each delegate in both parties there is also an alternate.

The functions of the national convention follow closely those of the convention system in general. Its main function is the selection of the party candidates for the Presidency and Vice-Presidency. In addition it formulates the party platform and policies, draws up its rules and regulations and method of procedure, examines the credentials of the delegates, devises ways and means of conducting a successful election campaign, appoints the necessary committees, including the national party committee which in turn is responsible for the calling of the next national convention.

It is not necessary to give here a detailed description of a national convention for the general scene of action is too well known. Much criticism, even ridicule, has attached itself to it on the one hand; but on the other hand there are those who feel that it is proper and fitting that the chief executive of the nation should be selected amid the spectacular and sensational scenes which accompany the meeting of a national convention. This situation is unique among nations, for nowhere else in the world is the leader of a nation selected by so large and tumultuous an assembly, the delegates and alternates to which number more than several thousand. Statesmen and politicians vie with one another in manipulating the votes of the delegates for personal or party interests. The question is frequently raised whether it would not be better and more fitting to national dignity and more conducive to national welfare were the candidates for the Presidency and Vice-Presidency selected by a smaller, more responsible and deliberative body instead of the present unwieldy convention, the large majority of whose members at best can do nothing but the bidding of local political leaders.

Party Committees.—Under the convention system, there developed a hierarchy of committees, which constitutes the political machinery by which party interests are guarded and by which campaigns and elections are conducted. At the top of this hierarchy is to be found the national committee, which is composed of a party representative from each state and territory, and at the head of which is a chairman who is the recognized leader of the party. The national committee provides for the national convention, formulates the method of procedure, and distributes propaganda necessary to a suc-

cessful party campaign. Below the national committee are the congressional committee, which has charge of party interests at the congressional elections between presidential campaigns; the state central committees; and the assembly, district, county, city and ward committees. Forming a network reaching from the centers of political activity to the most remote corners of the country, this machinery is ever in action promoting the interests of the party and looking toward the election of the men of its choice. The personnel of these committees usually consists of men who are not so much desirous of political positions as of political favors or of the control of the disbursement of political funds. It is largely this aspect of the committee system which has brought it into disfavor and disrepute in many states. It is generally conceded that the work done by the various committees could not easily be done by other than comparatively small bodies of men, and that successful party government necessitates some such plan. The committee system which formerly operated largely outside of the law has been brought to a considerable extent under legislative control, thereby making it more responsible to the electorate.

Despite the fact, then, that efforts have been made to regulate the conduct both of the caucus and of the convention, to limit their action and even to abolish them entirely, they both continue to persist as influential parts of the political machinery. Whether to abolish the caucus and the convention systems, or whether to retain them as permanent organs of party government in their present form or in a modified form, are issues on which there is a wide diversity of opinion. If caucus and convention are to be retained, it then becomes necessary to determine what functions can properly be accorded to these party devices and to define the regulations under which they may operate.

The Unregulated Primary.—The convention system was built also upon a series of primaries which were unregulated and unrecognized by law. They were managed and controlled by the leaders of the dominant political machine. The primary was at first a voluntary assembly open to any voter within a prescribed area who wished to participate in the nomination of party candidates, regardless of his party affiliations. Due to its informal organization which was responsible only to a few self-delegated party leaders, the unregulated primaries became the source of much political corruption.

Modern Methods of Nomination

The Direct or Regulated Primary.—As a result of a growing dissatisfaction with the convention system dominated by party bosses

and run by party committees, there developed an attempt to ascertain more nearly the popular will through the direct primary. The adoption of the direct primary had as its purpose to bring the nomination of candidates for public office under legal control through statutory regulations and restrictions under which party primaries might operate. The direct primary is actually a general election held prior to the regular elections for the purpose of selecting the party candidates for office. Under the direct primary system some states have retained some form of the party convention as an organized agency to formulate the party platform and to assist in the administration of certain phases of the election laws. Moreover, where conventions have given way to the direct primary, they have, in certain instances, been reestablished in order to permit the selection of candidates for particular offices.

The first primary law, passed by California in 1866, was purely optional, and in case it was accepted by a party required that (1) due notice be given of the time and place of the elections of candidates and delegates; (2) the time and place of the primary be published in the papers; (3) provision be made for a supervisor to examine prospective voters. In addition, penalties were provided for violation of the act. In Crawford County, Pennsylvania, a system was devised by which nominations were made by all parties on the same day under the same rules and regulations. This system was later recognized and approved under laws enacted by other states, in the effort to institute general regulation of primaries. Wisconsin adopted in 1903 the first state-wide direct primary law.

Public attention was now directed to the evils of parties and their regulation by law. Beginning with 1880, laws were passed in rapid succession. These statutes were designed mainly to prohibit fraud, such as double voting, stuffing ballot boxes, impersonating a voter, bribery, and intimidation. The beginning of effective regulation of primaries came with the New York act of 1882, which was made applicable to a few counties and which was followed by similar acts in other states. About this time statutes began to prescribe the conditions of membership in a political organization and to institute party tests for participation in primaries. The state was slow to assume the expenses of the primaries, charges being supposed to devolve upon the parties. Eventually, however, the expense of the primary was made a public charge. Qualifications of primary voters were no longer left to the party itself. It was required that qualifications should be stated to the public in advance and that only qualified voters should participate in the voting. In some states a form of oath was prescribed and a test required for the voters.

About the same time a beginning was made in the regulation of

conventions. The acts regulating conventions began to provide for (1) the fixing of the date of the convention, (2) the call of the convention and convention procedure, and (3) party committees, particularly their organization, terms, and elections.

Types of Direct Primary.—The direct primary with its many variations has been adopted in most of the states, Connecticut, New Mexico, and Rhode Island being the exceptions. There are various types of the direct primary. Under the compulsory or mandatory form the state law provides definitely for its use for particular or all nominations. In some states the method of nomination is optional. The law for this type generally provides that the party committees shall decide what form of nomination shall be used. A third type, the nonpartisan primary, is frequently employed for municipal offices and for the selection of judges.

Another classification of the direct primary is made in regard to party affiliation, namely, the open and closed primaries. The former does not make affiliation with the party holding the primary a prerequisite while the closed primary requires a party test for participation.

As above referred to in connection with the national convention, the principle of the direct primary has also been applied to the selection of delegates to the national conventions at which presidential nominees are selected. The object of the presidential primary is that the rank and file of voters may express their preference for the nominee for the office of Presidency. In 1905 Wisconsin's delegates to the national convention were chosen according to direct primary methods and other states soon adopted the same plan. For the Chicago convention in 1920, 569 delegates were selected through presidential primaries, and for the San Francisco convention 638 delegates were thus chosen. Several forms of the presidential primary have developed. The first is where the delegates to the national convention are selected at a presidential primary but are not bound by any instruction as to whom they shall support as a nominee. The second has been called the presidential preference primary, of which there are two variations. In the one the voters express a preference for a presidential nominee but the delegates are left free to vote in the convention as they choose; in the second type the delegates are legally bound to support the majority choice of the voters at the presidential primary.

In actual practice a number of inherent weaknesses in the presidential primary have become evident. As a result there has been a trend against the presidential primary and some of the states have repealed their laws in relation to it. In 1932, eighteen states, Alaska, and the District of Columbia employed this form of primary in the

selection of party delegates to the national conventions. One of the chief difficulties in the operation of the presidential primary is the lack of uniformity among the states as to the time and manner of holding the primary. Another weakness is the large expenditure of time and money which is required by the candidates who desire to conduct a campaign in all the states. Then, too, the failure of so many voters to participate in the presidential primary causes it to lose its significance. It is also very difficult to bind the delegates to vote for the selection of a particular candidate, for circumstances generally develop during the course of the national convention which make it difficult to hold a predetermined choice.

To remedy some of the present difficulties it has been suggested that presidential primaries in all states be held on the same date, that registration be required on a similar basis in all states, and that a limitation be placed on the expenditure of money to secure the nomination.

Advantages and Criticisms of the Direct Primary.—The chief advantage in the direct primary seems to be that the nomination of candidates for public office rests directly with the electorate, instead of being the work of an intermediate agency of a few self-delegated persons. It places the power of selection with the electorate of a party and in their hands rests the possibility of protecting themselves against corrupt political practices. The degree to which the selection of party committees and delegates to conventions is made at primary elections varies in the different states, but on the whole the personnel of committees and conventions represents more nearly the choice of the popular vote than was possible under the former unregulated primary-convention system. However, at the same time that the direct primary has been accepted as the method of nomination for almost all offices, a widespread agitation has developed for the repeal of the primary laws in order to return to the convention system.

The chief criticisms brought against the direct primary are, first, that the system fails to bring out a full vote. Although it was claimed for the direct primary that it would result in the more general participation of the voters in the making of nominations, it is rather unusual for 50 per cent or more of the qualified voters to take part in primary elections. In answer to this objection, it is contended that many more participate in making nominations than was the practice when the former caucus and convention methods prevailed. The second criticism against the primary is that the financial burden imposed on candidates is greater under the direct primary than under the convention system. It is the general belief that men of ordinary means have little chance to be nominated for public office. Though it is conceded that securing nominations under the direct primary costs

more than was the case under the convention system, it is thought by many that this additional expenditure is justifiable. The enactment of laws limiting the amounts which candidates may spend has brought some improvement, and the publication of publicity pamphlets giving some information concerning each candidate has reduced somewhat the necessity for extensive campaigning. But with all the devices to reduce costs the direct primary is an expensive system of making nominations.

A third criticism brought against the direct primary is that it has not, as was predicted, improved to any appreciable extent the character and ability of the nominees for office. It is difficult to secure any intelligible and satisfactory basis for comparison, with the result that judgments are apt to be based on personal predilections. There are those who feel confident that the character and the ability of candidates have declined, but others maintain that a gradual improvement is noticeable. The difference between the old and the new systems, as far as the character of nominees is concerned, does not appear to be very marked.

A fourth criticism of the direct primary is that it has not eliminated the caucus and the tendency of an inner circle to prepare the slates and thus to determine in a large measure the names which shall go on the ballot as party nominees. Instead of the elimination of former party methods and practices most of them continue and are merely conducted along somewhat different lines. It was, perhaps, an illusion to expect that caucuses and inner circles would cease to operate when the direct primary was inaugurated. It is contended that party responsibility and unity have been weakened, but party organizations have adapted themselves quite readily to the new machinery and with slight variations go on doing business in their customary way, without being responsible for the results.

Though criticisms have been directed from many quarters against the present primary system and though a few states have undertaken to return to a modified convention system, nevertheless the prevailing view appears to be that most of the serious defects of present primary laws can be eliminated, and that with some necessary changes the direct primary may be retained as a useful and effective method of securing the popular choice of nominees for public office. A return to the convention system, though probably desired by many politicians, is not likely to take place if the primary system can be improved. Experience with the direct primary, however, has brought disillusionment; the system is not popular, it has revealed serious shortcomings, and there is at present no public demand for its further extension.

Proposed Reforms of the Primary System.—Divergent views are held by those who favor a reform of the primary system, but of

these three distinct groups appear most prominent. First, there are some who would abolish the primary and return to the former convention system, with, of course, rather strict regulation of party procedure. This group forms a considerable minority in all of the states having the direct primary, and in several states it has gained control to such an extent that primary laws have been repealed. A second group would retain the primary system but would modify present laws so that representatives of each party chosen by voters in local districts would meet to select candidates and formulate platforms. In order to prevent machine control, should this evil develop, it is recommended under this plan that independent candidates be permitted to run for office and that voters be permitted to express freely their choice for such candidates. A third group would retain the present primary nominating system and by strengthening and improving existing laws would try to eliminate the serious defects of the present system. The advocates of this plan appear to be in the majority, particularly in the states of the Middle and Far West. What results will come from these and other conflicting views as to primary elections it would be rash indeed to predict. It is obvious that here is one of the problems of modern government which calls for the best thought of those who still have faith in the principles of popular government. A satisfactory method of recording the popular verdict and of securing persons of high caliber both as to ability and character in the filling of public offices is one of the greatest problems of democratic government.

The Invisible Government

In spite of the many reforms that have been put into effect relative to primary elections and conventions, secrecy in balloting, and the extension of the suffrage, there still remains the problem in popular government of securing effective regulation of parties. It is the problem of having statesmen become political leaders, instead of the political bosses who are now the power behind those who hold governmental positions and who constitute what has come to be known as "the invisible government."

Before the New York Constitutional Convention in 1915, Elihu Root, under the title "The Invisible Government," put the problem of parties and government in the following frank statement:

> We talk about the government of the constitution. We have spent many days in discussing the powers of this and that and the other officer. What is the government of this state? What has it been during the forty years of my acquaintance with it? The government of the constitution? Oh, no, not half the time, or half-way. When I ask

what do the people find wrong in our state government, my mind goes back to those periodic fits of public rage in which the people rouse up and tear down the political leader, first of one party and then of the other party. It goes on to the public feeling of resentment against the control of party organizations, of both parties and of all parties.

Now, I treat this subject in my own mind not as a personal question to any man. I am talking about the system. From the days of Fenton and Conkling and Arthur and Cornell and Platt, from the days of David B. Hill, down to the present time the government of the state has presented two different lines of activity, one of the constitutional and statutory officers of the state, and the other of the party leaders—they call them party bosses. They call the system—I don't coin the phrase, I adopt it because it carries its own meaning—the system they call "invisible government." For I don't remember how many years Mr. Conkling was the supreme ruler in this state; the governor did not count, the legislatures did not count; comptrollers and secretaries of state and what not did not count. It was what Mr. Conkling said, and in a great outburst of public rage he was pulled down.

Then Mr. Platt ruled the state; for nigh upon twenty years he ruled it. It was not the governor; it was not the legislature; it was not any elected officers; it was Mr. Platt. And the Capitol was not here; it was at 49 Broadway; Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Conkling or Cornell or Arthur or Platt, or by the names of men now living. The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the constitution or by the law; and, sir, there is throughout the length and breadth of this state a deep and sullen and long-continued resentment at being governed thus by men not of the people's choosing. The party leader is elected by no one, accountable to no one, bound by no oath of office, removable by no one. . . . But it is all wrong. It is all wrong that a government not authorized by the people should be continued superior to the government that is authorized by the people.

How is it accomplished? How is it done? Mr. Chairman, it is done by the use of patronage, and the patronage that my friends on the other side of this question have been arguing and pleading for in this convention is the power to continue that invisible government against that authorized by the people.

What does the boss have to do? He has to urge the appointment of a man whose appointment will consolidate his power and preserve the organization. The invisible government proceeds to build up and maintain its power by a reversal of the fundamental principle of good government, which is that men should be selected to perform the duties of the office; and to substitute the idea that men should be appointed to office for the preservation and enhancement of power

of the political leader. The one, the true one, looks upon appointment to office with a view to the service that can be given to the public. The other, the false one, looks upon appointment to office with a view to what can be gotten out of it. . . . Mr. Chairman, we all know that the halls of this Capitol swarm with men during the session of the legislature on pay day. A great number, seldom here, rendering no service, are put on the payrolls as a matter of patronage, not of service, but of party patronage. Both parties are alike; all parties are alike. The system extends through all. Ah, Mr. Chairman, that system finds its opportunity in the division of powers, in a six-headed executive, in which, by the natural workings of human nature there shall be opposition, discord, and the playing of one force against the other, and so, when we refuse to make one governor elected by the people the real chief executive, we make inevitable the setting up of a chief executive not selected by the people, not acting for the people's interest, but for the selfish interest of the few who control the party, whichever party it may be. Think for a moment of what this patronage system means. How many of you are there who would be willing to do to your private client, or customer, or any private trust, or to a friend or neighbor, what you see being done to the state of New York every year of your lives in the taking of money out of her treasury without service? We can, when we are in a private station, pass on without much attention to inveterate abuses. We can say to ourselves, I know it is wrong, I wish it could be set right; it cannot be set right, I will do nothing. But here, here, we face the duty, we cannot escape it, we are bound to do our work, face to face, in clear recognition of the truth, unpalatable, deplorable as it may be, and the truth is that what the unerring instinct of the democracy of our state has seen in this government is that a different standard of morality is applied to the conduct of affairs of state than that which is applied in private affairs. I have been told forty times since this Convention met that you cannot change it. We can try, can't we? I deny that we cannot change it. I repel that cynical assumption which is born of the lethargy that comes from poisoned air during all these years. I assert that this perversion of democracy, this robbing democracy of its virility, can be changed as truly as the system under which Walpole governed the commons of England by bribery, as truly as the atmosphere which made the *credit mobilier* scandal possible in the Congress of the United States has been blown away by the force of public opinion. We cannot change it in a moment, but we can do our share. We can take this one step toward, not robbing the people of their part in government, but toward robbing an irresponsible autocracy of its indefensible and unjust and undemocratic control of government, and restoring it to the people to be exercised by the men of their choice and their control.[6]

[6] *New York State Constitutional Convention Documents,* No. 50; reprinted in *The Annals* of the American Academy of Political and Social Science, vol.

The Political Boss and the Party Machine.—Probably no greater problem exists for the American people to solve than that of lessening the influence of the boss and his associates in party politics. Unlike able political leaders and statesmen, the boss, as his name indicates, handles huge numbers of persons and their votes to his own liking. Playing upon the weaknesses and oftentimes the misfortunes of men, he manipulates the votes and rewards his supporters with the spoils of elections and the favors which lie within his power to grant. To have political issues put honestly and openly before the citizens without the intrigues, favors, and influence of the party boss and machine being paramount is probably too high an ideal to approximate, with human nature constituted as it is. But if government is to approach democratic standards, the power of the person or persons who work in the dark instead of in the open, who use intrigue instead of fair and sincere argument, whose interests are primarily a matter of seeking selfish ends or power rather than a matter of general benefit, will have to be effectually checked.

The excrescences of the party system of government, namely, the boss and the political machine, will have to be held within bounds if leadership within party organization and public office are to appeal to the type of persons who are best qualified through their ability as statesmen. The power which has come to the boss and the machine has resulted, to no small extent, from the various desires of corporations willing to grant substantial aid to party funds in return for special privileges, and from the general indifference of the average voter and citizen to governmental affairs. In addition, the great number of elective offices, together with the general application of the spoils system with its attendant evils, have proved effective tools in the hands of the corrupt politicians and unscrupulous bosses. The placing of party interests and successes above the importance of the issue at stake and the persistent loyalty to the candidates of a particular party, regardless of ability or policy, have also aided in giving the boss superior power in manipulating large numbers of voters. The party organization, with machines and local representatives in every community, controls the nominations to public office and forces Presidents, governors, and other high officials to bow to its authority. Reforms have been attempted and a few changes have been accomplished which have tended to lessen the amenability of the governmental machinery to the underhand workings of the boss and the machine.

Functions of the Party Organization.—Whatever its shortcomings, upon the party organization falls much of the practical,

lxix, pp. x-xiii; cf. also article by Edgar Dawson, "The Invisible Government and Administrative Efficiency," *ibid.*, pp. 11-21.

everyday work of the political parties. It is an organization which is ever on the alert to strengthen its influence and power to appeal to the masses, and to make converts among them. At election seasons, on the hierarchy of committeemen and managers falls the work of the campaigns and the job of getting voters to cast their ballots for the proper party. To accomplish this, means of all sorts are resorted to and every available method is used. Emotional appeal, pecuniary aid, personal contacts, publicity of every kind, the establishment of speakers' bureaus, the radio, advertisements, circulars and pamphlets, documents, the party textbook, and the use of slogans are some of the means by which the party organization reaches the populace and aims to win supporters to the party cause.

It is through party organization and the technique of the party machine, whether under the control of statesmen or bosses, that the political parties accomplish their purpose, which, as has been stated before, is to carry into effect party policies and plans through putting into governmental offices the party's candidates. These policies and principles are expected, at least for propaganda purposes, to work for the general welfare of the nation as well as for the personal interests of the classes of individuals who dominate and manipulate party organizations and the party machine.

SUPPLEMENTARY READINGS

Brooks, Robert C., *Political Parties and Electoral Problems* (Harper & Brothers, 1933), revised edition.

Bruce, Harold R., *American Parties and Politics: History and Rôle of Political Parties in the United States* (Henry Holt and Company, Inc., 1932), revised edition.

Sait, E. M., *American Parties and Elections* (D. Appleton-Century Company, Inc., 1927).

Gosnell, Harold F., *Boss Platt and His New York Machine* (University of Chicago Press, 1924).

Zink, Harold M., *City Bosses in the United States* (Duke University Press, 1930).

Porter, Kirk H., *A History of Suffrage in the United States* (University of Chicago Press, 1918).

Merriam, Charles Edward, and Gosnell, Harold Foote, *The American Party System: An Introduction to the Study of Political Parties in the United States* (The Macmillan Company, 1929), revised edition.

Overacker, Louise, *The Presidential Primary* (The Macmillan Company, 1926).

Holcombe, A. N., *The Political Parties of Today* (Harper & Brothers, 1924).

——— *The New Party Politics* (W. W. Norton & Company Inc., 1933).

Boothe, Viva Belle, *The Political Party as a Social Process* (Philadelphia, 1923).

CHAPTER XI

ELECTIONS AND METHODS OF VOTING

ELECTIONS mark the culmination of the efforts of the political parties to place their candidates in governmental offices. The chief object of elections is to give the voter an opportunity to register his preference for party candidates for public office, although not infrequently he may also be asked to give his vote for or against constitutional amendments or other governmental policies.

Just as the caucus, the conventions, and the primaries were at first permitted to operate without legal restrictions, so were elections held in such manner and places as the political parties decided. As a result, the election of public officials became the source of every imaginable form of political corruption and remained so until brought under legal restraint and regulation. The primary aim of election and ballot legislation has been to protect the voter against fraud or intimidation in registering his choice for candidates for public offices and to assure honesty in the total result of the election. This has been largely accomplished by the enactment of laws regulating elections and the methods of balloting. Voters are now required to register in the district where they vote and to use a type of ballot which will insure secrecy. Bipartisan officials are in charge of the conduct of elections, and accurate counting of the votes is required. Excepting the provision in the national Constitution relative to the presidential election, the election of members of Congress and the date of casting the electoral vote for President, the regulation of holding elections and the method of balloting are left to the discretion of the states.

TYPES OF BALLOTS

The Australian Ballot.—The first measure of importance designed to improve the method of voting in the states was the adoption of the Australian ballot system. It was previously used in Australia and in England, and was then introduced in Louisville, Kentucky, and soon afterward in Massachusetts. After its adoption in the United States, it was rapidly accepted by the states as a possible remedy for the numerous evils which had crept into election practices and procedure. After 1890 there came a rapid adoption of the Australian ballot and the beginning of the definite legal regulation of parties.

The essential features of the Australian ballot are: (1) All ballots are printed under the supervision of public officials at public expense,

and are transmitted by these officials to the various voting places; (2) the names of all candidates nominated by any recognized political party are printed on a single sheet with an official designation; (3) a voter can secure a ballot only from the regular election officials at the polling place on election day and after having complied with preliminary requirements as to registration; (4) ballots must be marked in secrecy within the voting booth, with a proviso, under many laws, whereby a voter who claims he is unable to mark the ballot may receive assistance.

The Australian ballot soon underwent modifications which materially affected the general results anticipated by the ballot reformers. Reasons for these changes are thus described by Mr. Allen:

> The fact that most American voters were accustomed to voting a whole party ticket at a single operation explains how the true Australian ballot came to be modified in this country. The ballot reformers proposed a method by which a thick-and-thin Republican should, on election day, vote first for a Republican governor, then for a Republican lieutenant-governor, then for a Republican secretary of state, and so on, until he finished his ballot by voting for a Republican pound master. It was very plausible for the politicians in communities accustomed to the "vest-pocket ballot" to say: "No, we like your plans for a secret vote. We like your plans for purifying the polls and for insuring a fair count. But we do not like your idea of scattering the nominees of a party all over a blanket sheet. We will adopt your safeguards and we will make the ballot official, but we will follow the form of our old familiar party slip, simply arranging them side by side on a blanket sheet like yours."[1]

In order, then, to encourage straight-ticket voting and to strengthen party organization, the Australian ballot was seriously transformed, particularly in the party-column ballot which had a party scroll and emblem at the top, by which it was possible to use a single mark and vote a straight ticket much more easily than to vote a split ticket. It then became the chief practice of the party to encourage straight-ticket voting on the part of the uneducated voters and thereby to strengthen party control. This led to what has been described as the system in which each party placed in a "pigeonhole" those who usually voted the straight ticket and then concentrated its efforts upon those who were disposed to vote a split ticket and who constituted the independent element of the electorate.

The two chief forms of the Australian ballot in use in the United States are the office ballot, in which the candidates are arranged

[1] "The Multifarious Australian Ballot," *North American Review* (May, 1910), vol. cxci, p. 585; reprinted in P. S. Reinsch, *Readings on American State Government* (Ginn and Company, 1911), pp. 364-365.

under the office, usually in alphabetical order, and the party-column ballot, in which the candidates are arranged according to party rather than office.

The Australian ballot system, owing to the many officers to be elected and the frequent elections, brought about the development of the long ballot, with all of its consequent evils. The majority of men nominated for office were frequently unknown to the voters, were placed on the ballot by the party managers, and were usually carried into office by the head of the ticket. A great deal of evidence as to the evils of the long ballot and the system of electing officers under this plan has been presented, and an effort has been made to reduce the number of elective officers and to do away with some of the conspicuous defects.

Certain results of the use of the long ballot have brought discredit to this method of securing popular control. There is convincing testimony to the fact that the average voter does not know the majority of the candidates for whom he votes, and that blind voting becomes the practice in the selection of all but a few of the important candidates on the ticket. But more significant still is the fact that the many nominations to be made and the offices to be filled constitute a task which the voter cannot perform, and the result is that the job is undertaken by the politicians who have made of the political party in the United States veritably "an office-filling and spoils-sharing device."

Woodrow Wilson put the situation relative to the long ballot in these terse phrases:

> Elaborate your government; place every officer upon his own dear little statute; make it necessary for him to be voted for; and you will not have a democratic government. Just so certainly as you segregate all these little offices and put every man upon his own statutory pedestal and have a miscellaneous organ of government, too miscellaneous for a busy people either to put together or to watch, public aversion will have no effect on it; and public opinion, finding itself ineffectual, will get discouraged, as it does in this country by finding its assaults like assaults against battlements of air, where they find no one to resist them, where they capture no positions, where they accomplish nothing. You have a grand house-cleaning, you have a grand overturning, and the next morning you find the government going on just as it did before you did the overturning. What is the moral? . . . The remedy is contained in one word: *simplification.* Simplify your processes, and you will begin to control; complicate them, and you will get farther and farther away from their control. Simplification! simplification! simplification! is the task that awaits us; to reduce the number of persons to be voted for to the absolute workable minimum—knowing whom you have selected; knowing

whom you have trusted; and having so few persons to watch that you can watch them.[2]

As a result of the long ballot and blind voting, large power is intrusted to organizations of political specialists. This condition is not due to the peculiar civic indifference of the American people, but rests on the fact that our form of democracy is unworkable because:

1. It submits to popular election offices which are too unimportant to attract public attention.

2. It submits to popular election so many offices at one time as to make the business of ticket-making too intricate for popular participation; hence some sort of private political machine becomes an indispensable element in electoral action.

Consequently, many are elected to office without adequate public scrutiny, and owe their selection not to the voters, but to the makers of the party ticket, who thus acquire an influence that is capable of great abuse.

The long ballot, with its various lists of trivial offices, is primarily a characteristic of the political system of the United States. The English ballot does not include more than three offices, usually only one. In Canada, the ballot is less commonly limited to a single office, but the number is not large. The politicians as a professional class, separate from popular leaders or officeholders, are seldom known in other lands; the word "politician" has a special meaning in this country. Government manipulated behind the scenes by politicians, in endless opposition to government by public opinion, is the "unique American phenomenon in the long ballot's train of consequences."[3]

The Short Ballot.—The short ballot plan is a non-partisan movement and from time to time has received the enthusiastic support of some of the leading statesmen of the country.[4] Theodore Roosevelt said before the Ohio Constitutional Convention: "In the first place I believe in the short ballot. You cannot get good service from the public servant if you cannot see him, and there is no more effective way of hiding him than by mixing him up with a multitude of others so that there are none of them important enough to catch the eye of the average workaday citizen." Chief Justices Taft and Hughes have likewise spoken on the efficacy of the short ballot. Chief Justice Hughes said:

[2] From "Civic Problems," an address delivered March 9, 1909, before the Civic League of St. Louis.

[3] Cf. R. S. Childs, *Short Ballot Principles* (Houghton Mifflin Company, 1914).

[4] Reprinted in Foreword to *The Short Ballot in Illinois* (report of the Short Ballot Committee of the City Club of Chicago, 1912), and in *The Short Ballot —A Movement to Simplify Politics* (The National Short Ballot Organization, New York City, 1920).

"There should be a reduction in the number of elective offices. The ends of democracy will be better attained to the extent that the attention of the voters may be focused upon comparatively few offices, the incumbents of which can be held strictly accountable for administration."

The term "short ballot" has come into use during recent years in connection with the movement to reduce the number of elective offices. It contemplates the election of only those officers who are to determine policies and the appointment of those who are to act in administrative capacities.

It is a device intended to do away with our blanket ballot and to concentrate the attention of the voter upon a few important positions on which he can make a relatively intelligent decision as to candidates. A prominent advocate of the short ballot sums up the faults to be remedied by it. We find, he says, that there are three practical methods of concealing public servants from their masters, the people, and thus causing popular control to relax:

1. By having so many elections simultaneously that each individual candidate is lost in the confusion.
2. By dividing power among so many petty officers that each one of them escapes scrutiny by reason of insignificance.
3. By making an office undebatable in character, so that discussion regarding it is unlikely to attract attention.[5]

To remedy such conditions as now prevail, which result in blind voting and unintelligent action by voters, the following are regarded as indispensable:

1. To shorten the ballot to a point where the average man will vote intelligently without giving more attention to politics than he does at present.
2. To limit the elective offices to those which are naturally conspicuous.

Short ballot principles as applied to a state would, it is thought, result in the election of but few state officers, such as the governor and one or more financial officers, and the appointment of the heads of the state executive departments, boards, bureaus, and commissions. The members of Congress and of the state legislatures would also be elected, but by a district system each voter would be called upon to make only one choice. The only positions which should be filled by popular election[6] are those on the county board in counties and on the city council in cities.

[5] R. S. Childs, *op. cit.*, p. 50.

[6] Cf. *The Short Ballot in Illinois, op. cit.;* and *The Short Ballot Applied to the State of New York*, reprinted by the National Short Ballot Organization.

The short ballot plan involves the extension of the appointive power for those holding the higher positions and the adoption of the merit system for the selection of all but a few of the executive officers, who may be regarded, with the governor, as responsible for the general policies of the administration.

There are no short ballot states, though several have taken important steps toward shortening their ballots. The nearest approach to a "short ballot" state is now New Jersey, where only one executive officer is elected.[7] A step in this direction was taken in the enactment of the civil administrative code of Illinois which is planned on the short ballot basis, making the governor the executive head of the state, with the right to appoint cabinet heads. Most of the states which have adopted plans of administrative reorganization have included as a part of the plan the short ballot principle, namely, the election of only a few state officers and the appointment by the governor of most of the department heads and administrative officers. Constitutional regulations have usually prevented the appointment of certain officers whose status is fixed in the fundamental law.

The short ballot movement has gained greatest headway in the cities where commission government has reduced the number of elective officers to a board of approximately three to seven members, who become responsible for the entire management of city affairs. In the federal government the voter selects by an indirect method the President and the Vice-President. The President becomes responsible for the Cabinet and through his advisers for all of the subordinate officers in the federal administrative service. In line with the principle of simplifying voting, a few states have adopted a presidential short ballot, and the idea appears to be gaining in favor. Nebraska was the first state to adopt the plan and other states have since made use of a type of short ballot in selecting the presidential electors. It was customary prior to 1917, and still is the practice in most of the states, for the names of the entire list of candidates to appear on the ballot and for the voter to register his choice directly for the electors which had been nominated by the political parties or their officials. In using the presidential short ballot only the names of the party candidates for the Presidency and the Vice-Presidency appear on the ballot and votes cast for these candidates are regarded as votes for the corresponding party candidates for electors.

States which have adopted this type of ballot differ as to the method of recording the election results, but the object in all of them is practically the same, namely, that legally the voter signifies his choice of electors by voting for the party candidates for the Presidency and

[7] *Bulletins* for the Massachusetts Constitutional Convention (1917-1918), vol. i, no. 10, p. 397.

Vice-Presidency. The list of names of the candidates for electors is filed with the secretary of state or, as is the case in Nebraska, with the governor.

Obvious advantages result from the presidential short ballot both to the voter and to the election officials. The smaller-size ballot with fewer names printed on it also reduces considerably the item of expense. Objections on the ground of the constitutionality of this method for the selection of the President and the Vice-President are met by the fact that the national Constitution specifies the time for choosing the electors and also the date for casting their votes, but leaves to the several states the manner of selecting the electors.

Amendments relative to the abolishing of the electoral college in the selection of the President and Vice-President have been proposed from time to time in Congress. During recent sessions amendments have been sponsored to provide for the election of the President and Vice-President by popular vote. To meet the objections which are to be expected from the smaller states the measures provide that the voting strength of the states shall remain unchanged by retaining the present number of electoral votes in the various states but distributing them among the candidates upon a proportional basis. It is contended that this method of selecting the chief executive of the nation would eliminate much of the unfairness of the present method, would more nearly represent the real choice of the people, and at the same time would be more satisfactory to the voters whose candidates are defeated.

Among the recent efforts to improve political methods is the introduction of the non-partisan ballot, on which all party designations have been eliminated and the candidates' names arranged alphabetically in groups under each office. Non-partisan ballots have been adopted particularly in cities with commission government, and in the election of judges. Though the removal of party designations makes it more difficult for the ignorant voter to receive instructions, it has, of course, not had any noticeable effect upon the control and dominance of the election machinery by parties.

The chief difficulty with the extension of the short ballot principle in many states arises from the fact that as the number of elective officers is reduced there is an increase in the proposals submitted to the voters under the initiative and referendum, with the result that the ballot is slightly, if at all, reduced in size. Until separate elections can be held for national, state, and local officers and until more discrimination is used in referring proposals to the electorate, the average voter will continue to be overburdened and will find it impracticable to secure intelligent counsel and guidance in casting his ballot. Attempts to adopt plans for cumulative voting or efforts to secure

minority representation have been checked by the courts, which deem the foundation of a representative form of government to be that, unless the people have otherwise signified in their constitution, "every elector entitled to cast his ballot stands upon a complete political equality with every other elector, and that the majority or plurality of votes cast for any person or measure must prevail. . . . The constitution does not contemplate, but by implication forbids, any elector to cast more than one vote for any candidate for any office."[8]

Even though the ballot is considerably shortened and certain defects are in part eradicated, other difficulties stand in the way of a direct and accurate recording of the popular will by means of the ballot. One of these difficulties is involved in the problem of election by a plurality or by a majority system. To solve the problem the preferential ballot has been introduced.

The Preferential Ballot.—Election by plurality vote is the rule in elections in the United States. In principle, election by a majority vote is thought desirable, although an objection to this method is that where there are more than two candidates a failure to secure a majority is always a possibility. On the other hand, election by plurality, when there are more than two candidates for an office, is likely to result in a selection representing a minority of the voters. The preferential ballot which is now used in a number of cities for municipal elections and in some states in primary elections is a device by which the will of the majority of the voters may be ascertained and carried into effect with more certainty. The result is accomplished by permitting the voter to indicate his first choice and his second choice, and at times additional choices, among the candidates for office.

The principal method of preferential voting used in the United States is the Bucklin system, or some modification of it. According to the Bucklin system the candidate receiving a majority of first-choice votes is declared elected. The method of determining the election varies when no candidate receives a majority of first-choice votes. According to one plan the first- and second-choice votes are added together and if this does not result in a majority for any candidate the third-choice votes may also be added, and the candidate receiving the highest number of combined first-, second-, and third-choice votes is considered elected.

Another method of securing a majority under the preferential system of voting is by a process of elimination and redistribution of the votes cast. When the count is made and there is found to be no candidate who has received a majority of the first-choice votes, the candidate with the least number of first places is dropped and the

[8] Maynard *v.* Board of Canvassers, 84 Mich. 228 (1890); State *v.* Constantine, 42 Ohio St. 437 (1884).

support of his followers is divided among the other candidates in accordance with their second choices. This process of elimination is followed until one candidate receives a majority of votes cast.

The system of preferential or majority elections, as well as election by plurality, when used with the ordinary method of counting the votes, is subject to results not wholly satisfactory. With preferential voting there is a chance that no candidate will be elected, while with plurality voting the person elected may represent the choice of only a minority of the voters. On the other hand, through the preferential ballot it is possible to ascertain the opinion of the voter as to all the candidates, and when used for primary purposes the expense of elections is greatly reduced. The voter also has a greater choice among the candidates, and while a majority vote is not always possible the plurality vote under this system represents a wider choice than would otherwise be the case.

Proportional Representation

To meet the dissatisfaction of minority parties or groups which has been occasioned by the lack of fair representation in legislative bodies, including municipal commissions and councils, a system known as proportional representation has been devised and is superseding in a number of localities the method of representation based on plurality elections from small local districts.

The chief feature of the plan of proportional representation is that the representative bodies are so chosen that all reasonably large groups of voters will be represented in proportion to their numbers. For example, a political group casting 40 per cent of the total vote in a state election would be entitled to four-tenths of the seats in the state legislature. It is claimed that a representative body elected on this basis would represent the whole electorate more nearly than is now the case under the existing system of plurality representation where the greatest number of votes selects a single candidate in each of the several representative districts.

The simplest form of proportional representation is called the "single non-transferable vote." It is a special form of the limited vote in which a number of members are elected for a district and the elector has one vote only. The votes are counted as in the case of first-choice votes and the required number of members taken from the head of the poll. The single non-transferable vote has been used in the selection of representatives in Japan and China and was adopted by Congress for the selection of senators and representatives in Porto Rico.

Other devices have been tried to secure minority representation

and to prevent the flagrant irregularities of ordinary methods of selecting representatives by single districts with the frequent resort to gerrymandering. One of these is the limited vote by which the voter, when for instance twelve representatives are to be elected, can vote for only seven. This arrangement generally assures the selection of one or more representatives from minor parties, but the distribution is largely on the basis of chance and neither majority nor minority parties are satisfied. Another plan is the cumulative vote, whereby the voter is entitled to as many votes as there are representatives to be elected, but he may distribute them among the candidates as he sees fit, concentrating, if he so desires, upon one or more of the candidates. The chief instance of the trial of the cumulative vote in the United States has been in the State of Illinois, where the constitution of 1870 provides that "in all elections of representatives aforesaid each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates as he may see fit; and the candidate highest in votes shall be declared elected." In practice the cumulative method has given a minority party representation, though not on a strictly proportional basis. But as far as the two leading parties are concerned it has led to a proportional representation approaching mathematical exactness.

Though each of the above devices has its advantages, none has proved practicable from the standpoint of modern party government. Further attempts have been made to accomplish proportional representation through the list and Hare systems. The list system makes votes transferable so that first-choice votes need not be wasted, and records the choice not only of the individual voter, but also of the parties or groups voting. A vote not required to elect one candidate may be transferred to another of the same party. Candidates are nominated in party lists and the voter votes for a list and not a particular candidate.[9] Only voters belonging to a party can make their votes effective under the list system. Most continental European countries have adopted some form of the list system of proportional representation.

The system of proportional representation that is best known and most commonly used, especially in American cities, is the Hare system, named for Thomas Hare who first formulated the plan in 1859. It provides that, although the citizen shall have a single vote, he may indicate his preference among the candidates as first choice, second choice, and so on to the end. The quota is then ascertained by one

[9] Cf. Clarence Gilbert Hoag and George Herbert Hallett, *Proportional Representation* (The Macmillan Company, 1926), pp. 52, 53; for the various methods of assigning the seats won to each party, see *ibid.*, appendix vii.

of two methods: the number of votes cast is divided by the number of representatives; or, in order to make the result more accurate, the Droop quota (that is, the number of representatives plus one) is used to determine the number of votes necessary for election. In the counting of the votes, a candidate of the first choice is given just enough votes to fill his quota for election, the remainder being passed on to candidates not yet elected, in the order expressed in the preferences. If any candidate is elected by the votes he has received as second choice, the surplus votes are given to a third choice, and so on until the full list of seats is filled. In practice, the system is difficult to apply in large districts because the ballot boxes must all be brought to a central bureau to be counted. There is a considerable amount of chance in the order in which the ballots are counted, although various devices have been suggested to assure accuracy.

The progress of proportional representation has been retarded by the complicated procedure necessary to secure an accurate distribution of the votes and by the difficulty in arranging for the count. Despite its difficulty, proportional representation appears to be a satisfactory method of eliminating some of the defects of the district system; especially is this true in cities of not too large a size. It is claimed for it that the influence of political parties has largely disappeared in municipal politics and that sections or groups of the population are more effectively represented than under other methods of representation, and that non-partisan organizations are able to offer candidates for public office with greater surety of success. Even though the system of proportional representation is difficult for the rank and file of voters to understand, it has been sustained in most of the cities in which it has been used. Suggestions have been made for simplifying the system, even to finding a less complicated name in order to make the whole method more easily understood and as a result more acceptable to the average voter.[10]

Proportional representation has been employed in communal or local elections in Europe since 1890. The advantages of the system as applied in a limited way led to the adoption of the principle of proportional representation for the selection of members of the legislative assemblies in Belgium, Switzerland, Sweden, Austria, Bulgaria and Portugal. When the new constitutions were formed as a result of the changes due to the World War, proportional representation was so well established as a desirable feature of the governmental systems of Europe that most of the constitutions provided for the election of members of legislatures by this method.

[10] Joseph P. Harris, "The Practical Workings of Proportional Representation in the United States and Canada," *National Municipal Review* (May, 1930), supplement to vol. xix, pp. 337-383.

The list system whereby the voter in each district makes a choice from lists of candidates is the plan usually adopted. Lists may be prepared by small groups of citizens, but as a rule the important and successful lists are selected by the political parties. The systems differ as to the privileges accorded the voter in indicating his preferences and in the method of allotting seats.[11]

Though there are many critics of the system of proportional representation, it is generally conceded that the main purpose has been accomplished, namely, an equitable distribution of seats in accordance with the relative strength of the parties. As a device to suit the exigencies of a multiple-party system proportional representation is likely to find a permanent place in the electoral systems of most of the European nations.

Party Funds and Expenditures

To keep the extensive and elaborate party organization functioning a large amount of money is necessary. The task of raising sufficient money for the work of the party involves some of the most serious and troublesome problems arising under democratic government. It has been said by Oswald Spengler, the German scholar, that democracy "is the complete equating of money with political power." Questions naturally arise in a consideration of party finances as to what should be the source of party funds, and to what extent should publicity be given to the means employed in raising them. Also, what responsibility does each member owe to the management and financing of his party? Can the political parties serve the best interests of a democracy and be made responsible to the rank and file of their members when their financing is dependent upon a few individuals or upon special interests which look to the government for special favors or concessions?

Under the present method of raising money for the party exchequer the chief sources include contributions which are made by voluntary subscriptions from individual members, and also contributions from corporations where the laws do not prohibit them from doing so. Evasion of such prohibition occurs when members of corporations as individuals give financial assistance to the political parties. Various assessments are made upon officeholders and aspirants to office, especially in state and local contests, and upon special interests such as public utility interests, public contractors, and various resorts which desire government protection. Where there is a

[11] For the methods established by the new electoral laws of Europe, see Arnold John Zurcher, *The Experiment of Democracy in Central Europe* (Oxford University Press, 1933), pp. 79 ff.

strong and well-organized political machine, huge sums are frequently forthcoming from the special interests. These offer an opportunity for much political corruption and graft.

Further contributions have been made to party funds by those who have benefited by public policies which are advocated by the political parties and which become operative through the government. These general governmental policies include the question of high or low tariff, and the lax or rigid control of corporations which seek government protection. Attempts have been made to have political parties financed, at least in part, by small contributions from their total membership, but these have necessarily been materially supplemented by large donations from a few wealthy and especially interested members. Occasionally contributions have been made by the latter to both parties when it might be necessary to seek favors from either party.

What may well be considered legitimate expenses of the political parties involve large sums of money. Party expenditures have increased by leaps and bounds during the last few decades. The maintaining of party headquarters throughout the country, the printing and mailing of party circulars and letters; the party year book; the employing of a permanent staff of assistants, clerks, and speakers, and the use of the radio—all these and many more items of expense mean an outlay of much money. However, the greatest expenses incurred by the political parties are those incident to the election campaigns conducted in nation, state, and local districts. The amounts spent for campaign purposes naturally run highest during the presidential campaigns. These expenditures have increased from $25,000 and $100,000 for the election of Buchanan and Lincoln, respectively, to $4,309,829.58 for the two leading political parties, combined, during the campaigns of 1932 which, incidentally, were spoken of as having been economy campaigns. In the light of some of the expenditures for presidential campaigns which have intervened between those cited above, the expense incurred in the election campaigns of 1932 may be considered at least conservative.

The enormous expenditures by the political parties and the correspondingly large gifts accepted by them from individuals to assure the success of party campaigns, the maintenance of headquarters, the rewarding of the faithful, and the bribery of those so disposed have led to criticism and concern relative to the collection, handling, and manipulation of party finances. Investigations by Congress as to the manner of the election of its members have resulted and legal means have been taken to check the abuses and corruption attendant upon the collection and disbursements of party funds.

Corrupt Practices Acts.—Nearly all the states have passed laws intended to prevent various evils which have arisen in connection with the nomination and election of public officials, and to punish infractions of these laws. Included among the corrupt practices which have been legislated against are bribery, intimidating voters, manipulating ballots, and contributing money to party funds with the expectation of influencing legislation or appointments to political positions. Publicity as to amounts collected for campaign purposes, their sources and expenditure, has been included in the provisions of the statutes. The sources of contributions and the amount expended are usually filed with a state official and are open for inspection. Levying assessments on officials has been prohibited by most states. The amounts which may be spent by candidates are as a rule limited, although frequently no definite restrictions are placed upon contributions made by friends and relatives and an exception is generally made as to personal expenses of candidates.

By evasion of the laws where they exist, and in a few states where limits are not fixed by statutes, expenditures were made to the extent of about $3,000,000 in Pennsylvania and more than $1,000,000 in Illinois during the senatorial campaigns of 1926. An interesting proposal was made by President Theodore Roosevelt that the national government should bear part of the expense of the election campaigns of the leading national parties. So far the only material check which has operated toward improving campaign finances has been the publicity measures which have brought to light the amounts expended by parties and candidates, and by friends and relations of candidates, and by so doing have assisted in arousing a public sentiment which doubtless will in time further check the unscrupulous financing of parties and candidates.

Congress has likewise sought by the enactment of a series of statutes to check corrupt practices relative to the election of national officials. The Pendleton Civil Service Act of 1883 forbade contributions to be made by officeholders or candidates for office, and the act of 1907 sought to bring under control the contributions of corporations to campaign funds. A Federal Corrupt Practices Act passed in 1925 specifies in detail the publicity to be given to the amount and expenditures of campaign funds and provides that the names of contributors shall be made public. Provision is made for the filing of financial statements with the clerk of the House of Representatives and the secretary of the Senate. The amount which may be expended by the candidates is limited by the act, which also retains the prohibition on contributions by corporations.

The control which Congress may or does exercise over expenditures by parties, committees, and candidates is materially lessened since its

jurisdiction can reach only to the manner of holding elections and not to methods of conducting nominations. At least so it was stated in the decision handed down by the Supreme Court of the United States with a vote of four to five in the Newberry case in 1921.[12] The fifth judge who concurred in the decision as rendered did so with the reservation of uncertainty as to what power Congress under the Seventeenth Amendment has over the control of nominations of candidates for Senators. For the present, at least, the regulation of primaries and of the corruption therein rests with the states. Whether it will remain so indefinitely, whether the Supreme Court will some day reverse its decision, or whether public sentiment will demand an amendment to the Constitution in order to give Congress control over the nomination as well as over the election of its members are questions the answers to which the future holds.

Following the Newberry decision some of the states have applied the court's interpretation to suit their own particular needs. Texas has taken steps to curtail the Negro vote and thereby occasioned an interesting conflict between the federal government and the states concerning the application of the Fifteenth Amendment.

The Voter

The struggle to broaden the basis of suffrage which lasted throughout the nineteenth century and extended into the twentieth largely presupposed that the success, or at least a greater realization, of democracy depended on the obtaining of universal adult suffrage—that a government of the people and for the people could best be attained through an expression of their will by means of the ballot. As an aftermath of the gaining of suffrage by adult citizens regardless of property, race, or sex qualifications and with but a few necessary and reasonable limitations have come the alarm and protest occasioned by the small percentage of eligible voters who avail themselves of the opportunity now afforded by the ballot to express their view on public questions or on the selection of public officials. The number of non-voters has been variously estimated at from twenty-five to fifty or more per cent of the number of citizens eligible to vote. So great has become the apparent indifference that voting, which has been considered a privilege or a right granted the individual as a safeguard against political injustice, has now come to be referred to as a duty and one which in the opinion of many should be performed even to the point of compulsion.

Attempts have been made to beseech, to cajole, and to compel

[12] Newberry *v.* United States, 256 U. S. 232.

voters to go to the polls to vote, regardless of their understanding or interest in what they vote for or against. Get out the voters on election days has become a slogan with more than one organization. Such attempts have been made with the good intention that by so doing an understanding of the whole political process of democratic government will ultimately permeate the citizenry of the country. To such an extent has the idea of the duty of voting been carried that definite steps have been taken in some countries to make it compulsory.

Compulsory Voting.—Compulsory voting, where it has been put into effect, usually carries with it fines or prohibitions. It seems to have appeared first in certain of the cantons of Switzerland, where in the eighteenth and early nineteenth centuries absences from district elections without a satisfactory excuse were punished with a fine. Compulsory voting[13] has also been applied in Belgium, Bavaria, Baden, Bulgaria, New Zealand, Czechoslovakia, and other European countries before the recent political upheavals.

Until recently, practically nothing was attempted with respect to compulsory voting in the United States. However, a few states have lately adopted an amendment to, or have included some provision in, their fundamental law, which specifies some means to compel electors to avail themselves of the privilege of voting. Oklahoma in 1916 made it the duty of every qualified elector to register as such, and provided that if any qualified person failed to vote at three successive elections held in his precinct, his registration was to be canceled. The legislature of North Dakota has been given the power by the constitution to prescribe penalties for failure to vote on the part of those legally qualified to participate in elections, but so far the legislature has passed no act relative to compulsory voting. Illinois employs the rather unusual method of drawing her jurymen from the non-voters' lists. Probably the most significant measure taken with respect to compulsory voting is that of Massachusetts in the constitutional amendment to the effect that "the General Court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved." Other states have voted on the question of compulsory voting but have rejected the plan as a method of increasing the number and interest of voters.

The movement for compelling legally qualified voters to perform their duty in expressing their opinions through the ballot is open to question. Compulsion does not necessarily enhance the citizen's interest in voting. Surveys and critical studies tend to discount impressions that the neglect in voting is confined largely to the well-to-do,

[13] William A. Robson, "Compulsory Voting," *Political Science Quarterly* (December, 1923), vol. xxxviii, pp. 569 ff.

professional, and educated classes. Rather has it been found that the proportion of non-voters is greatest among the poor, ignorant, and politically uninformed persons. It has also been shown through studies made in various sections of the country that the number of persons participating in elections is proportionately lower in the more thickly populated centers than in the rural districts.[14]

The important question seems to be not so much a matter of getting non-voters to the polls as of finding the reasons for their not performing their political duty, as it is now considered, or deciding whether it is even desirable to compel or influence persons to vote who may have neither the interest nor the ability to vote intelligently.

Some wholly legitimate reasons for non-voting include sickness, insufficient legal residence, and distance from the polls. Consequently, many qualified and registered voters are frequently unable to cast their votes on election days in the customary manner. This difficulty is partially overcome by the practice of absentee voting. To prevent an unavoidable disfranchisement of persons who because of the nature of their occupations or because of sickness are unable to vote, the method of absentee voting has been adopted by most of the states. As early as 1896 Vermont passed an absent voting law. Kansas passed a similar law in 1901, and North Dakota, in 1913. More recent absent voting laws have followed with variations the general plans of Kansas and North Dakota. The former limits absent voting to those who are absent from the district wherein they have registered but are within the state. Several defects are obvious in the Kansas method, including a lack of secrecy in balloting; also, the voter is apt to be limited to voting for only state and national officers since he may not be familiar with local and county nominees. In addition, the ballots are counted several days after the election. In the North Dakota plan provision is made for official absent-voter ballots which when marked are mailed to the county auditor who in turn transmits them to the proper election official in time to be counted on election day. Modifications of these two types of absentee voting in states which have adopted the system include special requirements as to the time, the place, and the manner of casting the ballot and also as to its secrecy and the nominees to be elected and the measures to be voted upon.

Other difficulties and inconveniences are to be found in registration requirements, frequent elections, and the use of the long ballot with its large number of candidates and political issues. The complexity of modern life both private and public, together with the complicated election methods, tends to lessen the desire on the part of many

[14] Charles Edward Merriam and Harold Foote Gosnell, *Non-Voting: Causes and Methods of Control* (University of Chicago Press, 1924).

to cast their ballots on election day. Then, too, voters frequently feel the futility of voting in the light of the reputed corruption in politics; also, many of them (when they are members of minority parties) despair of any chance to influence the election results. Interest in public affairs is not apt to be active unless the issues are of personal importance. It is felt by some students of politics that it is futile to attempt to arouse interest where it naturally does not exist. The chief function of the ballot, it is claimed, is one of protest. This being the case, the vote may well be left to those vitally or personally interested. When the occasion warrants, a sufficient number of voters will participate in a given election to assure protection from undue oppression. This viewpoint may be questioned, however, as to whether there is not also an affirmative value incident to the use of the ballot, whether it may not be employed to approve or to suggest as well as to protest.

Whatever the causes for the large percentage of non-voters, it seems advisable, rather than attempting to decrease their number through propaganda, bribery, or compulsion, to make such changes in party practices and elections as would simplify the election process and thereby enhance the interest of eligible voters. Much might be accomplished if the short ballot were substituted for the present blanket ballot and national elections were separated from state and local elections, if minor officials were selected through the merit system, and if the elections were held less frequently, with the issues centering around more clearly cut policies instead of around personalities as is too often the case at present. The lack of interest and general indifference which now prevail might give way to greater interest in elections, and through a constant and thorough education in civic and public questions a keener and more genuine interest in politics might gradually be fostered.

Political Parties and Democracy.—According to the concept of the Greeks, a democracy was limited to a size necessary to render it possible to hear those participating in public debate or presenting a political dissertation. Democratic government in the modern sense is not confined to a limited area as a result of the adoption of the principle of representative government. Members of legislative assemblies are now chosen to speak and act politically for the people of a specified governmental area. The selection of representatives has come to be one of the chief functions of political parties which have thereby bridged the gap between the electorate and the policy determining bodies of the government.

In the development of an agency to perform this function, the agency itself by its complex organization controlled frequently by sinister influences has largely broken down the essential features

of democratic government. Democracy in the Greek sense has been defined as government by discussion; but when intimate exchange of ideas is impossible and when governmental policies and the selection of nominees for public offices are in the hands of partisan groups personal responsibility and participation in the functioning of the government become largely an impossibility. Interest in the operation of government which would lead to discussion is negligible except to those who desire to have the government serve their personal ends. This lack of interest may be due not so much to a general apathy or inertia of the electorate as to a realization of helplessness or of the futility of effort before the highly centralized power now exercised by party leaders, organizations, and machines.

A democracy in modern times, however, can be made to function only through the use of political parties and a system of representation. How can these be made to serve the electorate that democracy may not be entirely a misnomer? Perhaps one of the most effective methods of controlling the non-democratic functioning of political parties would be an extensive change in the management of party finance. So long as the political parties are dependent for financial support upon a few very large gifts from those seeking special privilege or election to office the control of parties will be under the dominance of the large contributors. It would seem that if the rank and file of members would influence the work of political parties then the burden of financing them should be shared proportionally. Political organization and leadership are inherently essential in democracies. How then may the electorate be held responsible for their support and how in turn may political organizations and leaders be made to function more nearly in the interests of the people? The corrupt and illegal practices which have gone hand in hand with the growth of parties need correction. Measures have been passed to curb such practices but much remains to be done. Suggestions have been made that additional regulations be placed on the conduct of elections and that an amendment be adopted which would bring nominations as well as elections to national offices under the control of Congress. It has also been advocated that local and national elections should be separated in order that balloting could be a more intelligible process, and that a more democratic system of representation might be adopted with advantage.

The limitations of political parties represent to a great degree the deficiencies of the general political and social standards of the people who control the government. A democracy based upon the principle of representation can be expected to function satisfactorily only in so far as the idea of representation carries with it increased political education and inculcates in the members of the electorate a disposition to seek information and to act on questions of political importance.

Might not political parties responsible to their membership instead of to a few financial supporters be able to cooperate with educational agencies in arousing interest and discussion, and in obtaining action along lines beneficial to a larger number of the electorate than is now possible?

SUPPLEMENTARY READINGS

Sait, E. M., *American Parties and Elections* (D. Appleton-Century Company, Inc., 1927).

Merriam, C. E., and Gosnell, H. F., *Non-Voting: Causes and Methods of Control* (University of Chicago Press, 1924).

Crawford, Finla Goff, *Readings in American Government* (F. S. Crofts & Co., 1933), revised edition, chap. xvii.

Kent, F. R., *The Great Game of Politics* (Doubleday, Doran & Company, Inc., 1924), chaps. xxix and xxx.

Hoag, C. G., and Hallett, G. H., *Proportional Representation* (The Macmillan Company, 1926).

Gosnell, H. F., *Why Europe Votes* (University of Chicago Press, 1930).

Harris, Joseph P., *Registration of Voters in the United States* (The Brookings Institution, 1929).

"A Model Election Administration System," *National Municipal League* (1930), vol. xix, pp. 629 ff.

CHAPTER XII

PUBLIC OPINION AND POPULAR CONTROL OF GOVERNMENT[1]

There is hardly anywhere a work on political science that does not, when it examines the phenomena of public opinion, either indulge in some wise and vague observations, or else make a frank admission of ignorance. And yet what can there possibly be to a political science with the very breath of its life left out? He who writes of the state, of law, or of politics without first coming to close quarters with public opinion is simply evading the very central structure of his study.

—A. F. BENTLEY.[2]

PUBLIC OPINION A POTENT FACTOR IN GOVERNMENT

GOVERNMENT in ancient times—in fact, during all times—has been based to a certain degree upon mystery. But especially was this true of the ancient world when rulers believed that they derived their powers from unseen spirits whose will could be evoked and executed only by the chosen few. Monarchy prospered for many years under the assumption of the mystical connection between the rulers and a divinity, and even to this day there still remain a few nations supposedly existing under the domination of the theory of the divine right of rulers. Survivals of this attitude toward government are the ideas that government is something above those governed, that those in office have been in some manner removed from common humanity, and that there is due to them an awelike reverence. On the other hand, in countries which are recognized as democracies, government is looked upon as a means to an end, a means whereby

[1] Secure the publications of the following associations and societies, and note in particular efforts to formulate and direct public opinion:

American Public Health Association
American Social Hygiene Association
National Municipal League
American Proportional Representation League
National Child Labor Committee
American Association for Labor Legislation
Playground and Recreation Association of America
American Federation of Labor
National Association of Manufacturers
National League of Women Voters

Addresses of these organizations may be found in *The World Almanac* or *The Survey*.

[2] A. F. Bentley, *The Process of Government* (University of Chicago Press, 1908), p. 163.

not only the interests of those who are executing the functions of government may be served but also the political, economic, and social welfare of all the citizens. It is assumed in democracies that the ultimate controlling power of government rests with the composite will of at least a majority of the people as this will finds expression through a public opinion which is registered objectively at the polls and which serves subjectively as a check upon public officials.

Two great factors of modern times have tended to increase the formation and influence of public opinion. The first of these is the modern devices to inform the public and the second is the extension of the electorate. The latter has been a slow and gradual process and is one of the chief accomplishments of democratic government.

The feudal and aristocratic characteristics of former governments where the monarch, his relatives and retainers, executed the functions of the nation have in many of the modern countries yielded to a participation in governmental affairs by male citizens over twenty-one years of age, with some important exceptions, and in not a few countries by women also. A few nations that have experienced the establishment of dictatorships since the war, and also Japan, offer exceptions to the tendency to extend the electorate which the preceding decades had witnessed. Nevertheless, the growth of democratic nations, the broadening of the basis for the franchise, and the influence brought about by a more general interest in political affairs have placed the control of governmental functions in many of the leading countries to a considerable degree in the hands of the public-minded citizens as well as of those especially interested. In spite of the reactionary tendencies of recent years in some countries, government is being recognized as a cooperative concern between the governed and those governing, and the necessity of citizens sharing with officials the responsibilities involved is likewise acknowledged.

The various functions which the government has come to perform, the ultimate way in which political affairs touch the life of the citizen, as well as the disastrous results which follow when government is left in the hands of the weak, inefficient, or corrupt—all of these emphasize the need of the citizen being vitally interested in government as the biggest cooperative undertaking of mankind. The citizen is called upon to select public officials and to exercise control over them. He is called upon to vote upon fundamental issues of politics in matters of local, state, and national concern. In numerous cases the responsibility of the citizen is much greater than in the past, and the necessity of a knowledge of governmental affairs is thereby greatly increased. To meet this need, a heavy task is placed upon the agencies which train for civic efficiency. There was never a time

when there was a greater demand and more immediate necessity for a study of social and political affairs.

The physical sciences have placed in man's hands instruments of destruction as well as the means to greater convenience and comfort. The social and political sciences have fallen far behind in their efforts to adjust mankind to the results of an era of invention and of a highly industrialized age, so that a satisfactory modern community life is still far from being attained. On those trained in the social sciences rests the seriousness of coping with the mechanical age with all that it implies and of so directing the forces and influences now operating that they may be made to serve to man's advantage and not to his destruction. Once more there must be a democratization of government, that it may be brought into service for the whole people. This can be done only through an enlightened and effective public sentiment, more commonly spoken of as public opinion. In the words of Abraham Lincoln: "In this and like communities public sentiment is everything. With public sentiment nothing can fail; without public sentiment nothing can succeed. Consequently he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed."

Immediately following the World War a number of European countries experimented with an organized democratic form of government. The enlarged civic responsibilities which suddenly devolved upon such communities showed a lack of an adequate understanding of the technique of government and of willingness to cooperate with those assuming leadership, as well as the need of a greater and more extensive appreciation of the principles and practices of democratic government. The reactions which followed in Germany, Italy, and other countries show that the people were unable to cope with modern economic and political conditions and were unequal to maintaining a democratic control of their government. There was lacking that informed, rational, and crystallized public opinion which comes through the leaders' power to mold public sentiment. Also, there was absent the willingness to support leaders of the citizens' own choosing which is essential to procure and maintain harmony and to assure security in a democratic community. The strongest force in any nation is an effective and unified public sentiment, and where that is absent the safeguard to the successful political control of a democracy by the electorate is wanting. Free citizenship, one of the fundamental principles of a democratic form of government, is dependent upon an effective public opinion based upon an interested and active understanding on the part of the citizens as to the vital questions relative to the practices and policies of the government.

Since an effective operation of popular government rests upon an enlightened public sentiment or opinion, it is necessary to discuss what constitutes the nature and characteristics of public opinion.

Nature and Characteristics of Public Opinion

Personal Opinion.—Before considering the leading elements of public opinion, it is of interest to ascertain if possible the basis of opinion in general and the means by which personal opinions are formed, and then to examine the more complex term, public opinion. An individual's opinion is thought by some scholars to be a conclusion arrived at by weighing two or more alternatives and then making a choice.[3] A personal opinion has been defined as one of two or more possible views on which rational men may differ. The comparison and the forming of an opinion may be made by the person himself or, as is most frequently the case, it may be accepted by the individual on the authority of others. The impressions or conclusions which persons hold are usually based on judgments or opinions which have been passed on to them by teachers, parents, or associates, or which have been unconsciously absorbed through various environmental, social, economic, or religious influences.

Concerning the opinions which individuals hold on questions to be decided by popular vote, James Bryce asserted:

> In examining the process by which opinion is formed, we cannot fail to note how small a part of the view which the average man entertains when he goes to vote is really of his own making. His original impression was faint and perhaps shapeless; its present definiteness and strength are mainly due to what he has heard and read. He has been told what to think, and why to think it. Arguments have been supplied to him from without, and controversy has embedded them in his mind. Although he supposes his view to be his own, he holds it rather because his acquaintances do the like. Each man believes and repeats certain phrases, because he thinks that everybody else on his own side believes them, and of what each believes only a small part is his own original impression, the far larger part being the result of the commingling and mutual action and reaction of the impressions of a multitude of individuals, in which the element of pure personal conviction based on individual thinking, is but small.[4]

At best, according to Walter Lippmann, personal opinions are based not on actual facts but rather on the individual's conceptions of these

[3] A. L. Lowell, *Public Opinion in War and Peace* (Harvard University Press, 1923).

[4] *The American Commonwealth* (The Macmillan Company, 1910), new and revised edition, vol. ii, p. 253.

facts, on the images in his mind which are never accurate and which may be termed stereotypes. The conclusions thus arrived at by a process of rationalizing preconceived notions and established prejudices, together with environmental influences, assume the form of opinions and deliberate decisions on the part of the individuals.

Moreover, persons are influenced in their opinions by the various groups to which they belong and which may represent a common interest in economics, religion, or politics. The group opinions operate as stimuli to its members and determine in no small measure the judgments formed by them.[5] The development of group life has become so pronounced in recent years that the trends of social and political activities are determined by the sentiments and opinions of the group involved.

Public Opinion.—When opinions pass beyond the interest of persons as individuals and are accepted on the basis of their social, economic, or political importance by groups of individuals, such opinions enter the realm of general significance and are then thought of in terms of public opinion. The interaction of many personal opinions gives to public opinion a complexity which renders it difficult to understand or to control. It is only as the common element in many personal and group opinions takes on a more or less definite form and becomes crystallized into an influential power, that public opinion becomes cognizable. In addition to public opinion being apprehended, it frequently implies the desirability that action which is consistent with the opinion be taken by the communities.

The attempts to define public opinion have been many and the results are somewhat bewildering, for the characteristics attributed to it are manifold.[6] Some writers on the subject would reduce public opinion to a delusion or phantom. Walter Lippmann maintains that the masses play but a limited rôle in the governing processes and that the public which is supposed to direct the course of events is only a phantom. Moreover, he feels that even the ablest are equipped with neither the training nor the information to make wise decisions on the many complicated questions of government in the present age of technology.[7]

Public opinion may also be regarded as a judgment on matters of general social importance which has been reached after serious discussion. It has been spoken of as an aroused, mature, organic, social

[5] E. Pendleton Herring, *Group Representation Before Congress* (Johns Hopkins Press, 1929), p. 7.

[6] For a summary of various definitions and interpretations of public opinion, cf. Virginia Rankin Sedman, "Some Interpretations of Public Opinion," *Social Forces* (March, 1932), vol. x, pp. 339 ff.

[7] See *The Phantom Public* (Harcourt, Brace and Company, 1925).

judgment which implies a conscious effort against tradition and custom and is regarded as the chief means of changing or revaluing existing conditions. James Bryce held that public opinion is commonly used to denote the aggregate of the views men hold regarding matters that affect or interest the community. He maintained that it is "a congeries of all sorts of discrepant notions, beliefs, fancies, prejudices, aspirations. It is confused, incoherent, amorphous, varying from day to day and week to week. But in the midst of this diversity and confusion every question as it rises into importance is subjected to a process of consolidation and clarification until there emerge and take definite shape certain views, or sets of interconnected views, each held and advocated in common by bodies of citizens. It is to the power exerted by any such view, or set of views, when held by an apparent majority of citizens, that we refer when we talk of public opinion as approving or disapproving a certain doctrine or proposal, and thereby becoming a guiding or ruling power."[8]

In contrast to this interpretation of public opinion, it is claimed by not a few political thinkers that public opinion is not a rational judgment reached after deliberate discussion but, similar to personal opinion, it is formed by groups according to their economic and social interests; and that there are group as well as personal stereotypes which determine the trend of what is termed public opinion. Walter Lippmann has said that he conceives public opinion "to be not the voice of God nor the voice of society but the voice of interested spectators of action." He furthermore states: "The pictures inside the heads of these human beings, the pictures of themselves, of others, of their needs, purposes and relationship are their public opinions. These pictures which are acted upon by groups of people or by individuals acting in the name of groups are public opinion in capital letters." "Opinions," Lippmann maintains, "are the responses to our stereotypes. The orthodox theory holds that public opinion constitutes a moral judgment on a group of facts. The theory I am suggesting is that in the present state of education, a public opinion is primarily a moralized and codified version of the facts. We see these facts, then, which fit our predetermined philosophy."[9]

Other contemporary interpretations of public opinion have designated it as a reserve force which becomes especially active during crises and remains active to a lesser degree during the interims. Legislation is usually the result of the insistence of a compact and formidable minority, Justice Learned Hand expresses the belief that "The

[8] James Bryce, *Modern Democracies* (The Macmillan Company, 1921), vol. i, pp 153, 154. By permission of The Macmillan Company, publishers.

[9] Walter Lippmann, *Public Opinion* (Harcourt, Brace and Company, 1922), especially parts i-iii.

truth appears to be that what we mean by a common will is no more than that there shall be an available peaceful means by which law may be changed when it becomes irksome to enough powerful people who can make their will effective. We may say if we like that meanwhile everybody has consented to what exists, but this is a fiction. They have not; they are merely too inert or too weak to do anything about it." Commenting further on the nebulous character of the so-called common will, he says: "In this as in so much else we must be content to accept some convention and hope that it will not bear too heavily to provoke rigid analysis."[10]

Still another conception of public opinion is that it is the thought of a society at a given time toward a given object, and that the group possessing such thought has the power to sway the larger public to its attitude.[11] Whatever interpretation is placed upon public opinion or whatever significance is given the term, it appears above controversy that, whether considered a phantom, an active force, or a latent power, political changes are brought about, governments overthrown, and revolutions, peaceful and otherwise, occur through the sanction or taboo of what is termed public opinion.

Propaganda.—Just as business has found it profitable through such agencies as the public relations council to prepare the public mind to accept and to utilize its products, so in the field of politics various methods of propaganda have been put to effective use. Propaganda has been defined as "the war of ideas on ideas," and it may be a thoroughly legitimate and satisfactory procedure when used for the benefit of the general public. Its abuses, however, present a serious problem. When propaganda is employed for sinister purposes, instead of the public being truly informed and able to weigh and discuss political and economic questions in a dispassionate and intelligent manner, the citizens are deliberately misinformed, their emotions aroused, and the decisions thus reached proved in the end unsatisfactory to the reasonable and fair-minded. As the national government has broadened its functions and extended its services most of the propaganda organizations and societies have established their headquarters in Washington. Washington has been called "the happy home of propaganda and the paradise of the press agent."

The manner in which the public can be misinformed through propaganda methods is well illustrated by the report of the Federal Trade Commission in relation to its investigation of the electrical

[10] "Is there a Common Will?" *Michigan Law Review* (November, 1929), vol. xxviii, pp. 46, 50, 51.

[11] E. L. Bernays, "Manipulating Public Opinion," *American Journal of Sociology* (May, 1928), vol. xxxiii, p. 960.

industry. The commission found evidence of the suppression of essential information and dubious methods of influencing public opinion. Serious revelations were made of the propaganda activities and the publicity methods of the public utilities. The public relations policy of the utilities was well stated by one of their enthusiastic agents when he said: "We feel it is a responsibility to get every person that can be reached in the country to have our views on the subject of municipal ownership and we have availed ourselves of every means of publicity known to date."[12]

Various means were employed in the publicity game. Advertising campaigns were extensively carried on and "canned" editorials were prepared and circulated at the expense of the utilities. This method was reported to be successful in that utility-prepared materials were freely used by many papers and to a considerable degree items favorable to public ownership were excluded from the press. Textbooks used in schools and colleges were surveyed and classified as good, fair, bad, and unfair in relation to their discussion of municipal ownership. To be in the favored class, a textbook must not mention such subjects as watered stocks or the political methods practiced by the utilities. But activities along this line did not stop at classifying and condemning textbooks. Writers of texts were "persuaded" to change paragraphs in their copies relating to utilities, and book companies were prevailed upon to insist on such changes as necessary before proceeding to the publication of manuscripts. Research funds were given to the universities, professors were subsidized for aiding the cause of the utilities, and funds were furnished for women's clubs; and in order to conceal some of the propaganda methods chambers of commerce, life insurance companies, and other organizations were enlisted in the campaign. All the money being spent is worth while, said another advocate, and then added, "Don't be afraid of the expense, the public pays the bill."[13]

Since the publication of data by the Federal Trade Commission the utility executives have to a certain extent changed their methods, and the most notorious of the propaganda organizations has been abolished. But the claim of certain officers that propaganda methods, lobbying, and attempts to influence any one except with facts have been discontinued by the utilities scarcely conforms to actual conditions.

Doubtless the most serious use which is made of propaganda, whether justifiable or otherwise, is that followed by nations when at

[12] *Senate Document* No. 92, part 3, 70th Cong., 1st Sess., p. 192.

[13] Carl D. Thompson, *Confessions of the Power Trust* (E. P. Dutton & Co., Inc., 1932), part vi on "Propaganda Methods."

war with one another.[14] During the World War, all the nations involved had highly organized propaganda agencies at work for the purpose both of strengthening their own position at home and of undermining that of the enemy. According to Mr. Lasswell, propaganda is one of the three chief implements of operation against a warring enemy, the other two being military force and economic pressure. He further says that in times of war the "rôle of propaganda is to mobilize the animosity of the community against the enemy, to maintain friendly relations with neutrals and allies, to arouse the neutrals against the enemy and to break up the solid wall of enemy antagonism." In addition it is stated that war must be interpreted to mean all things to all men, and it is the work of the propagandist to do this.

The technique of propaganda, as Mr. Lasswell points out, was highly developed by the nations participating in the World War, and constituted well-organized agencies which used every conceivable method to arouse the emotions and dull the reason of the citizens of each nation, including symbols of every description, horrifying stories and rumors, and moving pictures. It was important that each government should have as nearly as possible the undivided support of its people, and to accomplish this it was necessary that the accounts of the contests, the purposes of high officials, and the progress of the war should reach the people through government-controlled information. In the United States this was accomplished through the bureau at the head of which was George Creel and which consisted of the United States Committee on Public Information, and the Secretaries of the Navy, War, and State. Possibly at no time is the individual more susceptible to propaganda than during the high tension created by conditions incident to warfare. During such periods of psychological and physical stress the lower impulses of man are released and he becomes a subject ready to accept organized war propaganda of every description and to react in a manner anticipated by the agencies dispensing it, and to whom it has become a psychological game. Whether commendable or reprehensible, whether necessary or not, during periods of military conflict propaganda has become a powerful weapon of defense and aggression for modern warfare.

Public Opinion and International Relations.—In contrast to the emotional and irrational propaganda which is promulgated when nations are at war with one another, there is made during periods of peace a legitimate and sincere effort on the part of individual nations

[14] Cf. Harold D. Lasswell, *Propaganda Technique in the World War* (Alfred A. Knopf, 1927); and *Public Opinion and World Politics*, edited by Quincy Wright (University of Chicago Press, 1933).

to create a public opinion which is based upon an interpretation of the political, economic, and cultural relations which exist between nations. These interpretations, it is true, may have for each nation a certain bias, but no more so in an international sense than is the case with the formation of public opinion within nations, or among individuals in their personal opinions. It is true, also, that the real significance of the relations between nations is understood much more definitely by those in the diplomatic service and by the staff of foreign officers usually acting largely in secrecy than it can possibly be by any "public." Schuman feels that public opinion as such has very little weight with the relation between nations and that influence over foreign policy is not exercised by the electorate but is concentrated in a few important officials and a small number of private organizations and interests which have political influence.[15] In other words, the forming of public policies and the creating of a public opinion to support them rest largely in the hands of a small number of individuals or groups of persons with special interests at stake, and with those engaged in the diplomatic service including the professional bureaucracy. It is necessary, however, in order to accomplish specific ends, that the foreign ministers and other diplomatic representatives take into account the importance of an informed public opinion and its support. To create a responsive public opinion it becomes desirable to control the various agencies which mold public sentiment, including the press.

In the opinion of Schuman, national patriotism is the bond which creates the "public" and gives cohesion and unity to the various groups within the modern state. Patriotism underlies the foreign policies of nations and in its terms is pursued the competitive struggle for power. "The power interests of each state," he believes, "are expressed in terms of specific purposes which reflect the interests and attitudes of the politically dominant groups within the state. These purposes are formulated through the interaction of internal political forces. Once formulated they are imposed upon the nation as a whole and become identified with the nation's interests."[16]

The problems of modern nationalism supported by a loyal patriotism, backed by a trained public opinion, are as timely as they are numerous. They open up for discussion nationalism versus internationalism, how far the immediate interests of the former may be limited in relation to securing a better cooperation among nations, and to what extent governments may rightfully go in protecting group

[15] Frederick L. Schuman, *International Politics* (McGraw-Hill Book Company, Inc., 1933), pp. 494 ff.

[16] *Ibid.*, p. 503.

interests in terms of national interests. In addition to such questions as these, a consideration of the means to be employed to accomplish the ends sought may well be included. In the past public opinion has been educated to support the resort to military force in settling conflicts between nations. In the future may it not be employed to sanction the settlement of international difficulties through means similar to those used between individuals or groups of individuals? Much of the work undertaken by the League of Nations, the World Court, the International Conferences, and the various unions organized for the better understanding of the problems and difficulties arising among nations has been contributing to the creating of a new public opinion. An international-mindedness is being sought that will be supported by a public opinion which will require the settling of international differences by other means than a resort to armed force with all its attendant horrors, loss of human life and material wealth, and retrogression in cultural and intellectual attainments.

Measuring and Anticipating Public Opinion.—Modern psychologists and sociologists have been interested in deducing from results obtained from experimentation and investigation general laws which govern human behavior. Likewise, the realists among the political scientists are exploring the possibilities of bringing under scientific investigation and observation the reactions of individuals and communities to political situations, their expressions of opinion on public questions or policies, or their selection of public officials.

According to the behavioristic psychologists, the mind of an individual is thought of as a "total functioning of a unit of protoplasm in a given situation," in other words, a physical stimuli-response process. In line with this interpretation, "opinion becomes a tentative adjustment usually finding expression in some form of verbal behavior which the individual himself may recognize as based on only partial data."[17]

In interpreting the behavior of a community in its collective response to stimuli of a political nature, does not the public mind react in terms of a social community in a manner similar to the mind of an individual reacting to physical stimuli? Public decisions are made regardless of whether a majority of the people participate, and may be considered as an expression of public opinion when the public acquiesces to such tentative adjustments. Is the opinion of the public, then, other than an adjustment on the part of a potential community between two or more urgent political situations or stimuli? And if so, may not the political scientist attempt to measure such political

[17] George A. Lundberg, "Public Opinion from a Behavioristic Viewpoint," *American Journal of Sociology* (November, 1930), vol. xxxvi, pp. 387 ff.

reactions on the part of the public after a manner similar to that of the behavioristic psychologists? This is in fact what the realists among the political scientists are at present interested in doing. Two important phases of public opinion which are attracting the time and attention of political scientists are those relative to the possibility of measuring public opinion and of predicting how it will react under given conditions. It is felt that the function of public opinion will be greatly enhanced if its reactions can be predicted with a modicum of reliability. Those interested in measuring public opinion have for their aim the formulating of a precise statement of the "extent, direction, and intensity of the formative factors in public opinion."[18]

Various methods of measurement[19] are being applied in order that suggestive data may be compiled and interpreted. A rather common method of measuring public opinion is by a straw vote; another is to analyze past party alignments and to estimate the possible outcome of current elections in view of past experience.

In addition to the various methods of determining individual or group opinions on public questions, attempts are being made through investigations of statistical reports of elections to determine whether there exist from year to year patterns in political behavior which find expression at the polls, and whether these patterns follow any general principle or law.[20] Interesting and suggestive interpretations have been made as a result of measuring by the use of statistics how the public reacts to political stimuli such as voting for officers, national, state, and local. Though somewhat tentatively established, the evidence indicates that there are similar patterns and attitudes which appear in successive elections and that there is enough uniformity and sequence to this similarity to warrant the deduction of a few general laws operating in elections. Statistical methods as applied to voting behavior have been used successfully in measuring, verifying, and synthesizing results already obtained by the use of other methods of estimating the expression of public opinion through the ballot.

[18] Harold D. Lasswell, "The Measurement of Public Opinion," *American Political Science Review* (May, 1931), vol. xxv, pp. 311-326.

[19] For a summary of different methods of measuring public opinion see D. D. Droba, "Methods Used for Measuring Public Opinion," *American Journal of Sociology* (November, 1931), vol. xxxvii, pp. 410-423.

[20] Charles H. Titus, "Voting in California Cities, 1900-1925," *Southwestern Political and Social Science Quarterly* (March, 1928), vol. viii, pp. 383-399; "Rural Voting in California, 1900-1926," *ibid.* (September, 1928), vol. ix, pp. 198-215; "Voting in California, 1900-1926," *ibid.* (June, 1929), vol. x, pp. 76-95. Through the courtesy of Professor Titus we were accorded the privilege of examining a forthcoming monograph on the results secured from a statistical study of elections in the United States, in which are summarized the results of the application of this method of measuring political behavior.

The Agencies Which Aid in Forming Public Opinion

In modern governments, the forming and directing of public opinion is an enormous task, requiring the expenditure of huge sums of money and the employment of many men and women. Among the numerous means by which the public may be informed and thereby the formation of public opinion influenced are: the press, radio, moving pictures, cable, telegraph, political parties, religious groups, chambers of commerce, Anti-Saloon League, the Navy League of the United States, the American Legion, National Child Labor Committee, women's organizations, specialized private organizations, and official publications and documents.

The Press.—An important agency in the formation of public opinion is unquestionably the press, particularly the daily and weekly newspapers and magazines. Most of the facts relative to public questions as well as their interpretation are accepted by the average citizen as they are presented to him by the papers and magazines which he reads.

The press through its news and editorial columns renders a great public service in the preparation of the facts and opinions which are necessary to form judgments on public questions. While partisan newspapers and organs of special interests frequently present only one side of an issue or view a problem with a manifest bias, many newspapers aim to deal impartially with most public controversies. By means of various press associations and other agencies the news from every quarter of the world is brought in inexpensive form to the door of the humblest citizen. And by means of the admirable news-gathering methods of the large dailies and their almost instantaneous methods of printing there is little excuse for citizens being uninformed on the public questions of the day. For its great services in the molding of public opinion on the problems of modern politics the press deserves high commendation. But in the development of the press as an agency in the formation of public opinion certain problems have arisen which are of serious concern to citizens who are so largely dependent upon newspapers for opinions and information on public issues. Formerly, the opinions of the press were expressed through the medium of the editorial column. Within recent times, the editorial column has become of less importance, and the news column a greater influence in molding public opinion.

In place of the newspapers which were locally owned and which voiced in large part the individual opinion or opinions of the owner or the small group who controlled the entire policy of the paper, we now find large metropolitan dailies owned and managed by stock

companies and usually under the direction of interests which determine the editorial and news-gathering policy of the paper. This control is exercised not only by giving a particular color or trend to editorials and articles, but also by a kind of censorship which refuses to admit to the columns of the paper a type of news regarded as detrimental to the owners. For example, a paper which is owned and supported by the liquor interests will present a prohibition item so as to be agreeable to anti-prohibitionists. Similarly, a paper whose stock is owned largely by the stockholders and managers of public utilities will publish the news relating to public ownership in a form to suit the public utility stockholder. It is unfortunate that the number of privately owned and directed papers has decreased in favor of the stock-company paper whose policy is likely to conform to the views of the special interests of the large owners or those who purchase advertising space in the papers.

The situation with respect to the formation of public opinion through the press is thus described by William Dudley Foulke:

> The public does not know who is really in control. A large amount of capital is required for our great metropolitan papers and the men who own them are usually connected with other large interests. They are often stockholders and perhaps directors of railroads and banks and vast industrial concerns which are seriously affected by many public movements. The public insists that the newspaper shall advocate reform measures; the interests of the proprietors demand that certain special great enterprises shall remain undisturbed; hence, news is perverted and arguments are twisted so as to give the appearance of patriotism and public spirit without its real presence. It is the fact that these motives and interests are concealed which is the real source of evil. The public has little to fear from the advocacy of anything by persons whose purposes are well known, but the secret control of a paper by some unknown power or its use of news furnished by a news bureau similarly controlled, may well corrupt that public opinion which lies at the foundation of all popular government.
>
> For instance, there was a bureau which furnished arguments against municipal ownership of public utilities for the purpose of protecting and promoting the particular enterprises in which those connected with the bureau were interested. This bureau would pay newspapers advertising rates for articles to be published as news matter in violation of the first principle of journalistic ethics.
>
> During the investigation of the great life insurance companies of New York, some of the companies, through a "telegraphic news bureau," sent paid items in their own favor which were fraudulently published as impartial news. . . .
>
> The large advertisers in our most important newspapers have often secured the suppression of injurious facts in regard to themselves or to institutions with which they are connected.

These abuses infect free government at its fountain head, and newspapers, which are themselves the instruments of publicity, ought to be required both by public opinion and by specific law to furnish not only the names of all who are responsible for what is contained in their columns, but also, if demanded, the business connections of their directors and managers. Moreover, the furnishing of news by interested parties without disclosing such interest should be prohibited and visited with appropriate penalties.[21]

Since a large part of the information which ultimately reaches the public comes through the Associated Press agencies, it is extremely important that a fair and unbiased policy prevail in the dissemination of news. So important are these associations that it is a serious question whether some kind of control or public supervision ought not to be exercised over them.

Radio and Moving Pictures.—Among the many agencies by which the public may be informed on questions of general political, economic, and social interest, the radio and moving pictures are important modern devices for broadcasting such information. In the field of politics nothing has approached the radio as a means by which interest can be aroused and opinions formed. It has been said of the radio that it is to modern democracy what the Acropolis was to Athens and the Forum to Rome. Daily messages and information are brought to millions of persons in their homes. It appears possible that once more the contact between the people governed and those constituting the government may become very close.

The use which President Roosevelt has made of the radio in his personal messages to the citizens of the nation is illustrative of the method by which information may be brought directly to the people through the radio and the influence which it is possible for those in office to have on the formation of public opinion. By the use of the radio the President has been able through an informed public opinion to mobilize the support necessary to carry on his governmental program and policies. With the radio as an instrument for diffusing information by officials, and with the ballot in the hands of interested voters, together with opportunities for the discussion of political issues by the press and forum, there is a feeling that the responsibility for the management of the government rests with both citizens and officials.

Likewise, the portrayals of various political and economic situations, whether it is propaganda or otherwise, which are flashed hourly upon the thousands of screens throughout the country tend to direct

[21] William Dudley Foulke, "Public Opinion," *National Municipal Review* (April, 1914), vol. iii, pp. 248-249.

and influence the formation of public opinion. The news reel gives vivid even though brief sketches of recent happenings throughout the world and thus serves as an international newspaper in portraying and interpreting the events of the day, not always without bias or sensational treatment, it is true, but nevertheless bringing the happenings of the remote corners of the world to the audiences. The influence thus exerted in forming public opinion on economic, social, and political questions of national and international importance is not to be discounted. The moving picture has also been used for various campaign purposes, for social welfare, and for municipal reforms in government procedure and in sanitation as well as for general civic improvements.

Party Organizations and Public Opinion.—The political parties maintain a complicated system of machinery which is constantly at work in an effort to create and direct public opinion that is favorable to the policies of the party. Various committees, organized to forward party interests, conduct extensive educational campaigns in order to put the claims of the party before the voters. In the process of instructing the voters, newspaper and magazine articles and advertisements, as well as specially prepared campaign leaflets and documents, are freely used. Articles designed for news purposes are prepared under the direct supervision of the literary bureau, and are sent without charge to the newspapers for publication. Campaign documents are multitudinous and vary greatly in form. Cards, posters, pamphlets, speeches and books are prepared and distributed. The campaign textbook is the most ambitious effort to place at the disposal of party workers the material and facts to influence the great mass of the voters. On the whole, the efforts of the parties to inform the voters and to mold public opinion are the most thorough and extensive which have yet been devised, and the parties are unquestionably among the chief agencies in the formation of public opinion on some of the great political issues.[22]

National Organizations and Societies.—When a group of persons becomes conscious that there is need of change or of the initiation of a new feature in the management of government or in any of its activities, it is customary for those persons to attempt to lead as many other persons as possible to the same point of view, so that in time public opinion will be strong enough to bring about the desired change. This is best accomplished by organized educational campaigns, for only through organizations is public opinion able to become strong enough for this purpose. "There is no public opinion,"

[22] Cf. A. L. Lowell, *op. cit.*, chaps. ii-iv.

maintains Mr. Bentley, "that is not actually reflecting or representing the activity of a group or of a set of groups."[23]

Almost every government activity as now exercised had its beginning with small groups of persons particularly interested. And through an educational campaign the idea was carried to a larger number until sufficient sentiment was aroused to have it included as a part of the ordinary government functions. An illustration of this method is seen in the recent effort to establish a national department of education under a secretary who would be a member of the President's Cabinet. The bill presented to Congress was approved by numerous national organizations, including the National Education Association, the American Federation of Teachers, and the American Federation of Labor. However, public opinion on this issue has not reached the point where the proposal has been adopted. An illustration of the way in which legislation may be the direct result of the agitation of a group is the passage of the Adamson Law regulating the hours of labor and other conditions of employment on the railroads. This act was passed on account of pressure exerted by the railway brotherhoods in a case of extraordinary emergency. Similarly, organized labor has brought pressure to bear on Congress and the President to attempt to curb the exorbitant rise in prices following the war.

Among the questions which have aroused great controversies and have necessitated the education of public opinion pro and con are those which center around the control of great industrial corporations, holding companies and investment trusts. The National Association of Manufacturers, as well as other organizations representing the employers of labor, are ever on the alert to see that their interests are properly protected by governmental means. A number of protective tariff acts resulted from the efforts of these organizations. On the other hand, the American Federation of Labor, through its methods of organization and education, has succeeded in safeguarding the rights of the laboring classes by laws and by means of redress before the courts. The National Grange of Patrons of Husbandry, farmers' unions and cooperative societies are the organizations through which the farmer urges his demands for a share of government protection.

Most reforms have gone through similar stages of organization, education, and, finally, government action or supervision. The extension of the franchise to women and the passage of prohibition laws and their repeal have come largely through concerted efforts of local, state, and national organizations. The National Child Labor Committee and the National Civil Service Reform League have aided,

[23] A. F. Bentley, *op. cit.*, p. 223.

respectively, in creating a public opinion sufficiently strong to demand special protection for children against the greed of employers or the shiftlessness of parents, and protection against spoils politics.[24]

The number of organizations whose chief function is the formation of public opinion is legion, and it is impossible to attempt a detailed description of all of them, for every field of government activity has well-defined groups of those who are interested in securing changes in existing methods of political control.

What is true of the nation is similarly true of municipalities. Most cities of any size have clubs, civic organizations, or municipal leagues for educating public opinion in the interest of civic reform. Most of these organizations are maintained by voluntary subscriptions and are not under government control. However, they exert a great influence in local politics and assist in creating public interest in the projects for which they are organized, and their ultimate object is frequently to gain desired changes through legislative or administrative channels. In addition to these voluntarily supported agencies there have been established recently in several of the largest cities Bureaus of Municipal Research. The objects of these are to give city officials and citizens interested in government the benefit of what other cities are doing in the way of legislation and improved methods of administration. A useful service of this character may also be rendered by the municipal reference division of the public library, where civic information may be collected and classified for the use of officials as well as of interested citizens.[25]

Specialized Private Agencies.—One of the most effective of the private agencies organized to influence and conduct public affairs was the American Brewers' Association, which maintained an organization in every state and used every means available to prevent the spread of local option and to forestall the more radical step of prohibition. Large sums of money were collected and spent in so-called pivotal states.[26] Likewise, the movement to repeal the Eighteenth Amendment was fostered by many private organizations and groups using every known method to influence public sentiment. In a similar manner, the public utility interests have united in a campaign of education and of what one of their agents described as "the accelerating of public opinion" in support of the private ownership and management of public utilities. A private organization whose chief aim is the

[24] Consult especially the publications of such organizations as the American Association for Labor Legislation, Playground and Recreation Association, Public Ownership League, Russell Sage Foundation, and Local Bureaus of Municipal Research.

[25] Report on organizations that influence and control the government of some city with which you are familiar.

[26] Cf. *The Breweries and Texas Politics*, 2 vols.

formation of public sentiment in favor of preparation for war and the adoption of universal military service is the National Security League. While some of these organizations may seem remote from government, it is only necessary to seek the source of new laws or new administrative policies to find how largely government is molded by such agencies.[27]

Official Publications and Documents.—Within recent years a mass of information in the nature of legislative journals, compilations of statutes, executive and administrative reports, and a vast amount of statistical material have been prepared and published. Much of the material thus issued is utterly useless and represents a waste of both effort and money for publication and distribution. But along with these useless reports and documents are to be found publications of inestimable value for the collection of such facts and data as are indispensable for the formation of intelligent public judgments. It is much to be regretted that this very valuable material is often issued in little-used public documents and is not brought to the attention of those who might be aided thereby. Frequently, the legislature establishes a commission to investigate a subject of proposed legislation and to make recommendations as a basis for constructive legislation. The reports of these commissions, prepared in many instances under the direction and with the advice of specialists, are exceedingly useful.

Miscellaneous Bodies Forming Public Opinion.—In addition to the public and semi-private agencies which are engaged in the process of forming public opinion, there are other organizations or societies which exercise no direct influence upon public affairs, but which take part incidentally in the process of educating the public on political matters. Among such organizations notable examples are the national and local chambers of commerce, which give considerable time and thought to public matters. Many new movements for civic betterment receive their chief impetus from the associated chambers of commerce. Then, too, churches, although founded for a distinct religious purpose, aid at times in bringing about changes of political consequence, such as local option, prohibition, the regulation of vice, and the removal of unsanitary conditions. Likewise, the settlements and the charity organization societies, designed to take care of dependents and defectives, find themselves of necessity drawn into a campaign for the removal of the conditions which cause vice, crime, and poverty. Such national associations as the American Medical Association and the American Bar Association take no small part in the formulation of opinions and policies within their respective fields.

[27]Cf. E. Pendleton Herring, *op. cit.*

The most striking fact about the formation of public opinion is the compact and well-defined organization of private and selfish interests. These interests frequently desire men in office who will be amenable to control and direction for their benefit. When these elements are definitely organized for political purposes, they constitute the basis of what is commonly known as "the machine." Unfortunately, the machine combines some of the best elements in a community with some of those interests which are detrimental to the public welfare, and by its thorough and well-disciplined organization controls such a large part of the electorate as to make it very difficult for those who oppose it to win except for occasional periods. The agencies of reform and the organizations interested in public welfare are seldom able to combine and work effectively to defeat men who have the support and backing of these special interests.

On the other hand, as suggested by Walter Lippmann, the prejudices or "pictures" already in the minds of individuals greatly influence the opinions which they form, and this is especially true concerning matters of public interest. At best, these are far removed from the average citizen; and the avenues through which information reaches him are often at least partially closed by his own training, preconceived notions, and environment, in the first place, and, secondly, by the lack of accurate methods of conveying the facts upon which a trustworthy public opinion might be formed.[28]

Women's Clubs.—A recent stimulus to an active public opinion is the influence exerted by the united effort on the part of women through their clubs. Especially is this true of those organized for the purpose of promoting social betterment and civic improvement, and to an appreciable degree of those which combine an active interest in civic affairs with cultural study. State, national, and international federations of clubs have extended the work of the woman's club beyond the limits of given localities until its influence is felt the world over. In every department of social welfare, education, public health, recreation, better living and housing conditions, eradication of social evils, charities and corrections, and social legislation and its enforcement, women have assisted in arousing a public opinion which demands and supports better and safer conditions for community life. Where their club work is backed by the use of the ballot, results are more likely to be forthcoming. Especially are conditions improved where women have succeeded to public positions involving work in the fields of sanitation, recreation, and juvenile protection.

Not to be overlooked is the influence on public opinion of the information disseminated through the schools, colleges, and universities

[28] See Walter Lippmann, *Public Opinion.*

of the land. It is taken for granted that in the institutions of learning an attempt is made to present facts and information in an impartial manner. As far as possible, all sides of situations and policies are considered in such a way that unbiased judgments may be reached on public affairs. Here again the radio has been put to use in that the specially informed and technically trained frequently bring to the public at large the results of their special studies and investigations.

Methods by Which Public Opinion May Be Expressed

Representative Government.—While public opinion may be brought to bear upon the government and to influence public action in numerous ways, there is a growing tendency to provide official channels for the participation of the public in the affairs of government. Formerly, the petition, the remonstrance, and the request for the redress of grievances were the methods of bringing public pressure to bear upon the monarchs. As these devices failed to meet the needs of the various interests seeking government favors or immunities from heavy taxation, the monarchs were compelled to call in and to consult in the determination of important policies representatives of the several interests or estates, as they were originally called. The consultation of these estates before going to war or levying a new tax laid the foundation for modern representative government. And since different classes and estates had to be consulted, it became customary for the representatives to meet in groups. When the groups combined in England so as to form two chambers, a workable arrangement was hit upon which became a model for future representative bodies. With the decline of autocratic rule and with the growth of the desire for popular participation in government the representative idea was extended, and popular government could be conducted on a large scale. Popular agitation generally took the form of a demand for a constitution and a representative body, until all but a few nations had adopted legislative chambers with one branch, at least, elected by popular vote.

The representative principle is regarded as a great advance in the art of government. Through it popular government can be applied to large populations and over an extensive area. It is based on the theory that the people are unable or incompetent to undertake the determination of all of their public affairs and that public opinion may be expressed through representatives who will reflect the general opinions of the electorate. And despite its many failures and apparent weaknesses, all governments which have in any degree accepted the idea of popular participation in law-making have adopted the representative plan. Moreover, the double chamber, which has been charac-

terized as "the fortuitous product of English political evolution," has been followed with few exceptions.

Though the representative principle is well established, there is a growing belief that representative assemblies have failed to fulfill the high hopes of their founders. Popular assemblies have become unwieldy; the great mass of public business has necessitated undue haste and at times ill-considered action. Furthermore, the growing complexity of public business renders it increasingly difficult to form an intelligent judgment on many of the questions presented to a law-making body. These difficulties are further complicated by causes contributing to the loss of confidence in representative assemblies: namely, the belief, first, that representatives are dominated by local interests and by logrolling methods instead of standing for a straightforward support of community welfare; and, second, that the pressure of private interests is so strong as to weaken greatly the carrying out of public policies as expressed by the electorate in the selection of representatives. The decline in the esteem for legislative bodies has led to renewed efforts to influence legislative action through public opinion and the introduction of devices of direct government.[29]

The methods of bringing opinion to bear upon and to influence representatives are petition and remonstrance, initiative petitions, the recall, and publicity measures. By the petition and the remonstrance the public may give a direct and definite expression of opinion on some specific issue and thus instruct representatives. The method of petition and remonstrance, which is still extensively used, has not always proved effective; hence the devices known as the initiative, referendum, and recall have been adopted, by which more direct pressure may be brought to bear on representative bodies or whereby an appeal may be taken to the voters to reverse or to supplement legislative action. Another important way of bringing public opinion to bear on representatives is through the columns of the papers, the magazines, and the public press generally, and particularly through such agencies as are occasionally formed to keep track of representatives and to publish their records, and thus through publicity to condemn or to give encouragement and support to their actions.

Direct Government.—In contrast with representative government is direct government, in which an assembly composed of those capable of political action meets for the transaction and the control of public business. This form of government is found in village meetings in China and Russia, in the *landsgemeinde* of Switzerland, and in the New England town meetings. The town meeting, found only in

[29] For a further consideration of some of the defects in the functioning of representative assemblies and of certain changes advocated to remedy these defects, see *infra*, chap. xvi.

Michigan and in the rural parts of the New England states, is usually held annually, with special meetings on petition of a fixed number of voters. Town officers are selected and legislation is enacted on a variety of matters. Its most important duty is to levy local taxes and to vote appropriations. This form of popular assembly can be used only when the community is compact enough to permit citizens to come together easily and when the body is small enough to hear a man's voice. The advantages of the mass meetings are that the questions are local and familiar to everyone and that the function of inspection, supervision, and criticism may be directly exercised. Where the town meeting prevails, it is customary for measures to be initiated by selectmen as executive officers of the community. As a rule, they present proposals and defend their official conduct. The function of the assembly is to ratify or to reject their proposals and to subject the management of public affairs to criticism.

For small communities in which the population is educated, intelligent, and homogeneous, the town meeting offers a very interesting method by which the principles of direct democracy may be carried out with a considerable degree of effectiveness and by which popular opinion may direct and control all of the acts of the government. The town meeting and *landsgemeinde* have not commended themselves as a feasible arrangement for large government units, and for this reason the representative system has generally been adopted. But representative government is being made more responsive to public sentiment through the devices of direct government, the referendum, the initiative, and the recall.

The Referendum.—The term referendum is frequently used to refer to a political device whereby certain measures which have been drafted and approved by a state legislature or a constitutional convention are held in abeyance until the electorate either accepts or rejects them. In a more accurate sense the word referendum has come to be used when acts of legislatures are forced to a vote by a petition originating with the electors. There are two main forms of the referendum, the compulsory and the optional. The former is used in framing and amending state constitutions; the latter in the granting of the referendum by the legislature either by general laws, special provisions, or on the petition of a stipulated number of voters.

The compulsory referendum has been used extensively in the process of constitution-making in the United States. Drafts of constitutions were rejected and adopted in 1778 and 1780, respectively, in Massachusetts. And from the latter date to the present, state constitutions and amendments thereto, with few exceptions, have been ratified by popular vote. Though the compulsory referendum has been in use for over a century, the question has arisen as to whether the

extensive use of the method has been expeditious and has ascertained the real wish of the majority of the electorate. There are two kinds of optional referendum, namely, the *legislative referendum* and the *referendum by petition*, depending upon whether acts are referred to the people by the legislature or by means of a petition signed by the requisite number of voters.

The legislature, in referring its acts to the people, does so either by special grant for this purpose or by provisions of the general law. Included among the questions which have been submitted by the legislatures by special grants are local option, woman suffrage, and the holding of constitutional conventions. The general laws of some states provide that, among other matters, the legislatures shall leave the form of government for cities, their charters and amendments thereto, to the approval of a majority of the voters in the locality affected.

South Dakota was the first state to include a provision in its constitution for the optional referendum by petition.[30] And though similar action has been taken since 1898 by about a score of states, great diversity exists in the character and use of the optional referendum in the states which have adopted it. It is this form of the referendum which has occasioned the greatest discussion and differences of opinion. Some states require that all laws enacted by the legislatures may be submitted for approval or rejection, while others limit the referendum to particular types of legislation. Usually exempt from referendum petitions are "laws necessary for the immediate preservation of public peace, health, or safety," and also laws for the support of the state government or its various institutions, including the public schools. The limiting of the use of the referendum by an emergency clause has afforded a means of evasion of the purpose and intent of the constitutional provisions for this device. No readily ascertainable standard may be applied to the term "emergency." In eight states the referendum may apply to parts of statutes as well as to the entire law but in others only complete measures are subject to popular reference.

The Initiative.—The initiative as a method of enacting law originated in Switzerland. For many centuries the Swiss cantons (states) enacted their legislation through the *landsgemeinde*, a popular assembly of voters somewhat similar to the New England town meeting. In its modern form, that of presenting laws by petition and voting on them by ballot, the initiative was first used in the canton of Zurich in 1869, was speedily adopted in the other cantons, and in 1891 was

[30] Provisions for the initiative, referendum and recall were incorporated in a number of city charters, beginning with Los Angeles in 1903 where these devices were approved through a movement directed by Dr. John R. Haynes.

placed in the federal constitution. Recently the initiative, based on a plan similar to that of the Swiss cantons, has been adopted rather extensively in the states and cities of the United States. Through the initiative a specified number of voters may draft a law and obtain a popular vote on the law without recourse to the legislature. In contrast to the referendum, which is negative in character, the initiative is positive. The purpose of the former is to nullify objectionable acts passed by the legislature; the latter is designed to pass acts which the majority of the electorate desires, regardless of the sentiment of the legislature.

The initiative may be used in two distinct ways—the direct method and the indirect. Under the direct method the voters decide directly upon the measure. The proposed measure, with the petition, is filed with the secretary of state and submitted directly to the electors. Measures are submitted, as a rule, at general elections only. Under the indirect initiative the act is sent first to the legislature, and if passed without change by that body, it becomes a law; but if the action of the legislature is unfavorable, the measure is returned to the electorate for final action. Most of the states have the direct initiative on constitutional amendments, but Massachusetts has only the indirect initiative on both constitutional amendments and laws. Nine states provide for the direct initiative on statutes, whereas seven use only the indirect method. Under the indirect procedure the legislature may accept or reject the measure, and it is permitted in some states to submit a competing or substitute proposal to the voters. Certain states permit a choice of either the direct or the indirect method, requiring, as a rule, a higher percentage of voters on the petition to submit directly to the electorate.

Recall.—To the initiative and referendum as devices to secure popular control of government is frequently added the recall. This is a provision whereby a certain percentage of the voters may demand the recall of an elective officer or may require him to submit to the test of a new election. Though the recall was suggested in the Articles of Confederation as a scheme to control public officials and was discussed in the federal Convention it was not adopted until 1903, when a provision for the recall of officers was inserted in the Los Angeles city charter.[31] Since this date provisions for the recall of public officials have been adopted in eleven states and in more than one thousand municipalities. The recall is based on the idea that an officer is an agent of the public and that he can be turned out if a majority of the voters disapprove his conduct. There are two chief functions of

[31] Frederick L. Bird and Frances M. Ryan, *The Recall of Public Officers: A Study of the Operation of the Recall in California* (The Macmillan Company, 1930), p. 3.

the recall. In the first place, it provides a means by which the electorate may remove an official whose discharge of the duties of his office does not meet with their approval And in the second place, as has been aptly stated, the recall assists "the officeholder in retaining a candidate's frame of mind," helps him to remember preelection promises, and causes him to be alert as to the wishes of his constituents. The recall is conducted through a petition, similar to the procedure for the initiative and referendum; the number of signatures, the content of the petition, the time of filing, the recall election, and the manner of recourse to the latter vary in different states.

Relatively little use has been made of the recall, and most of the discussion has centered around the advisability of applying this remedy to the office of judge. As a rule, the recall is applied only to legislative and executive officers, but Oregon extended the control to judicial officers, and all of the states with recall provisions, except Idaho, Louisiana, Michigan and Washington, followed this plan. Colorado attempted to apply the principle to judicial decisions on constitutional questions, so as to render it possible for a majority of the voters to overrule the supreme court of the state on a constitutional issue. This provision, however, was declared unconstitutional on the ground that it was in conflict with the due process of law clause of the Fourteenth Amendment.

Results of Referendum, Initiative, and Recall.—While the states have moved slowly in the adoption of these democratic devices, the initiative, referendum, and recall have so commended themselves to the general public that they may be looked upon as satisfactory features of the plan to render popular government effective.

In Switzerland, where the initiative has been in use for many years, there is a good opportunity to see the results of this device. The initiative on constitutional questions has been used rather infrequently. Since 1874 relatively few attempts have been made to amend the constitution by the initiative, of which only a small number were successful. "Earlier writers on the Swiss initiative," says Professor Brooks, "have been too much inclined to condemn the institution because of the uses to which it was put during the first years of its existence. Whatever grounds for criticism may be afforded by the earlier experiences of the Swiss with the initiative, it seems to have justified itself from 1900 on. The measures submitted during the latter period were moderate and progressive. Those which failed laid an educational foundation for reforms which are likely to be made in the not distant future, while the two successful amendments represent substantial achievement. The permanence of the present constitutional initiative is assured, and there is considerable advocacy of the proposition to extend it to the enactment of ordinary federal legislation."

Only fifteen measures were passed in eighteen cantons in a period of twenty years, or less than one measure per canton.

From 1874 to 1917 thirty-one legislative projects were referred to the voters of the Swiss Republic. Of these, nineteen were rejected and twelve approved. The general result of direct legislation in Switzerland is that it "has not realized all the extravagant anticipations of its friends. But on the other hand it has completely falsified the dismal prophecies of chaos and revolution uttered by the conservatives of an earlier period. It has become a vital and freely functioning part of the Swiss political organism."[32] Switzerland was the only nation to submit to a referendum the question of joining the League of Nations. After a vigorous campaign by both advocates and opponents of the League, the proposal to join was carried by a vote of 415,819 for, to 323,225 against, with about 76 per cent of the voters participating.

The local referendum in American cities and counties has been found more satisfactory than the state-wide referendum, since there is better opportunity for discussion and the formation of a real public opinion. Local issues are not so complex, and a larger proportion of the voters show an interest in the measures. Local questions which are referred to the electorate are chiefly the incorporation of towns and the making of city charters, the borrowing of money, and the provisions of public franchises. But in the referendum on local questions as well as in the state-wide referendum a popular vote is of little value: (1) if the questions submitted are so trivial or so local in character as not to be of interest to those to whom they are submitted; (2) if the questions are so complicated and technical that the voter has no satisfactory means of informing himself regarding them; (3) if the questions are submitted in such great number that the voter, even if he might possibly render a satisfactory judgment upon any one of them, cannot inform himself regarding the merits of all the measures upon which he must pass.

Among some of the apparent results of the use of the initiative and referendum are the facts that not infrequently vital measures which the legislatures continued to ignore have been forced to a decision at the polls by the initiative, and as a consequence there has been an appreciable indirect effect upon the legislature itself; and that the interest of the voters has increased, as is shown by the general average of the votes on initiative and referendum petitions.

The results of the adoption of the initiative and referendum vary considerably according to the types of provisions approved by the

[32] Robert C. Brooks, *Government and Politics of Switzerland* (World Book Company, 1918), p. 164.

states and the attitude of the voters and public officials toward such measures to augment popular control of government. California, one of the first states to give the initiative and referendum a trial, has made the most extensive use of this procedure for approving or disapproving laws. In one year the people of California were called upon to vote on as many as 48 measures, including state and local projects. The use of the state-wide initiative and referendum in that state may be indicated by the following tables:

INITIATIVE MEASURES PLACED ON BALLOT SINCE 1911: 76[83]

Adopted since 1911: 21
Rejected since 1911: 55

Year	No.	Passed	Failed
1912	3	..	3
1914	17	6	11
1915	..	..	..
1916	4	1	3
1918	6	1	5
1920	10	3	7
1922	11	4	7
1924	4	2	2
1926	8	1	7
1928	2	0	2
1930	5	1	4
1932	6	2	4
Totals	76	21	55

REFERENDUM MEASURES PLACED ON BALLOT SINCE 1911: 22

Legislative measures sustained: 8
Legislative measures rejected: 14

Year	No.	Passed	Failed
1912	3	..	3
1914	4	3	1
1915	2	..	2
1916	1	..	1
1918	1	..	1
1920	5	2	3
1922	3	1	2
1924	..	..	..
1926	1	..	1
1928	2	2	..
1930	..	..	..
1932	..	..	..
Totals	22	8	14

[83] For this table we are indebted to Dr. John R. Haynes. See also his address, "Direct Government in California," *Senate Document* No. 738, 64th Cong., 2nd sess., Feb. 27, 1917.

Among important laws receiving popular approval are: the Torrens title system, alien land law, increased appropriations for schools, a state budget system, legislative reapportionment, permanent registration of voters, and various measures relating to the control of liquor. The voters disapproved many laws, including a poll tax, a single tax submitted four times, a comprehensive water and power act, and the taxation of publicly owned utilities. In view of the numerous proposals presented to the voters for consideration, it is generally believed that unusual discrimination has been manifested in passing on questions submitted.

The experience of California does not accord with the common belief that laws are placed on the statute book by a relatively small part of the electorate. Using the votes for governor or for all members of the assembly as standards varying from 80 to 96 per cent of the total votes cast at any given election, the votes on laws referred seldom fall as low as 50 per cent and not infrequently are from 80 to 90 per cent of the votes cast. The vote for minor officers is often considerably lower than that on issues referred to the people.

From the standpoint of those who advocated the initiative and referendum as means of extending and rendering more secure popular control over the processes of legislation, the results have at times been rather disappointing. Professor Thomas summarizes the accomplishments of the initiative and referendum in Arkansas for a period of twenty years as follows: "From 1912, the year the I. and R. became operative, to 1932, twenty-six proposed amendments were submitted by petition and nineteen by the legislature, counting duplications in both instances. The new I. and R. and the bond amendment for cities were submitted three times, each by petition, the latter once by the legislature. Out of twenty-six proposals made by petition, eight were ratified by a majority vote, but two were ruled out by the supreme court because in excess of the number allowed for submission, which was three at that time. Another has been superseded by a legislative proposal for a still higher local tax for schools. Still another was declared by the supreme court to have been repealed by implication by a later amendment. Four are still in effect. A part of another, limiting the sessions of the legislature to sixty days, is still in effect, but the limitation of pay to six dollars a day (this was in 1912) has been superseded by a legislative proposal raising the pay to one thousand dollars. A similar proposal for six hundred dollars had been turned down; probably this would not have succeeded had it not been tied up with an increase for the governor and supreme court judges. Four amendments and part of another may not appear to be a very good record for twenty years." Answering the objection advanced by the opponents of the initiative and

referendum that these measures would be designed to promote radicalism, Professor Thomas finds that only two amendments were submitted in the twenty-year period which could in any sense be considered departures from tradition or attacks upon private property.[34]

The decline in the use of the initiative and referendum where conditions are unfavorable for their operation may be illustrated by the experience in Colorado. Direct legislation adopted in 1910 was used in a few instances for several years, but by 1924 no statutes were proposed by or referred to the people. Since this date a small number of measures have been presented to the voters through the initiative, practically no use being made of the referendum. The failure to accomplish the results sought in the adoption of direct legislation may not be wholly attributed to the indifference of the people. The amendment providing for the use of the referendum contained the usual emergency clause and another important restriction which together have to a large extent prevented reference of measures to popular vote. Thus laws "necessary for the immediate preservation of public peace, health or safety" and "appropriations for the support and maintenance of the departments of state and state institutions" are not referred. The extent to which these limitations may preclude reference to the voters may be seen from the results of the legislative session of 1929, in which 186 laws were passed, 100 containing safety clauses and 33 involving appropriations, leaving only 53 subject to veto by the voters. Though it is manifestly intended by such procedure to evade the constitutional provisions relating to the referendum, the courts, following the prevailing practice, have held that the legislative determination as to the application of the emergency clause is not subject to the judicial veto.

The laws proposed by the initiative cover a range of subjects as wide as those which come before a state legislature, and about one-half of the proposals submitted to the voters under the initiative are disapproved. It is interesting to note the general reaction of the composite voter. In the words of a close student of the votes on measures in the State of Oregon, where these devices have been in use for a number of years: "The composite voter appears to be one jealous of his own rights and privileges, as most men are; resolute to see his government actually, as well as theoretically, deriving its just powers from the consent of the governed, and to see politics clean and fair; desirous of improvement of his institutions; open to thoughtful advice and mindful of well-reasoned opinion as to means of betterment,

[34] David Y. Thomas, "The Initiative and Referendum in Arkansas Come of Age," *American Political Science Review* (February, 1933), vol. xxxii, pp. 66 ff. See also the summary of the results of the use of the referendum in Maryland, *ibid.*, p. 75.

but averse to visionary innovations; reluctant to create new offices, and stingy with salaries to public officers, but yielding that point occasionally when involved with some higher good; nearly abreast of the best thought of the time in matters of social and industrial regulation, but lagging behind, and a bit muddled, in economics; and, until he reads the title clear of would-be spenders of the public money, saving with it to a fault."[35]

As to the character of legislation, it is claimed that the acts passed under the initiative are in some respects superior to those enacted by the legislature. This results from the fact that the persons most vitally interested in the measures are the persons who draft or cause to be drafted the bills which are presented for enactment. Then, too, the initiative method, with the extended discussions which usually accompany the presentation of a bill, results more often in framing a law in such a manner that its purpose is accomplished, than does the process of ordinary legislation.

Possibly the most important result of the initiative is the effect upon the voter himself. The discussions which occur in public halls, in influential clubs, and on the street indicate the serious attitude of the voter toward pending measures. As a rule, more interest is shown in the discussion of bills to be voted on than in the consideration of candidates for office. The earnestness and candor as well as the information imparted in the former are felt to be more sincere than in the latter. The educational advantages of a free and general consideration of arguments pro and con cannot be overestimated. With an opportunity to participate given to everyone who will, the kind of legislation enacted becomes a matter of personal responsibility. The problem of popular government, according to A. Lawrence Lowell, is "whether direct legislation is so adjusted to the means of forming a real public opinion that the people can decide intelligently all the questions presented to them, without unusual effort and without the aid of people who find a profit in steering them. Badly adjusted machinery is the opportunity of the boss and the combination. Professional politicians obtained control of elections because the people were called upon to do more than they could do without help, and the more the people are asked to decide questions in which they are not as a whole seriously interested, the greater will be the opening for the boss and his allies."[36]

Though a very appreciable interest has been shown in direct legislation, it has not, as many feared would be the case, endangered the

[35] Richard W. Montague, "The Oregon System at Work," *National Municipal Review* (April, 1914), vol. iii, p. 265.

[36] A. L. Lowell, *Public Opinion and Popular Government* (Longmans, Green and Company, 1914), pp. 230-231.

work of representative legislation. In Oregon during a single year 49 measures were passed of the 108 submitted, while the legislature enacted no fewer than 1624 of the 4429 bills which it considered. At the conclusion of an excellent summary of the results of the initiative and referendum in Oklahoma its author, John H. Bass, observes that "the prophecy that the initiative and referendum would lead to hasty and radical legislation has not been fulfilled. The initial petition has been filed on one hundred and ten questions, but only forty-five went so far as being voted upon. Many of the petitions were never seriously considered, and were filed merely for political purposes; in others the petition failed because of the inability to secure signatures."[37]

The fear that the recall would be abused and would result in frequent changes in public officials seems not to have been realized. Available data regarding the use of recall proceedings indicate that a very small percentage of public officials are threatened with recall, and of these approximately one-half have been removed from office. During a twenty-five-year period in California, two state senators, a district attorney, two county supervisors, two constables, three justices of the peace, fifteen directors of irrigation districts, three municipal judges, nine mayors, one city manager, three city clerks, six school directors, and eighty-three commissioners or councilmen, have been removed. It has been applied almost exclusively to local government officials. After a careful analysis of the results accomplished the following conclusion is reached: "It has been used most effectively, at times, to drive from office unfaithful, incompetent, and arbitrary officials; but it has also been employed, on occasion, without justification or beneficial result. Like all democratic political institutions it has failed to acquire automatic perfection, and its value in each instance of its use has depended upon the intelligence and judgment of the electorate which has employed it."[38] The fact is coming to be recognized that it is not its actual use, but the knowledge that it can be used, which makes officers responsive to the public will.

Public Opinion: How Rendered Effective?—Homogeneity of population and community of interests are among the requisites which make possible an effective public opinion. There are great difficulties and almost insuperable obstacles both in the formation of public opinion and in its effective functioning when such opposing influences as race feeling, religious differences, class bias, and the conflict between selfish interests are in evidence. Also, freedom to dissent is necessary. The minority must have the right to propagate

[37] "The Initiative and Referendum in Oklahoma," *The Southwestern Political Science Quar.* (Sept., 1920), vol. i, p. 125.

[38] Frederick L. Bird and Frances M. Ryan, *op. cit.*, p. 342.

their views by all fair and peaceful means. There must be the utmost freedom of organization in the preparation and advocacy of opinions. Finally, an essential condition for any form of popular government is that the will of the majority, fairly and clearly expressed, shall be acquiesced in and that the minority shall accept the decision until such time as its opinion may come to prevail. As was stated above, public opinion has not been effective in the control of popular governments in some countries, because minorities have refused to abide by decisions of the majority. On the other hand, public opinion as expressed by majorities sometimes has the tendency to ignore opposition and will attempt to silence such opposition by tyrannical methods. It is essential that public opinion as expressed by those in control should be tolerant of group opinions so that it may be a progressive process which profits by and accommodates itself to minority opinions. It is through a relatively fair and representative public opinion that the spirit of democracy is engendered, for "in a democracy," says Chief Justice Hughes, "public opinion wields the scepter."

The necessary procedure in rendering public opinion effective seems to center in better ways of presenting fair, unbiased and complete facts to the public. Mr. Lippmann feels that it would be better were public opinion to intervene less frequently than it does, that it is impossible for it to pass on more than the general principles involved or to understand the technical findings of experts. Others contend that the hope of democracy lies in an alert public opinion which tends to increase its participation in public affairs, and that through further dissemination of the information necessary to a better understanding of social relationships public opinion would become an effective agency in the improvement of human welfare. If the individual, as a citizen and a voter, is free to think and express his thoughts, and by means of the ballot participates in all phases of government activities, how can his opinions be effectively formed and made directly powerful in carrying on public affairs? What part should the knowledge and findings of the expert have in aiding the individual to form his opinions on public affairs? Of what importance is discussion in understanding political issues of the day? How may the citizen be able to distinguish between the broadcasting of information which brings profit and aggrandizement to the few personally concerned and the diffusion of facts which enhance the interests of the general public? Would a more thorough and more extensive education in public affairs be advantageous? Also, how may public opinion be brought to bear continuously and unequivocally upon all officers and organizations engaged in government work?

The real problem and difficulty involved in the relation of public opinion to popular government was admirably stated years ago by

Woodrow Wilson: "The political discussions of recent years concerning the reform of our political methods have carried us back to where we began. We set out upon our political adventures as a nation with one distinct object, namely, to put the control of government in the hands of the people, to set up a government by public opinion thoroughly democratic in its structure and motive. We were more interested in that than in making it efficient. Efficiency meant strength; strength might mean tyranny; and we were minded to have liberty at any cost. And now, behold! when our experiment is an hundred and thirty-odd years old we discover that we have neither efficiency nor control. It is stated and conceded on every side that our whole representative system is in the hands of the 'machine': That the people do not in reality choose their representatives any longer, and that their representatives do not serve the general interest unless dragooned into doing so by extraordinary forces or agitation, but are controlled by personal and private influences; that there is no one anywhere whom we can hold publicly responsible, and that it is hide-and-seek who shall be punished, who rewarded, who preferred, who rejected—that the processes of government amongst us, in short, are haphazard, the processes of control obscure and ineffectual. And so we are at the beginning again. We must, if any part of this be true, at once devote ourselves again to finding means to make our governments, whether in our cities, in our states, or in the nation, representative, responsible, and efficient."[39]

SUPPLEMENTARY READINGS

Bentley, A. F., *The Process of Government* (University of Chicago Press, 1908).

Bryce, James, *The American Commonwealth* (The Macmillan Company, 1910), revised edition, vol. ii, pt. iv.

Lowell, A. Lawrence, *Public Opinion and Popular Government* (Longmans, Green and Company, 1914).

———, *Public Opinion in War and Peace* (Harvard University Press, 1923).

Lippmann, Walter, *Public Opinion* (Harcourt, Brace and Company, 1922).

———, *The Phantom Public* (Harcourt, Brace and Company, 1925).

Graves, W. Brooke, *Readings in Public Opinion: Its Formation and Control* (D. Appleton-Century Company, Inc., 1928).

Lasswell, Harold D., *Propaganda Technique in the World War* (Alfred A. Knopf, 1927).

———, *Psychopathology and Politics* (University of Chicago Press, 1931).

[39] Woodrow Wilson, "Hide and Seek Politics," *North American Review* (November, 1910), vol. cxci, pp. 588 ff.

Bernays, Edward L., *Crystallizing Public Opinion* (Boni and Liveright, 1923).

Angell, Norman, *The Public Mind: Its Disorders; Its Exploitation* (E. P. Dutton & Co., Inc., 1928).

Public Opinion and World Politics, edited by Quincy Wright (University of Chicago Press, 1933).

Holcombe, Arthur N., *The Foundations of the Modern Commonwealth,* (Harper & Brothers, 1923).

Dewey, John, *The Public and Its Problems* (Henry Holt & Company, Inc., 1927).

Elliott, Harrison S., *The Process of Group Thinking* (Association Press, 1927).

CHAPTER XIII

CONSTITUTIONS AND CONSTITUTION-MAKING

WITH but few exceptions the governments of today are based upon charters known as constitutions. A constitution has been defined as "the fundamental law according to which the government of a state is organized and the relations of individuals with society as a whole are regulated." It may be either a document or a collection of acts promulgated at a certain time, or it may be the result of a series of legislative acts, judicial decisions, precedents, and customary regulations. Most of the constitutions of today consist of a single document. But the English constitution, the one from which all the others are in a certain sense derived, has never been put into systematic form.

THE ORIGIN OF CONSTITUTIONS

The written constitution is a comparatively new device in government. However, the distinction between certain laws that are fundamental and permanent and others that are temporary and changeable is, indeed, an ancient idea. This distinction was recognized in Greece and in Rome, and was made more definite and specific in the Middle Ages when the ancient law of nature was supplemented by the law of God to give strength and permanence to the rules and regulations laid down by the church. But while the distinction between fundamental and permanent laws and ordinary legislative or executive acts was recognized in ancient and mediæval times, no clear dividing line was drawn between the laws which were deemed fundamental and those which were regarded as temporary. With the exception of Magna Carta and certain charters or bills of right, there were no special written documents to set off the permanent from the temporary laws.[1]

It was not until the middle of the eighteenth century that the distinction between fundamental law and temporary statutory law was rendered specific by French and English authors. The distinction was clearly presented in Vattel's volume, *The Law of Nations,* which appeared in France in 1773, was translated into English, and was widely read in England and in America. Vattel declared that "the laws made directly with a view to the public welfare are political laws; and in this class are those that concern the body itself and the

[1] See Charles Grove Haines, *The Revival of Natural Law Concepts* (Harvard University Press, 1930), part i.

being of society, the form of government, the manner in which the public authority is to be exerted, those, in a word, which together form the constitution of the state, are the fundamental laws." These fundamental laws, Vattel maintained, are not to be changed by the legislature, and are to be regarded as inviolable except at the wish of the nation itself. This doctrine, supported as it was by the mediæval theory of the law of nature, regarded as superior to and above the ordinary laws, and strengthened by Sir Edward Coke's theory that the common law was superior both to the King and to Parliament, led to the development of the idea that the fundamental laws must be put into a well-defined form and embodied in a written document. The instrument of government prepared by Cromwell appears to be one of the first documents of this kind.

Written constitutions in the sense in which they are regarded today originated, however, with the American colonies, when they repudiated the governments established under their charters with England and set about to organize new governments. An effort was made to prepare in brief written form the primary rules and regulations in accordance with which the government was to be conducted. An impetus was given to the notion of instituting governments founded on written constitutions by the formation and adoption of the federal Constitution, 1787-1789. Soon thereafter, the revolutionary governments of France attempted to base public authority upon fundamental written laws. South and Central American countries have adopted constitutions modeled in some respects after the American charters. European countries have also formulated documents for the guidance of political authority, England, where the distinction between the constitution and ordinary law is rather uncertain, being a notable exception. The movement for the adoption of a written constitution has extended not only into Europe and America, but also into Asia and Africa. Likewise, the Self-Governing Colonies of Canada, Australia and South Africa have organized their governments on the basis of written laws which are superior to ordinary enactments. The states of central Europe formed as a result of the Versailles Treaty also drafted written fundamental laws, some of which have become inoperative due to the development of dictatorships. Thus, the development of written constitutions is one of the leading characteristics of modern political organizations.

Types of Constitutions

The distinction between England, where the constitution is unwritten and where no separate document has been issued as the fundamental law, and the United States, with a written constitution, has

been considerably exaggerated. While England has no definite written document, most of the matters of basic importance have been dealt with in special statutory enactments which may be looked upon as forming a constitution; whereas in the United States matters not covered in the fundamental law are also treated in statutes. In the words of Lord Bryce, "whether the constitution be written or unwritten, provision must be made for its growth and the written constitution must necessarily grow just as well as the unwritten constitution."[2] The efficacy of written documents in securing good government was much exaggerated in the eighteenth and nineteenth centuries. It is a noteworthy fact that two of the greatest political organizations, those of Rome and of England, were not based on written instruments. Certain South American nations have shown how a definitely written document can be readily ignored and governments conducted, notwithstanding such documents, according to the wishes of dominant cliques. Apparently the European nations which adopted constitutions since the end of the World War do not hesitate to disregard the provisions of these documents to carry out plans of economic and political reorganization. On the other hand, the political bonds between England and the Self-Governing Colonies demonstrate that an intricate political mechanism can operate successfully with few written provisions.

The former distinction between written and unwritten constitutions has been demonstrated to be one more of degree than of kind. In fact, all constitutions are contained in documents, statutes, and numerous written evidences of law and custom which are uniformly accepted as a guide for public officers. Thus the English constitution is largely written, only it is not found in a single instrument. It is embodied in many documents and statutes, and the part played by custom is unusually large. On the other hand, states having so-called written constitutions have so much custom, tradition, and judicial, legislative, and executive interpretation intertwined with the written document that the constitutional law of the country must be sought in many other sources than the written instrument. For example, in the United States political parties and the President's Cabinet are not dealt with in the national Constitution, yet each of these is an important and integral part of the government. We may think, said Judge Cooley, "that we have the Constitution all before us; but for practical purposes, the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens recognize and respect as such."

A further distinction has been made between constitutions which

[2] James Bryce, *Studies in History and Jurisprudence* (Oxford University Press, 1901), vol. i, pp. 139 ff.

are flexible and those which are rigid. The basic difference in this regard is to be found in the constitution of England, which is subject to change by an ordinary act of Parliament, and the Constitution of the United States, which requires a special procedure and extraordinary majorities to pass constitutional amendments. But there is a tendency for this distinction to disappear. When the process of constitution-changing involves a different organization, larger majorities, or other distinguishing procedure from the passage of ordinary legislation, it is possible to separate the constituent or constitution-making function from legislation and thus to recognize degrees of rigidity or flexibility in changing the fundamental law. But some states, such as Italy prior to the Fascist regime, do not separate the constituent and the legislative functions. Furthermore, in Switzerland and certain American states the constitution may be amended by the initiative and referendum under the same regulations as those set forth for the passage of ordinary statutes. In such states it is impossible to draw an exact line between the amending process and legislative powers. Moreover, there is a distinct tendency to make all constitutions easier to amend and thus to render of less significance the distinction between flexible and rigid constitutions.

The chief types of constitutions are exemplified in the fundamental laws of England, France, and the United States. The principal characteristics of the English constitution, as stated by A. Lawrence Lowell, are: "First, that no laws are ear-marked as constitutional—all laws can be changed by Parliament, and hence it is futile to attempt to draw a sharp line between those laws which do and those which do not form a part of the constitution; second, the large part played by customary rules, which are carefully followed, but which are entirely devoid of legal sanction."[3]

The term "constitutional," as applied to English law, means nothing more than that an act passed by Parliament is in harmony with the spirit of the English constitution. The negative term "unconstitutional" has no significance as applied to acts of Parliament, since they cannot be regarded as a violation of the fundamental law and in consequence void.

Though the French constitution, unlike the English, is a definite written document, nevertheless it gives wide latitude to the legislature and provides only in part for the general organization and distribution of public powers. The French constitution is dependent for its interpretation and enforcement on the judgment and will of the legislature. To the French, then, the constitutionality of an act has no other purport than that the legislature does not regard the measure as

[3] A. Lawrence Lowell, *Government of England* (The Macmillan Company, 1916), vol. i, p. 9.

contrary to the articles of the constitution. Constitutional law plays an insignificant part in the government of France.

In the United States the federal Constitution is regarded as the fundamental law which imposes a superior obligation upon the legislature and the executive, and legally restrains them from taking any action contrary to its provisions. If at any time either the executive or the legislature oversteps the limits of the powers as prescribed for each by the written instrument, the judiciary interposes its judgment and suspends such action as is regarded in opposition to the Constitution. This is what is meant by the unconstitutionality of an act of Congress, namely, the judiciary has decided that in its judgment the measure is contrary to the fundamental law and has declared it void on that ground.

Constitutions, as they have been described, naturally fall into two main classes: those in which the constitution is guarded and protected by the judiciary, and those in which its interpretation and the declaration of its meaning are in the hands of the legislature. In the United States a somewhat detailed bill of rights, which the courts are charged to protect against encroachments by the government, renders the Constitution a very important document from the standpoint of the individual, and constitutional law takes a prominent place in legal study and practice. In Canada and Australia, where either a bill of rights is omitted or very few individual rights are inserted in the constitution, the constitution has less significance. And in France, where the interpretation of the constitution belongs to the legislature and no specific bill of rights is included therein, constitutional law becomes of minor importance.

American Ideas of Constitutional Government

Constitutional government has been accurately and systematically developed in the United States—so much so that the American concept of a written constitution has formed a basis and served as a model for many modern constitutions.

When governments were in the process of formation in the United States it was decided that the public powers should find the source and sanction of their authority in written charters. There was a fear that governments would become over-assertive, arbitrary, and controlled by popular whims. To prevent the overbearing insolence of public officers and to check the dangers of an excessive democracy, the duties which governments were to perform were to be defined accurately, the limits on their powers were to be determined clearly, and the functions of government were to be divided among separate departments. It was one of the primary objects of the political leaders

of the time to inaugurate a system with the legislative, executive, and judicial powers in separate hands to the end, as the makers of the Massachusetts constitution declared, that there may be "a Government of Laws and not of Men."[4]

The well-known English doctrine of the supremacy of the law to which kings were to be subservient was being transformed in a new environment. Doctrines of a superior natural law and of natural rights belonging to the individual as such with which public authorities ought not to interfere, aided in this transformation. A common belief was epitomized in the statement that what was desired was a reign of laws and not a reign of lawyers. From the peculiar political theories and practices of these times as molded under new conditions came two of the notable contributions of the United States to the art of government, namely, *the American concept of a written constitution* and *the American practice of the review of legislative acts by the courts*. It is well to speak of the American ideas in relation to these features of government, for in no other country have they been accepted with similar meaning and significance.

A government of laws and not of men is a dictum which, like many others, contains an element of truth with a considerable admixture of error. "There never was such a government," said an eminent statesman; "constitute them how you will, governments are always governments of men, and no part of any government is better than the men to whom that part is intrusted."[5]

It is no doubt true that personality enters into all government administration and that individual views influence and more or less determine the nature of all public actions. The element of personality and individual political theories are not eliminated in a constitutional government. It is rather that some of the rules of political action are expressly stated and that those in public authority are expected to follow both express and implied requirements and limitations.

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[4] The idea of a government of laws and not of men is of ancient origin. James Harrington, professing to follow Aristotle and Livy, defined government as "the empire of laws and not of men," in the Oceana, *Works* (ed. 1737) p. 37. Cf. Aristotle, *Politics* III, xvi, 4, 5. John Marshall, in rendering the decision in the case of Marbury *v.* Madison, said: "The government of the United States has been emphatically termed a government of laws, and not of men."—1 Cranch 137, 163 (1803). "Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law'; 'This is a government of laws, and not of men'; 'No man is above the law'—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws."—Chief Justice Taft, in Truax *v.* Corrigan, 257 U. S. 312, 332 (1921). See also the opinion of Justice Matthews, in Yick Wo *v.* Hopkins, 118 U. S. 356, 369 (1885).

[5] Woodrow Wilson, *Constitutional Government in the United States* (Columbia University Press, 1908), p. 17.

One of the chief objects of constitutional government is the protection of the individual in his rights and liberties. For the protection of individual rights there has been a tendency to formulate privileges and guarantees in the part of fundamental charters known as bills of rights. Government action is to be restrained from infringing on the personal rights of the individual as to his life, his person, or his property. Freedom of speech, freedom of assembly, and freedom of worship are also to be preserved, and various other interferences with individual freedom are to be prohibited. To render these restrictions secure, it has been deemed necessary to give the individual recourse, particularly against the action of legislative and executive officers, and to place the protection of individual rights in the hands of the judiciary.

Principles Underlying American Written Constitutions.—The American theory of a written constitution is based upon three important principles: first, that a written constitution is a fundamental and paramount law and consequently superior to ordinary enactments; second, that the powers of the legislature are limited, the written constitution being in the nature of a commission to the legislature by which its powers are delegated and its limitations defined; third, that judges are the special guardians of the provisions of written constitutions, which are in the nature of mandatory instructions to the judges who must uphold these provisions and refuse to enforce any legislative enactment in conflict therewith. Furthermore, the background for all written constitutions in the United States is the theory of natural rights.[6]

It is a matter of common knowledge that natural law and natural rights were among the dominant ideas of the leaders of the American Revolution as well as the framers of our first constitutions. James Otis, Samuel Adams, John Adams, Thomas Paine, Patrick Henry, Thomas Jefferson, and others, combined to render the natural-rights notion popular. According to the Declaration of Independence, men are endowed with certain inalienable rights; among these are life, liberty, and the pursuit of happiness. Many of the revolutionary patriots believed, with Dickinson, that liberties do not result from charters; charters, rather, are in the nature of declarations of preexisting rights. They are founded, according to John Adams, "in the frame of human nature, rooted in the constitution of the intellectual world." Most significant of all is the fact that constitutions, federal and state, were framed when the natural-rights philosophy was particularly prevalent. In bills of rights, in occasional phrases

[6] Cf. C. G. Haines, *The American Doctrine of Judicial Supremacy* (University of California Press, 1932), revised edition chap. ii; and *The Revival of Natural Law Concepts* (Harvard University Press, 1930), 52 ff.

in the body of constitutions, and in the general opinion regarding the nature of constitutions are to be found evidences of natural rights, such, for example, as are expressed in the New Hampshire constitution which declares that "all men have certain natural, essential, and inherent rights; among which are—the enjoying and defending of life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness." It was generally thought that governments were instituted primarily to render more secure these preexisting rights[7] and that it was essential to formulate them into fundamental charters.

The American concept of a written constitution involves a definition of the powers of the legislative, executive, and judicial branches of the government, with express limitations particularly on the legislative and executive departments; it requires a specific formulation of the rights of the individual against the government, or a bill of rights; and it demands that some provision be made to see that the limits fixed by the constitution shall not be transcended.

For years after the first written constitutions were adopted it was uncertain whether the preservation of written constitutions should be left to the legislatures with an ultimate appeal to the electorate, or to a specially constituted agency like a council of censors, or to the courts of justice. The trend of the political thinking of the time, aided by the forceful leadership of men of conservative inclinations such as James Wilson and Alexander Hamilton, charged the courts with the duty of becoming the guardians of the written fundamental law. The assurance that there would be a government of laws and not a government of men was to be intrusted to the judges intrenched in positions relatively permanent and beyond the control of the electorate—except in certain instances by a remaking of the fundamental law. There were, it was thought, immutable principles embodied in the public law which were in no wise subject to change, and guardians were to be placed in the watch tower to warn against and resist violations of these principles.

The review of legislative acts by the courts to test their conformity with the provisions of written constitutions, as a means of preserving the fundamental law and of securing inviolate the immutable principles, was adopted slowly and with varying degrees of success by the state and federal courts. But by the middle of the nineteenth century it came to be regarded as the keystone of the federal political structure and as an essential requirement in the states. There was little public discussion of the issues involved at the time that the practice was made an integral part of the governmental system.

[7] Cf. "The Law of Nature in State and Federal Judicial Decisions," *Yale Law Journal* (June, 1917), vol. xxv, pp. 617 ff.

In only a few cases was there stubborn resistance in the states to the assertion of this authority by the courts. Though the federal judicial system was frequently subjected to criticisms and particular decisions were vigorously opposed, it was not until a century later that the grounds for the adoption of the review of acts of Congress by the courts were so seriously questioned as to become a national political issue. Such an effective analysis of the prevailing arguments in defense of the practice as that of Justice Gibson, who later became Chief Justice of the Supreme Court of Pennsylvania, was accorded slight consideration.

The general principles of the American theory of a written constitution, with the justification for the right of review of legislative acts by courts, first formulated in colonial cases and in early state and federal decisions, are best stated in the language of John Marshall; and on account of its significance in the American government and because it has served as a model in the later interpretation of constitutions, the statement by Marshall deserves to be quoted in full.

MARSHALL'S OPINION IN THE MARBURY CASE

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.

To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the

necessity of maintaining that courts must close their eyes on the Constitution and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection. . . .

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.[8]

The principles thus announced by Marshall are based primarily upon the assumption that the judiciary was to become the protector and guardian of the fundamental law. Through a long line of state decisions and federal precedents,[9] these principles were finally asserted and maintained to the effect that it was the right and the duty of courts to invalidate legislative acts in conflict with the fundamental law. In practically every case where there was resistance to judicial decisions invalidating legislative acts, the court's opinion and judgment ultimately prevailed and executive and legislative censure tended only to strengthen judicial power. Finally, the fact that the other departments of government deferred to the judgment of the courts, although there was no legal requirement that they should do so, tends to show that it was the acceptance of certain fundamental notions of law and government which led men to sanction and support the underlying principles of the American theory of written constitutions.

Why was this novel adventure in political affairs adopted in the United States? Strange as it may seem, the reasons which are ordinarily given for the adoption of judicial review of legislation fail to account for this peculiar political practice. The reasons for the

[8] Marbury *v.* Madison, 1 Cranch 137 at 176 to 180 (1803).

[9] For an analysis of these precedents, see Charles Grove Haines, *The American Doctrine of Judicial Supremacy*, chaps. v-viii.

acceptance of the American doctrine of constitutional law as defined by John Marshall are as follows:

1. The Constitution is a law of superior obligation of which the courts must take cognizance, and consequently any enactments contrary thereto must be held invalid.
2. The courts must exercise this power in order to uphold the terms of a written constitution, or, in other words, a written constitution necessitates the exercise of this power by the judiciary.
3. The oath of judges to support the Constitution requires that justices follow the Constitution and disregard the statute.
4. Legislative acts contrary to the Constitution are *ipso facto* void, consequently the courts are obliged to disregard such statutes.

It is easy to demonstrate, as was done by Justices Bland[10] and Gibson,[11] that not one of the above reasons in any way explains or justifies the use of this extraordinary power by the judiciary. First, if the constitution is a law of superior obligation, on what ground does the court insist that its judgment is superior to that of the legislature which has enacted the law? Second, is such a power necessary to uphold the terms of a written constitution? If so, why do many constitutions of recent times deliberately take away from the courts this extraordinary power, or perhaps never grant such authority? With regard to the oath in support of the constitution, all officers, including the members of the legislature, judges, and executive take the same oath. Why does the oath of the judges give them authority to scan the efforts of the lawmakers?

Why should a legislative act passed in due form, following all the laws of procedure, be held as never having been passed, or *ipso facto* void? Is it not presumptuous to assume that the *bona fide* acts of one department may be declared by another to be of no avail? In fact, as indicated by Justice Gibson, every argument in favor of the American doctrine begins by assuming the whole ground in dispute, and this line of argument is particularly evident in Marshall's opinion. If the reasons as given in decisions by John Marshall and other judges are not valid and conclusive, how, then, may the principle of judicial review be accounted for? The real answer to the question is best expressed in the language of Professor Burgess:

We must go back of statutes and constitutions for the explanation. It is the consciousness of the American people that law must rest upon reason and justice, that the Constitution is a more ultimate formulation of the fundamental principles of justice and reason than mere legislative acts, and that the judiciary is the better interpreter

[10] *Ibid.*, pp. 261 ff.
[11] Eakin *v.* Raub, 12 Sergeant & Rawles 330 (1825).

of those fundamental principles than the legislature. It is this consciousness which has given such authority to the interpretation of the Constitution by the Supreme Court, and I may add, it is this consciousness which has resulted in establishing in the United States what may be termed the supremacy of the judiciary.[12]

Political Doctrines Affecting American Views on Written Constitutions

Some of the political doctrines which aided in giving sanction to the American theory of a written constitution are as follows:

First, a distrust of legislative power. It was generally thought, at the time American constitutions were formed, that the legislative authority ought to be restricted and that special precaution should be taken to protect the people against legislative domination. The prevailing theory was thus summed up by Thomas Jefferson: "The concentrating of all powers in a legislative body is precisely the definition of despotic government. One hundred and seventy-three despots would surely be as oppressive as one. An elective despotism was not the government we fought for but one which should not only be founded on free principles, but in which the powers of government be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the other."

Second, protection of the minority. To protect the minority against the danger of oppression by majority rule was another purpose which the founders of the American government set about to accomplish in the process of constitution-making. At that time majority rule was greatly feared, and it was decided "that the majority must be rendered by their number and local situation unable to concert and carry into effect schemes of oppression." It was thought by Madison and others that the merits of the federal Constitution lay in the fact that it secured the rights of the minority against "the superior force of an interested and overbearing majority."

Third, protection of property rights. Underlying the process of constitution-making was also the belief that property was a sacred right which it is the supreme function of the government to preserve and protect. The favored position of property and property rights under the American constitutional system has been thus expressed by Hadley:

It is evident that large powers and privileges have been constitutionally delegated to private property in general and to corporate

[12] John W. Burgess, *Political Science and Constitutional Law* (Ginn and Company, 1902), vol. ii, p. 365.

property in particular. . . . The general status of the property owner under the law cannot be changed by the action of the legislature or the executive, or the people of a state voting at the polls, or all three put together. It cannot be changed without either a consensus of opinion among the judges, which should lead them to retrace their old views, or an amendment of the Constitution of the United States by the slow and cumbersome machinery provided for that purpose, or, last—and I hope most improbable—a revolution.

When it is said, as it commonly is, that the fundamental division of powers in the modern state is into legislative, executive, and judicial, the student of American institutions may fairly note an exception. The fundamental division of powers in the Constitution of the United States is between voters on the one hand and property owners on the other. The forces of democracy on one side, divided between the executive and legislature, are set over against the forces of property on the other side, with the judiciary as arbiter between them; the Constitution itself not only forbidding the legislature and executive to trench upon the rights of property, but compelling the judiciary to define and uphold these rights in a manner provided by the Constitution itself.[13]

Since the formulation of these fundamental principles, constitutions have undergone considerable change. When written constitutions were first framed, there was a disposition to include therein the bare framework of the government with the organization of the great departments. In America, the bill of rights was soon incorporated and came to be regarded as an integral part of the constitution. Later the method of amendment and revision was dealt with in detail as one of the essentials of the fundamental law. From the standpoint of these principles the federal Constitution is regarded as a model because it is confined to those provisions which are regarded as indispensable.

SUPPLEMENTARY READINGS

Wilson, Woodrow, *Constitutional Government in the United States* (Columbia University Press, 1908).

Willoughby, W. F., *The Government of Modern States* (D. Appleton-Century Company, Inc., 1919), chaps. vi and vii.

Haines, Charles Grove, *The American Doctrine of Judicial Supremacy* (University of California Press, 1932), revised edition.

Willoughby, Westel W., *Principles of Constitutional Law of the United States* (Baker, Voorhis & Co., 1930).

Bryce, James, *Studies in History and Jurisprudence* (Oxford University Press, 1901), vol. i, pp. 124 and 213.

Ogg, Frederic Austin, *English Government and Politics* (The Macmillan Company, 1929), chaps. ii and iii.

[13] From *The Independent* (April 16, 1908), vol. lxiv, p. 834.

MacIver, R. A., *The Modern State* (Oxford University Press, 1926), pp. 364-395.

Finer, Herman, *Theory and Practice of Modern Government* (Dial Press, 1931), vol. i, chaps. vii and viii.

Beard, Charles A., *The Supreme Court and the Constitution* (The Macmillan Company, 1912).

——— *An Economic Interpretation of the Constitution of the United States* (The Macmillan Company, 1913).

Horwill, Herbert W., *The Usages of the American Constitution* (Oxford University Press, 1925).

Zurcher, Arnold John, *The Experiment with Democracy in Central Europe* (Oxford University Press, 1933), chaps. i and ii.

Marriott, J. A. R., *Mechanism of the Modern State* (Oxford University Press, 1927).

CHAPTER XIV

REVISION AND AMENDMENT OF STATE CONSTITUTIONS

Principles of First State Constitutions

The first state constitutions which were adopted in 1776 were characterized by brevity. Comprising but a few pages, the documents were in the nature of temporary charters prepared to meet an emergency. A bare framework of government, including legislative, executive, and judicial departments and, in a few cases, a short bill of rights, constituted the first fundamental laws of the states. Important powers were placed in the legislature which was accorded authority over the judiciary in the appointment of judges, and at times acted as a final court of appeal. Under some of the constitutions, the assembly selected, and to a large extent controlled, the governor. It is not surprising to find men objecting to the fact that the legislature was gathering all of the powers of government into its hands. Definite limits were set to legislative action in certain respects, and it was declared that these limits were not to be exceeded. In only a few states, however, was any machinery provided, such as a council of censors, to safeguard the constitution from legislative encroachments.

The constitution was, as a rule, not based on popular sanction. Some of the constitutions were drafted by revolutionary conventions or by the legislatures and were put into effect without the express authority of the people. The most satisfactory procedure was devised in Massachusetts, when, in 1779, the legislature submitted to the people the question whether a new form of government should be drafted and whether the legislature should call a convention for this purpose. On a vote of approval a convention was called which prepared a new constitution and submitted it for approval or disapproval to the male inhabitants of each town and plantation. This method has come to be the established practice of providing for a total revision of state constitutions. In so far as the practice of making and approving these constitutions differs from the procedure in passing ordinary laws, the distinction between constitutional law and statutory law was first established. This distinction has come to be known as the fundamental principle of American constitutional development.

The principle of the separation of powers, expressly formulated in the constitution of Massachusetts, is one of the foremost tenets of

state government. It was then declared that "in the government of this commonwealth the legislative department must never exercise the executive and judicial powers or either of them. The judicial shall never exercise the legislative and executive powers or either of them to the end that it may be a government of laws and not of men."

Other constitutions usually added a provision to the effect that the legislative, executive, and judicial powers shall be separate and independent. The general belief of the time was well expressed by Madison, that "the accumulation of all powers, legislative, executive, and judicial, in the same hands, whether one, a few, or many, and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny." Thus a doctrine of separation of powers formulated into a theory by Montesquieu was put into practice in the American states, and has resulted in an adjustment of relations between the various divisions of government in the American commonwealths which is practically unique. While a great many changes and modifications of the rule of separation have been necessary, the general principle has been retained throughout the development of state constitutional law. Along with the theory of the separation of powers came the doctrine of checks and balances, by which it was determined that the powers of government should be divided and balanced so that the possibility of exceeding legal limits would be effectually checked and restrained.

The theory of the separation of powers, with the accompanying system of checks and balances, once the admiration of American statesmen, is now subjected to widespread criticisms. Many years ago Professor Goodnow contended that to our system of checks and balances is to be attributed the extraordinary growth and power of party machinery in the United States. The machine and the boss in American politics were, it was maintained, the direct result of the division of powers into many hands and the manifold provisions for checking public authorities. Directness and concentration, necessary features in public administration, were thus secured in an indirect manner and were largely independent of the framework of government established in constitutions and laws.[1]

To another observer of American political practices the theory of checks and balances is one of the prime causes of the prevalence of political corruption. The attack upon this one-time popular theory was presented by another critic as follows:

"Political institutions in America have been designed on the principle of distrust. Fear of the people, fear of the legislature, fear of the executive, have inspired constitution-makers and law-makers from

[1] See F. J. Goodnow, *Politics and Administration* (The Macmillan Company, 1900), for an illuminating discussion of this view.

the very beginning. Fear has shaped our political machinery in city, state, and nation. . . . This distrust of the people on the one hand and of officials on the other led to the creation of innumerable checks on freedom and obstacles to action. Instead of simplicity there is confusion. In place of directness there is indirectness. For responsibility there is irresponsibility."[2] Among the results of what is termed "the philosophy of distrust" are the rigidity of federal and state constitutions, which are often very difficult to amend; two legislative chambers, one to serve as a check on the other and both to be subject to an executive veto; and the power of the courts to review legislation and thus in many instances to have the final word as to the meaning of written constitutions. At no time in the United States, says Howe, "can the settled conviction of the public impress itself upon the whole government as is possible under the British parliamentary system."

The principle of the separation of powers, with its corresponding feature of checks and balances involving the division of public authority, the lack of concentration in administration, and the absence of a definite location of responsibility, have been, in a large measure, discarded in city government in the adoption of commission government and the city-manager types of charters. Numerous state committees and commissions have recently made recommendations which call for concentration of authority and the location of responsibility. It is recognized now that, whether in federal, state, or local governments, division of authority and checks and balances are barriers to efficient administration. The growth of a real administrative law with a multiplicity of boards, bureaus, commissions and commissioners engaged in the process of making and applying law and of rendering quasi-judicial determination of controversies has made significant inroads on the traditional separation theory, to which reference will be made later. However, the division of powers into executive, legislative, and judicial retains its fundamental validity as requiring the separation and division of functions into the making and administration of law. But it is now commonly conceded that the making and the enforcement of the law must be carried out in unity of purpose and practice, and that the enforcement of law must in a measure be subordinated to the large ends and aims defined by the departments representative of the popular judgment.

A second principle in the making of state constitutions was developed from the eighteenth-century concept of natural law and natural rights. The doctrine of natural rights was stated clearly in the Declaration of Independence, where it was affirmed that "we hold these truths to be self-evident that all men are created equal, that they are

[2] F. C. Howe, "The Constitution and Public Opinion," *Proceedings of the Academy of Political Science* (October, 1914), p. 7.

endowed by their creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness." There has been much discussion as to the significance of this pronouncement, many insisting that there are no natural rights and that the doctrine has no foundation in fact, and others maintaining that all government in the United States is essentially based upon the general concept of liberty declared under this provision. Despite these differences of opinion, this notion has had a controlling effect in impressing on the people the idea that the government is not an arbitrary mechanism, but that it is an institution designed to provide, as Jefferson declared, "equal opportunity to all, special privileges to none." The theory of natural rights has been frequently upheld by the courts in supporting the rights and liberties of the citizens and has received the approval of the Supreme Court of the United States in some fundamental decisions.[3] In support of the doctrine of natural law, Justice Miller declared that "it must be conceded that there are rights in every free government beyond the control of the state; and a government which recognizes no such rights, but holds the life and liberty and the property of its citizens subject at all times to the absolute and unlimited control of even the most democratic depository of power is, after all, but a despotism of the majority, but none the less a despotism. The theory of government, state and national, is opposed to the deposit of unlimited power anywhere."[4]

Along with the belief in the doctrine of natural rights as the foundation of political authority came the dominant notion of the latter part of the eighteenth century that individual liberties must be preserved.

Among the liberties which were to be protected were the freedom from physical restraint and freedom of speech and of the press. All of these were included in the early declarations of rights and in the first constitutions. Furthermore, provision was made for the liberty of conscience, the right of the individual to his religious faith and to worship as he chooses. This right resulted in the development of the form of religious toleration and the separation of church and state which has been one of the features of the American commonwealth. The reservation of these rights and their formulation in bills of rights which serve as a chart and guide to the judiciary constitute the foundation for a concept of civil liberty in which individual rights

[3] For a summary of the influence of the idea of natural rights in the law of the United States, consult article by C. G. Haines, "The Law of Nature in State and Federal Judicial Decisions," *Yale Law Journal* (June, 1917), vol. xxv, p. 617; and *The Revival of Natural Law Concepts* (Harvard University Press, 1930), parts i-iii.

[4] Loan Association *v.* Topeka, 20 Wallace 655 (1875).

are, to a considerable extent, rendered free from government regulation and control. Associated with the theory of natural rights was the right of revolution against arbitrary and oppressive government.

Subsidiary to the principle of natural rights and the protection of individual liberty, it was asserted that government should be based on the supremacy of law. Law was to represent the will of the people as formulated in constitutions and statutes, and in well-defined regulations by which all of the representatives of the people and officers in charge of the government were to be guided and directed. According to this dictum, "ours is a government of, by, and for the people, but the people govern by maintaining the supremacy of laws, sanctioned by public opinion." Furthermore, it was claimed that fundamental and essential rights have been reserved to the people and cannot be taken from them without their consent. In fact, it was thought that there were certain rights and principles with which the government could in no sense interfere. There was thus instituted a sphere of protection to the individual which forms the American principle of civil liberty—i.e., the protection of the individual from government interference.

The eighteenth-century theory of natural rights, which resulted in our constitutional bill of rights, has likewise been subjected to criticisms and to modifications which affect the validity of the theory. So-called natural rights have been attacked from the standpoint that a right in any valuable sense can only be that which the law secures to its possessor by requiring others to respect it and to abstain from its violation. Rights are the offspring of law; they are born of legal restraints. Thus, natural rights are held to have validity and sanction only when they become legal rights, and the term is relegated from the field of law and government to that of ethics. Attempts have also been made to refute the theory of natural and inalienable rights as defined in the Declaration of Independence and other public documents. Though much of the argument in favor of the doctrine of inalienable rights will not stand the test of modern analyses of law and rights, it is significant that the doctrine is still extensively used in the decisions of state and federal courts as a basis for the protection of the individual against what is deemed as arbitrary governmental action.[5]

A more serious criticism is the contention that our bills of rights, inserted in constitutions and interpreted according to eighteenth-century standards, have become barriers to progress in the reform of court procedure and to the development of satisfactory standards in social and industrial legislation. Provisions that were originally in-

[5] See especially references cited *supra*, pp. 305, 306.

tended to protect the individual and that may have been desirable a hundred years ago, such as presentment by grand jury, trial by petty jury, and the hindrance to the giving of testimony in criminal cases, have been so interpreted and applied as to stand in the way of an effective enforcement of the law. Some of these barriers have been removed in recent constitutions. Others are now being subjected to criticisms which may result either in their elimination from the fundamental law or in their modification so as to permit wider latitude to courts and prosecuting officers in the enforcement of the law, though the objection to what is called "the lawless enforcement of the law" directs attention again to the necessity of preserving the ancient safeguards to protect the individual.

Changes in Purpose of State Constitutions

Furthermore, the purpose and function of state constitutions have undergone great changes. The original constitutions were short, establishing merely the three departments and outlining in brief a general plan of government, the details of which were to be filled in later by the legislature, in whose hands the controlling powers of government were placed. Among the changes in state constitutions which were introduced in the first few decades of the nineteenth century were: (1) Constitutions were to be ratified by the electorate. This practice came to be the common one, although in a few instances the constitutions were put into effect without popular sanction. (2) The power of the governor was strengthened by giving him the veto power, and thus the principle of the separation of powers was made more effective. (3) The check-and-balance idea was extended so as to strengthen the position of the governor as against the legislature and to establish the courts as an additional check upon both the legislature and the executive. (4) The extension of judicial review of legislation—a principle which had been announced in revolutionary times to the effect that it was the duty of courts of justice to become the special guardians of the constitution—was gradually developed in the states and was eventually accepted as a general principle of state practice and procedure. The state judiciary became thereby the special protector of the constitution, with authority to prevent infractions of the fundamental law. (5) Flexibility in the constitution was introduced by the frequent use of amendment and by more general revisions. The constitution also grew in size, particularly by the addition of new subjects, such as the compensation and regulation of officeholders, legislative procedure, and the regulation of banks and education.

But state constitutions have been changed primarily on account

of certain correlative developments which have incorporated in constitutions many matters which in 1800 would have found no place in the fundamental law. (1) State constitutions have grown because of an increasing distrust of legislative bodies. The constitution has become a compendium of limitations on the powers and procedure of the legislative branch. A large part of all state constitutions is now given over to definite limitations upon legislative powers. Restrictions are inserted to narrow and confine legislative authority over state and local debts, over the regulation of banks and other corporations, and over types of local and special legislation. (2) New subjects which call for state regulation have been of such significance as to require rather detailed provisions. Among these are education, municipal corporations, elections, and parties. (3) Means for securing popular participation in government, which are regarded of importance to the electorate, such as the initiative, referendum, and recall, are also placed in state constitutions. (4) Matters, whether fundamental or not, on which the electorate desires to express a judgment are included among the provisions of the constitution.

Constitutions adopted or considerably changed by amendments during the last few years are likely to contain provisions relating to municipal home rule, a state budget, special requirements and conditions regarding taxation, the direct primary, and such matters relating to social legislation as workmen's compensation. The provisions establishing a government and defining its powers are thus mingled with ordinary statutory matters. It is not possible to draw a clear line between constitutional law and ordinary law. And as the method of amendment is rendered easier and the initiative and referendum are used more widely, the dividing line between constitutions and statutes becomes even less distinct. Thus the purpose and functions of constitutions will change as community sentiment varies on questions of general public interest.

Recent efforts to amend or to revise state constitutions so as to change the general character and content of the fundamental law of the state have brought to the surface certain problems and conditions which seriously affect the growth of the public law to meet modern economic and social conditions.

Difficulties and Problems Involved in the Revision of State Constitutions

Process of Amendment.—The state constitutions have been adapted to the changed conditions of American life by constitutional conventions and by the proposal of amendments by legislatures or by

initiative petitions with approval, as a rule, through a popular referendum. Constitutional conventions are normally used for a complete revision of state constitutions. Most of the states expressly provided that the question of calling a convention be referred to the voters and that the work of the convention be submitted to the electorate for approval or disapproval. Twelve states, however, make no provision in their constitutions for calling conventions; and until recently it was held, with a few exceptions, that where the constitution is silent the power to decide on the calling of a convention resides in the legislature, and that the legislature may act on its own judgment as to whether or not it is better policy to submit the question to the electorate. It is generally felt that the work of the conventions which have been called in the different states has been satisfactory and that these bodies have turned out a product superior to that of the ordinary legislative assembly. But one of the leading authorities on constitutional conventions believes that their accomplishments have been overpraised. Says Professor Dodd:

> They have ordinarily been content to follow rather than to lead, and little of constructive statesmanship has developed in constitutional conventions. They have imposed limitations upon legislative authority, in order to prevent the continuance or repetition of legislative policies that have failed. They have embodied in their constitutions details of policy recognized as desirable at the time the convention itself has been sitting. As organs for effective governmental policies of a permanent character they have largely failed; although this may merely be equivalent to a statement that they have been little, if at all, in advance of the political intelligence of the times in which they have acted.[6]

Owing to the difficulties in providing for constitutional conventions and the reluctance of the voters to approve the calling of bodies for this purpose, it has been necessary for the most important changes in constitutions to be made through the ordinary process of amendment as provided in the constitution itself. The amending procedure, which was either omitted in the earlier constitutions or made difficult, has been gradually modified so as to provide for easier methods of amending the fundamental law. However, many limitations which restrict the amending procedure are still found in state constitutions. Except in a few states which have provided for the amendment of the constitutions by initiative petition, the process of changing constitutions is slow and cumbersome. Voters frequently fail to vote on amendments and as a rule disapprove those submitted; hence a cam-

[6] Walter F. Dodd, *State Government* (D. Appleton-Century Company, Inc., second edition, 1928), p. 96.

paign of education and propaganda is necessary in order to carry any important modification in a state constitutional system.[7]

Adoption of Present Constitutions

The dates of the formation of the existing constitutions in force in the states of the Union suggest certain interesting and obvious conclusions. Though many constitutions have been changed where the amending process has been extensively used, most of the states are governed under constitutions formed many decades ago. The fact that the fundamental laws of the states were made at a time when conditions were markedly different from those now prevailing is shown pertinently by the following classification of constitutions:[8]

Group I—Constitutions Formed Prior to 1860

Connecticut	1818	Indiana	1851
Maine	1819	Minnesota	1857
Rhode Island	1842	Oregon	1857
New Jersey	1844	Iowa	1857
Wisconsin	1848	Kansas	1859

The voters of Indiana, in 1914, rejected a proposal to call a convention for the purpose of revising their state constitution. Subsequently, when the legislature attempted to prepare a new constitution to submit to the electorate, the right to do so was denied by the courts. When through legislative enactment a further effort was made to call a convention without submitting the question to the voters, the act was likewise declared void by the courts.[9]

In an advisory opinion the supreme court of Rhode Island informed the general assembly that it did not have authority to call a constitutional convention to revise the constitution of 1842, and that changes in the constitution could be secured only through the legislature by the submission of specific amendments, each of which requires a three-fifths majority of the electors for its ratification.[10]

[7] For the results of recent efforts to amend state constitutions, see the summaries in the *American Political Science Review*.

[8] It is not possible to obtain complete or even very extensive information regarding all the attempts that have been made by the various states to change their constitutions. Where such information is available, however, it throws some light on the attitude of the electorate toward changing a state's fundamental law.

[9] See Ellingham *v.* Dye, 178 Ind. 336, 99 N. E. 1 (1912); and Bennett *v.* Jackson, 186 Ind. 533, 116 N. E. 921 (1917).

[10] The situation was thus caricatured by a contemporary scribe:

"Alas what a pity our fathers didn't mention,

GROUP 2—CONSTITUTIONS FORMED FROM 1860 TO 1880

Arkansas	1874	Nevada	1864
California	1879	North Carolina	1876
Colorado	1876	Pennsylvania	1873
Georgia	1877	Tennessee	1870
Illinois	1870	Texas	1876
Maryland	1867	West Virginia	1872
Missouri	1875		

The states in Group 2 have made more frequent attempts to change or revise the fundamental laws than have those in Group 1. But the attempt in every instance was futile. Both Arkansas and Illinois rejected the new constitutions which were submitted to the voters, the former in 1918 and the latter in 1922. Likewise were rejected the proposals to call conventions for the purpose of revising the state constitution which were made by Colorado in 1915, Maryland in 1907, North Carolina in 1918, Pennsylvania in 1924, Tennessee in 1915, and Texas in 1919. In November, 1934, the electorate of North Carolina will vote on a proposed new constitution.

GROUP 3—CONSTITUTIONS FORMED FROM 1880 TO 1900

Delaware	1897	North Dakota	1889
Florida	1885	South Carolina	1895
Idaho	1890	South Dakota	1889
Kentucky	1891	Utah	1895
Mississippi	1890	Washington	1889
Montana	1889	Wyoming	1889
New York	1894		

The electorate of New York declined to accept the new constitution which was submitted to it in 1915. Two proposals to call constitutional conventions were made in South Dakota, one in 1915 and the other in 1924, but both were rejected by the voters. Similar action was taken by the electorates of Idaho in 1917, of Washington in 1918, and of New Hampshire in 1924. The constitutions of Massachusetts, Nebraska, Ohio, and Vermont were radically changed through a series of amendments submitted to the voters by a constitutional convention.

That we boys, if very good, could hold a convention.
They never said we shouldn't but didn't say we might,
'Ergo,' cry the sages, 'you haven't got the right.'
'Twas very bad, indeed, their permission to deny,
But infinitely worse at once to up and die;
For thus they turned the lock and flung away the key,
And Rhode Island's 'in a box' for all eternitee."

—RICHMAN, *Rhode Island*, p. 322.

Taken from a note in an article on "Advisory Opinions," *Harvard Law Review* (June, 1924), vol. xxxvii, pp. 1008, 1009.

GROUP 4—CONSTITUTIONS FORMED FROM 1900 TO 1925

Alabama	1901	New Hampshire	1912
Arizona	1912	New Mexico	1912
Louisiana	1921	Ohio	1851–1912
Massachusetts[11]	1780–1917–1918	Oklahoma	1907
Michigan	1908	Vermont	1793–1913
Nebraska	1875–1920	Virginia	1902

From the above, it is readily seen that the voters in the various commonwealths are prone to look with disfavor on attempts to change their constitutions in any material way. Conservatism and indifference are universal. Where efforts have been made, through specially appointed committees or through conventions, to bring antiquated instruments abreast with new conditions and pressing public needs, the results have usually been disapproved by the electorate. Especially has this been true where efforts have been made to change or revise the constitution in its entirety rather than through the more gradual method of a series of amendments.

In Illinois, a new constitution, representing several years' work of experts and of persons thoroughly cognizant of the needs of the state, was rejected by a vote of approximately 4 to 1. The convention which framed the Illinois constitution was a conservative body and on the whole few radical amendments were made. Among the important features of the rejected constitution was a provision which permitted the substitution of an income tax on intangibles for the existing general property tax and which would have authorized a general tax on all net incomes. Because of the failure to approve the new constitution a state tax on incomes to meet the extraordinary conditions due to the depression was declared void by the state supreme court. Provision was also made for the consolidation of the courts of Cook County, including Chicago, and for the simplification of the organization of courts in other parts of the state. The supreme court was given power to make rules of pleading, practice, and procedure. Under the rejected constitution Chicago would have been given power to frame its own charter and would also have secured a greater measure of municipal home rule.

The controversial points and unfavorable circumstances which occasioned the ultimate rejection of the new instrument centered around the questions of taxation and of representation, as well as on the necessity of voting upon the revised constitution as a whole, and on the fact that there existed a distrust for it because of the changes

[11] See opinion of justices, 233 Mass. 603 (1920), holding that the rearrangement of the Massachusetts constitution proposed in 1917 and approved by popular vote did not replace the original constitution.

made in the language of provisions transferred from the former constitution.

The Missouri voters approved a plan for a constitutional convention in August, 1921. The convention, which concluded its work in November, 1923, decided to submit a series of twenty-one amendments rather than to present a completely revised constitution. The failure of the plan followed by New York and Illinois, where complete constitutions were rejected, and the adoption of a series of amendments changing the constitutions of Ohio, Massachusetts, and Nebraska, no doubt led to this decision. The voters ratified six of the proposed amendments and rejected fifteen. The only important amendment ratified was the one which made certain modifications as to the eligibility of voters and authorized the legislature to make further changes as to nominations and elections.[12]

A commission appointed to suggest amendments to the constitution of Virginia presented a report to an extra session of the legislature in March, 1927. Among the changes proposed were included provisions for waiver of jury trial by the accused, for reading of bills by title, and for consolidation of counties upon a majority vote in each county. The supreme court was authorized to sit in divisions, and to enter final judgments in cases instead of remanding for new trial; and the prohibitions against the issuance of bonds and contracting debts to meet deficits in state revenue were removed, with a definite limitation upon the amount of bonds to be issued. Local governments were also permitted to exempt manufacturing establishments from local taxation for a period of five years.

In presenting its report the commission observed: "Much of the clamor for constitutional revision in Virginia has been rather a clamor for new legislation which, if wise, should be enacted and which the general assembly already has the power to enact without express constitutional warrant. The purpose of a state constitution is to restrict, not to confer, legislative power—and such restrictions should touch only the fundamentals of government—otherwise the constitution becomes an inelastic instrument with many provisions unsuited to changed conditions and requiring frequent amendment." In the main the commission refused to include new proposals primarily legislative in character.

The California legislature in 1929 took action on two propositions relating to the state constitution. First, it submitted to the people an amendment for the calling of a constitutional convention. This amendment was rejected by the voters who did not look with favor upon a complete revision of the constitution by a convention. Second, the

[12] Isidor Loeb, "The Missouri Constitutional Convention," *American Political Science Review* (February, 1924), vol. xviii, pp. 18 ff.

governor was authorized to appoint a commission "to investigate and report upon the need for the revision of the constitution." The governor appointed a group of prominent citizens who secured the advice and counsel of specialists in many fields and prepared a revised draft which reduced the constitution, with its one hundred and ninety amendments and 65,000 words, to about 27,000 words. In submitting its report to the governor, the commission noted that:

So far as the substance of the constitution is concerned, we find it to be a logical record of the struggle of the people to preserve their rights. We find in it adequate provisions preserving the natural rights of the people to protection in their persons and property. We find in it a general frame of government under which the state has prospered and been efficiently governed. We find that it embodies the principle of home rule in local and municipal affairs, for which the people have so long struggled. We find in it provisions by which the people have reserved to themselves powers by which they are enabled to control legislation, and by which the people have insisted that they themselves should establish the principles upon which they are to be taxed.

When it comes to the form of the constitution, we find that its constant amendment has produced an instrument bad in form, inconsistent in many particulars, loaded with unnecessary detail, encumbered with provisions of no permanent value, and replete with matter which might more properly be contained in the statute law of the state. Your Commission is unanimously of the view that it needs revision.

Many obsolete provisions were omitted, and others dealing with related matters were combined. Among the changes proposed, a lesser number of signatures to a petition for an initiative law was required than for a constitutional amendment, and steps were taken to encourage the presentation of initiative laws to the legislature. With the initiative, referendum, and recall in operation, the commission recommended the removal of numerous limitations upon the legislature. The provision for a divided session of the legislature was rejected. All reference to executive officers was omitted, with the exception of those elected by the people. For the judiciary the federal plan was adopted providing for a supreme court and such other courts as the legislature may establish.

The sections relating to the Railroad Commission and the Industrial Accident Commission were retained, but the commission refused to authorize such special bodies to deal with problems relating to water and claims for compensation for automobile injuries, leaving these matters to the legislature or to direct action by the people. Matters of detail and largely legislative in nature were removed from the sections on municipal corporations and taxation, with few sub-

stantial changes. The commission provided for a permanent tax commission to study the entire subject of taxation. For education an elective state board of education was proposed which would appoint a director of public instruction. Finally, the amending procedure was changed to permit the legislature to submit directly to the people a revision of any article of the constitution or the entire constitution. The proposed constitution was not submitted to the people for their approval or rejection and the recommendations can become effective only through separate amendments.

The failure to approve the calling of constitutional conventions and the rejection of carefully prepared state documents does not mean that state constitutional law is in a static condition, though in certain respects governmental activities are "cabined and confined." An average of nearly one hundred constitutional amendments are proposed and voted upon in the states each year. More than half of these amendments are as a rule approved by the voters. Though only a few amendments make important changes in political structure, by a gradual process antiquated forms of organization and procedure are eliminated and new ventures in statecraft are given a trial.

A review of the results of the vote on measures referred to the electorate in recent years confirms the belief that constitutional provisions should be confined to the framework of governmental organization and to the statement of fundamental principles or policies, leaving the details to be worked out by the legislature, which should be made more efficient and more responsive to the public interests.

A Model State Constitution

Under the direction of the National Municipal League groups of specialists have drafted a model state constitution which has been corrected and revised by a general committee on state government and supplemented by conclusions reached as a result of discussions held at the general meetings of the league.[13]

This draft contains a simplified and approved bill of rights, with twelve sections which include some of the ornamental phrases of existing bills of rights and provide for the right of petition, freedom of religious belief, freedom of speech and of the press; inhibit unreasonable searches and seizures; prohibit laws impairing the obligation of contracts, and the giving of irrevocable grants of special privileges; and forbid the taking of private property for public use without just compensation. The section dealing with criminal procedure is significant in that some of the well-known requirements of ex-

[13] A copy of this constitution may be secured by addressing the National Municipal League, 309 East 34th St., New York City.

isting bills of rights are either omitted or modified, as, for example, Section 11, which provides that:

In all criminal prosecutions the accused shall have the right to appear and defend himself in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial in the county or district in which the offense is alleged to have been committed. The right of trial by jury in all criminal cases shall remain inviolate; but a jury trial may be waived by the accused in any criminal case or by the parties in any civil case as may be prescribed by law.

The provisions relating to the legislature introduce some innovations, the most important of which are: (1) The abolition of the bicameral system and the adoption of a unicameral legislature. The committee which prepared the constitution thought that a single chamber chosen by proportional representation and not too large in number would be more representative and efficient than the present two-chamber system. (2) The establishment of a council to collect information and submit measures for action by the legislature. This council is to consist of the governor and seven members of the legislature. It is to be a continuous body for the purpose of gathering material, preparing the program, and drafting measures for introduction at the next session of the legislature. (3) Closer relationship between the governor and the legislature. In the first place, the governor is made a member of the legislative council, but, in addition, he and his department heads are entitled to seats in the legislature. Furthermore, the governor and his cabinet members may appear before the legislative committees to discuss measures and answer questions. With these three major changes, legislative organization as it now prevails in the states would be subjected to radical revision. In the opinion of many who have studied the weaknesses of existing state governments, all three of these measures would inure to greater efficiency in legislative organization and procedure.

The model constitution also makes some important modifications in the executive and administrative arrangements of the state government. The governor is to be the real head of the administrative and executive forces of the state, just as the President is of the government of the United States. He is to appoint and he may remove the heads of all the executive departments, and all other officers and employees in the executive service are to be appointed by the governor or by the heads of the departments. The governor is required to prepare the budget and to supervise the entire financial arrangements of the state government. The veto power is retained, with the

proviso that the governor may veto appropriation bills as a whole or in part, or reduce items, subject to the repassing by a two-thirds vote of the legislature. To avoid deadlocks between the governor and the legislature a provision is included authorizing a referendum to the people on measures vetoed by the governor and on bills which fail to pass, if at least one-third of the members voted in their favor. The office of lieutenant-governor is abolished and provisions are made for the establishment of an effective cabinet system in state government. To retain supervision and control of financial affairs the constitution creates the office of state auditor or comptroller, who is to be chosen by the legislature so as to be independent of the governor and of his administrative cabinet. In this manner the legislature may keep in close touch with the actual practices of the governor and department heads in the administration of state expenditures. The constitution contains detailed provisions for a state budget modeled in large part after the system now in operation in several states, such as Maryland, Massachusetts, and West Virginia.[14]

The provisions relating to the judiciary propose the establishment of a unified court of justice, with departments for the performance of all trial and appellate judicial functions. There is to be a permanent chief justice at the head of the judiciary, and a judicial council having large powers of control. Meetings of the judges are to be held at frequent intervals to consider methods for the improvement of judicial administration. The judicial council is vested with power to make rules of pleading, practice, and procedure. Administrative officers of the courts are to be nominated by the chief justice and confirmed by the judicial council. These proposals as to the organization of courts are in accord with the recommendations of such organizations as the American Judicature Society, the American Bar Association, and state bar organizations.

Not only does the model constitution provide for a system of home rule for cities, but this type of organization is also extended to counties, governmental units in which so far administrative reorganization is only in its beginnings. Though the provisions of this model constitution have not been adopted as a whole in any state, they furnish in convenient form some of the most important provisions which seem necessary in order to reorganize American state government along the lines now well formulated and defined by the various committees on efficiency and economy. Some of the provisions in the constitution have been so widely discussed and agreed upon that they are gradually being adopted by the states.

[14] See *infra*, pp. 497 ff.

Steps in the Framing and the Adoption of New State Constitutions

The making of a new state constitution involves five steps:

1. Calling of Constitutional Convention.—Of the forty-eight state constitutions now in force in the Union, thirty-six contain provisions for the calling of a constitutional convention.[15] In the twelve states where no express provision is made for this, the legislature is regarded as possessing the power, except in Rhode Island and Indiana. In fact, conventions without express constitutional warrant have been held in Arkansas, Connecticut, Louisiana, and Massachusetts. In Mississippi not only has such a convention been upheld, but the constitution which it framed was put in force without submission to the people, and this action was sustained by the supreme court of the state.[16] In these states it has been held that, where the constitution makes no provision for the calling of the convention, the legislature may exercise this authority without referring the question to a vote of the people; the Indiana courts alone have held that the legislature may not exercise such authority.[17] The majority of the Indiana court based their opinion on the general principle that the legislature has no inherent powers and that legislative powers are delegated powers. As no authority to call a convention is included among the granted powers, this right, the justices thought, is reserved to the people. If this general principle is accepted, the inevitable result is that no power inheres in the legislature to call a convention. But, as the dissenting judge points out, this doctrine of delegated powers is not contained in the constitution, it runs counter to a common practice in the states to regard the legislatures as possessing certain inherent powers, and it is contrary to the preponderant opinion of judges, text writers, and statesmen.

2. Preparation for Calling of Convention.—The method of constitution-making has changed considerably within recent years. The time has passed when constitutions can be framed by members of a convention who, as has been suggested, "evolved out of their inner consciousness the provisions which seemed to them to be good for the state" and who received little help from anyone except the people who had a particular ax to grind. The simple method of copy-

[15] The states which make no constitutional provisions for the calling of a convention are Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas, and Vermont.

[16] Sproule *v.* Fredericks, 69 Miss. 898 (1892).

[17] Bennett *v.* Jackson, 186 Ind. 533 (1917).

ing provisions from other instruments or of the ordinary give-and-take compromise and adjustment of the busy members of a convention in the short time that it is in session is no longer adequate. The method of using other constitutions as models was thus described by Justice Smith: "It is well known by the student of constitutional history that the constitutions of certain states were used as models for the constitution of Kansas. In fact, the convention voted on the question of which constitution should be used. On the final vote, Ohio received twenty-five votes; Indiana, twenty-three; and Kentucky, one. Other constitutions that were used were those from Iowa of 1857, Wisconsin of 1848, Illinois of 1848, Minnesota of 1857, New York of 1846, Pennsylvania of 1838, and the earlier Kansas constitutions of Topeka, Lecompton, and Leavenworth."[18] It is recognized that, owing to the complexities of the problems involved, the difficulties to be met, and the lack of available information, considerable time should be spent in the collection of information and data for the use of the convention members in the preparation of proposed provisions for a new constitution.

In order to prepare effectively for the making of a new constitution, special provision has been made in advance in a number of states. Among those which have particularly made such preparation are Ohio, Nebraska, New York, New Hampshire, Massachusetts, Pennsylvania, Virginia, and California.

The arrangements made in the different states are similar, although the plan adopted in Massachusetts deserves special attention. A commission was appointed under a general act of the assembly "to compile and render accessible in convenient form and arrange such information, data, and material as may aid the convention in the discharge of its duty." Its work constitutes one of the most effective efforts to prepare and compile information and place it at the disposition of the members of a constitutional convention.

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[18] Markham *v.* Cornell, 18 P. (2d) 158 (1933); and Rosa M. Perdue, *The Sources of the Constitution of Kansas*, p. 676.

Professor Dodd calls attention to the following instances of copying constitutional provisions: "The Vermont Constitution of 1777 was largely the Pennsylvania constitution of 1776. The New Hampshire constitution of 1784 copied freely from the Massachusetts constitution of 1780, as did also the Maine constitution of 1819. The framers of the first Illinois constitution copied from New York the provision for a council of revision to exercise a veto power upon legislation, at just the time when New York was about to abandon this plan. The Oregon constitution of 1857 was largely copied from the Indiana constitution of 1851. The Nebraska constitution of 1875 borrowed liberally from the Illinois constitution of 1870. When one state has copied from another, it has not always copied slavishly; and it is impossible to trace the present constitution of any one state directly to a source in a single constitution of another state." *Op. cit.*, pp. 86, 87.

The success of the commission was due to the appointment of specialists in government and law who formulated an effective plan of operation and agreed upon definite rules of procedure. Information was gathered on approximately one hundred subjects relating to constitutions and the powers of conventions. Some data were sent to the delegates before the convention met and the remainder was put in form for the use of the members and committees of the convention during its session. In addition to the collection of data the members of the commission assisted members of the convention in the drafting of amendments, and the vice-chairman of the commission was appointed technical adviser of the committees and was retained as a permanent officer of the convention.

Whatever method may be devised and followed preparatory to the drafting of a new constitution, it now seems imperative that some method of providing for collecting, digesting, and systematizing information be devised, with sufficient time for a competent staff of specialists to prepare available data for use while the convention is in session.

3. Selection of Delegates.—The selection of delegates constitutes one of the serious difficulties in the making of a constitution. Unless capable men who are familiar with the conditions of the state and who can think constructively and progressively for the state for a generation or more to come are selected and participate in the convention, it would be better not to undertake the work. But a difficulty arises here which has serious consequences. A noted authority in Illinois recently observed that the very fact that capable men were selected to the Illinois convention and that much serious thought had been given to the constitution by these men and some excellent features had been put into the document militated against its adoption by the voters. "Had less able men been selected, had fewer new and constructive ideas been put into the document—in other words, had the constitution been less constructive and less farseeing in its provisions—the possibilities of adoption would have been greater." In short, a more popular convention, made up of less capable members, might, so it seems, have prepared a constitution with better chances of adoption. The problem, then, of selecting delegates is chiefly one not only of securing capable and competent men and women, but also of being assured that the work which they do will carry sufficient weight and confidence to secure favorable action on the part of the electors.

4. Making of the Constitution.—When the convention has been called, information has been gathered and systematized, and a competent group of delegates selected, the real task of making a constitution has merely begun. It is at this point that all of the agencies of the

state interested in progress and reform should introduce their suggestions and ideas formulated into definite and concrete shape for consideration by the members of the convention. The time of the delegates will necessarily be limited, the problems they will have to deal with will be exceedingly complex, and the interests affected will bring every possible influence and pressure to bear upon them to secure certain ends. Therefore, unless those who look forward to improving the conditions of the state in regard to education, social welfare, and other lines formulate in advance the provisions which should enter into a new constitution and which are backed by the general sentiment of those interested, many of the important purposes for which a new constitution should be framed will be either scantily treated or neglected. What is primarily needed is not lobbying while the convention is in session, but the presentation of conclusions reached through careful study and persistent work on the part of those persons or groups of persons who are vitally interested in the general welfare of the state.

5. Education of Voters.—All of the above steps are, of course, preliminary; and the fact must be taken into account that the usual practice of the voters is to reject the constitutions after they have been carefully prepared.

Constitutions were rejected by the voters in two of the states in which drafts of constitutions were prepared and submitted with the greatest care and consideration, namely, New York and Illinois. In only a few instances within recent years have constitutions prepared and submitted to the electorate been adopted. Among these are Louisiana, Nebraska, Massachusetts, New Hampshire, Ohio, and Virginia. The entire constitutions in two of these states were not remade, but the convention submitted a series of amendments which changed certain fundamental features of the constitutions. In a third, the most controversial matters were submitted in separate amendments. Unless a great deal of time, care, and organized effort is given to presenting the issues of a convention to the electorate and to showing the need for changes, it is relatively certain that any constitution prepared by a convention will be rejected. The problem of securing the adoption of a new constitution has been well put by an observer of the result in Illinois:

> The tremendous majority against the constitution proves one thing —that it is impossible in such a state as Illinois to secure the adoption of a constitution submitted to a single vote. Such a unit submission results in uniting all dissatisfied persons. It further enables every opponent to assign a false reason for his opposition, so that special interests can masquerade under patriotism, or what not. No form of

politics makes stranger bedfellows than the unit vote on a constitution in a state as populous and diverse as Illinois.

The convention hung together for nearly three years and so worked out necessary compromises. But the electorate gleefully rejected the compromises, each side expecting to get a second chance and a larger share. The more irritating subjects should have been exposed to separate votes, but the delegates believed that the electorate would swallow some unpalatable features along with the rest.[19]

Principles Recognized in Recent State Constitution-making

In the process of constitutional revision which is now under way in the states a few principles are gaining general acceptance.

1. The constitution is designed to furnish the basis for the framework of government and to embody some enactments which are regarded as so fundamental as to deserve special force and sanctity. As far as is compatible with these main purposes a state constitution should be brief and clear. Like the federal Constitution, it should deal only with general principles and with the necessary features of government organization.

2. A constitution should be so prepared as to be subject to modification to meet changing conditions and needs. It is unfair to bind people for the future and to require them to accept the conclusions of a group of persons who could in no wise foresee the conditions and contingencies which might arise. The process of amendment should be so devised as to prevent hasty and ill-considered action, and flexible enough to permit of direct action by the electorate when the public will is clearly and definitely formulated.

3. Amendments to the constitution involving important questions of public policy, such as the adoption of provisions for the initiative, referendum, and recall, should be submitted to the voters as separate propositions. The Ohio constitution of 1912 contained many separate and detached amendments placed before the people in separate columns upon which the electors passed individual judgment. About one-half of these proposals were adopted; the other half were rejected, showing a more highly developed political intelligence than the electorate is generally assumed to possess. The fact that relatively thorough revisions of the constitutions were accomplished in Ohio, Massachusetts, and Nebraska through the submission of separate propositions, and that complete revisions prepared with unusual care and consideration were rejected in New York and Illinois seems to indicate that the separate amendment plan affords a more feasible process by which to make extensive changes in state fundamental

[19] *Journal of American Judicature Society*, vol. vi, no. 5.

laws. Among the other principles which are now being considered with a view to securing modifications in state constitutions are:

(a) That the number of elected officials should be reduced and the short ballot plan followed in the making of the state constitutions. The short ballot, it is thought, would simplify elections and would render it possible for the people to select a better type of official than can be chosen under the present system.

(b) That home rule should be granted to municipalities and to counties in order that local units may be permitted, with adequate restrictions, to manage their own affairs.

(c) That provisions should be made for the expression of popular opinion through such devices as the initiative, referendum, and recall. Experience has demonstrated that these devices are not so radical as was thought when they were originally adopted, and it is coming to be recognized that they may serve as a useful means to render public opinion effective.

It has been observed frequently that the constitutions framed since the Civil War have not been limited to those things which properly constitute the fundamental law of the state. They contain many matters which are strictly within the scope of legislation. Legislation always depends upon existing conditions. A constitution which seeks to legislate will inevitably be outgrown.

The makers of constitutions in the late eighteenth and early nineteenth centuries attached a significance to the provisions of written fundamental laws which seems strange to men of the present age. It was thought that the underlying principles of government were relatively simple, and that once they were discovered it was necessary to express them in permanent written form. Rulers and ruled not only would be guided by the terms and conditions thus enshrined, but also the mere formulation of essential forms and principles of political conduct was regarded as a guarantee of good government. Constitutionalism has been characterized as "the trust which men repose in the power of words engrossed on parchment to keep a government in order. The writing down of the fundamental law, beyond peradventure and against misunderstanding, is an important political invention. It offers exact and enduring language as a test for official conduct at the risk of imposing outworn standards upon current activities."[20]

Certain results, at least partly unanticipated, have come from the reliance upon written fundamental laws. They have tended to canalize political conduct and to demand conformity to the standards and

[20] Walton H. Hamilton, "Constitutionalism," *Encyclopædia of the Social Sciences,* vol. iv, p. 255.

ideals of a previous age. The main principles and dogmas of written constitutions were formulated in the midst of an agricultural and mercantilist economy. As far as political thought was concerned, when the Industrial Age rendered necessary important changes in governmental structure and the development of new policies to adjust political machinery to radically new economic conditions, written fundamental laws not infrequently stood in the way as difficult barriers to surmount. Not only was it necessary to convince people of the need and desirability of political revision and reconstruction, but in many instances amendments of the constitution were imperative before desirable governmental policies could be put into effect. As constitutional amendment normally requires extraordinary majorities, serious obstacles were placed in the way of reasonable and necessary economic and political reconstruction.

Though the slowing down of reconstructive processes has prevented hasty and ill-considered social and industrial regulations and has given time for public sentiment to become better crystallized, it has, on the other hand, placed bounds on legislative power not conducive to the development of initiative and responsibility in the people. They have rendered it difficult for the legislators to work out consistent policies in the regulation of social and industrial conditions. They have prevented experimentation and trial through which effective progress is often made, and above all they have narrowed the channels for the effective working of popular control in the widening realm of public affairs. In the efforts to establish through written constitutions a government of laws and not of men, judges have been exalted to a position heretofore deemed impracticable in the adjustment of political relations. Contrary to anticipations and to a fiction which has become deeply imbedded in American political thought, there has resulted primarily a government of men, for he who interprets the laws controls them. In the interpretation of the fundamental laws in the United States there have come into play all of the elements —social, economic, political, and temperamental—which operate in the processes of legislation and of administration. The lines of power and control are more concealed, and the traditional modes of legal thinking have encouraged the belief that personality affects to a small degree that complex which we know as a judicial decision. But such a belief is largely based on a fiction which is not adequately supported by a careful study of decisions. What the constitution means ultimately depends on who are the judges acting as the arbiters, and who for the time being wield judicial authority.

The most significant trend of modern times is the facile way by which written constitutions may be either ignored or interpreted to

secure desired social ends. In view of the unforeseen problems and conditions which must be dealt with and reconciled with the written language of the constitution, it is well that "the skilled interpreter knows how to march language and meaning along the same line of argument in opposite directions."[21] Judges have had an amazing facility at times in discovering the "latent and unsuspected" meanings of the written formulæ.

The way by which elaborate and detailed provisions have been inserted in written charters and have been thwarted or entirely ignored by various factions ruling the country has given many Latin American countries unfavorable notoriety. Other countries, regarding their constitutions as more or less sacrosanct, could look with scorn upon the unhappy and supposedly undeveloped communities where constitutions were not considered seriously in political circles. But the usual explanations for this condition seemed inappropriate when in a wave of enthusiasm after the war European states set about in a serious and systematic way to adopt constitutions and then gradually drifted into dictatorships, with constitutions discarded or almost entirely ignored. The decline of constitutionalism has spread so rapidly over Europe as to raise serious questions regarding the permanence of some of the features which have accompanied it. Even if dictatorships are temporary, though some of them appear to have an unusual measure of endurance, the problem still remains whether a genuine type of constitutionalism may again be restored in these countries.

Although conditions in the United States are in few respects similar to those in the European countries referred to, some notable trends in recent legislation and administration raise comparable problems regarding the permanence of certain phases of American constitutionalism. The simple and easy processes by which a virtual dictatorship may be established in war time have been a matter of frequent comment. But never before in peace times have such far-reaching economic and political measures been undertaken by the federal and state governments, many of which run counter to the constitutions as authoritatively interpreted by the highest courts. The fact that they were deemed necessary to meet the extraordinary conditions of an appalling economic depression and that they have been enacted and administered as emergency measures leaves some unsettled problems as to their status in the constitutional structure. In the economic and political order of the future, will written constitutions have such an important rôle in the consideration of national policies or will other issues overshadow those of constitutional formulæ and principles?

[21] *Ibid.*, p. 258.

SUPPLEMENTARY READINGS

Dodd, Walter F., "Illinois Rejects New Constitution," *American Political Science Review* (February, 1923), vol. xvii, p. 70.

——— *State Government* (D. Appleton-Century Company, Inc., 1928).

——— *The Revision and Amendment of State Constitutions* (Johns Hopkins Press, 1910).

Dealey, J. G., *Growth of American State Constitutions* (Ginn and Company, 1915).

Hoar, Roger Sherman, *Constitutional Conventions: Their Nature, Powers, and Limitations* (Little, Brown and Company, 1917).

Mathews, John M., *American State Government* (D. Appleton-Century Company, Inc., 1928), revised edition.

Bates, F. G., and Field, O. P., *State Government* (Harper & Brothers, 1928).

Kettleborough, Charles, *The State Constitutions and the Federal Constitution, etc.* (B. F. Bowen & Co., 1918).

Crawford, Finla Goff, *Readings in American Government* (F. S. Crofts & Company, 1933), revised edition, chap. xvi.

Evans, L. B., "The Constitutional Convention of Massachusetts," *American Political Science Review* (May, 1921), vol. xv, p. 214.

Loeb, Isidor, "The Missouri Constitutional Convention," *American Political Science Review* (February and May, 1924), vol. xviii, pp. 18 and 329.

CHAPTER XV

LEGISLATIVE, JUDICIAL, OR EXECUTIVE SUPREMACY

SINCE the decline of absolute monarchies, the tendency, with a few notable exceptions, has been to transfer the supreme power of the state either to the legislature or to the courts. The power thus transferred, however, is usually not absolute, but is subject to changes through the ordinary channels of legislation or to a reversal through a change in public opinion expressed by the electorate. When the fundamental law of a country is placed under the guardianship of the legislative body, as is the case in many European countries, *legislative supremacy* is said to prevail. If, on the other hand, the courts are made the custodians of the constitution, a condition obtains which may be termed *judicial supremacy*. The main basis for the difference in the two forms of expressing the supreme power of the state is whether or not the written constitution or the prevailing political practice expressly or impliedly provides that the determination of the ultimate validity of legislative acts rests with the judiciary. In the United States the judiciary exercises this power of review of legislative acts to determine whether they are in accord with the fundamental law, and in this respect interesting comparisons may be made with other nations where different methods prevail for determining the validity of legislative enactments. When constitutions are easily revised or amended, the opportunity for the development of the practice of judicial review is considerably lessened. And the tendency to make constitutions more amenable to revision or amendment has been steadily growing. Moreover, written constitutions which contain no extensive bills of individual rights or guarantees, or general phrases, such as due process of law or equal protection of the laws, which permit of varied interpretation, offer little possibility for the growth of review of legislative enactments by the judiciary.

With the establishment of dictatorships since 1918 certain characteristics of absolute monarchy have been revived in a new form of *executive supremacy*. And some incidents of the economic depression have shifted the direction of the policy-forming and administrative activities of the government, to a much greater extent than formerly, into the hands of the executive. A comparison may well be made regarding the prevailing practices under legislative, judicial, or executive supremacy.

Governments with Legislative Supremacy

Although legislative supremacy exists in many countries, England, France and Switzerland represent interesting and divergent types.

England.—In the first place, England has no written constitution as have the other countries. Parliament is recognized in England as the guardian of individual rights. The royal authority was early checked by the enforced granting of Magna Carta, of the Petition of Rights, and of the Bill of Rights, and by the revolution which occurred as the result of the great conflict between James I and Parliament and ended with the subordination of the power of the King to that of Parliament. The theory held by Coke at that time, that reason and the common law as interpreted by the courts were superior to both the King and Parliament, was discarded and the supremacy of the latter was established. Since the beginning of the eighteenth century the laws have been framed and administered by the executive and the administrative departments under the designation of King, Lords, and Commons. To their will the judiciary as well as the other public authorities are made subservient. An eminent jurist has said that "the corrective of the action of Parliament as a human and fallible institution is not a legal corrective, lies not with the judiciary, but lies with Parliament itself, acted upon by a fresh wave of public opinion, a higher sense of duty, a wider range of experience, or a broader perspective in the range of applied justice."

However, the supremacy of Parliament is limited to an appreciable degree by what is termed the "rule of law." By this practice the courts of England review the acts of public functionaries and hold all officers strictly to the general rules and laws laid down by Parliament.[1] Not even the King in Council, it has been held by the English courts, can take the property of a citizen during war times for military purposes without making due compensation.[2] On the other hand, the courts are obliged to reverse their opinions when Parliament through legislative enactments backed by public opinion changes its position. This was shown when the courts decided that the labor unions were corporations and could be sued before the English courts; but when Parliament later passed an act reversing this decision the courts were obliged to accept the decree as final, even though it meant a reversal of their earlier decisions.[3] Moreover, it is generally

[1] For modifications of the rule of law in England due to the conditions of war, see W. W. Willoughby and Lindsay Rogers, *An Introduction to the Problem of Government* (Doubleday, Doran and Company, Inc., 1921), pp. 95 ff.

[2] Attorney-General *v.* De Keyser's Hotel [1920] App. Cas. 508.

[3] Cf. Taff Vale Railway *v.* Amalgamated Society of Railway Servants

conceded that where there is no definite written constitution, as in England, it is the natural consequence to have the ultimate authority to interpret the laws vested in a legislative body.

France.—In France, where the form of government and the legal concepts underlying it are derived from the Roman law with its principles and practices, the method of guaranteeing individual rights differs from that in England. And this is true, notwithstanding the Declaration of Rights framed in 1789, which includes in the main those privileges guaranteed by the English charters. The fundamental law of France also is unlike that of England since it consists of a rigid instrument in written form. It provides for only a part of the actual framework of government and includes no provisions for the protection of individual rights. Few amendments have been added to the constitution since 1875. Unlike England in respect to the nature and form of her fundamental law, France, however, resembles her in that the legislative body is supreme, and that the final protection and guarantees of the constitution lie with the legislature itself, which is amenable only to public opinion as the ultimate source of legislative power and authority. Moreover, the courts in France are not permitted to interfere with the affairs of administration according to the restrictions placed upon them since 1791. As a result, France and certain other countries whose governments are based upon the French system of public law prohibit the courts from refusing to execute laws that have been duly enacted by the legislative bodies and promulgated by the executive.

Switzerland.—Since the Middle Ages some form of federal government has prevailed in Switzerland. One of the important features of the Swiss federal system has been the recognized supremacy of the legislature, which serves as the final interpreter of the constitution, subject only to a referendum by which its decisions may be reversed. The system of legislative supremacy adopted in Switzerland is a modified form of the prevailing practice in France and England. In order to maintain the proper balance of power between the central government and the cantons the federal courts review the acts of the cantonal legislatures. The protection of individual rights rests in Switzerland, as in France, with the legislative bodies, influenced and guided by the public sentiment of the nation. It is interesting to note that Switzerland deliberately rejected, after a careful study made by experts, the main feature of the federal government of the United States, namely, that the final power of review and interpretation of legislative acts rests with the judicial department.[4]

[1901] App. Cas. 426; and Trades Dispute Act of 1906, which reversed this decision.

[4] Cf. Georges Solyom, *La juridiction constitutionnelle aux Etats-unis et en Suisse* (Paris, 1923).

Governments with Executive Supremacy

The tendency toward the concentration of authority in executive hands, which characterizes governmental developments in many countries, has been considered in a previous chapter. This concentration has been carried out in extreme form in the establishment of dictatorships controlling a large part of Europe and Asia. Under these dictatorial forms of government, power is not only concentrated in the hands of the dictator but all other departments and agencies of the government are subordinate to the dictatorial will. A large part of the government is operated directly by representatives who act merely as assistants, and, where separate functions or divisions are established, they have no independent authority. There is, of course, no such thing as separation of powers, checks and balances, or what are normally deemed the characteristic features of constitutional government. The absolute authority which kings exercised in the Middle Ages is scarcely comparable to the authority wielded by typical dictators now dominating their countries.

Another type of executive supremacy based, ostensibly at least, on constitutional forms is found in Japan, where a monarchy exists based upon theocratic principles and virtually absolute in its manifestations. According to the first article of the constitution of Japan, "The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal." Though the theory that the government of Japan is an absolute monarchy is frequently expressed and insisted upon, the constitution and political parties, it is claimed, place some important restrictions upon the powers of the Crown. The Emperor is not supposed to act without advice, and he is expected to act in accordance with the recommendations of his advisers. But the recognized responsibility of the Cabinet is to the Emperor and not to the legislative bodies or the people. The attitude of the Japanese government toward popular and representative government was shown in the controversy over the Kellogg Pact which, in accordance with the terms of the Pact, was to be signed by the heads of the cosignatory states "in the names of their respective peoples." An effort on the part of Cabinet members to have the treaty signed including this phrase was hotly contested, and the treaty was signed with the statement that this phrase "viewed in the light of the provisions of the Imperial constitution is understood to be inapplicable, in so far as Japan is concerned." The executive authority in Japan is comprised of a highly bureaucratic system in which several agencies cooperate and in which military authorities under what is called the "supreme command" exercise dominant control. Under such a system the legis-

lative chambers and the courts perform distinctly subordinate functions.

The Japanese judicial system, in accordance with the French model, is deemed to be merely a subordinate arm of the government to carry out the orders and wishes of the superior authorities. In Japan, as was formerly the case in imperial Germany, a type of executive government prevails which does not accord with the principles of popular and representative institutions. The prevailing tendencies to augment executive authority were considered in a previous chapter (see pages 209 ff.).

Governments with Judicial Supremacy

The United States.—An extensive surveillance over the acts of the subordinate units of government is exercised by the courts in the United States. This is done to keep local authorities, such as cities and counties, within their respective jurisdictions and to test their acts as to fairness and reasonableness. Moreover, all acts, orders, or rules of administrative and executive affairs are subject to review by the courts to see that they keep within the law and that their powers are not abused to the detriment of the lives, liberties and property of individual citizens.

Another phase of judicial review in the United States inheres in the control exercised by the courts over acts of the states which are regarded as in conflict with the federal Constitution, treaties, laws, and regulations—a power which is exercised frequently both by the state and the federal courts. The most important part of judicial review in this country, however, is the practice of the courts, state and federal, to declare void acts of the coordinate departments, such as the practice followed by the Supreme Court in invalidating acts of Congress, and by the state supreme courts in invalidating acts of the state legislatures.

Of even greater significance than the adoption of all four of the above phases of judicial review in the United States is the fact that much the larger part of the powers now exercised by the courts in reviewing legislation has resulted from the application of judge-made concepts and restrictions to acts of the executive and legislative departments. A considerable part of these restrictions has grown up in connection with the application of the doctrine of protecting vested rights and of the interpretation of implied limitations on legislative powers conceived as inherent in the American concept of free government. Free government, as understood elsewhere in the world, seldom requires the application of such judicial checks. But in the United States public sentiment, in the main, has approved the process of

developing limits to the legislative powers both by express provisions of written constitutions and by judge-made implied limitations.[5]

It is by the exercise of this extraordinary power, which is not generally recognized as belonging to the functions of the courts and not expressly provided for in the American written constitutions, that more than sixty acts of Congress and several thousand acts of the states have been nullified. It is the combination in this country of all these phases of judicial review, and of numerous additional express and implied restrictions on legislative and executive acts, which has given currency to the term "judicial supremacy," or, as French commentators speak of it, "government by the judges," and that warrants the assertion that the United States is the prime example today of a country in which a theoretically democratic political order is tempered and confined by a series of checks administered by an "aristocracy of the robe."

Canada and Australia.—The federal systems of Canada and Australia accord to the courts the right to review all legislative acts both of the state and of the central government, in order to maintain the balance of power as defined in the constitution. There is also in both of these countries judicial review of the acts of the provinces or of the states to see that these subordinate bodies do not overstep their jurisdiction. Judicial review of legislation in countries such as Canada and Australia, however, has a narrow and limited application, for their constitutions contain few, if any, provisions guaranteeing individual rights, and no general phrases, such as due process of law, equal protection of the laws, or other language from which extensive implied limitations may be interpreted. It is customary also in countries dominated by English traditions to regard legislatures as practically supreme.

Citizens of Canada take pride in the fact that their courts do not meddle with matters of economic or social policy, as they think the Supreme Court of the United States did in the New York bakeshop case[6] and the minimum wage case.[7] As there are no special provisions in the constitution for the protection of acquired or vested rights, corporations or citizens cannot appeal to the Canadian courts for the protection of such rights unless a branch of the government attempts to assert authority entirely beyond the scope of its jurisdiction. Rate-

[5] For a consideration of the development of these implied limitations on legislatures in the United States, see Charles Grove Haines, "Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures," *Texas Law Review*, vol. ii (April and June, 1924), pp. 257 and 387; and vol. iii (December, 1924), p. 1.

[6] Lochner *v.* New York, 198 U. S. 45 (1905).

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

making, the control of public service corporations, and most other economic or social affairs are regulated by Canadian legislatures or commissions established by these bodies, whose acts are subject only to review by the legislative bodies themselves or by an ultimate appeal to the electorate.[8]

Brazil and Argentina.—Certain South American countries, such as Brazil and Argentina, provided not only that the courts may review acts of the state legislatures which may be in conflict with the national powers but have also accepted the American practice of declaring void the acts of the coordinate branches of the government. The Brazilian courts, following the general purpose of adopting the American system of public law as defined by Chief Justice Marshall, do not hesitate to declare void acts of the national congress.

Though similar authority is exercised by the courts of Argentina, the power is used less frequently and, as compared with either Brazil or the United States, such decisions are exceptional. Similarly, the provincial or state courts of Argentina have shown great reluctance in declaring acts invalid. This reluctance is thought to be due to the fact that the citizen, following Spanish traditions, prefers to abide by the law rather than to test its constitutionality. Another reason is thought to inhere in the greater authority accorded to and the greater confidence placed in the executive agencies which is characteristic of most Latin-American countries. The rather common practice in Brazil and Argentina of instituting by executive order the "state of siege," a form of martial law, interferes with the development of traditions favorable to the establishment of effective individual guarantees. Moreover, the fact that the courts in South American countries follow the French practice of according comparatively little weight to precedents renders the basis for judicial review insecure and vacillating.

Judicial Review in New European Constitutions.—The attempts to establish the supremacy of the constitution in Europe by means of judicial guardianship have met with little success. In the constitutions adopted since 1918 four states inserted provisions for certain types of judicial review of legislation, namely, Germany, Austria, Czechoslovakia and Finland. The German constitution gave the Reichsgericht a limited power to review legislation of the Länder (states) to determine its conformity with the national constitution. Though the courts also claimed the right to review acts of the national legislature, no such act was invalidated. The ascendency of Hitlerism has left small room for the operation of the principles of constitutional government.

[8] See William Renwick Riddell, *The Constitution of Canada in Its History and Practical Working* (Yale University Press, 1920).

Austria established in 1919 a constitutional court to pass on the validity of national or local laws. Few cases have arisen raising the validity of legislative acts, and current developments in Austria are undermining the authority and prestige of the constitutional court. Provisions for a constitutional court similar to the Austrian plan were inserted in the fundamental law of Czechoslovakia but the failure to have the tribunal serve any practical purpose has made this part of the constitution obsolete. Finland has attempted to put into operation an arrangement now in force in a number of the American states to secure an advisory judicial opinion on the constitutionality of proposed laws whose validity appears doubtful.[9] Though the results secured through these efforts to establish some form of judicial review of legislation are rather disappointing, they indicate a growing conviction that a written constitution is a fundamental law which should be preserved against executive and legislative encroachments.

A survey of the nations regarding the practice of the review of legislative acts by the courts indicates that about twenty nations have adopted something corresponding to the doctrine of judicial review of enactments. The doctrine has been made an integral part of the federal systems of government of Argentina, Australia, Brazil, Canada, Mexico, and Venezuela.[10] Following the American model but engrafting it upon a Roman or civil law foundation, the practice has been accepted as a feature of constitutions of Spanish American countries—Bolivia, Colombia, Costa Rica, Cuba, Haiti, Honduras, Nicaragua, San Salvador, and Uruguay. Judicial review of legislation in a limited form is a part of the public law of Portugal, and has been added as a feature of the new constitutions of Chile, of Czechoslovakia, and of the Irish Free State. It is an integral part of the governmental system of New Zealand and has been accepted, in a few particulars only, in Greece and Norway.[11] The commonly repeated statement that the doctrine of the review of legislative acts by the courts is a unique political phenomenon applicable to the United States alone is not true. However, the application of the doctrine in

[9] Arnold John Zurcher, *The Experiment with Democracy in Central Europe* (Oxford University Press, 1933), ch. ii.

[10] The authority of the courts to declare laws void when deemed by them to be in conflict with the constitution is implied from general language in the constitutions, similar to the provisions in the Constitution of the Unted States, in Argentina, Australia, Brazil, and Canada. Such authority is granted to the courts in Austria (Arts. 137-140), in Mexico (Art. 103), and in Venezuela (Art. 120).

[11] For extracts from constitutions and other data regarding judicial review of legislation in foreign countries, consult C. G. Haines, *The American Doctrine of Judicial Supremacy* (University of California Press, 1932), revised edition, Appendix ii.

the United States has resulted in conditions peculiar to the American government.

The majority of the nations, though accepting the written constitution as the foundation of government, have retained the practice of legislative supremacy or have reserved to the legislature the right of final interpretation of the constitution, subject only to a referendum vote or a reversal of the legislative decision by the election of new representatives. Among these countries are to be classed England, where parliamentary supremacy prevails, and Belgium,[12] Ecuador, France, Peru, Poland, South Africa, Sweden and Switzerland. The constitutions of these countries are looked upon as guides to the legislators, and the judges have no authority to scan their acts to see whether or not they conform to the fundamental laws. Political leaders in such countries are willing to trust the interpretation of the constitutions to legislators rather than to judges because legislators are nearer to the source of political authority—the people. It is believed to be more democratic to have a constitution interpreted by the people's representatives than by conservative-minded and life-appointed judges. Moreover, many terms of written constitutions are primarily of political significance and, it is claimed, can best be applied by those who are obliged to take account of the popular will.

Beneath the superficial resemblances to the American plan of judicial review which appear in the score of countries which have followed the American practice, it is readily discovered that most of these nations have limited the supremacy of legislatures only to a slight degree. In Norway the only provision which the courts may enforce is one relative to retroactive laws detrimental to private and personal rights. The courts of Greece have passed adversely on legislative acts in only a few cases. The practice of the reviewing of statutes by the courts in most Spanish American countries is limited by the constitutions and by the public laws, and is rarely called into action owing to the inherited traditions of the people to obey laws and executive orders rather than to contest their validity. Moreover, through a state of siege which may be declared by the legislature or by the executive, most of the rights and guaranties of the constitution can be set aside and the individual has only such recourse as the executive may permit. The limits set by the law on judicial review, the natural deference to public officers, and the not infrequent resort to the state of siege,

[12] Most of these constitutions have no express provisions relating to this matter. Exceptions to this rule are the constitutions of Ecuador (Art. 7), by which the Congress is intrusted with the function of interpreting the constitution; Poland (Art. 81), which prohibits the courts from examining the validity of laws; and Switzerland (Art. 113), which grants the legislature authority to place a final interpretation on the constitution.

give the courts a narrow field in which they may protect citizens by declaring legislative acts void. There are only a few countries in which the courts may effectively check the action of the other departments of government.[13]

Comparisons between American and Foreign Types of Judicial Review

Though the similarities between the practices of courts in declaring legislative acts invalid in foreign countries and the features of the American system are significant, the differences between the foreign ideas and procedure and the methods and results of judicial review in the United States are of greater import. One factor which changes the basis and application of judicial review, as has frequently been pointed out, is the practice of many foreign legislatures to enact mainly general laws and to authorize administrative officers to issue supplementary provisions and to regulate the details of administration by ordinances. Under such a system, most of the rules and regulations affecting private rights and privileges are made by administrative officers. And over the acts of these officers either special administrative courts or the ordinary courts exercise, as a rule, a vigorous and effective control. Their ordinances, if deemed in excess of the authority granted, may be annulled, and the administrative acts may be condemned for unfairness or inexpediency.[14] Since most of the cases in the United States wherein statutes are held void would arise in continental European countries under illegal ordinances or a misuse of administrative power, the courts of these countries can check illegal or unreasonable official conduct without becoming involved in a conflict with the supreme political powers of the state. It is the review of administrative action that constitutes the chief matter of interest in the public law of Europe. The combination of the review of the constitutionality of laws and of the legality of administrative action gave the Austrian constitutional court an important status, and the failure to confer similar authority weakened the position of the constitutional court of Czechoslovakia.

The significance of judicial review of legislation is also greatly affected by the method of amendment of the constitution. Where the

[13] For additional data and citations to authorities, see article by Charles Grove Haines, "Some Phases of the Theory and Practice of Judicial Review of Legislation in Foreign Countries," *American Political Science Review* (August, 1930), vol. xxiv, pp. 583 ff. Extracts are used from this article with the permission of the editors of the *Review*.

[14] See Raphaël Alibert, *Le contrôle juridictionnel de l'administration au moyen du recours pour excès de pouvoir* (Paris, 1926).

legislative chambers may change the constitution either by passing an amendment in successive sessions or by a greater majority, or subject to both requirements, the refusal of the courts to enforce a law may have the effect only of a suspensive veto. Moreover, a court which recognizes that its decisions can be reversed by legislative action will hesitate to decide that the legislature has incorrectly interpreted the fundamental law. The simple and direct methods of amending constitutions which are now in force in many countries will naturally limit efforts to establish an effective system of judicial review of legislation.

In view of the existing methods of legislation and administration, judicial review of legislation would be relatively unimportant in most European countries, because the primary and really effective results of such review are now secured by judicial control over administrative legislation and procedure. Significant issues before the people of many of these countries are: Shall judicial review of legislative acts be adopted, and under what forms shall it be accepted; or, granting that the principle of judicial review of legislative acts is already accepted, under what conditions and limitations should such authority be exercised?

Though the postulates and the fictions resulting therefrom, which are embodied in the standard arguments or explanations for judicial review of legislation in the United States are not infrequently accepted in foreign articles and treatises without critical analysis, the defects of these arguments are examined, and the discrepancies between political facts and political theories involved therein are discovered. The opposition to judicial review of legislation in Europe centers largely around three propositions. First, judicial review violates the theory of the separation of powers; second, it establishes the supremacy of the judiciary; third, it involves the courts in politics, with the result that acrimonious conflicts are sure to arise between the courts and the legislature or between the courts and the people.

These propositions, as advanced by European jurists, may well be considered in the light of American legal reasoning and some of its implications. Whereas the doctrine of judicial review of legislation is regarded in the United States as a necessary requirement in the application of the theory of the separation of powers, in Europe such a doctrine is generally thought to involve a confusion, and not a separation, of powers. Building on the principle that there are only two great functions of government, namely, to make and to execute the laws, and that of necessity these functions must be carried out with the closest unity and cooperation possible, the judiciary is considered as a subordinate agency of these functions, operating under the control and direction of the executive department. To allow the courts to check either or both of the primary functions of the state is thought

to make the judges masters over all of the agencies of government. Instead of judicial review establishing, as Americans contend, a government of laws and not of men, European jurists argue that it is precisely because the law is supreme that the legislature is placed above the other powers. Supremacy must reside in one department of government, and to European thinkers both reason and experience point to the legislature as the logical depository for supreme authority.

American lawyers consistently insist that the establishment of judicial review of legislation does not involve a supremacy of the judiciary. European jurists and statesmen, whether or not favorable to judicial review, almost as consistently assert that the review of legislation by the courts necessarily places the judiciary in a position of supremacy. As these jurists see the matter, it is primarily a question of what men are to be charged with the duty of rendering final decisions, and from what class they should be selected—whether they ought to be exclusively jurists or primarily men engaged in political life. Realizing that the establishment of judicial review is ultimately a question of the determination of supremacy for many of the issues of politics and law, European publicists are examining carefully the hypotheses and procedure for the adoption or extension of judicial review of legislation.

Many publicists oppose the review of legislative acts, either by a special constitutional court or by the ordinary courts, on the ground that the judges are likely to be influenced too greatly by the exigencies of partisan politics. "To annul a law," says Professor Hans Kelsen, "is to establish a general norm; for the abolition of a law has the same character of generality as to make it, being, so to speak, only the making with negative action—hence a phase of the legislative function. A court, then, which has the power to annul laws is consequently an organ of legislative power."[15]

Judicial review of legislation, it is claimed, requires essentially the exercise of political authority by the judges, and necessarily involves the judges in the political conflicts of the time. Though judges are conceded to have a limited authority to make laws where the legislative intent is not clearly expressed, this authority is expected to be limited to correcting minor defects in the law and not to be extended to the determination of important political or economic issues.

In most European countries the rule prevails that the guardianship of the constitution belongs to the legislature, and, subject to a reversal by popular referendum or the election of a new assembly, the legislature determines the limits of its own authority and exercises

[15] *Annuaire de l'Institut International de Droit Public* (1929), p. 94; and "La garantie juridictionnelle de la constitution," *Revue du Droit Public* (1928), vol. xlv, p. 197 ff.

control over the other departments of government. The legislature not only exercises ordinary legislative authority, but is recognized as possessing constituent powers, or powers of an ultimate sovereign. Where this rule is accepted, a written constitution is regarded mainly as a document comprising groups of political laws whose interpretation may, with a peculiar degree of propriety and convenience, be in charge of the political departments in the doubtful or critical cases that may arise. The well-recognized dictum of American judges, that there are certain questions of a political nature which the courts ought not to undertake to determine, and the settlement of which should be left with the legislative and executive departments of government, is extended so as to include practically all of the provisions of the constitution. Prescriptions of the constitution not being *laws* in in the ordinary sense, as understood by judges in interpreting and applying their provisions, they cannot form the basis of a contention or case before a court. A controversy regarding the meaning of a constitutional provision is simply not a *justiciable controversy*. The basic hypotheses, therefore, on which the American constitutional structure is founded—that constitutions are laws in the ordinary significance of that term, and that a case or controversy involving an alleged conflict between a constitutional provision and a statute is necessarily subject to judicial cognizance—are repudiated as legally unsound and politically impracticable.

The claim that a written constitution with limits on the powers of government, if not guarded and protected by the judiciary, becomes a mere "scrap of paper" and is not seriously observed appears to be disproved by the experience of countries with written fundamental laws and final legislative interpretation of the constitution. The constitutions of Belgium and Switzerland, though subject to final interpretation by the legislative assemblies, have seldom been changed merely by legislative interpretation or by a refusal to obey a constitutional requirement. The experience of these countries indicates that legitimate private rights and privileges are likely to receive adequate protection without a judicial guardianship of the written constitution.

Formal and Material Unconstitutionality.—In dealing with the practice of judicial review of legislation, European publicists make certain distinctions which are seldom alluded to by American judges or constitutional lawyers. First, a distinction is recognized between formal and material unconstitutionality of laws. The consideration of the formal constitutionality of a law is a review of the process of enactment to discover whether the procedural requirements of the constitution have been complied with. This form of control over legislation is sometimes called a review of "extrinsic constitutionality." The test of the validity of a law in the material sense involves a review of the

content of the law, or what has been termed its "intrinsic constitutionality." Judicial review of the formal constitutionality of a law is regarded as incidental to the ordinary processes of litigation; and frequently, when other forms of review of legislation are denied to the courts, review of formal or procedural constitutionality is accepted as a necessary function in the interpretation and application of the law by judges.

French judges claim the authority to refuse to apply an ordinary law when the formal requirements provided in the constitution are not followed. Such requirements, for example, would cover instances where a law as passed by one chamber was approved in a different form by the other chamber; or where the law was passed without following the rule as to a majority vote; or where the passage in one or both houses took place outside of the regular legal session; or where the law was not properly promulgated. It is generally recognized that German judges have similar authority.

Another distinction is made between review in the form of a direct annulment of an act, such as the disallowance of a statute in the self-governing English colonies, or the administrative annulment of an executive ordinance which is a common practice in European countries, and indirect review resulting from the refusal to apply a law in the course of an ordinary case or controversy before the courts of justice. Most foreign commentators who favor the adoption of the practice of judicial review of legislation desire the introduction of the indirect form of review as applied by American judges.

Deductions Relating to Judicial Review.—Certain deductions seem to be rather generally accepted in the discussion of judicial review of legislation in foreign countries. First, it is considered almost as an axiom that the definition and delimitation of powers in a federal system of government can best be intrusted to the courts. Federalism, with a written document distributing the powers of government, Professor Dicey insisted, means *legalism*—a legalism which presupposes a judicial body to serve as an arbiter or umpire. Today, few would undertake to dispute Dicey's dictum. With judicial review of legislation operating successfully in Argentina, Australia, Brazil, Canada, Mexico, Switzerland, the United States, and Venezuela, this phase of judicial review has come to be a significant feature of modern public law.

Second, in countries which have a unitary type of government there is a strong sentiment favorable to the adoption of judicial review of legislation as a desirable means of interpreting finally and upholding the specific provisions of the written constitution. Impressions regarding the failure of representative assemblies and the decline in the

confidence of former years in the devices of popular control of public affairs furnish a fruitful field in certain countries for the growth of doctrines supporting the "aristocracy of the robe."

Third, there is an insistent desire to place the protection of individual rights on a more secure basis than now prevails where the practice of legislative supremacy is a postulate of public law. Whether or not constitutions contain bills of rights, strong pressure is being brought to bear upon the courts to preserve and defend the fundamental personal and private rights of the individual. The detailed provisions favoring individual rights in some of the new constitutions adopted since the Great War are indicative of the prevailing impressions, and they predicate a basis for judicial surveillance of government conduct which is making inroads upon the doctrine of legislative supremacy. The introduction of the English and American phrases, "due process of law" and "the equal protection of the laws," in recent constitutions, even though limited in their applications, shows a desire to adopt as a test of legality the principle of fairness or reasonableness which is the outstanding product of American constitutional interpretation.

Fourth, the doctrine of judicial review of legislation is gaining adherents in the persistent efforts to establish and sustain the rule of law as against unwarranted and arbitrary political action. Advocates of superior law doctrines conceived as above all law and as limiting the functions of the state, such as Duguit and Hauriou, turned to the judiciary for the effective application of their higher law principles. Duguit looked with admiration upon the work of the Supreme Court of the United States because he believed that, in its espousal of higher law doctrines through "due process of law," "equal protection of the laws," and similar phrases, it was applying the rule of law, or *règle de droit*, for which he had contended during twenty years or more. Many jurists who are seeking a more secure basis for international law, and who find this basis chiefly in a modernized version of natural law, prefer to have the courts as the main expositors of this type of law. They, too, look favorably upon the application and extension of the practice of the courts in reviewing legislative acts.

Two tendencies are apparent in the consideration of the theories and practices in relation to judicial review of legislation in foreign countries. In the first place, the courts are to be accorded a supervisory authority over legislation, provided their decisions are confined to the express provisions of written constitutions. Courts passing on constitutional questions, "super-positive norms" of every kind, insists Hans Kelsen, must be rigorously excluded. Some of those who are favorably inclined toward judicial review of legislation hesitate to

urge its adoption or extension because they doubt whether judges can be prevailed upon to limit themselves to the application of the express provisions of written constitutions.

If there are fundamental principles of the social order which condition all law-making and law enforcement, the judges may be regarded as the chief custodians of these principles. One point of view would give the judges a quite narrow field in which to operate, and the other would grant them greater authority than they exercise in any country. But the broad judicial review which foreign commentators favor would be, as far as the review of statutes is concerned, a relatively unimportant feature of most foreign governmental systems.

Judicial review of legislation in foreign countries, then, is usually limited in scope by designating certain courts as the only ones before which a statute may be impugned, by restricting the procedure through which a case may arise in which the validity of a statute is questioned, by confining the attack on statutes to representatives of the government concerned, and by rendering the reversal of a judicial decision relatively easy through the course of constitutional amendments or referenda. These limitations, as we have seen, have made the provisions along this line in the new constitutions largely futile.

Certain factors must not be lost sight of in an appraisal of the tendencies to accept current ideas in relation to judicial review of legislation. In the first place, Canada and Australia, though adopting some of the main features of judicial guardianship of their constitutions, rejected the phases of the American plan which have given the courts the widest latitude and have called forth the highest praise of judicial censorship of legislation in the United States. When the supreme court of South Africa undertook to assert the American doctrine, the judges were severely rebuked by the legislative and executive departments; and the new constitution expressly provides for the principle of legislative supremacy in interpreting the provisions of the fundamental law.

The Irish constitution makes provision for judicial guardianship of the constitution, but the reversal by the Irish legislature of a decision of the Judicial Committee of the Privy Council will probably result in an attitude of great caution on the part of judges in their attempts to check legislative dominance in Ireland.[16] A similar rebuff to the Privy Council by the Quebec legislature does not augur well for the time when nationalist sentiment gains greater headway in Canada.

The tendencies of judges to enlarge their jurisdiction, and their

[16] See Wigg *v.* Attorney-General of Irish Free State [1927] A. C. 674, and act of the Irish Parliament, No. 11, 1926.

natural inclinations to frown upon innovations in the realm of legislation lead either to skepticism or to confirmed opposition to judicial review of legislation on the part of those who wish to secure a relatively free and untrammeled carrying out of public policies in the field of law. There are many who agree with Lord Birkenhead's observation that he had "become conscious of the dangerous and unprogressive conservatism of the legal profession, of its rigidity, and of its unadaptability to new and perhaps necessary and beneficial advancements." Hence the progressive and radical groups oppose the principle of judicial review of legislation; they foresee only obstructions to progress through a device which places conservative-minded judges as the chief guardians of the constitution.

As in the period of the adoption of the American doctrine of judicial review, the anti-democratic groups are foremost among those who wish to check the enactment of the popular will into law. These groups have now gained able allies in jurists and statesmen who believe that they see in the adoption of judicial review of legislation the possibility of the application of the principles of Magna Carta—the American and English concepts of the rule of law—to national and international life. But with the rule of law replaced in a large part of the world by the rule of force in the hands of imperious and strong-willed personalities, the conflict between those desiring to secure government according to law and those submitting to or sanctioning the personal and arbitrary government of dictators continues as one of the foremost issues of political life.

SUPPLEMENTARY READINGS

Haines, Charles Grove, *The American Doctrine of Judicial Supremacy* (University of California Press, 1932), revised edition.

——— *The Revival of Natural Law Concepts* (Harvard University Press, 1930).

——— "A Government of Laws or a Government of Men: Judicial or Legislative Supremacy" (University of California Printing Office, 1929).

Corwin, Edward S., *The Doctrine of Judicial Review* (Princeton University Press, 1914).

——— "The Higher Law Background of American Constitutional Law," *Harvard Law Review* (December, 1928, and January, 1929), vol. xlii, pp. 149 and 365.

Bryce, James, *Studies in History and Jurisprudence* (Oxford University Press, 1901), vol. i, pp. 124 ff.

Boudin, L. B., *Government by Judiciary* (William Godwin, 1932).

Zurcher, Arnold John, *The Experiment with Democracy in Central Europe* (Oxford University Press, 1933), chap. ii.

Lambert, Edouard, *Le Gouvernement des Juges et la Lutte contre la Législation sociale aux États-Unis* (Marcel Giard & Cie., 1921).

Mott, R. L., *Due Process of Law* (The Bobbs-Merrill & Company, 1926).
Warren, Charles, *Congress, the Constitution, and the Supreme Court* (Little, Brown & Company, 1925).
McLaughlin, Andrew C., *The Courts, The Constitution and Parties* (University of Chicago Press, 1912).

CHAPTER XVI

PROBLEMS OF LEGISLATIVE ORGANIZATION AND LEGISLATIVE METHODS

There is hardly any kind of intellectual work which so much needs to be done not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws. This is a sufficient reason, were there no other, why they can never be well made but by a committee of very few persons. A reason no less conclusive is, that every provision of a law requires to be framed with the most accurate and long-sighted perception of its effect on all the other provisions; and the law, when made, should be capable of fitting into a consistent whole with the previously existing laws. It is impossible that these conditions should be in any degree fulfilled when laws are voted clause by clause in a miscellaneous assembly.

—JOHN STUART MILL.[1]

THE representative assembly, its organization and functions, and its place in popular government are among the greatest problems of politics. As a device to render popular participation in government feasible, the representative assembly has become almost universal in modern governments. Only small communities, such as a few of the cantons of Switzerland, find it practicable to take care of public functions without the introduction of the representative idea. Despite long experience with representative government, legislative bodies have failed to fulfill the high hopes of the advocates of popular representation. The growth of a lack of confidence in legislative assemblies and the limitation of their functions are among the apparent tendencies of modern times. Elihu Root, in the closing address to the New York Constitutional Convention of 1915, observed: "We found that the legislature of the state had declined in public esteem and that the majority of the legislature were occupying themselves chiefly in the promotion of private and local bills, of special interests—private and local interests upon which apparently their reelections to their positions depended, and which made them cowards, and demoralized the whole body."[2]

[1] *Representative Government*, chap. v, p. 109.

[2] *Record*, New York Constitutional Convention (1915), p. 4458.

Reasons for Lack of Confidence in Legislative Bodies in the United States[3]

It is well known that legislative bodies, from Congress to municipal councils, are in disrepute in the United States. Originally, the legislatures of the states held dominant positions because the executive departments were weak. The governor had no independent position and no veto power, and the judiciary was partially subject to the legislative department, which included among its powers the most important functions of government. From this position, wherein the legislature was the central organ of government, a condition has developed which has occasioned a lack of confidence in state legislatures. The decline in public esteem is shown not only in the restrictions placed upon state legislatures, but also in the general feeling of discontent, disapproval, and disgust with legislative results both in state and in nation. In addition to the many limitations which are to be found in state constitutions, the recent adoption of the initiative, referendum, and recall[4] by some of the states bears significant testimony to the judgment as to the unsatisfactory conditions and inefficient methods which now prevail in legislative bodies.

This condition has come about with the growth of the principles of democracy and with the increased participation of the people in public affairs. The reasons for this are difficult to analyze. A few of the obvious defects which have tended to foster lack of confidence may be briefly mentioned. These are: personnel, length of session and congestion of legislative dockets, restrictive rules of procedure and the committee system, and the lobby and the dominance of special private interests.

Personnel.—Though it has been frequently demonstrated that the members of the legislature are "fairly representative of the various groups and divisions of the population,"[5] it is nevertheless true that few of those who are elected to the legislature have any special preparation either for the drafting or for the consideration of bills; and very few, indeed, have the necessary qualifications to consider the economic, industrial, and legal problems which are entailed in the legislative process. Legislators are elected from small districts, and the

[3] For a discussion of the causes of the lack of confidence in American legislatures, see P. O. Ray, *An Introduction to Political Parties and Practical Politics* (Charles Scribner's Sons, 1924), third edition, chaps. xviii and xix; and James Bryce, *Modern Democracies* (The Macmillan Company, 1921), chaps. lviii and lix.

[4] Cf. *supra*, pp. 285-295.

[5] See S. P. Orth, "Our State Legislatures," *Atlantic Monthly* (December, 1904), p. 728.

influences surrounding them are local and provincial. They regard themselves as agents of groups and of special interests which desire government aid and protection. The chief business of the legislator is often conceived as the securing of funds from the public treasury which will benefit "my district." Furthermore, it is the practice to reelect only a small portion of those who constitute the legislative body, with the result that the majority of those in the lower house and usually a large percentage of the members of the upper house comprise a new element in the legislative body, who get their first training and experience during the session. It is estimated that only about one third of each new legislature has had experience in legislative work. So long as it is not customary to reelect members of the legislature or to select those who have by training and experience secured a preparation for the requirements of legislation, it will be impossible to have an effective legislative body. Moreover, it is frequently the practice not to select from among the strong and capable members of a constituency, but to send to the legislature a member who is not representative of the best type of citizens in the community. There are many difficulties which account for this practice; nevertheless, it is one which is detrimental to the general effectiveness of the legislature. But in defense of these conditions it has been observed that legislators should not be expected to become expert law-makers. Few members will be able to investigate intricate subjects, examine legal technicalities, draft bills, or pass upon details. The very nature of representative government requires that the members of the legislature be ordinary, intelligent men without expert knowledge.[6]

Congestion of Legislative Dockets.—One of the chief difficulties in the legislative process is the short time within which legislatures are required to complete their work. It is customary to prescribe a limit of from thirty to ninety days for a biennial session of a state legislature. In this time a great many bills are presented, and many more are passed than it is possible to give adequate and critical consideration. The volume of legislation, along with the limitation of time, has resulted in the adoption of rules of procedure by which it is intended that business shall be done quickly without any detriment to the public interests. As a result of the shortness of the session a great part of the time is taken up with the presentation of bills and the consideration of measures in committee, leaving a very small amount of time for public discussion of measures. Thus, it is not unusual for fifty or a hundred bills to be passed during the last few days in a rush which gives little or no time to the careful consideration of separate measures. Furthermore, constitutions contain rules of

[6] John A. Lapp, "Making Legislators Law Makers," *The Annals* of the American Academy of Political and Social Science (March, 1916).

procedure which tend to hamper the legislature rather than to expedite the legislative process, such, for example, as the requirements for the reading of bills, which must either be ignored or perfunctorily fulfilled by reading titles. The practice of bringing in special rules to govern procedure with respect to matters in which the legislative leaders are concerned, and of setting aside rules of procedure by unanimous consent, often fosters contempt for constitutional limitations.

Another matter frequently commented upon relative to American legislatures is the large number of bills presented at each legislative session and the great number and variety of bills enacted into laws. Different causes contribute to the grist of the legislative mill. In the first place, individual members can introduce bills freely instead of having to secure the consent of the house or a committee in advance, as was formerly the practice in Congress and in the state legislatures. Again, a large number of bills, approximating as high as 60 per cent in certain legislatures, are introduced at the request of individuals or societies.[7] Many duplicate bills or bills dealing with substantially the same matters are introduced. It is not unusual for ten or more bills to be presented to accomplish the same purpose. Finally, it is regarded as enhancing the prestige of a member if his name is attached as the proponent of many bills. Although attempts have been made to restrict the freedom of members to introduce measures, none has proved acceptable in practice.

Rules of Procedure and the Committee System.—While there are great differences in the practices and procedure in the various state legislatures, a few general characteristics may be briefly noted. One of the special features of American legislatures is the extraordinary power of the speaker, based upon:

1. The right of recognition and the right to make rulings which can be reversed only by majority vote.
2. Power of appointment, which includes the selection of chairmen and members of the committees.
3. Powers of reference—selection of the committee to which a bill is referred.

With these powers and the control of all the important committees, the speaker and a few of the members practically control the business of a session.

A feature which differentiates American legislative procedure is the division of the houses into numerous committees upon which devolve a large part of the burden of sifting evidence, of passing on

[7] "Legislative Procedure in the Forty-eight States," *Bulletin* No. 3, Nebraska Legislative Reference Bureau, p. 9.

proposed bills, and of making recommendations favorable or unfavorable to passage. Perhaps nothing indicates so well the cumbersome methods of American legislatures as the number and size of the committees. The committees vary in number from about thirty to seventy, and in size from ten to forty members. Each member is expected to serve on five or more committees. So many committees would be impossible if it were not that the burden of work is confined to a few of the more important, while others meet irregularly throughout the session. The committees on appropriations, judiciary, and municipal affairs are usually kept very busy. Among the other committees dealing with important matters are those on agriculture, banking, county affairs, education, corporations, railroads, fish and game, and roads and bridges. The work of some committees is practically negligible.[8]

This division into committees seems to have been necessary, owing to the great amount and variety of matters presented to American legislatures, but it has tended to divide and disperse responsibility and thereby to weaken the power and influence of the body as a whole.[9] The chairmen of these committees frequently can decide whether or not a public hearing shall be held, and committees have the privilege of reporting bills or of refusing to make any report. It is evident that numerous large committees mean a lack of responsible action and of open public discussion. The actual work of committees is usually accomplished in what is known as "executive session." Here the few legislators vitally interested in or opposed to measures are afforded an opportunity either to push them through the committee or to kill them, with little possibility of being held responsible for the action and with little concern as to what the majority of the legislature may approve or disapprove. The committee system in American legislatures has taken, to a great extent, the place of the rule of the majority of the house. While it is possible to bring proposals before legislatures when an unfavorable report is made by a committee, the process is in most cases so difficult as to prove well-nigh prohibitive. Proposals to adopt the plan of joint committees of the two houses in accordance with the Massachusetts practice or to reduce the number and size of the committees have seldom been favorably considered.

The committee system and the rules of procedure designed to bind legislative action have had the following results:

1. The real work of the legislature is performed through committees.

[8] H. W. Dodds, "Procedure in State Legislatures," *The Annals* of the American Academy of Political and Social Science (May, 1918), pp. 40-41.

[9] For a good account of the committee system, see Robert Luce, *Legislative Procedure* (Houghton Mifflin Company, 1922), especially chaps. iv-vii and xxi.

2. Toward the end of the session the business of the house is largely in the hands of the speaker, the committee on rules and a steering committee, whose duty it is to save as many as possible of the important public bills.

3. The elaborate rules which bind the houses during the early part of the session are rather consistently ignored during the closing days, when by unanimous consent numerous bills are hurriedly rushed through.

4. There is little real debate on the floor.

The Lobby and Special Interests.—A primary cause of the decline in prestige of American legislatures is the conviction that much legislation is secured through special interests which maintain lobbies for the purpose of influencing legislation. It is generally recognized that a citizen who is interested in any proposed legislation has a right to employ an agent to collect evidence and to present it to the committee or to the members of the legislature in a fair and open manner. A considerable part of the effort to inform legislators regarding the conditions and problems to be regulated by means of statutory rules and regulations is legitimate and desirable.

But former practices which were regulated in part by anti-lobbying acts are scarcely comparable to the "amazing development of the practice of employing legislative agents to represent special interests during the sessions of legislative bodies." This development, notes Professor Pollock, "has gone on so rapidly that today it is clear to experienced observers that the influence of these organized and well represented groups is very potent in determining legislation, and in many cases it is even overwhelming and decisive. One writer refers to the lobbyists in Washington as 'the third house of Congress.' Other observers describe the swarm of lobbyists who attend the sessions of the state legislature. Everywhere it is evident that all substantial interests in a state or in the nation now consider it highly expedient to be represented before legislative bodies by an agent or agents."[10]

Various methods have been tried to overcome, or at least to lessen, the evils resulting from the practice of lobbying, but they have met with little success. Chief among these attempts are the requirements in many states of registration, the filing of expense accounts, and the prohibition of contingent compensation. Further efforts have been made to secure even more drastic legislation against the lobby, but in the main little has been accomplished except to prevent lobbying in the legislative halls and corridors, to require registration, and to secure a certain element of publicity in connection with personal

[10] James K. Pollock, Jr., "The Regulation of Lobbying," *American Political Science Review* (May, 1927), vol. xxi, p. 336.

solicitation. It is recognized, however, that the laws enacted against the lobby have accomplished little in the way of improving the methods of influencing legislation. Despite much criticism of lobbyists in Washington, Congress has not attempted to regulate their activities.[11] The attitude of members of Congress toward lobbying was expressed by a special committee as follows:

Your committee is of the opinion that any individual or any association of individuals interested in legislation pending in Congress has the unquestionable right to appear in person or through agents or attorneys before committees and present his or its views upon and arguments in behalf of or against such legislation; that it is the right of the individual and the mass to appeal to the legislator personally, verbally, if he sees proper to grant an interview, or in writing, if he sees proper to read it, and by education and argument seek to convince his judgment and his conscience. This we think is the true spirit of the right of petition guaranteed by the Constitution to the citizens of the Republic. To place the Congressman in a cloister to legislate, rendering him immune to extraneous influences, would be impossible, and if possible, it would be exceedingly ridiculous. But your committee feels assured that whenever any person or association attempts by secret or insidious means or methods, by either giving or encouraging the hope of other reward than that mental and spiritual exaltation which springs from the consciousness of having walked in the light of honest judgment and followed it to its logical end, or by threats of punishment to be vindictively inflicted, then such methods become a menace to the free exercise of the legislator's judgment and the true performance of his solemn obligation and duty, are improper, and merit the severest condemnation.[12]

Although it is generally taken for granted that legislatures are law-making bodies, the part which they perform is to an increasing degree little more than registering the ends sought and planned by those desiring government assistance and protection. Legislators today to a large extent merely formulate and ratify measures already prepared elsewhere. Most of the important bills are prepared by associations, clubs, individuals, and party managers and are watched by outside parties through every stage of their enactment. It is now generally recognized that "the real law-making power has moved back into the hands of individuals, party organizations, and other voluntary associations."[13]

[11] For a summary of the features of state legislation, see *ibid.*, pp. 337 ff.; also note in *Harvard Law Review*, vol. xlv, pp. 1241 ff.

[12] *House Rep. No. 113*, 63rd Congress, pp. 24-25.

[13] Consult *House Report No. 570*, 63rd Congress, 2d Session.

"I think the public ought to know the extraordinary exertions being made by the lobby in Washington to gain recognition for certain alterations of the tariff bill. Washington has seldom seen so numerous, so industrious, or so in-

The chief objection, then, to legislative methods is based upon the belief that much of the product is the result of the influence of special and private interests. It is an undisputed fact that many of the laws which pass the legislature are the result of understandings made between representatives who favor certain special interests and who, in order to have measures passed to protect these interests, trade votes freely with their colleagues. This practice, known as "logrolling," has been used in America to such an extent as to bring the entire legislative process under suspicion. On the whole, the most pernicious practice among law-making bodies is the giving of time and attention to petty local matters, by which legislative procedure becomes largely a matter of trade and barter. Each member under such a practice regards it as his duty and privilege to draw upon the public treasury for the special benefit of his locality and to satisfy the persistent demands of special interests. The onslaught on the public treasury by special interests and for the benefit of local needs has led to the familiar "pork-barrel" methods, which are nothing short of scandalous. To a large extent the foregoing evils are attributed to the district system of electing representatives whereby a member is chosen from a small territorial unit whose interests and advantages he is expected jealously to guard.

In addition to the other evils of the district system, such as the tendency to emphasize local interests in preference to state or national interests, and the practice of selecting an inferior representative because he resides in a particular district, the system affords an opportunity for a type of political manœuvring which has become notorious in American politics. This form of manœuvring, by which a majority party attempts to gain representatives at the expense of

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sidious a lobby. The newspapers are being filled with paid advertisements calculated to mislead the judgment of public men not only, but also the public opinion of the country itself. There is every evidence that money without limit is being spent to sustain this lobby and to create an appearance of a pressure of public opinion antagonistic to some of the chief items of the tariff bill. It is of serious interest to the country that the people at large should have no lobby and be voiceless in these matters, while great bodies of astute men seek to create an artificial opinion and to overcome the interests of the public for their private profit. It is thoroughly worth the while of the people of this country to take knowledge of this matter. Only public opinion can check and destroy it." From statement by President Wilson during the Sixty-second Congress resulting in the lobby investigations of 1913. See Edward B. Logan, "Lobbying," Supplement to *The Annals* of the American Academy of Political and Social Science, July, 1929. This monograph presents a useful analysis of the methods employed by lobbyists in the efforts to influence legislative activities. Consult also, Peter H. Odegard, *Pressure Politics, the Story of the Anti-Saloon League* (Columbia University Press, 1928), and Edward Pendleton Herring, *Group Representation before Congress* (Johns Hopkins Press, 1929).

the minority parties, is known as "gerrymandering," named after Governor Eldridge Gerry of Massachusetts, whose party passed a law to disfranchise the Democrats. The method employed was to concentrate its opponents' majorities and scatter its own, thus giving itself small majorities in many districts and its opponents large majorities in a few districts. The scheme of disfranchising the minority soon became the practice of all parties. As a result of this practice, state and national legislatures frequently do not represent the relative strength of the parties electing those bodies.

Although federal and state laws usually require that representatives be elected "by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants," gerrymandering is practiced by all parties.

But the decline of confidence in representative assemblies is not confined to the United States, where special interests are reputed to exercise a dominant influence and where "pork-barrel" and "log-rolling" methods frequently prevail. A similar decline has been noted in the position and prestige of the House of Commons as a legislative body.

Present Position of the House of Commons.—Just as legislative bodies have been losing their place in the confidence of the people of the United States, so a similar change has occurred in England in regard to the prestige of the House of Commons as a law-making body.[14] The changes which appear to be lessening the influence of the legislative body in England are the placing of increased power in the hands of the executive and the submission of legislative questions directly to the popular vote. Whereas the representatives in the House of Commons were once the spokesmen of the people, the Ministry now are the responsible agents of the nation or, perhaps more accurately, of the party which they represent. The fate of the Ministry is no longer decided by the House of Commons, but rather the personnel of the latter is determined by the preference shown by the electors in selecting the Prime Minister. In practice the House of Commons no longer controls the executive, but the executive controls the House of Commons. It is the duty of the Ministers to justify their acts before the representatives of the nation, and if they fail to do so, these representatives will turn them out of office. But modern Cabinets are seldom turned out of office. The influences which have aided in bringing about the change in the position of the House of Commons have been attributed to the development of the party system with its strict discipline, to the inferiority of the House of Commons to the press as a means of

[14] R. L. Schuyler, "The Decline of the House of Commons," *Columbia University Quarterly* (October, 1919).

expressing public opinion, and to the social transformation which has recently taken place in England.[15]

Proposals to Improve Present Conditions

It is obvious that the defects which are causing a decline in the confidence in legislative bodies should be eliminated. In fact, definite efforts are being made to restore the good will of the people toward legislatures. A few of the problems connected therewith, as well as others that arise from the attempt to adjust representative government to meet the complex political conditions of the present time, require some consideration. Among these are the limitation of the scope of legislative powers and functions, the abolition of the district system, the adoption of proportional representation, the securing of expert service in law-making, and the advisability of changing the present form of legislative organization.

Restriction of Legislative Powers.—That so many results of legislative action have seemed to be unsatisfactory is due in part to the failure to distinguish the various types of legislative functions and the differences in methods which are necessary in dealing with the diverse powers intrusted to representative bodies. To realize the difficulty, it is only necessary to analyze a few of their distinct duties. The chief duty of legislative bodies is to act as organs for the expression of public opinion. Efforts to perform this duty have sometimes been dissipated because of the mass of details regulating administrative departments and because of the amount of time and consideration given to local and private bills. But the practice of placing responsibility for the initiation of legislation in the hands of administrative officers is a tendency which is gaining in favor and is helping to restore emphasis to the primary function of the representative assembly. The change now well under way is described by Willoughby:

In England this movement has gone so far that it can almost be said that Parliament has ceased to be a legislative body, practically speaking, and has reverted to its original function of serving as an organ of public opinion. All legislation of importance is now drafted by the Ministry in power and is put through that body without change except as the Ministry may acquiesce in such modification. The inability of the House to modify ministerial proposals arises from the fact that the Ministry in power necessarily has a majority in the House, and this majority, under the practice now firmly established, is practically pledged in advance to make its action conform in all

[15] For further consideration of the weaknesses of the House of Commons as a legislative body, see *supra*, pp. 212 ff.

respects to such Ministry. The power of the individual member to introduce measures and secure their passage has steadily diminished until it no longer has any significance in determining the character of legislation that shall be enacted.

In the United States we are still in the midst of a similar evolution. More and more the people are looking to the President in the case of the national government, and to the governors in the governments of the states, to formulate and secure the enactment of all acts of general importance. There can be no doubt, moreover, that this movement is one which has generally commended itself to the populations of both countries.[16]

Thus it is the primary function of the legislative assembly to serve as a channel through which the public may bring influence to bear on the formation of government policies as well as on the methods of administration pursued. For the performance of this duty it becomes necessary that heads of departments and executive officers present to the legislative chambers adequate information on the expenditure of public money and on the methods and procedure in administration. Furthermore, no steps can be taken involving new policies or the application of general rules without first securing the consideration and approval of the legislative chambers.

A function no less significant, from the standpoint of American legislatures, is that which has to do with the organization of the administrative branch of the government, the work which shall be performed, and the money which shall be expended thereby. From this standpoint the legislature has been designated as the board of directors of a public corporation, representing the citizens as stockholders. As such, its functions are to give orders to administrative officers and to exercise supervision and control over such officers.

From this point of view there is a question whether the function of the chambers should be to determine authoritatively the main features of government organization, such as the creation of offices, the determination of the duties connected with them, methods of procedure, and limitations to be placed thereupon, or whether the primary responsibility for both legislation and administration should be placed upon executive officers, with the assemblies acting in an advisory and critical capacity. The latter method is that toward which parliamentary governments appear to be progressing, whereas the former is the practice prevailing to a large extent in the federal and state governments of the United States.

A large part of the time of American legislatures is given to the passing of laws which relate to the details of administration. Such

[16] W. F. Willoughby, *The Government of Modern States* (D. Appleton-Century Company, Inc., 1919), p. 295.

laws, for example, as concern the rules of procedure in courts of justice, the determination of boundaries of school districts, the payment of pensions or private claims, and a host of other matters might well, it is claimed, be provided for by executive departments with the authority to make rules and regulations under a definitely approved system. If the minor matters which are concerned merely with the details of administration and which can be handled better by executive and administrative officers were removed from the consideration of American legislative bodies, much of the business which now engages the attention of legislators would be eliminated and the time could be given profitably to the formulation of public policies. The strictures of J. S. Mill on legislative bodies are as true today as when he first contended that a popular assembly is not fitted to administer or to dictate in detail to those who have the charge of administration, and that, "even when honestly meant, the interference is almost always injurious. Every branch of public administration is a skilled business which has its own peculiar principles and traditional rules, many of them not even known in any effectual way, except to those who have at some time had a hand in carrying on the business and none of them likely to be duly appreciated by persons not practically acquainted with the department." The method of confining legislatures to the enactment of laws involving policies and general principles has been accomplished in a reasonably effective manner through the French administrative system and the English plan of delegated legislation. These devices by which executive officials make rules and regulations which have the force of law will be considered further in a subsequent chapter.[17]

Abolition of the District System.—Among the changes recommended to improve the method of representation in legislative bodies is a system of election by which a member would not be the representative of a small local district, but would be elected at large from a more extensive unit of the state. Some system of election on a general ticket involving the adoption of the principle of proportional representation is regarded as necessary in order to secure a legislative body which will not devote the greater part of its time to the petty projects of local and private interests. Such a change is particularly necessary in the United States where the method of electing representatives by single districts has led to the evil of gerrymandering.

Various devices have been tried to secure minority representation. One of these is the limited vote by which the voter casts his ballot for a number less than the total number to be selected; and another is the cumulative vote, which was considered in a previous chapter.

[17] Cf. pp. 445 ff.

The latter has at times given an undue representation to the minority party, though it has reduced the evils of the gerrymander. It appears to be favorable to the two-party system and to strengthen party discipline to the discouragement of independent voting, a difficulty which proportional representation is designed to overcome.

Proportional Representation.—The chief feature of the plan of proportional representation, which has been described briefly in a previous chapter, is that representative bodies are so chosen that large groups of voters will be represented in proportion to their numbers.[18] It is claimed not only that proportional representation gives a fairer and more reasonable basis of representation, but also that this system will result in greater interest in, and consideration for, public measures and national policies. Thus the system is advocated as a check upon the tendency of legislative bodies to fritter away time on local and special projects. Whether these claims will be fulfilled has not yet been conclusively demonstrated, although the countries which have tried the plan regard it as reasonably successful. But its proponents insist that "it actually gives the results, notably, the beneficial reactions on voters and parties, that are claimed for it by its informed and reasonable advocates."[19]

Reforms in Legislative Procedure.—It is generally conceded that some of the most serious defects in the legislative process are connected with the customary rules of procedure. Only a summary of the proposed reforms to remedy these defects can be given.

First, it is proposed that the rule requiring a reading of every bill upon three separate days in each house be eliminated. This rule is no longer followed in practice, and the original necessity for it has disappeared, since all bills are printed and furnished the members in advance of consideration. Second, various devices have been recommended to restrict the introduction of bills—namely, to limit the number of bills one member may introduce, to limit the days of the week on which bills may be introduced, and to establish a more rigorous procedure for special and local bills. An arrangement such as that provided by the British Parliament, whereby the public bills are given precedence over private and local bills and receive attention during the greater proportion of the time, would, it is thought, render possible greater consideration of important public policies. The practice of the House of Commons, where most of the bills are considered in the committee of the whole and where the discussions

[18] C. G. Hoag, "Effective Voting," *Document No. 359*, 63rd Congress, 2nd Session. For a brief history of proportional representation, see Clarence Gilbert Hoag and George Henry Hallett, Jr., *Proportional Representation* (The Macmillan Company, 1926), pp. 162 ff.

[19] *Ibid.*, p. 274.

are participated in by the entire House, private bills being relegated to committees and to the very slight consideration granted when public business does not interfere, might well be adopted in American legislatures. This plan, it has been suggested, might be made effective by giving the governor and the members of his cabinet the right to present measures to the legislature and to require that these measures receive first consideration.

Third, an effort has been made to reform committee organization in the legislature by (1) reducing the number of committees, (2) reducing the size of committees, and (3) limiting the number of committee memberships for each member. To remove some of the causes of complaint against procedure by committees, constitutional provisions have been enacted requiring that all bills be referred to committees and reported on to the legislature, and that all committee meetings shall be open to the public. A few constitutions forbid the introduction of bills after a certain date and thereby avoid undue congestion in the last days of the session. One state, California, provides for two parts to a session, one for the introduction of bills and one for their consideration, with an intervening period for careful investigation by committees and by other parties interested in the legislative projects. The bifurcated session does not appear to have worked well in practice. Many bills are introduced in outline or skeleton form in the first session, the real nature of the bills being revealed only in the second session. The problems of haste, lack of consideration of important public bills, and the confusion of the last weeks of the session are scarcely perceptibly relieved by such a device. Out of a total of 1041 bills presented to the House in the 1917 legislative session in Illinois, 460 were referred to three committees, whereas many committees had very little to do.[20] That more effective discussion of measures may be secured, it has been proposed that committees should be required to provide for a fixed schedule of meetings, with calendar announcements in advance, to grant full publicity in all hearings, and to require the keeping of records.

To avoid congestion at the end of the session, with the consequent haste, confusion, and disregard of the rules, it is proposed to lengthen the session. The Massachusetts system of an unlimited session is more likely to secure a careful and adequate consideration of bills. It is difficult to understand why measures of great public significance should be rushed through the legislative mill in order to close a session within the constitutional limit.

Expert Service in Law-making.—Not only has it been found necessary to limit the scope of legislative activity, but methods have

[20] Illinois Constitutional Convention *Bulletin*, No. 8, p. 564.

been considered to secure information and expert assistance in the legislative process.[21] To enable the legislature to do its work, improvement in the organization of the assistants who are to do the detailed work is imperative. There must be permanent, expert, nonpartisan officials who make a business of legislation, and who can bring to the representatives of the people an efficient kind of professional service. Better organization is necessary to secure legislative information; and when the information is secured, the services of an expert are essential to draft into effective legal provisions new proposals for legislation. Bill-drafting is a technical matter which involves great difficulties and requires skill of the highest character. A single word may change the entire meaning of an important statute, as has been found in numerous instances. It has been necessary to call special sessions of legislatures to correct mistakes in careless or unsatisfactory bill-drafting. The object of draftsmanship in lawmaking, according to Justice Stephens, is greater accuracy, for "it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain a degree of precision which a person reading in bad faith cannot misunderstand."

The existing agencies for furnishing information and rendering expert assistance in the preparation of legislative enactments are:

1. State legislative reference bureaus and drafting departments.
2. Municipal reference bureaus which render assistance to members of state legislatures.
3. Legislative drafting or research departments attached to universities, such as the legislative drafting bureau of Columbia University and such drafting or research bureaus as have been established in the state universities.
4. Committees of the various state and city bar associations and other societies appointed to examine and report on bills pending in state legislatures.

The most important of these agencies from the standpoint of the public are the legislative reference bureaus and the bill-drafting departments usually established in connection with the state capitol.

Legislative Reference Bureaus.—Although state libraries have been rendering special service to legislators for a long time, legislative reference work in the strict sense was initiated by the appointment of a Legislative Librarian in the New York State Library in 1890. This librarian indexed the laws of all the states so that their methods and experience might be available to the New York legisla-

[21] See Robert Luce, *op. cit.*, chaps. xxiv, xxv.

tor. The idea gained little favor, however, until 1901, when the Wisconsin legislative reference department, with Dr. Charles McCarthy in charge, was established by the Wisconsin Free Library Commission.

The following description of the work undertaken by Dr. McCarthy indicates what may be accomplished by such a bureau:

> On his appointment in 1901 Dr. McCarthy, the legislative librarian . . . (Wisconsin), started a clipping bureau. He collected all of the pamphlets, bulletins, reports of commissions, magazine articles, and the like that he could get free. He accumulated as many duplicates as possible for free distribution. He classified them and arranged them under proper headings, paying special attention to the subjects that he knew would come up at the next legislative session. He searched the libraries of the several state departments and brought over whatever he thought would be an aid to the legislature. By the time the session met in 1903 he had not what would be called a library, but an up-to-date, live set of aids to lawmakers.
>
> But this was preliminary. As soon as the elections had been held he sent to all the members of the incoming legislature a circular, telling them something of what he had on hand and offering to assist them by furnishing information, copies of laws enacted, or bills introduced in other states, etc., on any measure that they proposed to bring before the legislature. Over one hundred requests came in, and he forwarded by mail his clippings, pamphlets, and bills. When the legislature assembled he moved his collection to a room on the same floor. He circulated among the members, brought them to his library, and showed them what he had. He learned what they wanted, and if he did not have it on hand he immediately wrote or wired to all parts of the country to get it.
>
> When the committees were appointed and began their work he helped them in the same way. He sent hundreds of copies of their bills to experts, commissions, lawyers, and informed citizens in Wisconsin and other states, asking for criticisms, improvements, and accounts of whatever experience they might have had on the points involved. If a lobbyist made a statement before a committee he would have replies . . . within a day or two . . . from the parties who knew the facts. The chairman of the Committee on Claims has given several instances where these replies saved the state hundreds and even thousands of dollars. Other committees were aided in a similar way. The committees on railway legislation, primary elections, and civil service reform at the sessions of 1903 and 1905 had before them . . . the bills introduced in other states, the hearings on those bills, arguments of counsel, the best pamphlets and magazine articles, besides pertinent letters from the best-informed men of the country.[22]

Legislative reference bureaus connected with state libraries, uni-

[22] From article by John R. Commons, *Review of Reviews*, vol. xxxii, pp. 722 ff.

versities, or historical societies have been established in most of the states. In some instances these bureaus have been organized by legislation; in other cases no legislative action has been regarded as necessary, existing agencies being deemed capable of taking care of the work. Legislative reference and drafting bureaus are frequently combined, though the tendency is in the direction of the establishment of separate drafting bureaus.

The duties and responsibilities placed upon the librarians of such bureaus may be illustrated by an extract from the Michigan act of 1907:

> He shall procure and compile in suitable and convenient form for ready reference and access, information as to proposed and pending legislation in other states and shall also investigate the operation and effect of new legislation in other states and countries, to the end that either house of the legislature or any committee or member thereof, or any citizen of the state, may have the fullest information thereon. He shall also give such advice and assistance to the members of the legislature as they may require in the preparation of bills and resolutions, and shall draft bills upon such subjects as they may desire.

Bill-drafting Bureaus.—A number of states have made provisions for some method of securing expert assistance in the drafting of bills. For example, in New York the president of the Senate and the Speaker of the Assembly were authorized to appoint three persons whose duties during the session of the legislature should be "to draft bills, examine and revise proposed bills, and advise as to the consistency or other effect of proposed legislation." In Massachusetts provision for bill-drafting is made by each branch of the legislature. California established in 1913 a Legislative Counsel Bureau, to be in charge of a chief appointed by a board consisting of the Governor and two members each from the Senate and Assembly. The chief of the bureau is to be a specialist in the laws of the state, and is expected to prepare and assist in the preparation of amendments to legislative bills. A bill-drafting bureau is one of the necessary adjuncts for efficient law-making. To render its best service, the bureau, as well as the legislature itself, must have at its command a well-equipped legislative reference devision.

Additional duties and responsibilities as aids to the legislative process have been assumed by the legislative reference bureaus. During the session certain bureaus prepare card catalogues of bills and keep a record of their status in the legislature, others issue periodical bulletins giving a brief analysis of all bills introduced, and occasionally the results of the session are summarized in a pamphlet issued after adjournment. More important than these services is the func-

tion allotted to a few bureaus to assist in the codification and consolidation of state laws. Thus a plan of continuous codification is authorized by which the new laws on any subject may be arranged in relation to the existing statutes.

Though changes are being made regularly in the organization and functions of legislative reference and bill-drafting bureaus, such bureaus have become an accepted part of the machinery of government. They are sometimes accused of partisanship, and at other times of exercising too great influence on legislation. Because of the ever recurring conflict between the legislative and executive departments there is a frequent shifting of control over such bureaus from one department to the other. In recent years the legislature has been disposed to assume more direct control and authority over these agencies. Since the service to be rendered is primarily in aid of the legislature there is a justification for legislative control over legislative reference and bill-drafting bureaus. But unless this service is placed in the hands of a specially trained staff the main purpose of the bureau will not be attained. Regardless of the method of control, the organization of a successful bureau requires a group of permanent and professional technicians who must be independent of the hazards of spoils politics.[23]

Unicameral or Bicameral Legislatures

An issue of increasing importance is the question as to the advisability of changing the existing form of legislative organization. The bicameral principle was originally adopted in England, owing to the peculiar conditions by which different classes or estates were given representation. And when representative bodies were formed, the upper classes or estates were accorded special recognition in an upper house, and the other classes of freemen combined to select representatives to a lower house. The bicameral principle has been adopted throughout Europe, except in Greece, Finland, Estonia, and Jugoslavia. With the disappearance of the class basis on which the double chamber was originally founded, the upper houses have been formed on an artificial basis of the representation of interests. With the extension of the principles of popular government and the decline of the upper house in public esteem, the movement for the abolition of upper chambers or for a reduction in their powers and influence has been growing in popular favor. Most of the new constitutions of Europe make provisions for upper houses; however, they are

[23] On the difficulties and hazards of this movement, see John H. Leek, "The Legislative Reference Bureau in Recent Years," *American Political Science Review* (November, 1926), vol. xx, p. 823.

given a distinctly subordinate place in the government. Though they may delay action, they cannot withstand the determined will of the lower houses.

The lower houses are supposed to represent the popular will, and the tendency is to grant more power to the representatives of the people. In federal government alone is there a natural basis for two chambers in the representation of states and of individual electors. The colonies in America, with few exceptions, adopted the plan of having two houses, the one representative of the colonists, and the other of the British Crown. When the first state constitutions were framed, it was to be expected that they would follow the already well-established precedent of having two houses. Although the Articles of Confederation provided for a single house, the analogy of the English government and the desire to have state as well as individual representation led the makers of the federal Constitution to adopt the bicameral plan. However natural it was to have the legislatures of state and nation established on a bicameral basis, the present ineffective and cumbrous legislative procedure, the general lack of responsible action, and the failure of one body to act as a check upon the other in hasty or undesirable legislation, have led to no little discussion of the advisability of discarding the bicameral system in favor of a unicameral legislature. A few attempts have been made to accomplish the change through constitutional amendments, as in Oregon, Oklahoma, and Arizona. However, they have been unsuccessful and there does not seem to be a strong public sentiment favoring a single chamber.[24]

The problem of the two-chambered legislature has been actively discussed in Great Britain and in other countries having a parliamentary system under which the government is managed by a Cabinet who are responsible to a popularly elected legislative body, and who resign when they lose the support of that body. It will be seen that the responsibility of such a governing group to two legislative bodies, each of which may be controlled at a particular time by different interests, would present difficulties. The tendency in all countries under a parliamentary system has been distinctly toward making the Cabinet, as the governing group, responsible to the larger and more popular of the two legislative bodies. This means that the other house has little influence upon measures of a political character.

The experience of countries in which the single chamber has proved successful, along with the general criticism of our legislatures, has led to a movement for reform which argues for the single-chamber

[24] For a discussion of the problem of unicameral or bicameral legislatures for the states consult, Walter F. Dodd, *State Government* (D. Appleton-Century Company, Inc., 1928), second edition, pp. 141 ff.

legislative body. Practically all of the advantages in favor of the bicameral system can be secured, it is contended, through a unicameral body. The arguments in favor of the bicameral system were that greater consideration would be given public measures, that evils and defects would be discovered through delay and further consideration, and that the two houses would result in a representation of the minority in the Senate and in a representation of the people as a whole in the lower house. It is seriously questioned today, however, whether the system of two houses has prevented hasty legislation, whether it has resulted in more careful consideration of measures, and, furthermore, whether it is advisable to have classes represented in legislative bodies.

The defects of American legislative bodies which have become only too well known and which have called forth much deserved criticism and condemnation ought not to lead us to forget the large contributions to social and industrial reform which state and federal legislative bodies have made during the last century. The many experiment stations, as James Bryce characterized our state governments, have been trying all kinds of political and social reform. Out of failures have often evolved successful forms of organization or methods of administration which, when their efficacy was demonstrated in one state, have finally been adopted in other commonwealths. Bungling and cumbersome as many legislative methods seem, they have often produced results worthy of commendation. It is perhaps true, as has been suggested, that the English-speaking people can secure good government through poor political machinery. At any rate, the positive contributions of American legislative bodies add an interesting chapter to the evolution of social and political reform, an account of which does not fall within the scope of this volume. It remains to be determined whether a type of political machinery designed for the more simple and primitive conditions of a century ago can be made to function effectively under the complex conditions of today, or whether the radical social and economic changes require gradual reorganization of legislative assemblies.

One of the foremost authorities on state government and constitutional law presents the following appraisal of the work of the state legislatures:

> State legislative bodies are not so bad as they are reputed to be; and in many states they perform their functions no less satisfactorily than other departments of government. Legislatures are naturally the organs that receive blame for the failures of popular government, for they are the policy-determining agencies of the state. They are blamed both for the laws they pass and the laws they fail to pass. Those interested in proposed legislation blame legislative inaction,

even though the proposal may have had little popular support and little actual merit. Criticisms cumulate upon the legislature; and other organs of government can always, without fear of contradiction, put the blame for their failures upon the legislature. Not only this, but the work of legislatures is subjected to a more severe and more searching test than that of the other departments and organs of government. Someone is sufficiently interested to contest the constitutionality of almost every important piece of new legislation. For such a contest detailed examination is made of every sentence in the measure and of every step in its passage. The legislature is not blameless; but many of its failures are due to a cumbersome organization and procedure, and to complex constitutional restrictions which hedge it about on every side. Much may be accomplished toward restoring the confidence of the people in the legislatures by a simplification of their organization, and by a plan under which a program of proposed legislation may be submitted to each legislative session. Criticism of legislatures can, and should, cease only when everybody is satisfied with the laws they enact; for criticism is one of the most effective forces in popular government. To be thoroughly effective, criticism should, however, be intelligent.[25]

SUPPLEMENTARY READINGS

Dodds, H. W., "Procedure in State Legislatures," Supplement to *The Annals* of the American Academy of Political and Social Science, May, 1918.

Luce, Robert, *Legislative Procedure* (Houghton Mifflin Company, 1922).

——— *Legislative Assemblies: Their Framework, Make-up, Character, Characteristics, Habits and Manners* (Houghton Mifflin Company, 1924).

——— *Congress, An Explanation* (Harvard University Press, 1926).

——— *Legislative Principles: The History and Theory of Law Making by Representative Government* (Houghton Mifflin Company, 1930).

Finer, Herman, *Theory and Practice of Modern Government* (Dial Press, 1931), chaps. xvi-xxi.

Rogers, Lindsay, *The American Senate* (Alfred A. Knopf, 1926).

Laski, Harold J., *A Grammar of Politics* (Yale University Press, 1925), pp. 311 ff.

——— *Studies in Law and Politics* (Yale University Press, 1932), chap. iv, "The Problem of a Second Chamber."

Kingsbury, J. B., *Unicameral Legislatures in the Early American States* (1925).

Hasbrouck, P. D., *Party Government in the House of Representatives* (The Macmillan Company, 1927).

Crawford, Finla Goff, *Readings in American Government* (F. S. Crofts & Co., 1933), revised edition, chaps. xviii and xix.

[25] *Ibid.*, pp. 211, 212.

CHAPTER XVII

THE MERIT SYSTEM AND EFFORTS TO IMPROVE PUBLIC ADMINISTRATION[1]

Good Government and Efficient Public Servants[2]

One of the requirements for successful and efficient government is the selection of officials of good character and special qualifications for the public service. Whenever the offices are filled by men of character and ability the government is likely to be conducted with a high degree of success. Notable results were achieved when the Roman Senate in the days of the Republic was composed of men of unusual integrity and administrative ability. On the other hand, government is likely to be weak and inefficient when favoritism, influence, and corruption dominate political life. Such was the case with the monarchs of the old regime in France, who were thrust aside when the wave of revolution spread in 1789. Until 1870 most countries, with the exception of Prussia, recruited the civil service by a patronage system, political and social connections rather than competence being the chief qualification for appointment. Prussia has had experience for more than 200 years with a specially qualified bureaucracy, but recruitment based on merit was adopted in England in 1853, and in France and the United States about 1880.[3]

Too little attention has been given to the ways and methods of recruiting the public service, and particularly is this true in the United States, where the doctrine, "to the victor belong the spoils," along with the principle of rotation in office, has dominated political practice. One of the most difficult problems for democratic government centers around the patronage and the spoils of office, which are an outgrowth of the American party system. It remains for American democracy to learn the lesson of efficient administration from European nations and to adapt such administration to the theories and principles of popular government.

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[1] In the revision of this chapter we are indebted to Professor Frank M. Stewart of the University of California at Los Angeles for advice and helpful suggestions.

[2] Secure *Annual Proceedings of the National Civil Service Reform League, Annual Report of the United States Civil Service Commission* (Washington, D. C.), *Annual Reports* of State and City Civil Service Commissions, especially of Illinois, Massachusetts, New Jersey, New York, Ohio, and Wisconsin.

[3] Cf. article, "Civil Service," by Herman Finer in *Encyclopædia of the Social Sciences,* vol. iii, pp. 515 ff.

Public offices are filled by one of three methods—by appointment, by election, or by selection through a merit system involving some form of competition. Prior to the nineteenth century the method of appointment was commonly pursued. With the advent of popular control of government, elections were introduced to fill many offices. Difficulties in securing competent public servants either by appointment, which results frequently in rewarding favorites, relatives or personal friends, or by the elective system, which often brings into office politicians rather than competent officials, led to the introduction of the merit system based on competition. During the latter part of the nineteenth century the merit system was greatly extended. It has been difficult to reconcile the principles of the merit system, involving service during a period of efficiency and good behavior, with some of the early theories of popular government and democracy. This reconciliation has been made, however, and the merit system has had a promising development in countries where popular government prevails.

In the development of democratic government, a distinction has been drawn between (1) political offices to be filled by election, and (2) administrative offices to be filled chiefly by appointment on some basis of merit. In all governments in which the people have any voice, there are policies to be decided and issues to be determined on which the popular will must be considered and in which the people should exercise control. Such matters as high or low taxes, good or bad roads, prohibition or saloons, are questions on which the popular verdict may well be expressed. For this purpose, certain offices are regarded as of a political nature, and these offices are usually the channel through which the public will and popular sentiment may prevail. On the other hand, there are in the management of government many details of administration which can be understood only by experience and for the performance of which certain qualifications and training are necessary. For these administrative positions the most effective service can be secured only through the selection of appointees on a basis of merit, and promotion as a result of proved ability, with the assurance of permanence of tenure. In the words of Chief Justice Ryan, "Where you want skill you must appoint; where you want representation, elect."

While certain political offices ought always to be filled by election, and while the popular will should be made to prevail through these public offices, the most difficult part of the problem is the method of recruiting the civil service in the large number of administrative positions in which political opinions ought to have little weight. The development of methods of recruiting the civil service in the United

States will be briefly reviewed, and the present civil service system will then be compared with those of England, Germany, and France.

Civil Service and the Spoils System in the United States

Early Administrations.—The beginning of civil service in the United States under the administration of Washington followed certain principles which characterized the method of appointment during the first few decades. The chief thought of Washington was the fitness of the appointee to fill the desired position. Among the qualities of fitness he considered, first, the ability to perform the functions of the office; second, previous experience, preferably in some official capacity; third, established reputation. In the beginning little attention was paid to political opinions or party politics, but as the strife between the Federalists and the Republicans grew, the President gradually adopted the practice expressed in a letter to Pickering: "I shall not, while I have the honor of administering the government, bring men into any office of consequence knowingly whose political tenets are adverse to the measures the general government is pursuing; for this, in my opinion, would be a sort of political suicide." It was perhaps not accidental that all of the men nominated by Washington for justices of the Supreme Court were favorable to the Constitution, were Federalists in their political opinions, and in general were in accord with the President's views on constitutional issues.

Although partisan feeling became intense during the administration of President Adams and a few party removals were made, it may be said that the administration of public business bore a better relation to the business and professional standards of the country under the Federalists than in any subsequent period; and while there were evidences of the beginning of the spoils system, this practice did not seriously affect the efficiency of the civil service. Aristocratic standards for selection to public office, often based upon ownership of considerable property and the prevailing opinion that only "gentlemen" should participate in the management of government, combined to foster the establishment of a civil service based upon previous political experience and preferment.

With the election of Thomas Jefferson, the Republican party came into power; and, with the majority of the offices manned by Federalists, it is not surprising to find considerable pressure to force removals and to bring about a change in the personnel of the public service so as to make it more nearly in accord with the popular verdict at the polls. Jefferson, however, laid down the rule of efficiency as the standard on which appointments were to be made and acceded

to demands of the partisans to change only a few officers for political purposes. However, by a few removals and by a gradual change as the time of appointments expired, the character of the civil service was changed, so that in five years it was regarded as strongly Republican as it had been Federalist in 1801. Despite this change, Jefferson adhered strictly to the idea of fitness for office as an essential. And it is generally conceded that the character of the civil service was not seriously changed. With the Republican party in power and with most of the offices filled by Republicans, few changes in the civil service were made during the administrations of Madison and Monroe. The first specific change in the federal civil service came with the passage of the four-year law, which was enacted in 1820. This act fixed a term of four years, in place of tenure at the pleasure of the President, for district attorneys, collectors of customs, naval officers, revenue officers, public land agents, and paymasters in the army. Although introduced in order to require an accounting every four years on the part of federal officers and thereby to secure greater efficiency, it was charged from the beginning that the act was designed to secure political ends. Whether this was true or not, it was not long before the urgent demands of the spoilsmen resulted in extending the law to all offices and in the introduction of the idea of rotation in office as a primary principle in the federal government.

Introduction of the Spoils System.—The long struggle between the spoilsmen and the advocates of the merit system has been appropriately called "the guiding factor in our public administration." Built upon certain theories and policies which were introduced into the turmoil of party politics in the states, namely, the custom of using the public offices as ammunition in party warfare, and the idea of rotation in office, the spoils system took a strong hold on public sentiment. Rotation gained ground rapidly in the states. It was urged that rotation would educate the public in the business of government, and that it would serve as a check to the overbearing insolence of officers. The doctrine of equality, gaining headway as one of the main tenets of the pioneer ideals of democracy, gave sanction to the political practices of short terms and rotation in office.

New York was the first state in which offices were openly and continuously used for partisan purposes. The practice, however, soon spread to other states, notably to Pennsylvania, where rotation in office was the rule as early as 1820. Though some of the states appeared to resist the rising wave of the spoilsmen, the majority of the commonwealths were soon forced into line. Among the last states to succumb were Massachusetts and some of the southern states in which the spoils philosophy made headway slowly. By 1828, says

Professor Fish, "in every state throughout the North and West the spoils system either was established or there existed an element eager to introduce it. The movement was a growing one and it was but a question of time and circumstances when the custom would become national. . . . The people in general . . . disliked the life tenure and the aristocratic manners of the officials of the existing regime; those who enjoyed the national salaries should, they thought, be of the people. In the frontier states, particularly, the superb self-confidence born of the pioneers' single-handed victory over nature balked not at the full measure of democracy, asserted that all men were created equally able to fulfil the duties of government offices."[4]

The outright adoption of the spoils system in the national government came with the election of Andrew Jackson to the Presidency, and there began "the first appearance of a species of four-year locusts that has never since failed to devastate our capital city." Great pressure was brought to bear for a complete removal of all men in office. Although the number of removals made by Jackson was relatively small, the custom was firmly established that removals would be made for partisan purposes, and that an incoming President would recruit the civil service according to his own wishes and desires.

While the spoils system was not the work of one man but was rather the result of a gradual development, it is nevertheless true that Andrew Jackson and Martin Van Buren had more to do than any other men with the extensive development of the system in the federal and state governments. Although individual members of Congress and many political leaders spoke against the spoils system, each President in turn accepted the general principles of the system and participated sufficiently in the practice to bring about a change in the personnel of the federal service. The practical philosophy of the spoils system has been well stated as follows: "In the field of actual politics, parties are a necessity and organization is essential. It is the duty of the citizen, therefore, to support the party that stands for right policies and to adhere closely to its official organization. Loyalty should be rewarded by appointment to positions within the gift of the party; and disloyalty should be looked upon as political treason. One who votes for anyone except the organization candidate feels himself superior to his party, is faithless to the great ideal and is only a little less despicable than he who, having been elected to an office through the energy and devotion of the party workers, is then so ungrateful as to refuse to appoint the workers to positions within his gift. Positions constitute the cohesive force that holds the organization

[4] C. R. Fish, *The Civil Service and the Patronage* (Longmans, Green and Company, 1905), pp. 103-104.

intact."[5] The spoils system thus became an agency of reward for party services.

After 1845 the spoils system was generally followed throughout the United States; the victors divided the spoils and were unashamed. Though the number of removals made in any one executive term might vary, there was a general acceptance of the principle by all Presidents and all parties. Along with the introduction of the spoils system came the democratic movement which resulted in the abolition of property qualifications for suffrage and which multiplied the number of elective offices, creating thereby a large number of places to be filled by the party organizations now becoming strong and vigorous.

Efforts to Check the Spoils System.—With the introduction of the spoils system came the first efforts to reform the civil service.[6] Prior to 1860 committees of Congress investigated the evils of the patronage system, and several attempts were made to introduce a system of examination to be conducted by the heads of departments for inferior positions. The movement for reform was temporarily checked by the Civil War and later by the conflict between the President and Congress. In the meantime there had developed that interesting feature of American political life, senatorial courtesy, by which the wishes of Senators were first to be consulted and their recommendations to be regarded as virtually mandatory upon the President for the selection of the various officials within their states. Members of Congress naturally exercised considerable influence from the beginning; the Cabinet sometimes wielded power over the President; but the development of the machines and bosses in the states brought to the front Senators who became the chief distributors of patronage.

It was not until Thomas Allen Jenckes of Rhode Island, as a member of a committee on economy, became interested in the civil service in 1863 that the beginning of a definite reform was made. As a result of a thorough study of the civil service in England, he took up the cause of reform and in 1865 introduced a bill for the improvement of the civil service. Through the appointment of a select committee a thorough investigation was made of the conditions in the United States, with summaries of the civil service systems of leading foreign countries.

A draft bill submitted by the committee, though rejected by Congress, formed the basis for the act passed two decades later. Agitation for reform was continued through civil service reform

[5] C. R. Lingley, *Since the Civil War* (D. Appleton-Century Company, Inc., 1926), revised edition, p. 132.

[6] See especially Frank Mann Stewart, *The National Civil Service Reform League* (University of Texas Press, 1929), chaps. i-iii.

organizations and particularly through a national league which was launched in 1881 with George William Curtis as president. The object of the league was to establish a system of appointment, promotion, and removal in the civil service founded upon the principle that public office is a public trust, admission to which should depend upon proved fitness. State societies were also formed and a nation-wide campaign was inaugurated. The death of Garfield at the hands of a disappointed office-seeker finally brought the matter to a head, and a civil service reform bill drawn by Dorman B. Eaton was presented to Congress and finally passed. The bill was enacted in 1883, and the first commission appointed under the act began at once to enforce its provisions.

The civil service act of January, 1883, provided for the appointment of three civil service commissioners, whose duty it was to aid the President in the preparation of rules to carry the act into effect and to provide for open competitive examinations for testing the fitness of applicants for the public service. It was provided that the examinations were to be practical in character and in the main to relate to the fitness and capacity of applicants to discharge the duties of the service to which they sought appointment.

The close relation between the merit system and efficiency in the public service is so important that the question of reform of the civil service is one of the greatest issues in improving the government service in the United States. Many obstacles have stood in the way of the adoption of the merit system and its wide application. There has been a failure to make distinct at times what is recognized in European countries, namely, that political offices such as cabinet heads ought not to be and cannot be placed under civil service rules and requirements, but that administrative officers requiring technical training and experience ought to be permanent and should be brought under the merit system. The chief objection to the adoption of the merit system is the necessity of rewarding party workers—those who bear the brunt and responsibility of conducting party affairs. This large army of party workers, it is claimed, must be rewarded, and public offices constitute the only basis for reward. The spoils system has in large part been retained as a reward and incentive to keep going the elaborate party organization which began to develop in this country with the Democratic revolution from 1830 to 1840. But it is maintained that the cost of the system to the country in the incompetence, inefficiency, and corruption of the public service is too great a price to pay for the assistance of the party worker, and that it would be even better for the government to give a large sum to each organization than to support its workers in public offices. It is the necessity of finding some adequate means of paying for party services

that retards the progress of the merit system. Great as this handicap undoubtedly is, it is slowly being overcome by the desire of the people that the government be placed upon a higher plane of thoroughness and efficiency and by the belief that the public service should be placed on a basis of merit and ability rather than be regarded as a reward for participation in partisan politics.

Progress and Problems of Civil Service Reform

But civil service reform in the United States has moved forward slowly, and at times it has actually retrograded. At first, Congress withheld the appropriation for the Civil Service Commission. Since the establishment of a permanent Civil Service Commission, every President has had to resist the pressure of spoilsmen and of the politicians. And after years of agitation for reform, it could be stated conservatively: "Almost every year has seen riders to appropriation bills providing exemption from the classified civil service, promotion of temporary patronage appointees, transfers which violate the letter or spirit of the civil service law, illegal participation of civil servants in elections and enforced contributions to party funds, four-year tenure laws, dismissals for political reasons, appointments through senatorial courtesy, and a dozen other forms of patronage and retrogression. Not a single administration at Washington since the act of 1883 has an absolutely clean reform record; and in most cases this is no fault of the President and the Cabinet."[7]

Primarily, the civil service acts in the United States have been interpreted as applicable to the filling of minor and clerical positions; consequently, all the important positions remained in the hands of party leaders to be used as spoils for political rewards. The spoils system dies hard. With its related ideas of short term and rotation in office, it has become an ingrained conviction in the minds of the politicians, and of the public, too, that offices should be openly and flagrantly used to reward personal political friends and to punish enemies. Men became accustomed to what Senator Hoar called the *shameless doctrine*, "that the true way by which power should be gained in this republic is to bribe the people with offices created for their service and the true end for which it should be used when gained is the promotion of selfish ambition and the gratification of personal revenge."[8] The grip of the spoilsmen is evidenced in the slow and intermittent

[7] Robert Moses, *The Civil Service of Great Britain* (Columbia University Studies in History, Economics, and Public Law), vol. lvii, no. 1, p. 247.

[8] Quoted in *Bulletin of Bureau of Municipal Research* (New York), (November, 1915), No. 67, p. 4.

progress of civil service reform in the federal government and the difficulties in introducing the merit system in the states.

Through executive orders issued by the Presidents and congressional acts extending the merit system for the selection of employees in the federal civil service, more than four-fifths of the present positions are filled by the application of the competitive principle. Controversies have been waged over presidential orders providing for the filling of vacancies in postmasterships and over the exemption by congressional act of the prohibition enforcement agents. Despite the failure of Presidents to resist the pressure of the spoilsmen and a great deal of under-cover politics in the administration of the civil service, steady progress has been made in the extension of the competitive principle in the federal service. In 1924 Congress brought a large part of the foreign service within the merit system, and in 1927 former policies were reversed and the employees of the Bureau of Customs and the Bureau of Prohibition were rendered subject to civil service laws and regulations. But the continuous and persistent pressure of the politicians has resulted in securing exemption from competition for the collectors of internal revenue, the deputy United States marshals and the employees of such federal agencies as the Federal Farm Loan Board, the Federal Reserve Board, and the Veterans' Bureau. And practically all of the important agencies created by Congress in the emergency legislation of 1933 have been exempted from the application of civil service rules.

The campaign for civil service reform, though a constant struggle, has gradually succeeded in reducing the number and the power of the spoilsmen and has given the merit system a wider application. The extension of the system to some of the higher positions of the federal service and to many state, municipal, and county offices is an indication of the growing acceptance of the merit principle.

Standardization of Positions and Salaries.—The purpose of the first civil service acts in state and federal governments and of the efforts of the first civil service commissions was primarily negative in character. Such acts were designed to place a limit upon the appointive power of the executive and to remove some of the gross abuses which accompanied the development of the spoils system. Little thought was given to a constructive program of public employment which would improve the conditions surrounding public officials and would study the needs of civil servants with a view to supervising their welfare and attaining greater efficiency in the government service. Most of the important posts remained the object of patronage and spoils. Promotion was still largely controlled by accident or personal preference. Devices for removal or transfer were easily invented. Standards governing the amount, kind, or quality of service

to be rendered were not formulated. Evasions of the provisions of the civil service law against political activity were often encouraged by those in authority. In fact, the administration of the civil service regulations had not been taken out of politics.

And despite noteworthy advances made through civil service acts in raising the requirements for entrance to the service and improving the personnel in various branches of administration, glaring inequalities developed in the salaries paid for particular grades of work under the different conditions prescribed for substantially the same service.

In order to remedy such defects in the public service, a series of studies were begun to formulate some principles and standards for appointments, promotions, and salaries; and, in some instances, efforts have been made to apply the principles and standards developed. The objects of this movement for standardization are to formulate a basis for the fixing of salaries in relation to the work performed, so as to involve equal work for equal pay; to determine the factors of education or experience necessary for each grade of employment, and to establish standards to govern promotions and transfers.[9]

Though a beginning has been made in the inauguration of principles and standards both in appointments and in promotions, in a few states and cities the reform has made progress slowly and differences in methods and procedure, as well as the peculiar conditions involved in each instance, have made the adoption of standards extremely difficult. Recently an effort has been made to adapt the standard of wages to the cost of living and this has made the process even more complicated. Unfortunately, the movement for standardization and uniformity in the tests for entrance to the civil service has not affected to any great extent the methods as prescribed by civil service commissions.

The most ambitious attempt at standardization was that inaugurated by Congress in 1919 in the appointment of a Congressional Joint Commission on Reclassification of Salaries.[10] It was made the duty of the commission to investigate the rates of compensation paid to civilian employees by the municipal government of the District of Columbia and the various executive departments, and to make recommendations as to reclassifications and readjustments of compensation

[9] Cf. *ibid.*, p. 17; and William C. Beyer, "Employment Standardization in the Public Service," supplement to the *National Municipal Review*, June, 1920, p. 394.

[10] See *Report* of the Congressional Joint Commission on Reclassification of Salaries, submitting a classification of positions on the basis of duties and qualifications, and schedules of compensation for the respective classes. *House Document* No. 686, 66th Congress, 2nd Session, March 12, 1920.

in order to provide uniform and equitable pay for the same type of employment.

About 100,000 employees were comprised within the scope of the inquiry. In attempting to classify the employees doing substantially the same kind of work, needing the same general qualifications, and assuming about the same degree of responsibility, the commission found it necessary to make 1700 classes. Assistance was received from those who had gained experience in classification elsewhere, and an effort was made to secure the cooperation of departments and employees.

In 1923 Congress followed this study by the enactment of a classification act which, with subsequent amendments, provides for the classification of and compensation for all positions in the departmental services in the District of Columbia, with the exception of employees in the recognized trades and crafts and skilled and semi-skilled laborers.[11] The original survey and the progress made as a result of it encouraged Congress to authorize another investigation covering the civilian positions in the field service of the federal government. This survey extended into governmental activities affecting more than one hundred thousand employees. A preliminary report indicated the great need of classification, salary adjustments, and the elimination of other inequities in the field service of the government.[12]

Inadequacies in the present system of examinations, recruitment, and promotions in the civil service have led to rather persistent efforts to secure a new civil service law. A draft bill for this purpose, prepared by the Bureau of Public Personnel Administration, was presented too late to receive favorable consideration before the effects of the economic depression resulted in emergency measures having little relation to the efficiency of the federal civil service. Despite temporary setbacks due to this and other causes, the basic principles of civil service reform are still being actively fostered with a somewhat different purpose from that espoused by the original reformers.

Today the movement toward classification and standardization is being given a broader scope in the development of principles of public personnel administration. These principles include a consideration of ways and means to stimulate the morale and welfare of employees, to establish devices for measurement of individual efficiency for advancement and promotion, to insure means of protection against unwarranted discipline or removals, and to promote the adoption of a satisfactory retirement system.[13]

[11] See *Report* of Wage and Personnel Survey, Personnel Classification Board, *House Document* No. 602, 70th Congress, 2nd Session.

[12] Consult *ibid.* for additional data.

[13] See Frank Mann Stewart, *op. cit.*, chap. vii; and Leonard D. White, *In-*

The concentration of interest and efforts toward improvements in the federal civil service on a program of personnel work is deemed to be as important in the progress of civil service reform as the adoption and extension of the merit principle. In the investigations and reports of the Joint Commission on Reclassification of Salaries, in the establishment of the Personnel Classification Board, and in subsequent acts adjusting the wage scales and extending the principles and policies of a more scientific system of classification and standardization, a beginning has been made toward a reorganization of the federal administrative services which has resulted in many changes for the betterment of the public service.

In addition to the consideration of methods of recruiting the civil service and the classification and standardization of those within the service, special attention has recently been given in federal and state governments to proposals for the retirement of public employees. It is recognized that the failure to provide retirement allowances is expensive to the government, since many continue in active service who are unable to do efficient work, and the retention of such employees checks the advancement of those who are performing their duties well. Though it is difficult to provide a system which will meet the needs of the service and will be financially practicable, some first steps have been taken in the solution of this problem and the principles involved have been rather clearly formulated.[14] On the whole, a more favorable attitude is becoming apparent on the part of the public toward those engaged in public employment.[15]

On the other hand, only a beginning has been made in recognizing the necessity of training for many branches of the public service. Efforts have been too much consumed in fighting the spoilsmen to permit much attention to be given to the positive side of public service training and to provisions for a permanent tenure for those who prepare for the technical and professional branches of the service. "We have been so busy fighting for a full realization of the competitive principle and so busy preventing retrogressions," observes Dr. Moses, "that the great problems of division, of intellectual qualifications and examinations, of stimulating national education through civil service examinations and attracting the best men into our government departments, have been quite neglected."[16]

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troduction to the Study of Public Administration (The Macmillan Company, 1926), pp. 234 ff.

[14] Lewis Meriam, *Principles Governing the Retirement of Public Employees* (D. Appleton-Century Company, Inc., 1918).

[15] See the studies by Leonard D. White, *The Prestige Value of Public Employment* (University of Chicago Press, 1929).

[16] Robert Moses, *op. cit.*, p. 249.

In considering a program for civil service reform it is sometimes not fully appreciated that efficiency is only one of the objects of government. Many of the practices in private employment which are commonly lauded as conducive to administrative efficiency have been detrimental and inconsiderate as far as the human element in the employment problem is concerned. Private establishments are beginning to develop personnel policies which give much greater consideration to the social, educational and cultural life of their employees. Government, even more than private business, must consider the human element in its employment policies. For this reason constructive planning in relation to a personnel program is today deemed to be one of the essential features in all civil service work. The government is becoming interested not merely in wages, salaries, promotions, and other financial considerations regarding employment, but also in making provisions for educational facilities, for the establishment of a physical evironment conducive to a high quality of work, for the maintenance of activities promoting health and safety, and for the establishment of a procedure for the consideration of individual grievances, thus affording an outlet for the expression of complaints and the adjustment of difficulties. For this purpose provision is gradually being made for systems of employee representation, with the aim of securing constructive cooperation from the employees in matters of joint interest. All of these factors combined tend to the development of a constructive civil service program based upon much broader considerations than were involved in the former programs and plans of reform. The Civil Service Act of 1883, indeed, "no longer stands alone as the great statute regulating federal employment. Congress has since passed acts recognized as landmarks in federal personnel progress and built up a body of smaller regulations affecting the personnel problem at various points. The time is ripe for an effort to fill out the existing measures and to establish machinery for securing a rounded personnel program, a coordinated personnel agency, and continuous personnel research."

There are certain weaknesses of the merit system for appointments to the public service which have militated against its extension, particularly in certain phases of the service. In the first place, for minor and clerical positions there has been a tendency toward standardization of the requirements at a level considerably below the standards normally in use in private employments. This practice has resulted in many attempts to exempt from the civil service positions ordinarily filled by this method. On the other hand, the fact that relatively few positions of importance in the higher administrative services are included under the merit principle, and that the examinations frequently are of such a character that specially trained men do not wish to sub-

mit to the tests, have had the effect of limiting the number of capable men and women who seek entrance to the public service where the merit system prevails. The recent use of the non-assembled examinations has in part obviated the difficulty arising from the former narrow and academic type of tests. The non-assembled examinations are applied primarily for positions requiring special capacities, training, and experience. They are usually not examinations at all in the popular sense, but a consideration of an applicant's past history and an inspection of his application and the supporting evidence as to his training and past work. Further changes in the types of examinations will be necessary in order to attract to the service those who have given special time and attention to preparation for public service activities.

Another difficulty which has worked against the extension of the merit principle is that as a rule no satisfactory system of promotions in the service has been worked out. There will be little incentive for preparation for a career in the public service until better assurances can be given of promotions where work has proved satisfactory. A further difficulty which is detrimental on the whole to the morale of those who secure positions under the merit system arises from the evils of veteran preference. As in other countries, veterans in the United States are given exceptional privileges in the civil service in the qualifications for examinations, in credits granted in the rating of the examinations, in their appointments, and in their retention. So serious has become the practice of according special privileges to veterans that many of those who would ordinarily apply for civil service positions and take the examinations have declined to do so, realizing that though they rank among the highest on the list their opportunities for appointment are greatly restricted. No doubt some system of veteran preference is necessary under existing conditions, but in the development of a successful and efficient civil service is it not likely that such exceptions to the merit principle tend to break down the morale and effectiveness of the entire civil service system?

But more progress has been made in applying the principle of merit to the major positions in the government than is often realized.[17] With regard to bureau chiefs and their direct subordinates, Professor MacMahon points out that "selection on the basis of congruous training and stability of tenure may be encouraged by law and custom. Fundamentally, a well understood tradition is more important than legal formalities."[18] Of the fifty-four bureau chiefs examined (No-

[17] *Ibid.*, p. 249.

[18] Arthur W. MacMahon, "Bureau Chiefs in the National Administration," *American Political Science Review* (August, 1926), vol. xx, p. 551.

vember, 1926), Professor MacMahon notes that forty-two were under the direction of persons who were already in the national administrative service at the time of their selection for their present positions.[19] And the employees themselves have begun to protect their own interests and to participate in the efforts to improve the public service through unions either on an independent basis or by affiliation with the American Federation of Labor. There are unions of federal, state, and municipal employees; and though they have encountered bitter opposition, they have, with few exceptions, justified themselves as agencies worthy of recognition and support.

With the extension of the merit system to important administrative positions and the introduction of public service training in the universities, we may look forward to a body of trained and permanently employed public servants, similar to the practice in the European countries where greater administrative efficiency has been attained. The primary principles and requirements for a satisfactory civil service system can be better appreciated by a comparison with the methods pursued in a few foreign countries.

Public Service in England, Germany, and France

Civil Service in England.—According to A. Lawrence Lowell, the English nation "has been saved from a bureaucracy such as prevails over the greater part of Europe, on the one hand, and from the American spoils system, on the other, by the sharp distinction between political and non-political officials."[20] The most important principle in the British civil service is the separation of political from non-political offices. Both by Parliamentary acts and by practice the distinction has been recognized between (1) a clear-cut isolation of the offices in the Ministry which combine political and administrative duties and which are held only by members of Parliament, and (2) the equally clear-cut isolation of the strictly administrative non-political offices and employments in the civil service which can be filled only by civil servants.[21] The former are trained in Parliament, not in administrative routine. They direct the general policy of the government, and go out of office with the Cabinet. The non-political officials continue in service without regard to party changes, and carry out in detail the policy adopted by the Cabinet.

[19] *Ibid.*, pp. 553, 554, and 800.

[20] A. Lawrence Lowell, *The Government of England* (The Macmillan Company, 1916), new edition, chaps. vii and viii.

[21] Morris B. Lambie, "The British Civil Service," in *Report* of the Personnel Classification Board, *op. cit.*, pp. 403 ff.

In short, England has recognized a distinction between, first, political, elective, and temporary officials who represent the people, and, second, permanent, non-political, administrative officials. The permanent officials may not be members of Parliament, and they take no active part in politics. Permanence of tenure is based on custom rather than on law, and is supported by the theory that a man has a vested interest in the office that he holds. Although corruption of the worst sort was practiced in England in the eighteenth and nineteenth centuries, the spoils system of rewarding party workers and punishing opponents, and the idea of rotation in office never gained a firm foothold in England.

The primary control over the civil service is exercised through the Treasury, which for all practical purposes is in charge of the recruiting policy of the government, salary determinations, and all matters of personnel management. From the standpoint of the civil service the duties of the British Treasury are as follows: To supervise and approve the work of the civil service commission in examining applicants to the service, in preparing rules and regulations, and in certifying appointments of those who have successfully passed the examinations; to supervise and determine matters of classification, compensation, and rating of civil servants in each department; to approve reinstatements and promotions; and to administer the superannuation act. By way of summary, it is the duty of the Treasury "to make regulations for controlling the conduct of His Majesty's civil establishments and providing for the classification, remuneration, and other conditions of service to all persons employed therein whether permanently or temporarily."

The basis of the present British civil service is an order in council of July 22, 1920, which, with certain qualified exceptions, provides that no person shall be appointed to any situation or employment in any of His Majesty's civil establishments, whether permanently or temporarily, unless his qualifications have been approved by the civil service commission.

The integrity of the civil service is maintained. There are no rotations in office, no four-year tenures, and no practices akin to senatorial or congressional courtesy. This non-political integrity is secured by the following considerations:

(1) There is the fixed principle of permanency of tenure for the established service.

(2) With few exceptions, all positions are filled by persons approved by the Treasury and certified by the civil service commission.

(3) If a Cabinet head permitted patronage to influence appointments, the resulting inefficiencies would reflect upon his decision. A

doubtful appointment of an unqualified person or of a political adherent might ultimately provide opportunity for open criticism in the House of Commons.

(4) Patronage, when it does exist, is confined to legislative offices and does not extend to the civil service. The Ministers are party appointees. These appointments are sufficient to retain party loyalty and discipline.

(5) The political party system in Great Britain is so organized and financed that party loyalty and service may be rewarded, when rewards are necessary, without recourse to patronage in the civil service.[22]

Examinations for Civil Service.—For the first-class clerkships requiring work of an administrative and highly responsible character, the examinations are based largely on courses of study in the universities. Very few who have had no university training pass these examinations. With regard to the character of the candidates, Lowell observes: "The candidates who win the appointments are men of education and intellectual power. They belong to the type that forms the kernel of the professions; and many of them enter the civil service simply because they have not the means to enable them to wait long enough to achieve success in a professional career. They form an excellent corps of administrators."[23]

The second-class clerkships include a large body of officers whose work is merely clerical. The service in this division is of the same character as that performed by clerks in commercial houses; and the examination, as originally devised, was adopted to test immediate fitness for clerical work. In 1896 the system was changed so as to have the examination conform more nearly to the curricula of the schools. The result is that the real test for appointments is now based on general education rather than on technical knowledge, although proficiency in clerical duties continues to form a part of the examination. Below the second-division clerks there are the assistant clerks and boy clerks, whose duties are usually temporary. The experience acquired here may be used in lieu of examination for advancement into some of the minor positions.

There has been a tendency in recent years to increase the number of offices to be filled by examination and to reduce the number of exemptions. In general, it may be said that all clerks and assistants are selected through a system of open competition. The existing arrangment in a typical department may be illustrated by the following outline:

[22] *Ibid.*, pp. 406 ff.

[23] A. Lawrence Lowell, *op. cit.*, p. 164.

Secretary Parliamentary Under-Secretary	Political
Permanent Under-Secretary Assistant Under-Secretaries Chiefs of Branches	Usually non-political and permanent
First-class Clerkships Second-division Clerkships Assistant Clerks	Non-political — permanent; open competitive examinations
Messengers Porters Servants	Nomination without examination

Not only has political influence been removed almost entirely from appointments to office in the administrative service, but it has also been nearly eliminated in the matter of promotion.

The civil service of England has become a career to which some of the best talent of the young generation aspire. Although the salaries are not high, the attractiveness of the service has been enhanced by the provision for pensions, a feature which was introduced by the superannuation act of 1859. Grants have been made by this act to persons who have served in an established capacity in the permanent civil service of the state for at least ten years and they are retired at sixty years of age. Provision has been made also for compensation for injuries received in public service.

Civil Service and the Cabinet.—In the English civil service one of the important features is the relation between the temporary political officers of a department and the permanent subordinate officials. The function of the political chief is to bring the administration into harmony with the opinions of the constituents and especially of Parliament. He must keep his department in accord with the views of the majority in the House of Commons, and he must defend it when criticized, and protect it against any ill-considered action of the House. It is his duty to correct and prevent the tendency in the department to employ too much red tape. It is for him to decide upon the general policy to be pursued. The permanent officials are to give their advice upon the questions that arise, so as to enable the head of the department to reach a wise conclusion and to keep from making mistakes. They keep the department running by doing the routine work.

The smooth working of the system depends upon the extent of mutual respect and confidence between the Ministers and the permanent under-secretaries. The under-secretary is expected to give his advice frankly, but decision on important matters rests with the chief. A decision having been rendered, it then devolves upon the under-secretary to carry it out. It is the duty of the political chief to seek the advice of his under-secretary, although this advice is likely to be limited to details rather than to include the general principles of policy on any public question. Though the final authority is in the hands of the political chief, owing to his greater knowledge of details and technical information coming from experience, the permanent under-secretary is likely in the long run to direct and control the acts of the Minister. The combination thus secured between the lay official who is subject to the popular will and required to defend his conduct before the popular representatives in the House of Commons and before his constituents at home, and the permanent official who is a master of the details of government and an expert in the service, is a superior and effective one.

Civil Service in Germany.—The civil service in Germany, and in particular in the state of Prussia, has long been noted for its high general quality. The methods pursued in administering the civil service include a satisfactory classification of personnel, high qualifications for appointment, and a restricted eligibility for examinations to the administrative and technical positions. A system of placement, promotions, and transfers has been adopted that makes of the German civil service a career of honor. Pensions and retiring allowances are granted the disabled and superannuated. The right to engage in outside activities keeps the civil servant from confining his interests and activities to mere administrative routine. Salaries are high enough to encourage the entrance of individuals of exceptional training and ability into the civil service. A system of employee representation renders possible the presentation of the difficulties of the employees and the consideration of the grievances they may have. These factors have aided in the establishment of "a capable civil service with a high morale."[24]

Appointments to the German civil service are made after consideration has been given to training, experience, and capacity. A trial or probationary period is required before the candidate is accepted in the classified service, and whenever possible the individual is placed in the

[24] For data on the German civil service we are indebted to Dr. Frederick F. Blachly, and Miriam E. Oatman of the Institute for Government Research of the Brookings Institution, who prepared a summary statement for the *Report* of the Personnel Classification Board, *op. cit.*, p. 392 ff.

position in which he can exercise to the highest degree his special talents.

The close integration of the civil service requirements with the curricula of the educational institutions of all grades is an important feature of the German civil service. Various schools furnish the basic education for the three grades of civil service, *the lower, the intermediate,* and *the higher.* Promotions, disciplinary measures, demotions and dismissals are carefully regulated by laws and administrative rules.

One of the most important features of the German civil service is the means which are provided for the adequate expression of the opinions and suggestions of those in the service. Through a system of employee representation, officers are given the opportunity to express their grievances, to offer suggestions for the improvement of the service, and to present other ideas which they may have.

Summarizing the features of the German system F. F. Blachly and Miriam E. Oatman conclude:

> The German civil service is noted for its high morale. This is due in large part to the relative absence of purely political appointments. The higher administrative service in both the Reich and the States includes practically every high position in the government below the cabinet. This service is manned throughout by personnel which has met severe entrance requirements and has looked forward to the public service as a life career. Able and ambitious persons who enter the upper rank of the public service may expect to rise to the very highest positions short of the cabinet. . . . Other features of the German civil service that encourage a high morale are appointments for life, unless otherwise specified; a liberal salary and pension system designed to relieve the officer of economic worry, so that he can devote his best powers to the service; the right to salary increases based on length of service; access to personnel records, with the right to be heard before unfavorable facts are entered upon them; and the right to a formal trial by a specially qualified tribunal, with the possibility of protest and a rehearing by a national disciplinary court, before suspension or dismissal is allowed. Both law and custom combine to make public service in Germany a career of honor and distinction.[25]

The Hitler regime has made important changes in the operation of the requirements for public service It is impossible to predict to what extent these changes may permanently affect the standard principles and practices relating to the civil service.

Civil Service in France.—The French political system, according to an eminent French scholar, is a parliamentary democracy superposed upon the administrative regime of Napoleon. This system of

[25] *Ibid.,* pp. 402, 403.

administrative organization is composed of a hierarchy of officials from the President and Council of State at the head to the mayor of the commune and his adjuncts at the bottom; it may be more accurately described "as a series of more or less independent departmental hierarchies tied together, only loosely at best, by the political cabinet and numerous semi-active and dominant interdepartmental committees."[26] Executive decrees and departmental regulations determine to a large extent the requirements and qualifications for appointment to the administrative service.

For some of the technical and professional branches of the service the applicants are required to graduate from schools established by the government; for example, engineers are educated at the school of mines. It is customary for positions in the higher administrative services to require a degree, such as bachelor of letters and science, or bachelor of laws. For ordinary administrative positions the applicant must pass an open competitive examination. Candidates for minor offices are required to give evidence of a good general education. Examinations for positions in the public service are conducted by officers in the departments into which entrance is sought and are under the supervision of the heads of the departments. The French frequently prescribe a term of probation preceding definite appointment, though in practice this requirement is not strictly observed.

French public administration has been only slightly affected by the American system of "spoils politics." The tendency for political favoritism centering around the deputies and senators to gain a foothold in the administration has been checked, and instead an increasing number of positions are being filled by the merit system based upon open competitive examinations. Since 1908 all judicial positions, including the justices of peace, have been filled by means of competitive examinations testing the applicant's academic training and his professional qualifications.

Many of the best engineers, scientists, economists and literary men are specially trained for the public service. "Not only does the French State provide a far-flung system of specialized training for professional and scientific work," comments Professor Sharp, "but it undertakes to insure that the institutions of the state itself will be manned by the potentially best talent which the system is capable of developing."[27]

Though Cabinet instability affects the efficiency of the public services and though there is a lack of proper unity and coordination among departments, nevertheless the average Frenchman supports

[26] Walter Rice Sharp, *The French Civil Service: Bureaucracy in Transition* (The Macmillan Company, 1931), p. 32.

[27] *Ibid.*, p. 171.

the bureaucratic regime and resents the intrusion of personal favoritism or political interference.

It is impossible to give an account of the methods of recruiting the civil service in other European countries, but extensive use has been made of the merit system in the filling of public offices and particularly in the higher administrative branches of the public service in most countries.[28]

The leading nations of Europe, then, have committed themselves fully to the idea that the service of the state requires a large body of men carefully and thoroughly trained; in consequence, a system of higher instruction has been adopted to meet the needs of these nations. To anyone who examines the administrative systems of European countries—the administration as distinguished from the politics or the policy-determining activities—it is clear that the science of administration is considered of prime significance. Entrance to this service requires, as a rule, a thorough secondary education, practically the equivalent of a college course in the United States; and, in addition, advanced instruction leading to a higher degree is frequently demanded, with rigorous examinations before admission to the service. In short, the subject of administration is regarded in the universities, as well as among men of administrative affairs, as calling for just as much thoroughness, study, and scientific accuracy as any of the learned professions.

Despite the advantages of a specially trained and professional class of public servants, there is an ingrained fear among the people of the United States that the establishment of such a special class of officials would result in a governmental bureaucracy and would necessarily interfere with the liberties of the individual. The characteristics of a bureaucracy which usually involve a regime in which there is a passion for routine in administration, the sacrifice of flexibility to rule, delay in making decisions, and a refusal to embark upon experiments, are presumed not to be in accord with the typical American ideals and principles. Expressing the prevailing sentiment some years ago, President Wilson said: "I know that a corps of civil servants prepared by a special schooling and drilled, after appointment, into a perfected organization, with appropriate hierarchy and characteristic discipline, seems to a great many very thoughtful persons to contain elements which might combine to make an offensive official class, a distinct, semi-corporate body with sympathies divorced from those of a progressive, free-spirited people, and with hearts narrowed to the meanness of a bigoted officialism. Certainly such a class would be alto-

[28] Consult Leonard D. White, *The Civil Service in the Modern State* (University of Chicago Press, 1930), for data regarding the application of the merit system for filling public offices in the leading countries.

gether hateful and harmful in the United States. Any measures calculated to produce it would for us be measures of reaction and folly. . . .

"The ideal for us is a civil service cultured and self-sufficient enough to act with sense and vigor, and yet so intimately connected with the popular thought, by means of elections and constant public counsel, as to find arbitrariness or class spirit quite out of the question."[29]

SUPPLEMENTARY READINGS

Fish, C. R., *The Civil Service and the Patronage* (Longmans, Green and Company, 1905).

Moses, Robert, *The Civil Service of Great Britain* (Columbia University Studies in History, Economics, and Public Law), vol. lvii, no. 1.

Sharp, Walter Rice, *The French Civil Service: Bureaucracy in Transition* (The Macmillan Company, 1931).

Stewart, Frank Mann, *The National Civil Service Reform League: History, Activities and Problems* (University of Texas Press, 1929).

Foulke, William Dudley, *Fighting the Spoilsmen: Reminiscences of the Civil Service Reform Movement* (G. P. Putnam's Sons, 1919).

Meriam, Lewis, *Principles Governing the Retirement of Public Employees* (D. Appleton-Century Company, Inc., 1918).

White, Leonard D., *The Prestige Value of Public Employment* (University of Chicago Press, 1929).

——— *Further Contributions to the Prestige Value of Public Employment* (University of Chicago Press, 1932).

——— *Whitley Councils in the British Civil Service* (University of Chicago Press, 1933).

——— *The Civil Service in the Modern State: A Collection of Documents* (University of Chicago Press, 1930).

Friedrick, Carl Joachim, and Cole, Taylor, *Responsible Bureaucracy: A Study of the Swiss Civil Service* (Harvard University Press, 1932).

Smith, Darrel H., *The United States Civil Service Commission* (The Institute for Government Research, 1928).

Willoughby, W. F., *Principles of Public Administration* (Johns Hopkins Press, 1927).

The Merit System in Government, Report of the Conference Committee on the Merit System (National Municipal League, 1926).

Finer, Herman, *The Theory and Practice of Modern Government* (Dial Press, 1922), part vii.

University Training for the National Service, Proceedings of a Conference held at the University of Minnesota (University of Minnesota Press, 1931).

[29] "The Study of Administration," *Political Science Quarterly* (June, 1887), vol. ii, pp. 198 ff.

CHAPTER XVIII

PROBLEMS OF EXECUTIVE ORGANIZATION AND ADMINISTRATIVE REORGANIZATION

THE science of administration, wrote Woodrow Wilson, "is the latest fruit of that study of the science of politics which was begun some twenty-two hundred years ago"; and though administration is the most obvious part of government, i.e., government in action, the study of its principles and intricacies was quite neglected.

"No one wrote systematically of administration," continued Wilson, "as a branch of the science of government until the present century had passed its first youth and had begun to put forth its characteristic flower of systematic knowledge. Up to our own day all the political writers whom we now read had thought, argued, dogmatized only about the *constitution* of government; about the nature of the state, the essence and seat of sovereignty, popular power and kingly prerogative; about the greatest meanings lying at the heart of government, and the high ends set before the purpose of government by man's nature and man's aims. . . . The question was always: Who shall make law, and what shall that law be? The other question, how shall law be administered with enlightenment, with equity, with speed, and without friction, was put aside as 'practical detail' which clerks could arrange after doctors had agreed upon principles."[1] But with the extension of government functions and its active participation in many phases of the lives of the people, problems of administration and administrative law overshadow the former subjects of statecraft concerned so largely with the making and interpretation of constitutions and statutes.

DEFINITION AND SCOPE OF ADMINISTRATION

The term "administration" has been used in different and rather distinct senses to designate, first, all of the powers and duties concerned with the execution of public policies; second, the exercise of these powers and duties; and third, the body of officials or administrative personnel. The term is used more frequently in either the second or the third meaning—that is, as to whether the emphasis is placed upon functions or upon the organization and personnel of the administrative branches of the government.

[1] Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* (June, 1887), vol. ii, p. 198.

The matters which have to do with the laws, rules, and regulations of government are of such significance in modern governments that the administration has been designated a separate branch of government.[2] Administration as distinct from legislation involves, as Willoughby indicates:

1. Problems of organization
2. Problems of personnel
3. Problems of material
4. Problems of business practice and procedure

The persons in charge of the execution of public policies are required, first, to "determine the structural character or organization of the service or services by means of which the work of administration is to be performed. Secondly, they must make provision for the manning of this organization with a personnel and the determination of the conditions under which such personnel will give their services. Thirdly, they must provide for the material equipment required by this organization for the performance of its duties or fix the conditions under which such material will be acquired. And, finally, decision has to be reached regarding the methods that will be employed in operating the services. These are all, it will be seen, matters purely of business administration."[3]

When the distinction has been recognized between the policy-forming and the administrative agencies of government, it has been found necessary to subject the administration to control by the popular or policy-determining bodies. The different forms of control adopted are the popular or political control, the legislative, and the judicial. Popular control is always exercised to some extent through the agencies of public opinion. But popular control is rendered effective where provisions of constitutions or legislative acts, or both, are submitted to the electorate for approval. Where the offices are filled by election, administrative officers are always subservient to public demands. Both the control and the supervision of the administration in the United States are exercised to a large extent by the legislature. But as the legislature cannot exercise this control in any direct and specific manner, it is necessary to provide within the administration itself methods of checking and supervising by means of accounts and reports so as to keep in constant touch with the work performed by those who have the immediate duty of putting law into effect. The prime reason for the differences in the development of the practice

[2] Cf. W. F. Willoughby, *The Government of Modern States* (D. Appleton-Century Company, Inc., 1919), p. 385.

[3] *Ibid.*, p. 391.

and technique of administration is to be found in the application of diverse theories as to the division of public powers.

Politics and Administration

A somewhat artificial separation of powers into legislative, executive, and judicial branches in the government of the United States and an effort to establish a system of checks and balances by setting one department against the others have tended to distract attention from the time-honored grouping of public functions into two main divisions: first, the formation of public policies, and, second, the execution of these policies. In European governments the two functions are rather clearly defined under the terms "politics" and "administration." The term "politics" is understood to mean the formation of public policies. In this the influence of public opinion holds sway; elections and political campaigns result in the victory of one policy over another and in the carrying out of the party programs and the determination of general principles of public management. The term "administration" is understood to include the execution of these policies, the formulation of those rules and regulations by which the policies may be effectively enforced, and the development of a technique adapted to the purpose to be accomplished. The administration comprises the officers and personnel of the executive and judicial branches of the government and includes the laws and regulations under which these officers perform their functions.

In politics, all the elements of human nature are at work, and the necessary complexity of the factors involved makes it often a matter of chance as to what policy may be temporarily adopted. While the motives and the forces of public opinion and the conduct of the electorate may be analyzed much more completely and systematically than has yet been done, there will always be a large element of uncertainty in the determination of public policies through the avenues of public opinion, elections, and legislative chambers. Administration, on the other hand, in many of its branches requires that specialization and technique which the man of experience and training alone possesses.

In the United States, the policy-determining and policy-executing functions have been confused under the general term "politics." "Administration" separated from "politics" has not come into general use. The failure to distinguish between these two functions and to recognize that the one, politics, necessarily involves all of the play of human interests and emotions, and that the other calls for training, experience, and the development of a scientific technique, has retarded the development of a permanent tenure in government service.

The Anglo-American system of administration is decentralized in character in the sense that locally elected officers administer local laws under the supervision and control of an independent judiciary. The continental administrative system is highly centralized in the sense that centrally appointed officers execute the instructions of administrative superiors and are to a large extent independent of judicial control. During the nineteenth century the Anglo-American system has tended toward centralization, and the continental system toward decentralization, the two approaching in the direction of a single general plan. The tendency toward centralization is quite marked in the American state governments in the establishment of boards, bureaus, and commissions with supervisory functions in many instances over local officers and subordinate units of government. Finally, centralization of all these boards into a governor's Cabinet and the concentration of executive authority are distinct tendencies in state governments. The same centralization has been established from the beginning in the federal government. Continental governments, on the other hand, have tried to grant a greater degree of independence to local officers. It is still true, however, that Anglo-American administration is decentralized, whereas continental European administration is centralized.[4]

Executive Powers and Functions

The primary function of the executive of a nation is to supervise and direct the administration of its laws. It is sometimes suggested that it is the function of the legislature to formulate the will of the nation, and of the executive to carry out the policies thus formulated. But normally the duties of the executive involve much more than the enforcement of legislative policies. The chief duties of the executive may be stated briefly as follows: To act as head of the government and to represent the government in its relations with other countries; to appoint and remove officers, mostly in the higher branches of the public service; to act as commander-in-chief of the military forces of the government; to grant reprieves and pardons; in certain cases, to approve or disapprove acts of the legislature; sometimes to summon and adjourn its sessions; and generally to supervise the enforcement of the laws.

In the performance of these duties it is often necessary for the executive to exercise his discretion and to use judgment as to the scope and the methods of law enforcement. For this reason, much depends upon the personal views of the executive as to what laws will

[4] Cf. pp. 468 ff. on recent tendencies favorable to administrative decentralization or devolution.

be effectively enforced. Laws sometimes remain on the statute books for years, with little or no effect, until some vigorous type of executive or one to whom the laws make a special appeal proceeds to enforce them. For example, it is generally conceded that, owing largely to the personal views of two Presidents, the Sherman Anti-Trust Act was not enforced for nearly eight years; and it is a fact that numerous restrictive and prohibitive liquor laws have not been enforced when clemency or non-enforcement appeared to accord with the popular will.

Personality and individual views enter into the execution of the laws to such a large extent that much more consideration should be given to the rôle of discretion and to the individual judgments of executive officers. In addition to the exercise of judgment and discretion in the enforcement of laws, it is likewise regarded as part of the executive function to formulate constructive policies and in a measure to direct the public life of the state. Everywhere may be seen a tendency to increase the responsibility of executive officers and to enlarge their functions. Owing to the necessity for prompt and effective action, the executive authority rests in a single person in every nation except Switzerland, where it is placed in a committee of seven. Though there is a noteworthy resemblance in the ordinary powers and functions allotted to the executives of the various countries, there is a fundamental difference between the European and the American conceptions of the executive power. This difference involves one of the foremost problems of executive organization.

The European Doctrine of Executive Power.—The idea of executive power in European countries differs materially from the notion prevalent in the United States. Though certain powers such as those of military command, of appointment of officers, and of the granting of pardons are quite similar in all countries, the practical methods of exercising such powers vary considerably. The European executive is not personally responsible for his official acts, the responsibility resting upon the Minister who countersigns all public acts. Moreover, legislative acts are passed in skeleton form and the heads of executive departments are granted the power to issue rules and regulations in the form of ordinances which have the force of law. Thus, in large part, the details of administration are left directly in charge of executive officers. European executives are also accorded the right to dissolve the legislative chambers, to initiate legislative measures, and, through Cabinet officers, to participate actively in the legislative process. Owing to the responsibility of the executive to his Cabinet and of the Cabinet to the lower house, it has been found unnecessary to define the limits of the executive powers because they are invariably subject to the control of Parliament. Legislation is

ordinarily confined to the formulation of general rules and of principles which are carried into effect by executive ordinances on the Continent and by provisional orders in England.

The American Doctrine of Executive Power.—The American idea of executive power was largely influenced by Montesquieu's theory, which involved the separation of powers into legislative, executive, and judicial, and which required that each one of the authorities was to be independent of the others. Despite the fact that Montesquieu misinterpreted the English system of government (from which he professed to derive his theory) and that the principle of separation into three powers has never been accepted in England or in France, nevertheless the theory was made a part of the public law of the United States. And the distribution of government activities among the three branches, each of which has a certain realm of independent powers and duties, is the first principle of the organization of public powers in the United States. But in the application of this theory it was early determined that the legislature should specify in detail the powers to be exercised by the executive. "Each officer is within the law to act in accordance with his own views of what is right and proper. The allegiance and responsibility of each officer are to the law and not to some administrative superior."[5] The legislature becomes the creator and regulator of the administration. Thus was initiated the American notion of a government of laws and not of men.

Beginning with the constitutions of 1776, it was generally provided in the United States that executive powers should be clearly defined and enumerated. The person in whom executive power was vested was to exercise only the functions thus specifically defined. Owing to the many conflicts with colonial governors, it was thought best in framing state constitutions not to create a strong executive. The executive was therefore denied both the power of prorogation or dissolution of the legislative assembly and that of formally initiating laws, and was granted limited powers of appointment which were to be exercised only with the approval of the senate. Furthermore, the ordinance-making power which executives in European countries almost invariably possess was likewise not regarded as included among executive powers. The general result of these principles has been described by President Wilson in the dictum that "our laws abound in the most minute administrative details, prescribe the duties of executive officers and the methods by which statutes are to be put

[5] F. J. Goodnow, *Principles of Administrative Law in the United States* (G. P. Putnam's Sons, 1903), pp. 44-45. Though this is one of the earliest volumes in which the American principles of administrative law are formulated, it may still be read with considerable interest and profit.

into practice with the utmost particularity, and all the reins of government seem to have fallen to those who were once only its censors."[6]

According to the European theory, the function of the legislature is considerably circumscribed, owing to its restriction to the formulation of policies, whereas the function of the executive is much extended, owing to the necessity of the executive's attending to the details of legislation in addition to the ordinary executive powers. The legislature in America exercises much more extensive powers, in that it becomes its duty to prescribe to a considerable extent the details of executive functions. Consequently, the executive power is narrowed in scope and bound by minute regulations defined in legislative acts. In Europe recent developments have tended to enlarge the legislative control over departments, and in the United States numerous exceptions have been recognized by which executive officers or boards are accorded rule-making authority. It is evident that legislatures are relinquishing some of their control over administrative details. The two doctrines appear, then, to be converging toward a clearer differentiation of the true functions of the executive and the legislative departments. Nevertheless, the separation of administration and legislation so as to secure efficient government and to preserve satisfactory public control remains in a measure an unsolved problem in Europe and in America.

Principles of Executive Organization in the United States

Two different principles are followed in organizing executive power in the United States. As was stated in a previous chapter, the federal government concentrates authority in the hands of a single executive officer. The executive authority in the states, however, is distributed among a number of elective and appointive officers, each of whom is frequently independent and uncontrolled in the administration of his separate department.

State Administrative Organization

Though the governor is granted about the same general powers as the President, such as commander-in-chief of the militia, legislative powers of message and veto, and the pardoning power, his administrative powers which have to do with appointments, removals, and the control of the administration are as a rule much more restricted.

The position of the governor has been influenced by the fact that

[6] Woodrow Wilson, *Constitutional Government in the United States* (Columbia University Press, 1909), p. 15.

some of the most important state offices have been made elective, and thus they have been rendered independent of the chief executive. Also, the establishment of numerous boards, bureaus, and commissions with independent powers has tended to break up into minute divisions the administrative authority which in the federal government is concentrated in the President.

The chief power of the governor is to be found in the general provision which authorizes him to see that the laws are faithfully executed. This power has been greatly restricted by the rule which has been adopted everywhere in the United States to the effect that the governor cannot enforce laws unless specific provision is made therefor in the constitution or statutes. Consequently, the execution of the laws is, for the most part, in the hands of officers over whom the governor has little or no control. The administrative powers of the governor are exercised through appointment, through supervision, and through suspension or removal. The appointive power of the governor, although quite extensive, is limited by the fact that frequently the most important department heads are elected by popular vote, and thus little control may be exercised over these officers. His appointive power applies largely to administrative boards and commissions, and it is through his authority over these that he has secured a greater influence in the matter of administrative control. Furthermore, the governor has no legal powers of supervision over state or local officers unless specific provision is made by statute. The authority of the governor is exercised over such officials by means of requests for information and by the authority to inquire into all phases of the government and to make public his findings.

With respect to the power of removal also, the governor has no general power, and it is only when provision is made by a constitution or statute that he may remove state officers. In deciding that the governor has no implied authority to appoint state officers, the supreme court of Alabama said: "With us the governor has no prerogatives. He must find warrant in the written law for his every official action. He has no more power to appoint officers, when not expressly conferred, than has the president of the senate, who is of the legislative, or the chief justice of this court, who is of the judicial department."[7] This condition has been changed in a number of respects which will be noted later, but in the main the governor is limited to those functions expressly granted by the constitution or statutes and is not accorded the extensive implied or resulting powers which increase the President's control over the federal administration. The lack of power of removal and of the right to control executive

[7] Fox *v.* McDonald, 101 Ala. 57 (1892).

officers is the chief reason why the executive branch of state government has been less effective than that of the federal system. It is generally stipulated that the governor may not remove without reasonable notice, without specific charges, and without any opportunity being given to the officer to make his defense.

In state governments the problem which is now receiving most attention is the creation of a real executive with control over both removals and appointments, with supervision of and responsibility for the preparation of the budget, and with a directive control over administrative departments.

Reorganization of State Administration[8]

The difficulties and problems involved in the organization of the executive departments of the state have recently led to a general movement for reorganization. In order to adjust a form of government planned for the more primitive conditions of many years ago, so that the multitudinous functions which now devolve upon state governments may be performed, it was thought necessary to establish a considerable number of boards, bureaus, commissions, and commissioners. Since these boards and bureaus were created one at a time as occasion arose and were constituted as independent agencies with specially designated powers, state administration frequently lacked the unity and correlation necessary to secure economical and efficient public service. The typical organization of state administration during the nineteenth century showed little evidence of systematic planning. It consisted of many separate authorities, operating with little reference to one another or to any central control.[9] Lack of unity and of correlation in the arrangements for state administration led to dissatisfaction and criticisms which have resulted in a significant movement for state administrative reorganization.

The first step in most states has been the appointment of a committee to investigate existing conditions and to recommend constructive measures. Most of these committees have been designated as commissions on efficiency and economy. A majority of the commissions have recommended the reform of administrative methods, and a few have proposed a complete reorganization of state administrative agencies. Primarily, the recommendations aim to secure "greater concentration of power and responsibility through the consolidation of the numerous state bureaus, departments, boards, and commissions."

[8] Some problems of administrative reorganization in relation to the budget are considered in chap. xxi.

[9] J. M. Mathews, *Principles of State Administration* (D. Appleton-Century Company, Inc., 1917), p. 499.

New Jersey was the first to provide for a special commission to investigate and to report on the administrative agencies of the state, and about the same time similar committees were appointed in Massachusetts and New York.[10] Comprehensive investigations of the organization of the administrative agencies of state government were inaugurated in Minnesota and Iowa in 1913. Two years later, the New York Bureau of Municipal Research made an exhaustive study of the organization of the government of New York State and suggested a plan for consolidation and reorganization. A constitution which embodied many of the recommendations of the bureau was defeated at the polls; and the suggestions for reorganization by the commissions of Minnesota and Iowa were not accepted by the legislatures of these states. Nevertheless, these preliminary studies served as a guide for the Illinois commission authorized in 1913, whose recommendations for consolidation were the first to be carried into execution.

Three methods have been employed in the conduct of the investigations. The first and, until quite recently, the most common method was to authorize the appointment of a special committee composed of members from the two legislative chambers, and this committee through a series of subcommittees conducted the inquiries, held hearings, and summarized the evidence collected. A second method of procedure has been the appointment of an official commission, usually composed either of executive officers or of members of the legislature and a certain number of appointed members. It is assumed that the latter will bring to the investigation special ability and qualifications, and by devoting their entire energies to the task will render the investigation more thorough and complete. This method of combining the official point of view with that of interested outside parties is now frequently adopted in place of the former legislative investigating committees.

A third method takes this procedure a step further by authorizing an official committee to employ specialists and to place in their charge the conduct of investigations. This plan was followed in Illinois and in Oregon and bids fair to replace the other two methods, thereby introducing into the administrative branch of the government a practice which will transform the administration, just as the management of business establishments has been transformed, through the employment of experts. The report on a Survey of the Organization and Administration of the State Government of North Carolina by the Institute for Government Research of The Brookings Institution and

[10] The State Board of Public Affairs established in Wisconsin in 1911 performed some of the functions of an economy and efficiency committee. See Raymond Moley, *The State Movement for Efficiency and Economy* (1918).

a similar report on a survey for New Jersey by the National Institute of Public Administration presented not only the results of a painstaking analysis of the peculiar conditions in each state, but also carefully considered recommendations embodying the mature conclusions of specialists in both theoretical and practical politics.

Reorganization in Illinois.—One of the best illustrations of the method involving the employment of specialists is to be found in the movement for reorganization in the State of Illinois.[11] Extensive use has been made in other states of the thorough investigations and the constructive recommendations prepared by the Illinois commission. The legislature of this state in 1913 provided for the appointment of a committee on efficiency and economy, and gave the committee full power to investigate all departments and agencies of the state government. Under the direction of the committee, specialists made a survey of all of the agencies of state administration and prepared tentative plans for consolidation.

As a result of its investigations, the Illinois committee found that a condition of disorganization and confusion existed in the executive departments of the state government which necessarily produced inefficiency and waste in the state services.

The main points in the indictment may be briefly summarized:

> There is unnecessary duplication of positions and salaries; not only in the chief officers of each separate bureau or board, but still more in their staffs of clerks and employees. But this is the smallest part of the loss. The work that is undertaken is not well done and costs much more for the results obtained than with a more efficient organization. Supplies in many cases are purchased in small quantities for each office or institution, which could be secured at lower prices if purchased in larger quantities on contracts based on competitive bids, as is done by the board of administration for the charitable institutions. The absence of definite correlation and cooperation between the most closely related offices, necessarily leads to loss and inefficient work. The only supervision provided by law over most of the executive offices, boards, and commissions burdens the governor with a mass of unnecessary detail which no single individual can effectively handle, and at the same time does not afford him either the time or the facilities for the proper determination of the more important questions of administrative and legislative policy. The present arrangements also fail to provide the general assembly with adequate information or advice to enable it to perform its work wisely, either in making appropriations or in enacting substantive legislation. And while reports are made and published, they are so numerous and

[11] See *Report of the Efficiency and Economy Committee* (Illinois), 1915; for a brief account, consult J. M. Mathews, "Administrative Reorganization in Illinois," Supplement to the *National Municipal Review*, November, 1920.

poorly organized that the general public fails to receive satisfactory information on the work that is done and has no satisfactory means of fixing responsibility or of discriminating between those officials who perform their work well and those who perform it poorly or not at all.[12]

The committee concluded that "the compensation of state officers lacks any approach to uniformity on the basis of work done." As a result of the absence of any systematic organization of related services, there is no effective supervision and control over the various offices, boards, and commissions. One of the most serious defects arising from the lack of correlation and effective supervision over the subordinate authorities is found to be the absence of any satisfactory budget of estimates as a basis for appropriations. As a result, appropriations have been based in the main upon estimates made by the head of each office, bureau, or board, most of whom have not been charged with a sufficient degree of responsibility to make them careful and sparing in their requests. The general assembly has acted upon these requests without sufficient time, means, or opportunity for adequate investigation. Hence unnecessary appropriations have been made in some cases; while in others needed funds for important public services have not been provided.[13] Largely due to the absence of a proper budgetary system, the accounts of the various state authorities are entirely inadequate. Finally, with the existing lack of efficient executive organization, both the governor and the legislature fail to receive proper information and advice as to needed legislation. The committee continued:

No machinery has been provided by which the recommendations and proposals for legislation from the numerous lists of officers, boards, and commissions can be carefully weighed and sifted by officials charged with responsibility over a large field of administration. Conflicting measures are often proposed by different state authorities; and many proposals are presented from outside sources both on subjects within and without the jurisdiction of existing executive officials. As a result, there is no harmonious legislative policy formulated; and the measures enacted not only lack coherence, but at times acts are passed at the same session which contain directly contradictory provisions. There is clear need for an executive organization which will make possible a well-defined administration program of legislation.[14]

Another result of the present method of legislation has been the creation of many new and independent departments at an increased

[12] *Report of the Efficiency and Economy Committee* (Illinois), pp. 18-19.
[13] *Ibid.*, p. 22.
[14] *Ibid.*, p. 23.

expense to the state, where, in many cases, the work might have been more efficiently and economically performed in connection with some existing agency. Under the present arrangements, it is claimed that though "the general public is deluged with printed reports, it fails to receive reliable information in digested form as to the conduct of the state administration, and is unable to locate definite responsibility for negligence or misconduct in public business."

The proposed plan of reorganization provided for the consolidation of the administrative agencies under ten departments. Bills to carry the recommendations into effect were prepared by the committee and submitted to the legislature with its report. However, the legislature took no action. But two years later, under the leadership of Governor Lowden, a more consistent and unified plan than that proposed by the committee was prepared and enacted into law under the title, "Civil Administrative Code." The primary object of the new code was to reorganize and consolidate the numerous state administrative offices, boards, and commissions into a limited number of state departments, as in the national government of the United States. Nine main departments were created, as follows:

1. Finance
2. Agriculture
3. Labor
4. Mines and Minerals
5. Public Works and Buildings
6. Public Welfare
7. Public Health
8. Trade and Commerce
9. Registration and Education[15]

These departments absorbed the functions of forty executive offices and fifty boards and commissions, as well as of a large number of subordinate positions. Each department has at its head a director who is authorized to make rules and regulations for his department and to fix salaries and define the duties of his subordinates. Officials in charge of important bureaus and divisions, as well as of some administrative and a few unpaid advisory boards, were provided for in the code. All of these officials were appointed by the governor with the consent of the senate. The consolidation did not affect the elective officers provided for in the constitution.

While the principle that one man should have complete responsibility in the discharge of executive functions was recognized in the

[15] In 1925 two additional departments were created, namely, Purchases and Construction, and Conservation; and certain functions of the original nine departments were transferred to them.

administrative code, it was also recognized that in the discharge of quasi-legislative or quasi-judicial functions it was essential to have the judgment of a number of men. Consequently provisions were made for boards or commissions for the administration of such departments. Thus an industrial commission was established; also a mining board, a tax commission, a commerce commission, a normal school board, a food standards commission and a parole board. Where questions of policy are to be determined in the administrative departments, arrangements are also made for the appointment of advisory boards. Such advisory boards have been attached to the departments of agriculture, labor, public works, purchases and construction, public welfare, public health, registration and education, and conservation.

The principal results to be expected from this organization were pointed out in the report of the efficiency and economy committee. In the first place, there was more definite responsibility; likewise, increased efficiency resulting from the coordination and correlation of the different branches of state administration in the nine main departments and from the active supervision of the directors of these departments by the governor. Of special importance was the consolidation of the state correctional institutions and of the state normal schools, each organization being under a single authority. The new organization aided in securing more consistent and more effective legislation, and prevented the creation of additional and useless officials and boards. According to the judgment of Governor Lowden, the Civil Administrative Code "more than justified all expectations that were formed concerning it. The functions of the government are discharged at the Capitol. The governor is in daily contact with his administration in all its activities. Unity and harmony of administration have been allowed, and vigor and energy of administration enhanced." Though governors have not always been friendly to the new system, it resulted in giving the people of Illinois better government for less cost than under the former type of organization.

Reorganization in Other States.—The plan for administration reorganization and consolidation was soon adopted in other states.[16] In 1919 Idaho adopted a consolidation act also creating nine new departments. Since merely the agencies were reorganized through which administrative duties were to be carried on, without corresponding changes in state law, the act placed upon the governor the responsibility to "devise a practical working basis for cooperation and

[16] Efficiency and economy committees were created, and made recommendations for administrative reorganization in Pennsylvania, 1913; Connecticut, Alabama, Colorado and Kansas in 1915; in Virginia in 1916, and in West Virginia in 1917. But few changes resulted from the reports of these committees. Cf. Raymond Moley, *op. cit.*, pp. 22 ff.

coordination of work, eliminating duplication and overlapping of functions." By means of this act more than forty offices, boards, commissions, and other administrative agencies were abolished.

Efforts toward consolidation in Nebraska by both the legislature and the governor resulted in the passage of the Civil Administrative Code of 1919.[17] The object of the code was to combine the statutory administrative agencies and to transfer their duties to one of the six new departments established. According to the language of the code, the civil administration is vested in the governor, who is aided in the administration of the laws by the heads of the several departments. Constitutional officers and constitutional boards were not affected by the consolidation. Mr. Buck summed up as follows the results of the new administrative code in Nebraska:

1. The integration of related activities of the state government.
2. The application of the Cabinet idea to the work of the state government.
3. The establishment of a budget system with uniform financial control over expenditures.
4. The installation of a central accounting system.
5. The establishment of a system of employment and personnel control.
6. The inauguration of a state purchasing system.[18]

In some respects, the Nebraska plan did not involve so complete a centralization as that provided for in the codes of Illinois and Idaho, but in Nebraska an effort was made to codify the administrative law of the state and thereby to eliminate duplications and overlapping functions.

As a result of a proposal submitted to the voters by a constitutional convention, a general plan of executive and administrative consolidation was approved in Massachusetts. In the legislative session of 1919, various plans for consolidation were considered, and these were finally combined into an Administrative Consolidation bill which was enacted into law.[19] In addition to the constitutional departments of secretary of the commonwealth, treasurer and receiver-general, auditor, and attorney-general, sixteen departments were created.

The Massachusetts Reorganization Act of 1919 has been regarded as unsatisfactory. A commission on state administration and expenditures reported to the legislature in 1922 that a more complete consolidation of administrative departments was necessary, and that something in the nature of an administrative cabinet should be estab-

[17] *Session Laws,* chap. cxc.
[18] *National Municipal Review* (June, 1922), vol. xi, pp. 192 ff.
[19] *Session Laws,* 1919, chap. cccl.

lished, with the governor as chairman. But the legislature ignored the recommendations of this commission and took a backward step by providing for a commission on administration and finance, composed of four members appointed by the governor with the consent of the council. Budgetary, financial, purchasing, and personnel control were vested in the commission. The broad powers granted to the commission over the business affairs of the state placed the chairman of the commission virtually in the position of a state manager.

Reorganization laws were enacted in Washington and Ohio in 1921, and in the same year California, Michigan, and Utah took certain steps in the same direction. Maryland adopted a concentration plan in 1922, Pennsylvania, Vermont, and Tennessee in 1923. Minnesota put into effect a reorganization plan in 1925, and New York in 1926. Partial plans similar in scope have been adopted in South Dakota and Virginia. The new acts follow in large part the Illinois consolidation plan, but a few variations deserve mention.

In the Washington act it is made the duty of the administrative board comprised of the governor and ten appointed directors to systematize and unify the duties of the various departments of the government; to classify subordinate offices, departments, and institutions; to determine the salaries and compensation of subordinate officers and employees; and to authorize, in cases of emergency, any institution, officer, or department to incur liabilities to carry on its work until the meeting of the legislature.[20]

The features of the Ohio administrative reorganization are: first, the development, to a greater extent than in any other state, of the theory that administrative work should be conducted by single heads of departments. The act provides for few boards, even of an advisory character, but authorizes the departments, with the consent of the governor, to create such boards in cases where it may be desirable. Second, the heads of divisions within each department are appointed by the heads of the department. Third, the governor may remove the heads of departments at his pleasure. In 1929 a legislative committee on economy in the public service, with the aid of specialists in business management and political science, presented a report substantially approving the general plan and practice of consolidation and proposing further merging of administrative agencies.

A tentative step toward a state manager was taken by California in the establishment of the department of finance. The director of this department has general authority to supervise the fiscal affairs of the state. He audits the accounts of all state agencies, and authorizes expenditures to meet deficiencies. He also invests certain state funds,

[20] *American Political Science Review* (1921), vol. xv, p. 570.

buys bonds of local units, has the custody of property belonging to the state, and approves state contracts. With these and numerous other functions, he has been appropriately termed "the business manager of the state government."[21]

The outstanding feature in the Pennsylvania reorganization act is claimed to be the reasonable centralization of fiscal responsibility with a proper decentralization in administration. For example, in the purchase of supplies there is centralization as to standards and information, with decentralization in purchasing for the outlying state institutions under the control and scrutiny of the central officer. The act provides for an executive board to standardize all salaries and positions other than those in the three elective departments. The executive board is, in effect, the central personnel agency for the state government. The code provides for an executive budget prepared by a secretary in the governor's office, but does not in any way limit the power of the legislature to decrease, increase, or omit items.[22]

In Tennessee administrative reorganization was hampered by few constitutional restrictions. The governor is the only constitutional elective officer. With the assistance of members of the staff of the New York Bureau of Municipal Research, a survey was made of the various departments and agencies of the state government, and under the direction of the governor a bill was drafted to reorganize the entire administrative system. The enactment of this bill abolished the forty-nine statutory offices, boards, and bureaus, and created instead eight administrative departments. With the exception of the railroad and public utilities commission, all the statutory agencies were placed in one of the eight departments,[23] and the governor was made the responsible head of the state administration to a greater degree than in any other state.

With the approval by the voters of a new code on November 9, 1931, Maine joined the states having consolidated administrative systems. A preliminary survey of state administration by the National Institute of Public Administration and the publication of a report was followed by public hearings throughout the state. With the consultation of the staff who prepared the survey a draft code was prepared, which with some changes was approved by the legislature and the voters. The single executive type of administration was applied to all of the departments except highways and public utilities. And what is deemed the most advanced step taken by the states in the

[21] A. E. Buck, "Administrative Consolidation in State Governments," *Technical Pamphlet Series No. 2,* National Municipal League (1930), p. 22.

[22] *American Political Science Review* (November, 1923), vol. xvii, p. 597.

[23] A. E. Buck, "Administrative Reorganization in Tennessee," *National Municipal Review* (October, 1923), vol. xii, pp. 592 ff.

process of reorganization was the establishment in the executive department of a personnel officer who will have charge of the appointment, promotion and retirement of subordinate officers. To aid the personnel officer, provisions are made for efficiency records, service ratings, and standardization of salaries. The plan as finally adopted failed to include the sections relating to personnel supervision and accomplished only a partial consolidation of existing boards and bureaus. Colorado joined the states with consolidation plans when a new administrative code became effective in July, 1933.[24]

Proposed plans for consolidation have been presented in other states but in most instances little has been accomplished.[25]

The plan proposed by the National Institute of Public Administration for the State of New Jersey deserves brief comment. It is pointed out that the time has come "for a complete revision of titles, specifications, and salary ranges, and rates which will take into account the important changes in state employment during the past ten years, as well as the more modern conceptions of budgetary control of expenditures for personal services."[26] To meet this situation it is recommended that the recruiting, examining, qualifying and removal of state employees be transferred from the civil service commission to a director of personnel in the proposed department of finance. The civil service commission would be retained merely as a board of appeals to adjudicate questions arising out of personnel administration. The establishment of a special personnel officer is in line with the recent trends in civil service administration in both the state and federal governments.

The plan for consolidation of agencies provides for thirteen major departments to carry on the administrative work of the state government. Each department is to be administered by a single head responsible to the governor, who is to become the real chief executive of the state. Boards are to be retained where there are quasi-legislative, quasi-judicial, or advisory functions to be performed. An independent department of audit headed by the comptroller is to be under the control of the legislature. Indicative of recent tendencies

[24] Cf. *National Municipal Review* (July, 1933), vol. xxii, p. 334.

[25] For a summary of these proposed plans and their fate at the hands of unfriendly legislatures or executives, see A. E. Buck, "Administrative Consolidation in State Governments," pp. 44 ff.

For a consideration of the various plans proposed for the reorganization of state administration in Texas, with a suggested plan for the reorganization of the administrative agencies of the state, see Frank M. Stewart, "The Reorganization of State Administration in Texas," University of Texas *Bulletin*, 1925.

[26] *Report on a Survey of the Organization and Administration of the State Government of New Jersey* (1930), p. 82.

in administrative reorganization, the following departments were recommended:

1. Finance
2. Taxation
3. Agriculture
4. Labor
5. Public Welfare
6. Health
7. Public Works
8. Conservation
9. Public Utilities[27]
10. Banking and Insurance
11. Education
12. Legal Services.

The Institute for Government Research of The Brookings Institution, in its report and recommendations for North Carolina, also gave primary consideration to problems of personnel administration.[28] Such matters as the effective recruitment and just appointment of individuals, fair and deserved advancement, promotions from within the service, equitable salaries, and such typical personnel matters as transfers, dismissal, training of employees and their retirement are treated as of major importance in any plan for effective administrative organization. Though some preliminary work was done along this line by a salary and wage commission established in 1925, the activities of this commission were too limited in scope and the effectiveness of its work was cramped by inadequate legislation. To meet the present situation the Institute recommends the establishment of a bureau of personnel in the executive department to serve as a recruiting

[27] As a new departure in state administration, a department of public utilities is proposed with an administrative staff under an executive head.

[28] The Institute recommended the following departments:

I. Executive
II. Finance
III. Justice
IV. Education
V. Health
VI. Highways and Public Works
VII. Agriculture
VIII. Conservation and Development
IX. Labor
X. Institutions
XI. Local Government and Finance
XII. Banking and Insurance
XIII. Public Utilities Commission
XIV. State Auditor

agency for the state service and to pass on all advancements, promotions, and demotions. Some of the advantages to be gained from the creation of such a bureau are thus summarized:

> The work of the bureau of personnel will bring about many economies in the state service. Administrators, who should be devoting their time to important problems of policy and procedure will not be troubled by those who are seeking positions. They will not have to spend their time looking about for employees and making selections. They will merely requisition the bureau of personnel for a list of competent people to fill a vacancy or newly created position. The bureau will do the rest. Moreover, there can be no doubt that better qualified employees will be brought into the state service through the efforts of the bureau of personnel. This, in turn, will result in a direct and immediate saving by making possible the reduction of forces, and a better and more economic organization of departments.[29]

The budget recommendations have passed beyond the theoretical stage, for a majority of the states have enacted legislation providing for a consolidated budget system, with varying provisions as to methods of preparation, legislative review, and enactment into law. Half of these states have placed upon the governor the responsibility of initiating the budget.[30]

The recommendations with reference to the reorganization of boards, offices, and commissions have not been accepted by the state legislatures as readily as proposals for budget reform. The reasons are obvious. A consolidation of a hundred or more offices, boards, and other agencies affects political patronage more vitally than does a budget system, and it requires considerable courage and intelligence on the part of a legislature to reorganize an entire system of state government.

The general principles and standards of the plans of administrative consolidation now in operation in a few states and proposed for other states, according to Mr. Buck, may be thus briefly summarized:

1. *Functional departmentalization of administrative agencies.* All offices, boards, commissions and agencies of a state government should be consolidated and their duties integrated in a few orderly departments, each of which should comprehend a major function of the government, such as finance, agriculture, public welfare, or public works. The number and character of the departments should be determined by the conditions within the particular state and the scope of its existing activities. However, the total number of departments

[29] *Report on a Survey of the Organization and Administration of the State Government of North Carolina,* Institute for Government Research, The Brookings Institution, 1930, p. 119.

[30] For an account of the movement for the adoption of an executive budget, see pp. 483 ff.

in any state government ought not to exceed twelve or fifteen. Closely related work within each department should be grouped under appropriate bureaus and divisions.

2. *Fixed and definite lines of responsibility for all departmental work.* Each department should be headed by a single officer appointed and removable by the governor. This arrangement places beyond question the responsibility for the administrative work of the government and makes the governor in fact, as well as in theory, the responsible chief executive of the state. The department heads should constitute a cabinet to advise with the governor in matters of administration and to assist him in budgeting. Responsibility for the work of each bureau or division should be placed on a single officer directly accountable to the head of the department. The bureau heads should, as a general rule, be appointed by the department heads under which they work.

3. *Proper coordination of the terms of office of administrative officials.* The term of office of the governor should be at least four years, and the terms of the department heads, if they are to be definitely fixed, should be carefully adjusted with reference to that of the governor. The department heads should not have fixed terms longer than that of the governor. It seems preferable to have them serve at the governor's pleasure. However, this exception may be made: the members of boards performing quasi-legislative, quasi-judicial, inspectional, or advisory functions under the departments or otherwise may be appointed for longer terms than that of the governor.

4. *Boards undesirable as purely administrative agencies.* Boards in this capacity are generally found inefficient owing to division of powers and absence of initiative and responsibility. *Ex officio* boards are almost never effective. Whenever there are quasi-legislative, quasi-judicial, advisory, or inspectional functions within a department, a board may with advantage be attached to the department to perform any one of these functions.

The above standards are not uniformly accepted, since in every state reorganization there has been more or less of a fight between those who sought the new system and those who supported the old order of things. In some states this opposition has been so strong that the consolidation plans adopted were to a large extent compromises in which standards gave way to expediency. Furthermore, since nearly all the consolidation plans are statutory, the constitutional provisions of many states have placed very serious restrictions on what could be accomplished in the way of thorough administrative reorganization. In most states, such reorganization is impossible without constitutional changes.

Those who have made a careful study of state constitutions are of the opinion that the governor ought to be the only elective administrative officer and all the administrative machinery of the state government ought to be carefully departmentalized and placed directly under

his supervision and control. They suggest further, as a check on the administration and its use of funds, that there ought to be a state auditor appointed by and responsible to the state legislature, whose duty it would be to audit all accounts kept by the administration and to report on the financial condition of the state government to the legislature and the people. Such an organization is recommended in the "Model State Constitution," published by the National Municipal League.[31]

Undoubtedly, some progress has been made in the unity and consolidation resulting from the new administrative codes. But a review of the movement for reorganization raises some pertinent problems. For example, will a consolidation accomplish very much which merely reclassifies the offices and places them under a few grand headings without changing substantially the relation of the governor to his Cabinet and the relation of Cabinet officers to their subordinates, leaving to the legislature as heretofore the detailed definition of duties and functions? The mere fact that the federal government has ten departments with more or less miscellaneous groups of agencies under each does not assure efficiency in the federal government. Again, the inquiry is frequently raised in the consideration of the reorganization of administration, whether a closer connection between the governor and his Cabinet[32] and the Cabinet and the legislature is not an imperative necessity if efficiency and economy are to be practiced in state administration. To this end not a few advocate for state governments the adoption of the primary features of the Cabinet system of England, which is also in operation in all of the Self-governing Colonies. That some form of closer cooperation between the legislative and executive departments is desirable all will agree, but how to accomplish such cooperation and not sacrifice principles regarded as indispensable is a leading issue.

Finally, there are those who admit the advantages of unity and coordination among the administrative departments but who fear the dangers involved in such a plan in case a chief executive is either inefficient or corrupt. They see in a system designed to secure good results under strong executives a dangerous power which may be wielded so as to do incalculable harm. Hence, unless better arrangements are devised to dispose of corrupt and incompetent executives, they believe administrative reorganization unwise which concentrates so much power in the hands of a single officer. It is pointed out in this connection that administrative concentration in city governments

[31] A. E. Buck, "Administrative Consolidation in State Governments," pp. 5, 6.

[32] In a few states something like a real Cabinet directing state affairs is in process of development.

has worked well when reform administrations have been elected, but that the return of corrupt and unprincipled political machines has merely given the politicians a better type of organization with which to foster their wily designs. In this as in other efforts to improve the organization and administration of government, too much emphasis has been given to mere structural changes. There is often a failure to recognize that with the proper kind of personnel in important political and administrative posts very satisfactory results may be secured even with cumbersome check and balance devices, whereas with a scientifically remolded administrative mechanism designing politicians can more readily transform the government into an agency to foster their selfish ends and those of their friends. A fair and pertinent question relating to administrative consolidation is: Should not more consideration be given to the filling of the major political and administrative posts before ineffectively controlled executives are placed in positions to dominate the political activities of a state?[33]

Administrative Reorganization in Municipal Government

Administrative reorganization in city government has been accomplished in several hundred cities under two forms of city charters known as the commission government and the city-manager plans. The commission form of government, first introduced in Galveston, Texas, has resulted in some radical innovations in city charter-making.

The form of city government which developed in the United States in the early part of the nineteenth century is the mayor and council plan, which, in addition to the mayor, includes a council elected by wards, and a number of independent administrative officials chosen either by popular vote or by the city council. In 1901, Galveston, in order to meet the emergencies created by a flood, petitioned the legislature for authority to place the administration of city affairs in the hands of a small board of business men. The legislature complied with this request and created a commission of five members, three to be appointed by the governor and two to be elected by the voters of the city. The appointment of city officers by state authority was held unconstitutional, with the result that the legislature amended the act in 1903 so that the other members of the Galveston commission could be chosen by popular vote. In 1905 Houston adopted a similar charter, and two years later the legislature of Iowa passed an act permitting any city in the state having a population of more than

[33] Prepare a chart of the present administrative organization of your state.

twenty-five thousand to adopt a commission type of government. Des Moines was the first city to adopt a charter under this act, and the Des Moines plan became a model for many of the later commission government charters.

Features of Commission Government.—In brief, the plan provides for the concentration of all legislative and executive functions in a small board consisting of a mayor and four commissioners at large having a term of two years each. Under the Des Moines plan the business of the city was grouped into five departments: public affairs, accounts and finance, public safety, streets and public improvements, parks and public property. The commissioner who was elected mayor became *ex officio* head of the department of public affairs, while each of the other commissioners was assigned to head one of the other departments by majority vote of the council. All officials and employees in each department were appointed by the council as a whole. Provision was also made for the appointment of a board of three civil service commissioners to have charge of the administration of the civil service law. The Des Moines plan introduced also the initiative, referendum, and recall, which were not provided in the Galveston charter. Commission government has been established by four methods, namely, by general commission government laws enacted by the legislature, by special legislative charters, optional charter laws, and home-rule charters.

The main principles of commission government which are embodied in the new city charters are as follows:

1. The adoption of a city charter by the voters, thus putting into effect the principle of municipal home rule.
2. The city government is placed in the hands of a small board, usually from three to ten members, who exercise legislative, executive, and administrative functions.
3. Nominations and elections are generally held under an arrangement for non-partisan ballots.
4. Wards are abolished and the members of the council are elected on a general ticket.
5. The mayor is usually denied the veto power.
6. Most of the charters provide for the initiative, referendum, and recall.
7. As a rule, provision is made for popular vote on public service franchises.
8. The charters provide generally for publicity, open sessions, and monthly reports.
9. An improved method of accounting with uniform accounts, a regular system of auditing, and other devices to improve financial conditions are usually added.

10. Most of the charters provide for a merit system for appointments to the subordinate positions.[34]

One of the conspicuous features with regard to commission government is that it involves a return to the concentration of power and responsibility as to both the executive and legislative matters in the hands of a small body such as was established in the council system under which the first cities in the United States were governed. Only a few cities have voted to return to the mayor and council form of government after having once adopted a commission charter. But certain defects in the plan of organization for commission-governed cities have been apparent from the beginning and have militated against the success of the plan in operation.

For example, commissioners are elected as representatives of the people and at the same time as directors of administrative departments. An elected commissioner has to perform technical functions. Commission charters create, instead of a single executive, a five- or seven-headed executive. The chief defects, then, have been found to be the ignoring of the need of administrative experts and the lack of concentration of administrative power. Voters, it is claimed, can select men to determine policies or to act as a board of advisers, but cannot intelligently select heads of departments.

Owing to such weaknesses and certain unsatisfactory results from those elected to fill positions in commission-governed cities, it was frequently deemed necessary to adopt a new type of charter embodying more concentration of authority and greater responsibility. The general principles of successful administration for private affairs as well as for government service are now generally conceded to be:

1. For the administration of departments, a single administrator, with the concentration of power and responsibility directly placed in a single executive head.
2. To advise and determine policies, boards or commissions acting as groups of advisers or directors.
3. Choosing of subordinates on a basis of merit, training, and efficient public service.
4. Popular control through the selection of a board or commission with general powers of legislation or ordinance making, and of policy determining.

These principles have been incorporated into a new form of city government known as the commission-manager form of government.

[34] For a brief summary of the movement for commission government in American cities, see *Bulletins for the Massachusetts Constitutional Convention* (1917-1918), vol. i, no. 12, p. 451.

Features of City-manager Charters.—Features of the city-manager plan, more recently known as the council-manager plan, are a single elective board or council, supervisory and legislative in function, the members of which give only part time to municipal work and receive nominal salaries or none; and an appointive chief executive or city manager, selected by the board and holding office at the pleasure of the board. The manager appoints and controls the remaining city employees subject, as a rule, to adequate civil service provisions.

A committee of the National Municipal League has approved the city-manager plan in a suggested charter, which has recently been adopted by the league and is recommended to cities throughout the country. This committee, comprised of specialists on municipal government from various sections of the United States, approved the city-manager feature as a valuable addition to the commission plan and recommended to charter makers serious consideration of the inclusion of this feature in the making of new charters. The committee summarized the advantages of the city-manager plan as follows:

1. It creates a single-headed administrator instead of the five separate administrators as in the Des Moines plan. This administrative unity makes for harmony between municipal departments, since all are subject to a common head.
2. The city-manager plan permits expertness in administration at the point where it is most valuable—namely, at the head.
3. It permits comparative permanence in the office of the chief executive, whereas in all plans involving elective executives long tenures are rare.
4. The city-manager plan permits the chief executives to migrate from city to city, inasmuch as the city manager need not be necessarily a resident of the city at the time of his appointment, and thus an experienced man can be summoned at an advanced salary from a similar post in another city.
5. The city-manager plan, while giving a single-headed administration, abolishes the one-man power seen in the old mayor-and-council plan. The manager has no independence and the city need not suffer from his personal whims or prejudices, since he is subject to instant correction, or even discharge, by the commission. Likewise, in the commission each member's individual whims or prejudices are safely submerged and averaged in the combined judgment of the whole commission, since no member exerts any authority in the municipal government save as one voting member of the commission.
6. The city-manager plan abandons all attempts to choose administrators by popular election. This is desirable.
7. The city-manager plan leaves the line of responsibility unmistakably clear, avoiding the confusion in the Des Moines plan between

the responsibility of the individual commissioners and that of the commission as a whole.

8. It provides a basis for better discipline and harmony, inasmuch as the city-manager cannot safely be at odds with the commission, as can the Des Moines commissioners in their capacity as department heads, or the mayor with the council in the mayor-and-council plan.

9. It is better adapted for large cities than the Des Moines plan. Large cities should have more than five members in their commission, to avoid overloading the members with work and responsibility, and to avoid conferring too much legislative power per individual member. Unlike the Des Moines plan, the city-manager plan permits such enlarged commissions, and so opens the way to the broader and more diversified representation which large cities need.

10. In very small cities, by providing the services of one well-paid manager instead of five or three paid commissioners, it makes possible economy in salaries and overhead expenses.

11. It permits ward elections or proportional representation, as the Des Moines plan does not. One or the other of these is likely to prove desirable in very large cities, to preserve a district of such size that it will not be so big that the cost and difficulty of effective canvassing will balk independent candidacies, thereby giving a monopoly of hopeful nominations to permanent political machines.

12. It creates positions (membership in the commission) which should be attractive to first-class citizens, since the service offers opportunities for high usefulness without interruption of their private careers.[35]

The city-manager plan is, then, a form of government which combines the ideas of the small representative body elected at large or by districts on a non-partisan ballot, possessing all of the large powers of the cities and subject to certain important checks in the hands of the electorate, with concentration of administrative power into a single individual chosen by the representative body because of expert professional qualifications. Such a plan adopts the valuable features of commission government and remedies the two fundamental defects of that form.

The primary feature of the city-manager charter is the provision which deals with the selection, the powers and duties, and the control over the administrative forces of the city by the manager. In this respect the council-manager charters follow a uniform plan. The manager is designated as the chief executive of the city. He appoints the department heads, supervises and controls the employees, prepares the budget and makes recommendations to the council for the future program and policies of the city administration. As the chief execu-

[35] Taken from pamphlet issued by the National Municipal League, "The Commission Plan and the Commission-manager Plan of Municipal Government," *Majority Report*, pp. 17 ff.

tive, the manager is responsible for all of his acts to the council, which has power to dismiss him at will but is usually forbidden to interfere in the actual details of administration. The council thus remains as "the ultimate authority in the city government, with the exclusive power to decide the policy of the city, to provide funds for its execution, and to control the chief executive."[36]

To be an effective city manager he must be given large powers, and, though checks must be placed upon him, he must not be interfered with in the management of departments and in the details of administration. In order to make the work of the city manager effective, it is necessary to introduce two other important features in city government. The first is a scientific budget system along with uniform accounting and accurate and thorough auditing methods. Such provisions will make it possible for the manager to insure good results and at the same time safeguard the public interest where it is most vitally affected, namely, in the treatment of the city's revenues and expenditures. Second, special arrangements should be made for the merit system in the appointments to subordinate positions in the city government. If the city charter makes adequate provisions for the city manager to introduce a scientific budget system, provides for the merit system in the appointment of subordinate officials, and creates a commission to select the manager and to advise with him on the passage of ordinances and on the determination of the policies of the city, it is deemed possible to secure better results than under any other plan of administration organization.

Speaking of city managers, it has been suggested that "the mind of the manager should be fixed on efficiency, on so much to be done in so much time, and on revision, reorganizations, tabulations."[37] And in estimating the results of the adoption of council-manager plans in a representative list of cities, Professor White observes, "They [the managers] have clearly been more alert to possible savings, have planned with greater foresight, have handled purchasing with greater success, have eliminated influence more completely than most mayors."[38] On the other hand, the managers have done comparatively little to advance municipal administration in its wider aspects and implications. The real improvements in municipal administration along most lines have not been fostered by city managers but have been accepted by them only after their effectiveness has been demonstrated. But if some of the high expectations of the advocates of

[36] Leonard D. White, *The City Manager* (University of Chicago Press, 1927), p. 288. This work may be consulted for an estimate and appraisal of the city-manager plan in operation.

[37] City Manager's *Yearbook*, vol. i, p. 21.

[38] Leonard D. White, *op. cit.*, p. 234.

city-manager charters have not been realized, the new approach to problems of government fostered by the best of the city managers and the measurable accomplishments warrant the conclusion that the council-manager plan embodies the best combination yet devised for efficient administration with adequate popular control.[39]

The commission form of government and the city-manager plan have each led to definite improvements in municipal administration. Commission government has resulted in greater concentration of authority and a more direct location of responsibility, with more effective popular control. The city-manager plan has had a tendency to encourage the selection of men of administrative ability, wherever they may be found, and to place emphasis upon training and experience in making selections. The term of managers has been too short, however, and the number of men specially trained for such work too few to assure a permanent personnel of trained administrators which appears to be essential to the success of the manager plan. Organized efforts have been made to help train men for the responsibilities of this position and, in the main, the managers have been chosen from among those who have demonstrated their administrative ability in other fields of endeavor.

It remains for American cities to develop a professional class of administrators whose tenure will be permanent and based solely upon merit. No ready-made form of charter can change ramshackle into efficient administration, and it is quite easy to place too much emphasis on charter-making, to the neglect of equally important factors in city government. But charter-making has tended to bring to the light some of the basic elements of weakness in present methods of administration, and to differentiate the functions to be allotted to an elected commission, those which should be performed by appointive officers, and those on which the electorate itself should render a verdict. Publicity has rendered clearer the problem of improving city administration, and has at least pointed the way to remove some of the serious defects which have served as handicaps.

Reorganization of County Administration

The last unit to be subjected to schemes of administrative organization is the county. The most common types of county government in the United States are, first, the county board type in which the boards are comprised of representatives from townships or municipalities. These boards are often large and unwieldy in operation. Second, there is a commissioner type in which a small commis-

[39] See especially *ibid.*, chap. xiv, summary and conclusions.

sion of from three to seven members elected at large or by districts controls county affairs. A number of states such as California, North Carolina, and Virginia have authorized counties to adopt the county-manager form of government. In the latter type of organization a county manager is selected by the county commissioners and is controlled by them along lines similar to the city-manager plan.[40] A beginning has been made in the adoption of this plan by the counties of California, North Carolina, and Virginia.

Reporting on a survey of county government in Virginia, the New York Bureau of Municipal Research commented on "the scattered, disjointed, and irresponsible type of organization prevailing in the state." The bureau further characterized the situation:

> The present county government has no responsible head; it is without a chief administrative officer and the board of supervisors controls through appointment only a small part of the county administration. Authority for carrying on the administrative work of the county at the present time rests with many individuals. The voters of the county have very little power in the determination of county policies. It is true that they elect a number of administrative officers besides the members of the board of supervisors, but this serves only to dissipate authority and to increase the difficulties of securing effective and economical county government. In fact, there is nothing to commend the present form of county government in Virginia. In many of the counties, it is grossly political, careless, wasteful, and thoroughly inefficient. It has been that way for years, but still it exists and seems to flourish. Perhaps the reason for this is that the people of the state have not yet become aware of the possibility of establishing a different form of county government, which is less costly, more efficient, and better able to meet modern conditions.[41]

A later report confirmed these conclusions in the statement that "the county presents a picture of disorganization and confusion which violates almost every principle of sound business organization."[42]

To remedy existing conditions, the bureau suggested two forms of organization by which there would be a responsible administrative head for the county. The first is called the "county administrator type," under which a county administrator is to be elected by the voters for a term of four years, corresponding to the term of the board of supervisors. All functions of the county government, except those of a judicial character and those pertaining to elections, are

[40] See Supplement to *National Municipal Review* (August, 1930), vol. xix, no. 8; also County Government Number of *National Municipal Review* (August, 1932), vol. xxi.

[41] *Report on a Survey of County Government in Virginia,* prepared by the New York Bureau of Municipal Research, 1927, p. 6.

[42] Cf. *Report on County Government Made by a Special Commission,* 1931.

to be placed under the administrator. The heads of the county offices are to be appointed by the administrator, subject in a few instances to supervision by state officials, and to serve at his pleasure. Under the second, called the "county manager plan," the manager is to be selected by the board of supervisors and to hold office at its pleasure. The manager, like the city manager, appoints the department heads and they are responsible to him.

Principles and adjustments which are regarded as necessary for a reasonably adequate and flexible form of county organization are summarized as follows:

1. The responsibility of the people's representatives in the county organization should be complete; likewise their authority should be complete. 2. The people should be provided at all times with full knowledge of the governmental processes and procedure. 3. State and local cooperation should be recognized and fostered on the basis of the proportionate joint interests involved. 4. The people themselves should in some way be quickened into a new interest in governmental affairs.

Naturally these principles imply the unification and simplification of the organization and structure of county government, and the establishment of a system of advanced planning, including complete budgets, organized purchasing, and full and accurate accounting control. They imply also a degree of cooperation between the state and the counties which has heretofore rarely been attained.

Concretely, these ends may be accomplished through the application of certain well-established principles, as follows: 1. Distinguish clearly between policy-determination and policy-execution and let the people elect a small policy-forming body with general supervision and control over all the affairs of the county. 2. Let the policy-forming body appoint an executive agent—a full-time officer or an officer serving at the same time as a department head—to carry out the policies of the board, to supervise personnel and to install and enforce adequate business procedure throughout all the divisions of the county government; in other words, to coordinate the activities of the county and act as the administrative head of the government. 3. Consolidate the county functions into a few major departments, organize these departments internally, and man them with a competent personnel. 4. Coordinate the activities of the county with those of the state by providing for cooperation between the county and the state in the appointment and direction of officers engaged in performing joint services. 5. Provide for the establishment of administrative areas through the cooperation of adjacent counties and for such consolidation of smaller counties as is not forbidden by traditional or historic reasons.

In accordance with these principles, therefore, the commission developed its proposals along the following lines:

1. A county executive form, which is sufficiently flexible to be adapted to the needs of any county in the state.
2. A county manager form, which is particularly recommended for counties with urban conditions and larger rural counties.
3. Provision for the voluntary cooperation of adjoining counties or of counties and towns in the establishment of larger areas for the administration of roads, health, welfare, and other public functions.
4. Certain independent measures designed to correct existing administrative defects and to set up types of procedure needed by every county, regardless of the particular form of its organization.[43]

Among the other suggestions to remold county administration are the abolition of the fee system as a method of compensating public officers, except for a few part-time positions; the authorization to establish regional areas for administrative purposes, comprising two or more adjoining counties wherein local problems and interests are in many respects similar; systematic requirements for a uniform plan of accounting, and an effective budget system. Beginnings toward the consolidation of counties and the unification of government in local rural areas have been made in several states, and proposals for such consolidation are likely to meet with approval by the electors in other states.[44]

So unsatisfactory are conditions frequently in county administration that recent reports of surveys have ventured the suggestion that "the time has arrived when the legislatures and the states should begin to consider seriously the desirability of the entire abolition of the counties as political subdivisions, or at least the progressive liquidation of their powers through the transfer to state agencies of the duties now being performed by them."[45] Since abolition of the county as a political unit was deemed impracticable for some time to come, a more moderate plan was proposed involving a merging of counties into regional groups and a gradual transfer to state agencies of some of the important functions now performed. To strengthen and unify state control, a state department of local government finance is proposed to be authorized among other things (1) to install uniform systems of budgeting and accounting; (2) to supervise, inspect and audit all local accounts; (3) to exercise control over indebtedness and sinking funds—in short, to improve financial conditions in local government by state inspection, supervision and control.

There have been doubts in the minds of many engaged in the

[43] *Ibid.*, pp. 15-16.

[44] See J. W. Manning, "The Progress of County Consolidation," *National Municipal Review* (August, 1932), vol. xxi, pp. 510 ff.

[45] *Report on a Survey of the Organization and Administration of County Government in North Carolina,* pp. 11, 12.

movement for administrative consolidation in federal,[46] state or local governments whether the plans proposed and adopted are not predicated on too simple a formula. In the first place, the presumed standards of efficiency in the operation of private business establishments have served as a model for most of the reorganization plans without taking into account the accompanying waste, corruption, and ruthlessness which often characterize business practices. Moreover, the business side of government is only one, though an important one, of its phases. Governments serve primarily as protective agencies and, as such, other factors than efficiency must often guide and control public policies. They often have significant functions in conserving and developing human values and ideals where efficiency and economy may be applicable but need to be subordinated to other considerations. And it is questionable today whether the standards and practices which have accounted in large measure for the success attributed to private business management have not been altogether too impersonal and inconsiderate with respect to human interests. Private producers and distributors have felt free to cast upon the more reasonable and humane agencies of government the heavy responsibilities and expenses of caring for the failures and wrecks of an industrial order in which managers were more solicitous of their mechanical equipment than of the laborers necessary for a going concern. The trend in business has been in the direction of according more serious consideration to personnel problems and of conserving to a greater degree the lives and interests of the employees. Thus programs of education, of recreation, and of fostering the social interests of workers are combined with arrangements to assist and care for those who suffer injury or loss from industrial accidents. It is all the more necessary that governments give foremost attention to human interests and values, sometimes with an eye not too closely on the dollars saved to the public treasury.

Does not the tendency to consolidate, centralize, and unify too frequently give undue authority to and place too great a burden upon officials who are unfamiliar with the local conditions with which they are called upon to deal? There is a point in the process of centralizing administrative responsibilities where an increase in duties results in a diminution of efficiency. This has been rightly termed "the inherent vice of centralized authority." "It is so baffled by the very vastness of its business," says Professor Laski, "as necessarily to be narrow and despotic and overformal in character. It tends to substitute for a real effort to grapple with special problems an attempt to apply wide generalizations that are in fact irrelevant. It

[46] For the steps toward administrative reorganization in the federal government, see pp. 491 ff.

involves the decay of local energy, taking real power from its hands. It puts real responsibility in a situation where, from its very flavor or generality, an unreal responsibility is postulated. It prevents the saving grace of experiment." No organizations or devices have yet been found to take the place of active and interested participation in local political affairs on the part of intelligent and public-spirited citizens. A community which fails to recognize and capitalize the citizen's participation in government cannot expect to secure the best type of public service by merely changing the form of local administration.

Another insistent question to which no satisfactory answer has been given is whether the consolidation movement has not gone too far in abolishing advisory and consultative boards. Boards are retained where quasi-judicial or discretionary powers are involved, though there is a disposition to concentrate authority even in such fields, as is indicated by the movement to replace public utility commissions by a single commissioner. They are also retained to a certain degree in educational, health and welfare matters, as far as policy-determining is concerned. But may not advisory boards or committees of capable, interested and sympathetic citizens be used to advantage in guiding policies and in tempering administration in many other lines? The satisfactory results secured by boards directing and controlling administrative action in a few fields demonstrate that officers gain quite measurably when their acts are regularly scrutinized by laymen who represent a variety and breadth of interests and affiliations. The administrative mechanism appears much too complex to mold it according to a simple formula and a uniform pattern.

SUPPLEMENTARY READINGS

Goodnow, F. J., *Comparative Administrative Law* (G. P. Putnam's Sons, 1903), student's edition.

Mathews, J. M., *Principles of State Administration* (D. Appleton-Century Company., Inc., 1917).

Buck, A. E., "Administrative Consolidation in State Governments," (*Technical Pamphlet Series* No. 2) National Municipal League. A useful summary of the movement for administrative reorganization in the American states.

Willoughby, W. F., *The Government of Modern States* (D. Appleton-Century Company, Inc., 1919), chap. xiv, "The Executive Branch," and chap. xvi, "The Administrative Branch."

Report of Efficiency and Economy Committee, Illinois, 1917. A comprehensive report on the former administrative organization of the state of Illinois with an analysis of defects and proposals for reorganization.

Hart, J., *The Ordinance Making Powers of the President of the United States* (Johns Hopkins Press, 1925).

Comer, John Preston, *Legislative Functions of National Administrative Authorities* (Columbia University Press, 1927).

Crawford, Finla Goff, *Readings in American Government* (F. S. Crofts and Co., 1933), chap. xxi.

Atkinson, R. C., "Principles of a Model County Government," Supplement to *National Municipal Review* (September, 1933).

Marriott, J. A. R., *The Mechanism of the Modern State* (Oxford University Press, 1927), 2 vols.

Blachly, Frederick F., and Oatman, Miriam E., *The Government and Administration of Germany* (Johns Hopkins Press, 1928).

CHAPTER XIX

PROBLEMS OF LOCAL ADMINISTRATION AND THE GROWTH OF ADMINISTRATIVE LAW

Characteristics of Local Administration in the United States

The chief characteristic of local administration in the United States is that the powers of local districts and the duties of officers in these districts are as a rule determined in detail by statutes. Such control as is exercised over local units is in large part prescribed by the legislature. Formerly, this regulation was provided in special and local acts which dealt separately with each locality. But the evils of such a system of special legislation led to the constitutional requirement that powers and duties of local government bodies shall be dealt with in general acts. It has been necessary, however, to permit the legislature to prescribe by special acts for the regulation of certain matters which cannot be completely and satisfactorily comprehended in general laws. Thus, while the principle of special acts has been condemned, the courts have found it necessary to permit the practice to a limited extent in order to provide for exceptional circumstances which are constantly arising. The general result of this practice has been to interfere with the independence of local units and to render it difficult to distinguish between affairs which are central and those which are local in character.

The second characteristic of local administration in the United States is the great number of authorities which are independent of one another and are not under the control or direction of any central power. Professor Goodnow's characterization of the American system of local administration is still to a large extent true, that

> . . . it is from the administrative point of view extremely decentralized. The administrative control, both central and local, is believed to be unnecessary because of the detailed enumeration in the statutes of all the powers of the local corporations, and of the officers in the local areas. Everything is so fully regulated by the legislature that there is little room left for administrative instructions to be sent either by the central authorities of the commonwealth or any superior local authority. In order to insure that officers will perform the duties imposed upon them by the statutes, resort has been had to the sanctions of the criminal law. To the violation of almost every official duty is attached a criminal penalty which is to be enforced by the ordinary criminal courts. Detailed enumeration of official duties in the statutes

and punishment of the violation of official duties by the criminal courts are thought to be sufficient to insure efficient and impartial administration and to obviate the necessity of forming any strong administrative control.[1]

The third characteristic of local administration in the United States is that the services are performed by lay or nonprofessional officers. Frequently officers receive small salaries or per diem allowances. Officers are selected from the ranks of the ordinary vocations of life to serve for a short term, and are then returned to private life.

Though numerous exceptions have been made to these principles, they remain basic in all local administration. The peculiarities of these principles in operation may be better appreciated by comparison with the French system of local administration and the English method of provisional orders. There are marked differences between the method of administering local government in England and in the United States and the method employed in continental European countries.

The French System of Local Administration

In the first place, administration in France is carefully divided into central affairs, which are largely in charge of central officers with strict control and supervision, and local affairs, which are largely in the hands of local officers. In the second place, continental European countries do not as a rule attempt to define the duties of local governmental bodies, but merely formulate general principles of local administration which are to be carried into effect, the details of which are to be filled in by the local officers themselves. The officers of local corporations, such as communes and cities, are not, as in the United States, authorities of enumerated powers, but have the right to exercise all powers which they wish, provided they conform to the general laws applicable. All local bodies, however, are subject to a central administrative control which prevents them from encroaching upon the domain of the central government and from acting contrary to the best interests of the nation as a whole.

As the French system of administration has been accepted as a model for the majority of continental European countries and has been followed to a considerable extent in South and Central American states, it seems desirable to present a brief survey of the general plan of the French system.[2]

[1] F. J. Goodnow, *Comparative Administrative Law* (G. P. Putnam's Sons, 1903), vol. i, pp. 228-231.

[2] For a more complete account of the French system of local administration,

For the purpose of local administration, France is divided into artificial subdivisions or administrative districts known as departments. Each department is a unit for carrying out central affairs, and is also a corporation with its own officers and with many duties of a local nature to perform. At the head of the department is a prefect, who is appointed and removed by the President of the Republic on the recommendation of the Minister of the Interior. Though no special qualifications are required by law, a prefect usually has had experience as a subprefect or as secretary of a prefecture. The prefect is in charge of central affairs, in accordance with which it is his duty to see that the laws and decrees of the central government are effectively carried into operation. He appoints and dismisses a large number of officers, such as postmasters, police officers, prison wardens, collectors of taxes, highway overseers, and teachers in the schools, and has broad powers of direction and control. Special authority is accorded to him to supplement the general statutes with ordinances covering local matters which require uniform regulation.

The prefect likewise exercises an extensive control over the smaller units, the communes. As a local officer for the department, he appoints officers in the departmental service, has charge of the financial administration of the department, and directs the management and controls all departmental public works. He prepares the departmental budget and is the executive officer of the departmental council which determines the general policies for the management of the department. The prefects, notes Professor Gooch, "are the most important local officials in France, perhaps in the world. Though the central aspect of their dual administrative rôle is even more pronounced than the local aspect, the very combination of the two heightens the local position of the office. Moreover, the position possesses a distinctly political aspect."[3]

Formerly, by the side of the prefect there was a council of the prefecture which served as an advisory council to the prefect. Since 1926 regional prefectural councils have been established whose function it is primarily to serve as a court of first instance where the council tries cases affecting the rights and duties of officers.

In addition to consulting with the professional council which is associated with him, the prefect is further expected to advise and consult with a body known as the departmental commission, usually composed of from four to seven members elected by the general

see *ibid.*, vol. i, book iii, chap. vi. Cf. also E. M. Sait, *Government and Politics of France* (World Book Company, 1920), chap. viii.

[3] R. K. Gooch, *Regionalism in France* (D. Appleton-Century Company, Inc., 1931), p. 28. Chapter ii of this book may be consulted for a useful description of the present system of local administration.

council of the department. The main duty of the commission is to present to the general council the budget of the department, with suggestions and recommendations, and to make an inventory of the property of the department. Its consent is necessary to the making of all important contracts. In a measure, the departmental commission acts as an executive committee of the council while the council is not in session and performs miscellaneous duties delegated to it by the council. These committees have a significant place in French local government.

Composed of members elected on the basis of universal suffrage, the general council is the legislative body for the department. Members are elected from cantons for a term of six years, one-half of the members retiring every third year. Ordinarily the council meets twice a year, but it may be convened on other occasions by the order of the President. General control over the local affairs of the department is exercised by the council, subject to central control and supervision. All of the department property, finances, taxes, highways, with the exception of state roads, departmental public works, and public salaries, are in charge of the council, which also exercises an extensive supervision over the communes. With respect to central affairs, the council is closely supervised, and its acts may be vetoed on the recommendation of the prefect. In financial matters and in the preparation of the budget, it is necessary that the acts of the council have the approval of the central administrative authorities.

For the purpose of local government, each department is divided into *arrondissements*, or districts, at the head of which is placed a subprefect also appointed by the President, and a district council. The primary duty of the subprefect is the carrying out of the orders of the prefect.

The most important unit for local government in France is the commune. Communes are historic units, all of France being subdivided into rural or urban communes. The government of the communes is in charge of a mayor and several deputies, who are elected by the municipal council from among the members of that body. These officers serve during the term of the council, but may be suspended by the prefect of the department or the Minister of the Interior, and may be removed by the President of the Republic. For the carrying out of central duties, the prefect exercises control over the acts of the mayor. Like the prefect, the mayor is a central officer and, as such, is expected to enforce the laws and decrees made by the central government. For this purpose he has control of police, election, and health officials, and is granted special ordinance powers. As a local officer, he has the appointment of the communal officers, and it is his duty to take charge of the details of local administration.

He draws up the budget of the commune, orders the payment of all expenditures, has charge of the revenue and property, executes contracts, and supervises all acts.

The legislative body for the commune is the municipal council which has the general supervision and control of communal affairs. According to law, the communal council controls the affairs of the commune, and the department council manages the business of the department; but in actual fact the mayor and the prefect control to a large extent all the affairs of local government. The general practice is for the executive to prepare the agenda and direct the discussions in the councils.

There is in France, then, despite all of the arrangements for central control, a considerable degree of local self-government. But it is self-government under a *tutelle administrative*—in most respects a definitive central control or, as it is sometimes called, control by bureaucrats. The present situation regarding the relations between the nation and the localities has been suggestively summed up as follows:

> Given an apparently broad sphere of action in which local decisions may not be annulled by the controlling authority so long as such decisions remain within this sphere and do not violate existing law, legal local acts of government, however unwise or impolitic, would appear to enjoy a broad freedom, untrammelled by control from higher authority. This, however, is not altogether the case. The *decision* may be taken with great freedom, but the practical necessity of execution remains. Here the initial freedom is often almost entirely offset, and the control begins again. In the first place, since few activities of any interest or importance fail to involve an inscription of proposed expenditure in a budget subject to control, freedom of decision concerning these activities is largely neutralized by the comparative lack of local financial freedom. Again, a particular activity may by decision of a local council be freely undertaken; and yet the execution of the undertaking is likely to involve other activities which concern higher authorities and which thus for practical purposes bring into play a control that diminishes in marked degree the importance of the original freedom of decision. . . . Thus, in fact, practically every local act involves control by a higher authority. It is especially this sort of consideration which must be taken along with other elements in the situation when a conclusion is drawn. On the balance, France stands out as the most highly centralized of all the great countries of the world.[4]

It is evident, then, that the French system of local administration is fundamentally different from that of either England or the United

[4] *Ibid.*, p. 41.

States, where the duties of local authorities are to a considerable degree minutely defined in statutes. But the obvious defects of this arrangement have been remedied in England by the establishment of a system of central control, by an extension of the principle of delegated legislation, and by an ingenious device known as "provisional orders" designed to relieve the legislature of the duty of determining the details of administrative routine.

English Method of Provisional Orders

In order to provide for central control over local authorities and to relieve the legislature of providing for the details of the duties and responsibilities of local officers, the device known as "provisional orders" has developed in England. It was formerly the practice in England, as in the United States, to grant powers to local units, such as counties, boroughs and parishes, by general law or by special statute. As the administrative needs of local government increased, the requests for special legislation grew so numerous that Parliament was forced to seek relief. To reduce the great number of private and local bills, Parliament vested general powers over local authorities in boards or departments, such as the Board of Agriculture and the Board of Trade, and permitted these boards to grant further powers by provisional orders within well-defined limits and restrictions. A provisional order may be defined as "an ordinance made by a department of the government which acquires the force of law either automatically after a fixed period . . . or by the express confirmation of Parliament itself." The extensive practice of issuing such orders creates each year a large body of rules and regulations, exceeding in bulk many times the formal statutes and being referred to as "delegated legislation."[5]

Legislation passed by Parliament with reference to local affairs, as in France, is usually drawn in broad terms and in many cases made permissive. This is particularly true of laws which confer powers upon municipalities. In such laws, however, it has become customary to insert a clause providing that any municipality which desires to exercise such permissive power must first secure by provisional order the approval of the Ministry of Health, which by an act of 1919 superseded the Local Government Board, or the Board of Trade, or the Home Office. If, for example, an English municipality wishes to borrow money or to engage in any form of public service enterprise,

[5] See *Bulletins for the Massachusetts Constitutional Convention* (1917-1918), vol. ii, no. 30, p. 367. Consult also Cecil T. Carr, *Delegated Legislation* (Cambridge University Press, 1921), and John Willis, *The Parliamentary Powers of English Government Departments* (Harvard University Press, 1933).

it ordinarily applies for a provisional order, not for a special act or authorization under a general law. When an application for a provisional order is made on behalf of any local authority, an inquiry or hearing is held by an inspector of the central board.

In some cases the orders issued by the various administrative authorities are final; but in other cases the statutes require that provisional orders shall be laid before the Houses of Parliament, and that they shall not go into effect if either House passes a resolution of disapproval within a certain prescribed period. It is difficult to draw any definite line between those matters in which the action of the administrative authorities is final and those that must be laid before Parliament, because the procedure in any instance depends upon the subject matter of the provisional order, upon the statute under which it is granted, and upon the question as to whether or not the order is opposed. Some of the provisional orders which are required to be laid before Parliament, whether opposed or not, are those granted by the Board of Trade to railways for raising capital, those in regard to deciding upon working agreements, and other matters. Among the orders issued by the administrative authorities are those granting charters to boroughs, changing boundaries of parishes, providing dwellings for the working classes, and so on.

As a general practice, however, it may be said that provisional orders conferring important powers must be submitted to Parliament for formal ratification. Every year such of the provisional orders as are thus submitted are grouped together into a series of consolidated measures, known as Provisional Orders Confirmation Acts, and passed through the usual stages like other private bills. They may be amended or rejected at the discretion of Parliament; but as a matter of fact it is rare that any provisional order is stricken from one of these bills in Parliament. The plan has the merit of presenting an effective type of central control and at the same time preserving the initiative and responsibility of the localities.

In recent years there has been a marked growth of delegated legislation in England. The expansion has come mainly through the insertion of a provision in an act by which rules and regulations made by a department have the same effect as if enacted in the act. But other devices, such as the authority granted to the Ministers to remove difficulties and to modify substantially an act of Parliament, have considerably extended the sublegislative functions of the departments. Procedure by a scheme in which the final approval rests with the department now to a large extent replaces the system of provisional orders.[6]

[6] John Willis, *op. cit.*, p. 82.

Administrative Orders in the United States

Though executive officers in the United States are limited in their actions to powers and duties defined in the laws, it is quite impossible for the legislature to regulate all the details of administration. This fact is recognized in the creation of commissions with certain prescribed rule-making powers and in the granting of a limited ordinance power to the President and state executive officers. Few people, indeed, are aware of the extent to which public administration in the United States is controlled by administrative regulations or orders, or by delegated legislation. Though administrative regulations in the United States are less important than departmental regulations in Great Britain, or than similar orders or decrees as issued in France and Germany,[7] according to Professor Comer:

> . . . The earnestness with which Congress has set about delegating legislative power can be seen by reviewing the functions of the President, of the ten great departments, and of the ever-growing list of independent executive establishments such as the Interstate Commerce Commission, the Federal Reserve Board, the Shipping Board, the Federal Power Commission and the Veterans' Bureau.[8] Indeed government by law and rule has become, in large part, government by the wish and discretion of administrative officers. Whether Mr. Common Citizen is making commercial catsup in Oregon, or selling oleomargarine in Illinois, or shipping cotton from Texas or cattle from Oklahoma, or importing seed from Russia, or exporting munitions of war to Mexico, or sending shrubbery from New England, or fishing in the navigable waters of the United States, or paying federal income taxes, or buying interstate transportation, or prescribing habit-forming drugs, or securing sacramental wine—whatever he is doing under national law he is likely to be acting in accordance with, or contrary to, some rule, order or proclamation of the appropriate administrative officer of the United States.[9]

That these regulations have in many instances the full force and effect of laws is the conclusion of the Supreme Court in numerous cases involving such regulations.

A similar tendency is apparent in the powers granted to commissions in state governments. For example, civil service commissions, public utility commissions, state boards of health, and boards of edu-

[7] John A. Fairlie, "Administrative Legislation," *Michigan Law Review* (January, 1920), vol. xviii, pp. 181-182.

[8] *Ibid.*, p. 181; and Roscoe Pound, "The Growth of Administrative Justice," *Wisconsin Law Review*, vol. ii, p. 321.

[9] John Preston Comer, *Legislative Functions of National Administrative Authorities* (Columbia University Press, 1927), pp. 14-15.

cation have been authorized to issue rules having the force and effect of laws. When, as in Illinois and New Jersey, this authority is extended to the determination of the salaries and duties of subordinate officers, a practice is inaugurated which restricts legislative power over administrative details. How far this practice will be extended and what effect it will eventually have on administrative organization and personnel, it is difficult to surmise. That the movement toward the centralization and the concentration of powers is in part being counteracted by tendencies in the opposite direction will be indicated in the following chapter.

Problems Connected with the Growth of Administrative Law[10]

The development of Anglo-American law has been greatly influenced by certain theories and doctrines which have directed and conditioned the evolution of administrative law. Foremost among these are the political and legal theory of the separation of governmental powers and a juridical doctrine relating to the nature and scope of law itself. Briefly, the theory of the separation of powers, which is commonly announced as a fundamental principle of American constitutional law, and is implicit in some phases of English law, is to the effect that laws are made by the legislature, executed by the executive, and interpreted and applied by the courts. As a correlative of this doctrine, it is understood as essential that none of these departments may delegate powers which properly belong to it to either of the other departments, in order that, as the Massachusetts constitution expresses it, "there shall be a government of laws and not of men."

The juridical doctrine referred to is one which has profoundly affected legal thinking in all Anglo-American jurisdictions. According to it, that is law which is juridically permissible, or, as it is commonly expressed, law is comprised of those rules which are accepted and applied by the courts. In the language of such eminent interpreters of legal thought as Justice Holmes and Judge Salmond, law is a prediction of what the courts or judges will do when a controversy arises. As far as Anglo-American law is concerned, the theory of the separation of powers, which is typically American, and the juridical doctrine as to the nature of law, along with the practical adjustments which resulted therefrom, were formulated before administrative law

[10] Parts of this chapter have been taken, with the permission of the editor, from an article by Charles Grove Haines, "Effects of the Growth of Administrative Law upon Traditional Anglo-American Legal Theories and Practices," *American Political Science Review* (October, 1932), vol. xxvii, pp. 875 ff.

had developed sufficiently to affect legal theories and practices to any appreciable degree.

Delegated Legislation.—With the increase in the functions of government, and with the extension of administration into the fields of social and economic life, the establishment of boards, commissions, and commissioners to carry out the duties either of the legislature or of the executive ran counter to the strict distribution of governmental powers as deemed necessary by the principle of separation of powers formulated or implied as a constitutional principle. Hence the delegation of subordinate legislative functions and the transfer of their administration to executive boards and commissions specially established for the purpose either were checked and rendered impotent for the time being or were forced to function in a roundabout manner so as to avoid the strict division of powers supposed to be enshrined in the constitutional principle of separation. But the legislative departments and the executive officers, in carrying out their functions, found it necessary to delegate more and more authority to administrative officers, and the theory of the separation of powers has had to be interpreted gradually so as to permit a combination of powers and functions deemed impossible under a strict interpretation of the separation theory. Contrary to the insistence of many legal writers and judges that the principles of Anglo-American law were opposed to the growth of administrative law, it has found a secure place in these systems.

Just as the theory of the separation of powers proved inadequate and inapplicable to the new and complex conditions which developed in the latter part of the nineteenth century, so the juridical doctrine that law is only that which the courts interpret and apply as such has proved to be unsuited and impractical in the developments which have come within the last few decades. Relatively new social and economic conditions have required a revision of the doctrines and ideas underlying the interpretation and application of law. A fundamental dictum which is associated with the juridical doctrine is that the people make their laws through elected representatives and independent judges administer them. But do judges actually administer law? Can the negative attitude in which the courts wait until controversies arise and are brought to them for adjustment be considered as a satisfactory method of law administration? The ideal of the judges operating under the juridical doctrine is that a body of systematized and well-coordinated case law is available for the determination of controversies as they arise. But the manifold activities and interests which have accompanied the growth of population and the development of large urban centers, with their increasing complications and complexities, result in frequent difficulties and controversies for which no

adequate solution is available through the formulated system of case law. In short, neither the old and consecrated doctrine of the separation of powers nor the juridical doctrine that law is comprised of the rules applied by the judges is suitable to control and to circumscribe the development of law under the conditions now prevailing.

Certain potent facts in modern political practice render apparent the inadequacy of the old theories and doctrines. In the first place, among the chief law-making agencies in both England and the United States, as well as in continental European countries, are administrative officers, boards, and commissions. About five times the quantity of legislation enacted by the English Parliament, it is claimed, is issued in the form of delegated legislation through executive departments, boards, and commissions authorized to participate in legislative activities; and the published rules and regulations by no means include all of the rules which administrative officers formulate and apply in performing the functions intrusted to them. There is a growing quantity of delegated legislation in the United States. To what extent this delegated legislation exceeds the amount of legislation now issuing from legislative bodies cannot be determined, but in view of the numerous officers, boards, and commissions authorized to make administrative orders, rules, and regulations, it is obvious that in the United States the amount of such delegated legislation approximates that enacted by the federal and state assemblies. Moreover, it is apparent that in the establishment and extension of the authority of administrative officers, all of the powers of government—legislative, executive, and judicial—are not infrequently combined. In other words, the doctrine of the separation of powers embodied in constitutions manifestly has not interfered seriously, or for a long time, in the general movement to establish administrative authorities with legislative, executive, and judicial powers.

The most significant fact connected with this development has been the tendency to place final and conclusive authority in the hands of administrative officers, and thereby to exclude from the control of the judiciary a continually widening field of governmental authority. One may argue that in this development the orders, rules, and regulations and the administrative decisions rendered therewith which have, to all intents and purposes, the effect of law, as far as the relations of the citizens are concerned, are not really laws. But, as Mr. Robson observes in the case of England, it is scarcely possible to exclude this extensive field of effective regulations from the domain of law, if the term is to have any practical significance in modern life. The result, then, is that in the field of administration the separation of powers has apparently little application, and that law is made on an extensive scale, not as formerly when deemed necessary by

courts and judges, but by administrative officers who are granted the authority to make, interpret, and apply regulations which have the force of law.

An example of such administrative powers, quite common in the efforts to regulate industrial conditions, is found in the legislative provision in a workmen's compensation act that the employer shall furnish *a safe working place* for his employees, a violation of which is rendered punishable by fine or imprisonment. The authority to make general or special orders prescribing *standards of safety* in particular employments is confided to the commission established by the act. Through consultation and cooperation with the industries affected, safety orders are made and promulgated. Commission inspectors check whether the orders are obeyed and institute criminal proceedings when employers refuse to install the necessary appliances to carry out the requirements of the order. Courts participate in the process only when representatives of the commission and the employers cannot adjust their differences so far as the administration of the order is concerned. In practice, few criminal prosecutions are necessary, since such safety orders are quite generally enforced through administrative proceedings.

An early approval of broad administrative powers is found in the first statutes providing for the commissioner of the General Land Office in the United States. From the beginning, the commissioner was authorized to give instructions as to the proper construction of the land laws. Such instructions were not always deemed binding, but they established the executive construction of the acts which the courts frequently followed. In the disposal of controversies which have arisen under the land laws, an unusual degree of concentration of authority has been approved. The commissioner, in one of his annual reports, notes that when an issue arises it is his duty to prepare the charge on which an action is based, his agents collect the evidence and present it at a hearing which he orders, and "officers subordinate and answerable to him preside at the trial, find the facts, and declare the law." In the hearing of such cases, the department is governed very largely by its own rules, regulations, and unwritten customs. The department, it is claimed, is much more consciously making law by its decisions than are the courts. "A large part of its work," according to Mr. McClintock, "is the preparation of rules and regulations which manifestly are laws, and naturally the principles stated in its decisions, prepared in the same office and largely by the same men, and printed in the same reports, come to be regarded as part of the legislative work of the department."[11] It is Mr.

[11] Henry L. McClintock, "The Administrative Determination of Land Controversies," *Minnesota Law Review* (April, 1925), vol. ix, pp. 420, 641.

McClintock's judgment that the department has succeeded in providing speedy and cheap settlement of controversies in a large number of cases while preserving to a great degree the safeguards of administration by courts of law.

So significant have been the facts referred to that criticism is rife regarding what is termed by the Lord Chief Justice of England "administrative lawlessness,"[12] and by an Oxford scholar "bureaucracy triumphant."[13] Eminent authorities in England and in the United States have joined in the criticisms of the trend toward government by commissions or administrative officers. There has been a widely expressed fear that the modern tendencies in administrative law are resulting in confusion in the meaning and application of the legal conception of the sovereignty of the state. These critics have deplored the fact that the extraordinary growth of administrative legislation and its execution are profoundly changing the two concepts on which the English system of law is presumed to be based, namely, the sovereignty of Parliament and the rule of law. We are building, in the opinion of these critics, an administrative despotism on the ruins of both of these concepts. It appears to be all the more alarming to the opponents of the growth of administrative law that the prevailing method followed is to use the sovereignty of Parliament to enthrone administrative officers and oust the jurisdiction of the courts.

The critics are prone to compare judicial procedure with administrative procedure, and to contrast the administrative mind with the judicial mind. To the latter, it is claimed, justice depends upon hearing, evidence, cross examination, and a judgment presumed to follow known rules or principles. Legal discretion, as they see it, distinguished from administrative discretion, is informed by tradition, methodized by analogy, disciplined by system, and subordinated to the necessity of order in the social life. As over against these characteristics of the judicial attitude, it is pointed out that no one can fail to be impressed by the volume of evidence of a growing arbitrariness of temper on the part of government departments which contradicts elementary principles of justice. Many agree with Federal Judge Hutcheson, who criticized the administrative proceedings in a deportation case, in which one man acted as inquisitor, interpreter, prosecutor, and judge, as a hearing "stripped of the conditions which make for justice."

The essentials of court procedure, such as the insistence on first-hand evidence, appearance of witnesses in person, necessity of prov-

[12] Lord Hewart, *The New Despotism* (Benn Brothers, 1929).

[13] Carlton Kemp Allen, *Bureaucracy Triumphant* (Oxford University Press, 1931).

ing formally every document and every fact in issue, with pleadings formulated in technical language, and the employment of counsel, are deemed prerequisites for much of the procedure which now is carried out informally and summarily by administrative officers. There appears at times to be an assumption that every tribunal which does not form a part of the recognized system of courts necessarily acts in an arbitrary and incompetent manner, and in such a way as to be injurious to the citizen. The very essence of legal procedure as comprised in the tendencies toward uniformity, equality, and certainty is deemed to be lacking in the administrative procedure which is growing more common among the commissions and officers set up to administer many of the laws enacted by our legislatures.

Reasons for Growth of Administrative Procedure.—Despite these insistent, and at times trenchant, criticisms of administrative practice and procedure, why has there been such an amazing growth of administrative justice within the last few decades? The reasons are fairly obvious to anyone who analyzes recent tendencies in governmental developments. In the first place, the attributes of a good legal system are presumed to be incorruptible and impartial judges administering law accurately and founded on recognized principles, with judgments rendered quickly and justice accessible to citizens at a low cost. The courts have met to a reasonable degree the requirements of impartial judges and of administering law upon fairly well established legal principles. They have failed to meet the insistent demands that justice be rendered quickly and be made available to citizens cheaply. In order to secure quick and cheap justice, various administrative bodies, such as industrial accident boards or workmen's compensation commissions, public utility commissions, boards of tax appeals, and boards of arbitration for various purposes, have been established to supplement the ordinary and more elaborate forms and practices of judicial procedure.

A second factor which has affected the growth of administrative justice is the increasing complexity of social phenomena, controversies concerning which can be dealt with only rather clumsily and with unusual delay through the ordinary courts. A Royal Sanitary Commission, reporting in England in 1871 relative to the administrative control of boards of health in sanitary matters, called attention to the impossibility of securing satisfactory remedies through ordinary legal procedure. The commission contended that the legal process was too long and dilatory, and that the case, when brought to issue, was of such a nature that a court of law is unfitted to try it. Details of sewers and sewage, quantity and quality of water supply, capacity of works to be constructed, the mode in which refuse is removed—these and similar questions are constantly arising for consideration

and decision. A mere statement of them, in relation to the intricate facts involved, indicates that they cannot with any satisfactory result be dealt with effectively by courts of justice.

Common law judges, according to Lord Sumner, are "ill-equipped to weigh the merits of one solution of a practical question against another." The development of the social control of education, medicine, sanitary engineering, thermodynamics, and other subjects frequently highly technical, raises matters of standards and technique which are to a large degree beyond the range of the abilities and competence of lawyers and judges, unless they have had opportunities to specialize in the field concerned. The difficulties along this line have been faced frankly at times when judges have pointed out their inability and relative unfitness to handle satisfactorily the complicated problems which arise in such a field as the regulation of railroads. The sheer extent and complexity of the field of public utility regulation has rendered it necessary to establish such commissions as the Interstate Commerce Commission, state public utility commissions, and separate railway boards.

The supreme court of Wisconsin referred to the public utility commission as "composed of experts in their field, who are equipped, by reason of their office, their experience, and the nature of their work, with special qualifications to perform the administrative duties devolved upon them by statute. They also possess facilities enhancing their ability to properly perform them which are not ordinarily possessed by individuals or even the courts."[14] Those who spend all of their time in the analysis of the problems that arise in utility regulation can only with great care and trepidation analyze and weigh the involved relations and factors which arise in such a matter as a rate controversy. In the number of cases and their significance in relation to the community, these utility boards or public utility commissions are called upon to do a type and quality of work often of greater consequence than the issues which normally arise in courts of justice. A recent commentator observes: "The sweep of the jurisdiction thus confided to the Interstate Commerce Commission is seldom realized. The monetary stake is frequently tremendous. In the 1920 rate case, the advances sought and authorized by the Commission were estimated to amount to more than $1,000,000,000 per annum. The reductions in the rate case of 1922 were estimated to amount to several hundred millions per annum. In the Pullman surcharge investigation, the amount at stake was approximately $35,000,000 to $40,000,000 per annum; and the amount involved in the Interchangeable Mileage Ticket case approximately $20,000,000 to $30,000,000 per annum.

[14] Commonwealth Tel. Co. *v.* Carley, 192 Wis. 464 (1927).

These proceedings are cited merely by way of illustration, though the first two cases were, of course, exceptional. Ordinarily court litigation is a mere bagatelle in point of monetary stake as compared with proceedings before the Commission, particularly when it is remembered that action by the Commission in rate cases continues to have its effect from year to year."[15]

A third reason for the development of administrative justice has arisen as a result of the extension of governmental functions in the effort to control economic and social conditions. It is in behalf of this control that there has been turned over to various officers and boards the task of establishing new standards along lines wherein courts of justice would have been unable to function effectively. In the transportation field, boards or commissions have been charged with the duty of insuring adequate service, preventing undue preference and prejudice, and assuring a reasonable return on investments. The formation of new standards in such unexplored fields has required something more than technical knowledge. To determine what constituted reasonable service for a public utility required not only a knowledge of some of the rules and policies formulated over a long term of years by the legislatures and courts, but also special familiarity with the conditions and responsibilities of a public service corporation operating in the midst of an economic, social, and industrial environment of which common law judges had little cognizance. A greater reliance upon standards and less reliance on rules is an inevitable result when the emphasis changes from the preservation of property and contracts, with the consequent enforcement of individual rights, to a condition in which concepts of administration of services in the public interest dominate certain phases of economic life. The formulation of standards becomes a matter of primary concern when social policies are adopted for the promotion of the public health, the improvement of housing facilities, and the mitigation of the conditions of poverty and unemployment.

In short, it is recognized more fully today that statutes acquire meaning and precision from the sense and experience of the men who apply them, and it is for this reason that it is urged that greater weight be given to "the judgment of a tribunal appointed by law and informed by experience." In administrative decisions, more significance is likely to be given to imponderables. Administrative officers are perhaps more disposed than judges to express, in the words of Justice Holmes, "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth." It

[15] Henry W. Biklé, "Justice Brandeis and the Regulation of Railroads," *Harvard Law Review* (November, 1931), vol. xlv, p. 12.

is in certain fields such as the juvenile courts and various specialized tribunals that the intuition of the administrator, if given a reasonable opportunity, is likely to arrive at more effective and more reasonable results than the formal procedure of courts of justice permits. Both the increasing complexity of phenomena, to which reference has been made, and the growing tendency for the government to regulate social and economic conditions render it particularly important that administrative officers or boards develop new standards and work out the various interrelations that result from their application.

A fourth factor which has influenced the development of administrative justice is inherent in the very organization and procedure of a legal system. The legal approach to problems is necessarily static, unprogressive, *laissez faire*. A court can intervene only when a conflict or controversy arises. It can move in the direction of the adjustment of the controversy and its function ends. The difficulties that may arise from the decision, the complications that follow, and the interrelations involved, are beyond the scope of the court's jurisdiction or action except in so far as subsequent controversies arise for determination. And it is a notorious fact that legal controversies arise, are fostered, and are prosecuted through the courts in the atmosphere and spirit of a litigious fringe of any social group. The great majority of the group manage to adjust their differences or suffer serious losses or inconveniences rather than turn to the courts for relief.

A changing society demands to a greater degree a progressive attitude and an adaptation of policies to meet different conditions. Administrators are not bound by precedent, and they are not confined to negative action. It is part of their duty and function to formulate policies, to develop administrative techniques, to work out new methods of adjusting controversies, to check and modify their standards in the ordinary frictions and difficulties of everyday life, and to adjust their decisions and attitudes accordingly.[16] The administrator introduces a degree of flexibility in removing conditions which foster controversies and in cooperating with the parties concerned to settle controversies when they arise. In other words, along numerous lines constructive planning and social engineering are absolute necessities if modern society is to be able to live in peace, health, and even mod-

[16] A typical industrial accident law provides that from the date of an injury, upon notice and after opportunity to be heard, the commission may rescind, alter, or amend an order, decision, or award made by it upon good cause. The commission also has the right "to review, grant, or regrant, diminish, increase, or terminate within the limits prescribed any compensation awarded upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, decreased, or terminated." Such review is usually confined to cases in which new facts have arisen.

erately workable social conditions. Through administrative procedure alone are such planning and engineering practicable.

Finally, and in a sense summing up the preceding reasons for the growth of administrative justice, it is the increasing specialization of modern life that has rendered imperative a growth of the administration of government according to new standards and new techniques. Under these circumstances, administrative officers giving their time and attention to the special problems that arise in a limited field not only become specialists in the field, but gain a familiarity with the needs and difficulties of those for whom the laws and regulations are designed, so that they can develop governmental policies and doctrines which bring a maximum of advantage to the individuals concerned, with a minimum of expense, delay, and friction in securing prompt and necessary action.

Criticisms of Administrative Procedure.—But the growth of administrative justice in legal systems ill-adapted to the necessary procedure and technique involved has raised objections to the essential features of this type of justice. Criticisms have been directed chiefly against the device of subordinate or delegated legislation, the discretionary action or quasi-judicial determination of disputes, and the failure to recognize and follow the standard methods in making and interpreting law. It has become the custom to condemn legislative bodies for their failure to perform their necessary and so-called legitimate functions, and for the ready and easy manner by which they have delegated their duties and responsibilities to subordinate legislative and executive tribunals. A noted English historian laments that "many modern statutes are mere *cadres* giving no adequate indication of their ultimate scope. They lay down general rules and leave it to the departments concerned to give substance to the legislative skeleton by issuance of administrative orders." In most instances of this kind, it is contended, Parliament maintains a merely formal control which has little practical consequence. Lord Chief Justice Hewart argues that the ordinary reasons offered for an extension of delegated legislation, such as urgent action to meet a national emergency, the pressure of time upon the House of Commons rendering it impractical to become familiar with the multitude of details involved in an effort to make statutes complete in all particulars, the inability of members of Parliament to become familiar with the technical details necessary to a complete legislative program, and the need of greater flexibility in the rules governing social relationship so as to permit the carrying out of experiments, are nothing else than "a well-thought-out plan, the object and the effect of which are to clothe the department with despotic powers."

Regardless of such criticisms, subordinate or delegated legislation

has become a necessity. Legislative bodies, in spite of any intentions to the contrary, cannot confine their attention to anything else than the substantial provisions of acts, and they are compelled to leave the details to be settled departmentally. Even if legislators have the ability and aptitude to deal with the many technical matters which must be determined before a legislative policy or program can be formulated, or if they can command for their purposes the best of advice, the real details which give life and vigor to a law cannot be phrased in its actual implications in the statute or the code. Administrators must breathe into it the breath of life. Moreover, legislatures meet intermittently, while governments must go on and, if need be, emergencies must be met. Delegated legislation permits experiments to be carried out in a way that would be impossible by means of the slow methods of parliamentary enactments. "No one who looks at a collection of the annual output of delegated legislation," says Mr. Carr, "can seriously propose that Parliament should now cancel the concession of legislative power and should undertake for the future under its own direct authority all the legislative authorities which at present are left to His Majesty in Council or to the various public departments."[17]

The chief problem today is not how to prevent or check rule-making and government by department leaders, but how to devise effective and adequate supervision. It is obvious that there must be limits to the extent to which delegated legislation can supersede or supplement the work of the "sovereign" assembly. But what these limits should be is very difficult to determine. The conditions under which regulations may be made by an administrative officer may be defined in detail, and the courts may review the process under the doctrine of *ultra vires*. If such review is prevented, the legislative assembly alone can check extreme arbitrariness or officiousness. The present situation is well summed up by Elihu Root in the comment: "The old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong-doing which, under our new social and industrial conditions, cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."

With the multiplicity of duties and functions of administrative officers, and the growing difficulties in exercising any effective control either by the legislatures or by the courts, it becomes imperative to develop a spirit of professionalism among the administrators them-

[17] Cecil T. Carr, *op. cit.*, p. 21.

selves, and to provide machinery and develop standards by which they control and discipline themselves. Perhaps the ultimate outcome must be a series of administrative boards of review or courts, with an appeal to a supreme administrative tribunal, somewhat similar to the French Council of State.

Even more insistent objections than those hitherto raised against the tendency to rely on the practice of delegated legislation are directed against the discretionary and quasi-judicial determinations of administrative officers. Investing administrators with discretionary authority affecting the private rights of the citizen is common in assessing and collecting taxes, in declaring and abating nuisances for sanitary and health purposes, in the enforcement of immigration and deportation proceedings, and to a limited degree in most statutes designed to regulate the licensing of a business or a profession. Sometimes such discretionary authority is deemed an incident to the authority to remove public officers. To an enhanced degree, legislative acts lay down policies of safety, fairness, or reasonableness for types of human conduct, and administrative officers are accorded a considerable latitude of discretion in determining permissible lines of conduct in accordance with predetermined standards.

A large part of administrative law in the United States concerns the gradual process of overcoming the objections of judges who conceived the separation of powers doctrine in a narrow and formal spirit and placed obstacles in the way either of delegating administrative powers or of investing executive agents with discretionary authority. The granting of such authority—judicial, or quasi-judicial, as it is often called—so as not to come within the scope of the theory of the separation of powers, was deemed frequently to invade the function of the judiciary, and until rather recent times courts looked askance at such a seeming violation of the separation theory.

Administrative Finality.—One of the most disturbing tendencies in administrative law, to those who are partial to the rule of law and its implications, is the feature of recent statutes which prevents recourse to the courts to review alleged arbitrary action. This practice is not entirely new, for as early as 1885 Congress passed a law authorizing payment, after examination by the accounting officers of the Treasury, of claims for property belonging to officers and enlisted men and lost or destroyed in the military service.[18] According to a proviso of the act, "any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened and considered." Such a proviso, Justice Brandeis held, expresses clearly "the intention to confer upon

[18] 23 *Stat.* C. 335.

the Treasury Department exclusive jurisdiction and to make its decision final."[19] In England, this tendency is indicated in the enactment of statutes which exclude the doctrine of *ultra vires* by means of a provision that "rules made under this act shall have the same effect as if enacted in this act." This provision has been held to preclude the courts from scrutinizing administrative orders.

Extreme instances of administrative finality may be cited, such as the workmen's compensation act of Ontario whereby the action or decision of the board shall be final and conclusive, and shall not be open to question or review in any court, and no proceedings by the board may be restrained by injunction, prohibition, or other process in any court, or be removable by *certiorari* or otherwise into any court. Thousands of cases are determined in a single year under this act, and the parties must accept the administrative decisions as final. Similarly, English acts defining the authority of the Ministry of Labor under the Unemployment Insurance Plan established an elaborate system of tribunals charged with the statutory task of determining intricate questions of fact and points of law. The decisions of the officers of the department are declared final, and no appeal is permitted to the courts. It was this type of act which led Justice Darling to protest that the section in question "gave an order made by a public department the absolute finality and effect of an act of Parliament. . . . Here there was a public department put in a position of absolute supremacy . . . and they could only say that Parliament had enacted only last year that the Board of Agriculture in acting as they did should be no more impeachable than Parliament itself."[20]

In the United States, a recent Oregon statute reorganizing the system for the regulation of public utilities prescribed that the commissioner of public utilities shall be appointed by the governor and may be removed by him "for any cause deemed by him sufficient," and the clause is added that "such power of removal shall be absolute, and there shall be no right of review of the same in any court whatsoever."[21]

The chief purpose of continental administrative law is "to set bounds to bureaucratic action." Whereas in France and Germany there is a tendency to extend the control of the courts over the admin-

[19] United States *v.* Babcock, 250 U. S. 328 (1918).

[20] *Ex parte* Ringer, 25 *Times Law Reports*, 718 (1909). According to the Small Holdings Act, 1908, 39 (3), orders "when confirmed shall become final and have effect as if enacted in this act; and the confirmation shall be conclusive evidence that the requirements of this act have been complied with and that the order has been duly made and is within the powers of this act."

[21] *Laws*, 1931, chap. ciii, secs. 61-102.

istration, in England and in the United States one of the main objects has been to remove administrative action from the control of the courts. An example illustrates the recent tendency in England. A department attempted by a regulation to prevent a subject from taking proceedings before a court of law to recover the possession of his premises, and endeavored by the same regulation to make the mere act of taking such proceedings a penal offense.[22] It is the extension of the principle of administrative finality, with prevention of the opportunity to appeal to the courts or to follow the procedure of judicial justice, that appears most alarming, though it is rather the principle of finality than actual instances of arbitrariness or injustice that seems to have called forth the severest strictures.

Whether one may be friendly toward administrative practices and procedure and may deem advantageous the mode of justice which results from such procedure, or may be disposed to condemn so-called "administrative justice," it is apparent that the main features of administrative law, either of the continental or of the Anglo-American type, must be deemed as more than a passing characteristic of modern legal systems. And it is well to consider what are some of the effects, particularly on Anglo-American traditional legal concepts, of the new administrative justice.

In the first place, a definition of law which excludes the rules, regulations, and decisions of administrative officers is in need of revision. Administrative rules and regulations have for a long time had a sort of back-door admittance to the concept of the law. When such officers "fill up the details of the statute," or make public regulations "interpreting the statute and directing the details of its execution," such traditionalists as Chief Justice Taft approved the process and gave their sanction to these rules because they were deemed to be carrying out the intention of the legislature. But unless we can delude ourselves by a series of legal fictions, such an explanation does not account for the most significant functions of administrative officers. And some realistic interpreters of legal phenomena are willing to find a legitimate place in a legal system for administrative law. Professor Llewellyn believes that "more often than not administrative action is, to the layman affected, the last expression of the law on the case. In such a situation, I think it highly useful to regard it as the law on the case."[23]

But those who are inclined to follow the modified Austinian approach to the definition of law think that the term "law" cannot be

[22] Chester *v.* Bateson [1920] 1 K. B., 829.

[23] Karl N. Llewellyn, "A Realistic Jurisprudence," *Columbia Law Review* (April, 1930), vol. xxx, pp. 431, 455.

so broadened without losing its real significance.[24] Is the preservation of the sacred precincts of the law as Austinians conceive it the really important desideratum? Rather, may we not think of law as an ever-widening concept in which equity, formerly beyond its confines, is admitted, and administrative justice, originally outside of its scope, may now be deemed as having gained a reputable status of admission into the realm?

Arbitral Methods in Administrative Justice.—Modern theory and practice are inclined to regard as law rules applied in a definite and systematic manner by umpires, by arbitrators, as well as by quasi-judicial administrators.[25] The decisions of umpires and arbitrators may be purely individual or personal, as indeed judicial judgments may be; or they may be according to customary ways of judging human conduct, and may follow well-known criteria for analyzing the evidence and issues of a controversy. Why may not the latter mode of procedure be included within the realm of law?[26]

In England, extensive use of arbitration is made in administrative procedure under the common law, under the Arbitration Act of 1889, and under special statutory provisions relating to the housing of the working classes, to workmen's compensation, and to public health. The whole process is under the supervision of the courts, and the awards are enforcible by judicial procedure. In many cases an arbitrator is appointed for the special controversy. Sometimes an attempt is made to get a speedy and summary reference to a tribunal having practical knowledge of the subject, as in the provisions for a railway rates tribunal consisting of a business man, a railway expert, and a lawyer. Even the general conviction of the necessity of sanctions to make administrative law effective is undergoing change. The English Industrial Court, established in 1919 to adjudicate controversies between employers and employees, was granted no power to enforce its awards. Yet its awards have invariably been put into effect, and the court is "building up a definite body of economic jurisprudence which is applied effectively without any external sanctions."

That much of the procedure and practice of these administrative bodies may be regarded as coming within the range of law is a conviction that is growing among authorities who have become cognizant

[24] See John Dickinson, "Legal Rules: Their Function in the Process of Decision," *University of Pennsylvania Law Review* (May and June, 1931), vol. lxxix, p. 835.

[25] See especially Herman U. Kantorowicz and Edwin W. Patterson, "Legal Science, A Summary of its Methodology," *Columbia Law Review* (June, 1928), vol. xxviii, pp. 679 ff.

[26] On the tendency of arbitrators to regard themselves as controlled by law rather than to be guided by personal considerations, see Jackson H. Ralston, *International Arbitration from Athens to Locarno* (Stanford Press, 1929).

of the prevailing tendencies. Thus Mr. Robson observes: "If we would keep to a true view of the judicial function, we must include within its ambit the activities of all those persons other than judges who have at one time or another to decide controversies, great or small, even where no legally enforcible right is concerned. Everyone must to some extent feel himself to be a judge when his decision is sought by two friends in momentary dispute, whether they be a couple of business men who have fallen out about a contract or a boy and girl quarreling over a toy. The question whether the rights in issue are legal rights or moral rights or natural rights (if such exist!) is immaterial. There are more judges under high heaven than those who sit in courts. On this view, then, we can conceive a *lis inter partes* existing whenever a person finds himself called upon to decide a controversy between others, whether he is an administrative official, or a business man, or a peacemaker among friends."[27]

A great deal of the administrative justice of the future is likely to be concerned with the settlement of disputes in which the enforcement of the decision will depend more on its voluntary acceptance by the parties than on effective penal sanctions exerted by the police. This is particularly the case in controversies within the economic sphere, where anything in the nature of specific enforcement imposed by coercion is often impossible. Thus it will be found that, on the ground which lies midway between formal litigation on the one hand and arbitration by agreement on the other, some effort to obtain voluntary submission to the findings of the tribunal must frequently be sought; and where this is the case, the inclusion of representative members on the tribunal is desirable. The success of the English Railway Wages Board, which is a purely advisory body without direct powers of enforcement, is essentially dependent on the appointment of representatives of the trade unions and the railway companies as members of the board. The remarkable growth in scope and power of the work of the Industrial Court, which is also based on the principle of voluntary acceptance, or self-enforcement of the award, is full of significance in this connection, for the Industrial Court is composed of representative membership under a neutral chairman.[28]

Justice Rosenberry says of the authority of the commissioner of insurance in Wisconsin: "The change is fundamental because the law, at least in some of its aspects, no longer emanates from the legislature, is no longer wholly declared and enforced by the courts; and to the extent that this is true, we have departed from the fundamental principles upon which our political institutions rest. . . . The

[27] William A. Robson, *Justice and Administrative Law* (The Macmillan Company, 1928), pp. 72, 73. By permission of the publishers.

[28] *Ibid.*, p. 298.

regulation made by the administrative officers answers every definition of law. The regulation prescribes a rule of future conduct, compliance with which may be enforced in a court of law. . . . It leads only to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power."

In fact-finding powers, most administrative agencies follow substantially the procedure of courts. A refusal to recognize the facts as they exist, and to give administrative law its rightful place in our legal theory, in Justice Rosenberry's opinion, has prevented a logical and symmetrical development of the law.[29]

It is not difficult to see in the modern administrator who makes the law which he enforces, and acts as a judge in a preliminary way when cases arising under it are adjudicated, a replica of the prætor, an officer who made a distinct and lasting contribution to Roman jurisprudence. Among the prætor's manifold duties and responsibilities, he was authorized, first, to deny to a person having a legal right his proper remedy (that is, he could recognize what in modern terminology would be called equitable defenses); second, he could give old actions to persons having no legal rights, or introduce entirely new actions; and, third, he sat as a judge to investigate and determine disputes.

The sources of his wide powers were the *jurisdictio* and *imperium*. The former gave him permission to determine whether a case should be brought into court. For the hearing of a case, he appointed an arbitrator, defined the law under which the umpire conducted the hearing, and later gave effect to the arbitrator's decisions, the latter giving him legislative, as distinct from administrative, authority. It has been said of him: "His right to alter the law was openly acknowledged, but it was not unlimited. He was surrounded by a firm, though invisible and somewhat elastic, band. He was checked by public opinion, and by the probability of having to answer for his conduct on demitting office. He may be viewed as the keeper of the conscience of the Roman people, as the person that was to determine in what cases strict law was to give way to natural justice."[30]

The prætor was not hampered by a fine-spun theory of the separation of powers. He could make and apply law to meet the needs of the communities he was expected to serve. Prætorian law has some significant characteristics in common with modern administrative law. Continental systems of administrative law have profited by the Roman model, and have not permitted a formal and mechanical theory of the

[29] State *ex rel.* Wis. Inspection Bureau *v.* Whitman, 196 Wis. 472 (1928).

[30] William A. Hunter, *A Short History of Roman Law* (Sweet & Maxwell, 1902), 4th ed., p. 42.

separation of powers to interfere with administrative concentration of authority.

It is in Anglo-American jurisdictions, and primarily in the United States, that the most marked contrasts have been fostered between judicial justice, presumed to be based upon rules and principles and furnishing norms according to which any case or controversy can be decided, and administrative justice, believed to be based upon custom, expediency, community sentiment, and following in practice an inspired officialism. It is perhaps not fully recognized that whether a man acts as a judge or as an administrator, his mental attitude and approach to the settlement of controversies will follow certain well-defined and predetermined criteria and standards, and that the individual and personal element is likely to play a minor rôle. The extent to which mental judgments and choices are confined and analyzed by the merely normal conditions and processes of thinking has been overlooked in the appraisal of administrative action. On the other hand, the relatively large rôle of individual views and reactions in their effects on judicial justice has been minimized.

Advantages and Disadvantages of Administrative Justice.— The advantages and disadvantages of administrative justice may be estimated by comparing the characteristics of judicial justice with those of administrative justice. Among the principles and features of judicial justice are generally understood to be the principle of judicial independence and permanent judicial tenure. It is expected that judges will be guided by rules and principles, will have no personal interest in the cause, and will consider a case only in a suit between parties, a *lis inter partes*. When acting in this capacity, the judge is not liable for his action, whether wrongful, malicious, or corrupt. The proceedings of the trial must be public and according to known and established procedure. The judgment is to be in accordance with the evidence.

Administrative justice, on the other hand, is characterized by a hierarchy of authorities in which the officers performing administrative functions are usually subordinate to higher authorities. Such positions are generally subject to change more or less frequently. In administrative proceedings, rules and principles are likely to have less weight, and personality more. These officers are to a limited extent subject to the review of the courts for neglect of duty or abuse of authority, either through a review of the action of the officer or for liability for damages in case of error or mistake. Administrators usually have a personal interest in the cause they are considering. They may delegate their duties, and they may initiate action on their own motion. They have a continuing responsibility for results. In the hearing or trial of cases, they may act in certain respects without

evidence or against the evidence, and may accept testimony not admissible in a court of law. They may establish standards of evidence of their own. With respect to such hearings, they are liable to review by the courts (except in the instances where their actions are made final and conclusive). Judicial review of quasi-judicial administrative action is usually confined to a consideration of questions of law or of extreme abuse of authority, and as a rule such review is sought in relatively few cases.

The chief advantages of administrative tribunals are deemed to be cheaper justice (particularly to litigants), speedy determination of issues, facilities for settling a controversy or fixing a policy which result from experience in the special field. In this respect they have an advantage over courts of law, which have few facilities for acquiring information on the details of social phenomena. Administrative tribunals have the advantage of flexibility in the discharge of their functions, being less hampered than judges by technical principles of law or judicial precedents. They have the authority and duty to formulate and adopt policies which tend toward improvement in administrative methods and in the control of social relationships.

The disadvantages of administrative tribunals are that their proceedings commonly lack publicity and their decisions are seldom published. The failure to give reasons for their decisions or to publish reports frequently renders informed criticism of their decisions very difficult. The sheer necessity of speed in the determination of cases is likely to mean that facts may not be investigated fully. Where judicial review is not actively exercised, or professional criticism and check of administrative action by administrative courts or boards is not provided for, there is a distinct tendency for administrators to assume an attitude of arbitrariness and officiousness. Experience has demonstrated, however, that these difficulties may be met without any radical changes in administrative organization and procedure.

Much of the criticism directed against the present practices and procedure before administrative officers seems to be inspired by an idealization of the common legal methods of adherence to precedent, and of the use of logic in the process of the rationalization of judgments rendered. Referring to the powers allotted to the Federal Trade Commission in the United States, Mr. Henderson observes: "I do not see how this important duty can be performed, unless the Commission is ready to publish its decisions in such form that the reader can tell what has been decided and by what reasoning the decision is supported."[31]

[31] Gerard C. Henderson, *The Federal Trade Commission* (Yale University Press, 1925), p. 336.

But what would the publication of decisions and the attempts to rationalize the processes of thinking involved, mean? It would mean the building up of cases as precedents, the effort to develop doctrines and principles into a logical and symmetrical system, and a tendency to emphasize the formal processes of thought concerned, with annotations, digests, commentaries, *ad infinitum*—all given a prominence often, perhaps, out of relation to the adjustment of individual controversies and the issues of justice or fairness arising therefrom. In continental European countries, where judges are more frankly authorized to consider cases on the basis of fairness or equity, if decisions are reported at all, they seem to conceal quite effectively the reasons for the judgments arrived at. The development of a consistent and coherent system of law is left to the commentators, text writers, and those who concern themselves with jurisprudence or doctrines.

There are no doubt fields in which a relatively high degree of certainty and formality is desirable, such as in the regulation of transportation systems, and in which the statement of reasons for the decisions rendered and the publication of reports may be deemed necessary and indispensable. But to insist upon a similar plan for the typical administrative board or commission would fasten upon its procedure the formalities and technicalities of discredited common law processes, when what is needed is the evolution of practices more expeditious and less cumbersome than formerly prevailed in chancery. Commenting on the administrative practices in connection with the application of the criminal laws, Raymond Moley notes that "administrative methods are not always clear-cut objective things that can be easily subjected to a nice scientific analysis. They are deeply involved in considerations which go to the motives of human conduct, which involve political relationships, economic forces, factors in public opinion, and in a great many well-nigh imponderable and immeasurable considerations."[82]

After all is said for and against administrative justice, a good case may be made for the tendencies which are now so apparent in Anglo-American countries, and which have heretofore resulted in the development of an efficient model of administrative organization and procedure in continental European countries. Indicative of a point of view which is now coming to be a prevalent one, the conclusions of Mr. Robson seem to give a fair appraisal of the results accomplished and the prospects to be anticipated in the enlargements and extensions of administrative justice: "The judicial power which has been

[82] *Politics and Criminal Prosecution* (Minton, Balch and Company, 1929), pp. 46, 47.

given to administrative bodies will, I believe, be exercised wisely, and the results are likely to be good. After surveying the facts with all the care and thoroughness in my power, I am convinced that administrative tribunals have accomplished, and are accomplishing, ends which are beyond the competence of our courts of law as at present constituted. Furthermore, those ends seem to me socially desirable ones which compare favorably with the selfish individual claims based on absolute legal rights to which the formal courts are so often compelled to lend ear. I believe that administrative law as it has developed in modern England is filling an urgent social need which is not met by any other branch of the law; and that there is no inherent reason, if due care and foresight are exercised, why it should be unfitted to take its place side by side with the common law and equity and statute law in the constitutional firmament of the English governmental system. I believe that administrative justice may become as well-founded and broad-based as any other kind of justice now known to us and embodied in human institutions."[33]

SUPPLEMENTARY READINGS

Local Administration

Fairlie, John A., and Kneier, Charles M., *County Government and Administration* (D. Appleton-Century Company, Inc., 130).

Bromage, Arthur U., *American County Government* (Sears Publishing Company, 1933).

Seasongood, Murray, *Local Government in the United States* (Harvard University Press, 1933).

MacDonald, Austin F., *American City Government and Administration* (Thomas Y. Crowell Company, 1929).

Crawford, Finla Goff, *Readings in American Government* (F. S. Crofts & Co., 1933), revised edition, chap. xxv.

Atkinson, R. C., "Principles of a Model County Government," Supplement to *National Municipal Review* (September, 1933), vol. xxii.

Robson, William A., *The Development of Local Government* (G. Allen and Unwin, 1931).

Administrative Law

Dickinson, John, *Administrative Justice and the Supremacy of Law* (Harvard University Press, 1927).

Carr, Cecil T., *Delegated Legislation* (Cambridge University Press, 1921).

Robson, William A., *Justice and Administrative Law* (The Macmillan Company, 1928).

Willis, John, *The Parliamentary Powers of English Government Departments* (Harvard University Press, 1933).

[33] William A. Robson, *op. cit.*, p. 324. By permission of The Macmillan Company, publishers.

Blachly, Frederick F., and Oatman, Miriam E., *The Government and Administration of Germany* (Johns Hopkins Press, 1928).

Berthélemy, H., *Traité élémentaire de Droit Administratif* (Paris, 1930), twelfth edition.

Fleiner, Fritz, *Institutionen des deutschen Verwaltungsrecht* (Tübingen, 1928), eighth edition.

CHAPTER XX

PROBLEMS OF LEGISLATIVE AND ADMINISTRATIVE DECENTRALIZATION OR DEVOLUTION

THE last few centuries have been characterized politically by the principles of centralization and unification of public powers. Administrative unity or centralization, which received its highest development in certain states, such as England and France, has been in process of general acceptance in most of the countries of the world. Where such unification or concentration of public powers has run counter to social, economic, and political traditions favorable to localism, federal government has been established as a device to give a modicum of central authority and at the same time preserve local self-government. Centralization, however, has been the tendency in governments which have adopted the federal principle of organization, as is evidenced in Australia, Canada, and the United States. The extension of the principle of centralization has been carried to such an extent and has taken such forms that there is a movement today to revert in political thinking to some of the original principles of federalism and to revive interest again in the restoration of the political life and autonomy of local units and divisions. This reaction is receiving its impetus from a revival of nationalist ideals and traditions, as is the case in Scotland, and from difficulties and weaknesses in central administration which have become more apparent as government functions have increased in breadth and scope. Certain ideas and principles favorable to the restoration of local powers are now well enough formulated to be known under the terms of decentralization, devolution, or regionalism.[1]

There was once a profound faith in what Mill called "the grand discovery of modern times—representative government," whereby parliaments as legislative assemblies were assumed to be the sole and sovereign representatives of the citizens. With Bentham, men interested in political reform believed that all persons were more or less equally endowed as to native talents and capabilities and that the differences in persons were due largely to environmental conditions over which man as an individual had but little control. These supposedly artificial differences were, however, thought to be capable

[1] A form of deconcentration of powers is sometimes advocated which would require the distribution of a considerable portion of the powers now exercised by central governments to a small number of regions or districts, with centralized administrative organization and procedure for each of the districts.

of control through an equalization of training and opportunities. To accomplish this the adoption of universal suffrage and the breakdown of social privileges were regarded as essential. It was felt that once the inequalities of the social and political heritage were overcome, men would develop their latent powers, which, in turn, would find expression through an enlightened self-interest and an improved environment.

After more than a century's experience there is prevalent a feeling of disillusionment as to the validity of some of these premises. Man as an agent of the modern highly organized industrial world possesses little inclination and finds less opportunity to modify to any appreciable extent the environment in which he finds himself. Conditions have grown increasingly complex and persons have neither the time nor the necessary educational background to perform the heavy political duties which Bentham's scheme has thrust upon them. The observation is made with respect to the English government that neither the Parliament nor the Cabinet which is responsible to it feels itself sufficiently well acquainted with the needs of the nation to perform satisfactorily the normal functions of government. The citizen also lacks confidence and respect for the representative assemblies which are supposed to guard his interests in governmental affairs. The situation in England has become so acute that various royal commissions have been authorized to investigate conditions and advisory bodies made up of persons outside of the departmental bureaucracy have been created for the purpose of assisting the administrative agencies.[2]

At the present time it frequently is difficult for the members of Parliament or even the body of permanent officials to learn what are the urgent needs and will of the nation. There is sporadic but constant direct action of citizens upon the government, operating through groups on the basis of interest. The repeated and increasing use of the closure, guillotine, or what is more euphemistically called the "allocation of time," has largely stifled the minority and reduced the necessity for Ministers to convince the opposition and the nation by reasoned argument.[3] As a result of this development, Professor Finer claims that Parliament has ceased to be a thought organization and under the lash of Ministers has become merely a will machine to carry out the dictates of the parties in power. Mr. Laski expresses a similar opinion when he says that "the independence of the private

[2] See Van-Hsuan Chiao, *Devolution in Great Britain,* Columbia University Studies in History, Economics and Public Law (1916), vol. cxxiv, chap. iv, for a résumé of various proposals for devolution in England.

[3] Herman Finer, *Representative Government and a Parliament of Industry* (Allen & Unwin, Ltd., 1923), pp. 7-12.

member has for all practical purposes disappeared. The rigidity of the party ties has notably been increased. The reality of debate has been largely impaired by the simple necessity of getting business done. It is a commonplace to note the apathy of those not actively engaged in working the machinery of party."[4]

Devolution in England

As a result of these conditions and tendencies, the demand for devolution has taken distinct form in England, where an overwhelming burden of business has devolved upon the House of Commons. This condition led as early as 1885 to suggestions toward some plan of national councils which were to be instituted for the constituent parts of the Empire, and the House of Commons was to be confined to functions of a general nature. Recently there has been a more insistent demand for devolution in England since the work of Parliament has been greatly enlarged.

It may be well to note that Parliament acts in four capacities: (1) as a local legislature for England and Scotland; (2) as a general legislature for England, Scotland, Ireland, Wales, Canada, Australia, and South Africa; (3) as a legislature for the dependent Crown colonies and protectorates; (4) as the main authority for the protection of the interests of the Empire as a whole. In addition, Parliament performs certain administrative as well as regulative functions in (1) defining the processes by which administrative bodies are to be guided and (2) supervising and controlling these bodies. The extraordinary congestion of work thus thrust upon Parliament has been considered by many select committees which have suggested ways and means of relieving the concentration of business in the hands of Parliament. Despite these committees and the various proposals considered, it is claimed that the mass of work is accumulating and that the power of the House to cope with it is diminishing. The extraordinary congestion of business in the House of Commons has had certain undesirable results, examples of which are: (1) the adoption of closure of debates; (2) legislation by reference (3) the reference of public bills to committees; (4) the reference of controversial questions to be dealt with by departments through orders in council, provisional orders, or departmental committees. This makes the departments of government intended to perform administrative functions sources of the law which they are themselves to administer.[5]

[4] Harold J. Laski, "The Problem of Administrative Areas," in *The Foundations of Sovereignty and Other Essays* (Harcourt, Brace and Company, 1921), p. 37.

[5] See J. A. Murray MacDonald, *The Case for Federal Devolution* (P. S. King, 1920).

The real problem seems to be whether England should be divided into fairly large districts or states, or whether some other form of decentralization or devolution may be devised which will give power and vitality to the local divisions through which the central government may be relieved of the existing burden of details. Some Englishmen believe that a federal system such as that prevailing in the United States is the only practical plan to distribute authority and to relieve the congestion in Parliament. Despite the seriousness of the situation in England, there is yet relatively little popular sentiment in favor of decentralization by the adoption of some form of federalism.

In commenting on the conditions tending toward devolution in England, Mr. Allen says:

> To imagine that one supreme sovereign rules from Westminster is to misunderstand completely the existing conditions of English society. We are apparently reluctant in England to abandon the Austinian doctrine of the one omnipotent indivisible sovereign, though it is discredited in most other countries, and though the facts of government and social organization increasingly militate against it. Yet it is evident that not only is the "supreme" constitutional sovereign unable in many cases to deal with measures urgently needed and long overdue, but it is quite hopeless to cope with all those complex details of civil life which affect the ordinary man's existence far more intimately than statutes of grandiose conception and comprehensive operation.[6]

More and more, Parliament is forced to delegate its powers, with the result that ever-increasing spheres of direct legislative power are being committed to subordinate authorities. A Speaker's Conference was convened in 1919 and considered carefully the need for devolution, and various proposals to accomplish this purpose. Though there was agreement as to the necessity for the adoption of some means to relieve Parliament, the conference failed to agree upon a plan to present to Parliament to remedy the situation. Various committees have since investigated the problem but no satisfactory plan has yet been devised. It is generally believed that when the Liberal or the Labor party again comes into power devolution will be one of its main objectives.[7]

The extent to which Parliament has found it necessary and desirable to delegate its functions to administrative agencies has been recently summarized in the report of a Committee on Ministers' Powers. Many instances are listed in which departments and bureaus may make rules with some such proviso that "any rules made shall be

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[6] Carlton Kemp Allen, "Decentralization and Group Government in England," *Columbia Law Review* (November, 1924), vol. xxiv, p. 722.

[7] Wan-Hsuan Chiao, *op. cit.*, pp. 275, 276.

deemed to be within the powers conferred by the act, and shall have the same force as if enacted in the said act." To an alarming degree the extraordinary increase in the number of matters to be disposed of and the complexity of the factors involved have combined to render delegations of power indispensable. Such delegations have been most extensive in connection with various divisions of the Ministry of Health.

The history of the development of the self-governing dominions bears witness to the fact that it is neither practical nor wise to attempt to govern from Westminster large communities of people imbued with English habits and traditions of self-government. Devolution here has taken the unique form of the evolution of the "autonomous colony." Wide governing powers for other colonies are delegated to the Privy Council, which within the scope of its authority issues a great mass of rules having in effect the force of law.

Noteworthy instances in which rule-making powers have been conferred upon other than legislative bodies may be found in the appointment of the Rules Committee of the Supreme Court which was authorized under the judicature acts of 1875 to make and amend rules of procedure in the courts; in the organization of public utility corporations which are granted powers to make rules as to rates, facilities, and conditions of rendering public services; and in the work of various religious and charitable associations which are allowed to make rules affecting their members. The rules imposed by such organizations, by which the members agree to be bound, may be regarded as examples of "autonomy by consent." Voluntary autonomy of this character is carried out to a much greater degree in industry, where each industry tends to form itself into a self-governing group. And associations of these groups are beginning to contest the power of the state to interfere with affairs which are regarded as within their jurisdiction and competence. Says Mr. Allen, "It is mere logomachy to say that the constitutional sovereign retains an ultimate transcendent power over all social groups; as a fact, the ordinances of industrial organizations appear as laws which do constantly govern the conditions under which the bulk of society work and trade."[8] With a growing sentiment that some system must be devised to relieve the congestion in Parliament, with the extensive development of the practice of delegating powers to administrative agencies, and with certain distinct tendencies toward a greater degree of local autonomy on the part of political subdivisions and of various economic and social groups, prevailing ideas regarding the English parliamentary system are undergoing a marked transformation.

[8] Carleton Kemp Allen, *op. cit.*, p. 725.

Regionalism in France

A similar movement against centralization and bureaucratic administration has been under way for some time in France and has recently developed into a national issue over various plans for the adoption of regionalism. There was a time when France was envied in both Europe and America on account of its administrative system. Today it is recognized that the weight of opinion has turned against this system.[9] Its chief advantages were considered to be its unity of structure and its efficiency of operation. These advantages, it is frequently claimed, have been offset by detrimental effects on the social, cultural and economic life of the nation. There is a growing resentment against an administrative system which throttles the principles of democracy, republicanism, and parliamentary government. Critics are prone to lay the blame upon the administrative set-up for the weaknesses and failures of the parliamentary regime. These critics usually favor some type of administrative reform which would give greater vitality and significance to local units of government or would inaugurate a plan of regional distribution of public powers.[10] In the opinion of students of French affairs this has tended toward confusion and inefficiency. The situation in France has been characterized in the words of Lamennais: "With centralization you have apoplexy at the center and paralysis at the extremities."

Since 1884 further centralization has taken place by grants-in-aid given on the fulfillment of conditions laid down by the central authorities. "The total result of this system," in the opinion of H. J. Laski, "is constant delay in the settlement of even small affairs of local government, an invasion of the spirit of system and routine, congestion in the central departments, and a notable falling off in local responsibility and initiative." A combination of conditions, then, has cleared the way for the formulation of plans for devolution or regionalism, and numerous efforts have been made to define and establish the confines of certain great areas with sufficient interests in common to form convenient administrative areas. The problem of liberty in France, declares Professor Barthélemy, is the problem of decentralization and the restoration of the local life and patriotism of the communes.[11]

[9] Joseph Barthélemy, *Traité élémentaire de Droit Administratif* (Paris, 1930), twelfth edition, pp. xx-xxiv.

[10] Robert K. Gooch, *Regionalism in France* (D. Appleton-Century Company, Inc., 1931), chap. iii.

[11] See Joseph Barthélemy, "Le Mouvement de décentralisation," *Revue de Droit Public* (1901), vol. xvi, pp. 114 ff.; also Jules Mihura, "Le Régionalisme," *Revue des Sciences Politiques* (June, 1920), vol. xliii, p. 351.

One of the foremost attacks upon centralization and bureaucracy is being directed by the civil servants of France. The charge is made by those who have served long in the civil service that favoritism dominates appointments to many of the higher positions of trust and that partisanship is the test of public advancement. It is one of the peculiarities of the growth of popular and representative governments that many more citizens are called into the service of the state and that they become dissatisfied with the conditions under which they are working and become militant leaders of the movement for the reform of the administrative machinery of government.

Since the centralizing tendencies of the period of the Revolution took shape in the basic features of the French administrative system there have not been lacking supporters of the cause of decentralization. Sometimes decentralization has been visualized as requiring an adoption of the principle of federalism in France. But the discussions arising in connection with both decentralization and federalism have gradually centered around the expression, regionalism. Since the establishment of the Third Republic in 1870, scores of proposals for regional adjustments in the general administrative arrangements of France have been made.[12] The inability of the regionalists to agree on any feasible plan accounts for the failure to accomplish any significant changes in the administrative organization. All of the plans would reduce the number of departments to twelve or more regions and would place considerable authority over local affairs in the hands of a regional committee.[13]

The advocates of Syndicalism in France have joined those who criticize the current conceptions of state authority and organization, and have insisted on greater opportunities for the functioning of the economic groups in the political life of the nation.[14] Syndicalist leaders not only favor a minimum of control by the government in all civic and social affairs but they also urge extreme decentralization in the political activities of their proposed state. The fact that many Syndicalists have strong anarchistic inclinations, often opposing all existing forms of government, and that the movement for regionalism has thus been identified with the programs of the extreme radical elements in French political life has militated against the acceptance of the principles of decentralization by the moderate Socialist and Liberal parties. Despite general dissatisfaction with central administrative domination in France, the efforts to increase the independence

[12] For a short analysis of the most important of these plans, see Robert K. Gooch, *op. cit.*, pp. 55 ff.

[13] See *ibid.*, chaps. v-viii, for other phases of the regionalist movement.

[14] Rodney L. Mott, "The Political Theory of Syndicalism," *Political Science Quarterly* (March, 1922), vol. xxxvii, p. 25.

of local bodies have so far failed and the tendency seems to be toward even greater concentration of authority.

Decentralization in the United States

In the efforts to counteract the feelings and sentiments of localism and particularism in the United States which frontier conditions have tended to foster, the dominant tendencies so far have been in the direction of centralization.[15] The rapid economic and industrial expansion of the country has also worked in the same direction. Along with the nationalization of economic interests has come the need for national control of economic and business conditions. Thus federal laws have been enacted to regulate monopolies and restraint of trade, to control various forms of business organization, and to condemn unfair methods of competition. The trend in the direction of centralization is also shown by the gradual extension of the policy of federal grants-in-aid. This method of aiding the states and local divisions by financial grants, which was begun in the field of education, has been extended along educational lines and has been followed in the building of roads and in various measures for social reform, such as mothers' pensions. The movement toward centralization has also resulted in various measures directed toward the fixing of standards by the federal government through the Bureau of Standards and other federal agencies. Though certain signs of a reaction against these tendencies were appearing, the movement in the direction of centralization has become more marked in the last few years than at any other time in American history. The failure of the states and local government divisions to cope with the problems of unemployment and distress due to the economic depression has led to dependence upon the federal government not only for large grants of money but also for control and direction in its distribution.

Certain difficulties and dangers have become apparent as a result of what seems to be undue centralization in the United States. There is frequently a lack of appreciation and understanding of local conditions and local sentiment; for example, the determination of the policies and practices relative to the conservation of the public lands, mineral rights, forest reserves, and other interests involved in the administration of the public domain, by officials who in many cases

[15] "It is difficult to imagine any large state where local interests are more clearly marked than they are in the United States, and one reason for there not being such a protest against centralization in the United States as there has been in England and France may be that whereas in England and France the agencies of local control have been reduced to impotence, in the United States there have been opportunities for the effective expression of regional opinion." Walter Thompson, *op. cit.*, p. 359.

live along the Atlantic seaboard and have no direct knowledge or appreciation of the situation in the western states where the public domain is located, has resulted in a great deal of ill feeling and misapprehension. In a similar way various methods and policies have been proposed for improving educational opportunities and the general social conditions of the Negro by those who are utterly unfamiliar with, and very far removed from, the real problems of Negro life.

However strong the ties of union may be and however closely the economical and industrial forces toward centralization may bind the states, the fact remains that the United States is divided into regions of vastly different historic traditions, social interests, and ideals. These differences are peculiarly marked in such divergent sections as the New England states, the southern states, and the far western states. It is not at all surprising to find that a citizen of Massachusetts can little appreciate or understand the point of view and reactions of a native Texan, just as the Texan cannot sympathize with the ways of life and attitude of a native of Massachusetts. Moreover, federal administrators are often too far removed from the people who are affected by their regulations to be in a position to deal satisfactorily with their needs. There is as a result too great a tendency to fix standards, to overemphasize routine, and to develop bureaucratic methods. It is not uncommon for federal officials to give arbitrary orders and directions in utter disregard of the different facts and circumstances which require varying methods of treatment. Regarding the difficulties inherent in the process of centralization, Professor Thompson observes that "the government in attempting to handle innumerable minute things becomes mechanical and the more mechanical a government becomes and the less able it is to deal directly with the people, the more danger there is of its becoming entangled in a mesh of red tape."[16]

Despite the marked inclinations toward federal centralization and the extension of national jurisdiction in the United States, certain tendencies show a trend in the direction of regionalism somewhat similar to the European movements. During the World War, for example, regional administrative organizations were instituted for various purposes, such as the sale of bonds, price-fixing, and the distribution of food products. The regional administrative plan was found to be the most effective form of organization for carrying out some of the great projects of both military and civil administration. Similarly, plans of regional organization have been found desirable in the administration of the national financial system through

[16] *Ibid.*, p. 367.

the Federal Reserve Board and for the consolidation of the railroads in carrying out a plan of federal control. Mr. Lippmann, who is a competent observer of American political parties and methods, is of the opinion that American parties are federal in character because the political life of America is attributable to compromises which are necessary to secure the alignment of these regional groups. Commenting on this phase of politics, he says: "The American party system in its actual working is a most extraordinary device for creating a national majority out of regional factions. The party conventions are really the scenes of the great regional battles and compromises which have to take place somewhere if federalism is to survive. The formal machinery of the American government—the Presidency, the Congress, the Courts—are much too rigid to effect the necessary adjustments."

That a new form of regionalism or devolution is in process of development in the United States is the prophecy of not a few observers of political tendencies.[17] The prediction which has been made for certain European countries that, though the nineteenth century was the century of centralization, the twentieth century will be the century of devolution, may yet prove applicable to the United States.

Effects of the Movement for Decentralization on Certain Phases of Political Thought

Those who favor decentralization or devolution are thrust back to some form of federalism. Federal government, which was once thought to be a temporary form of government that would gradually disappear as the localism and particularism on which the system was based would decline, is looming up as one of the most pregnant concepts in modern political organization. The difficulty so far has been that federal government has been considered only in terms of political areas. "Federations in the past," says Mr. Laski, "have been so naturally the outcome either of vast size on the one hand or the coalescence of historically separate communities on the other that it has been difficult not to translate our federal thought immediately into spatial terms."[18]

The growth of ideas favorable to federalism is also apparent in the plans devised to secure representation by functions or professions. Thus a kind of federalism is conceived in which the powers represented are not by districts alone but also by functional or profes-

[17] See Frederick J. Turner, "The Significance of the Section in American History," *Wisconsin History Magazine* (March, 1925), vol. viii, p. 255.

[18] Harold J. Laski, *Authority in the Modern State* (Yale University Press, 1919), pp. 384, 385.

sional groups.[19] Federalism has acquired an impetus from the growth of voluntary associations which have gradually assumed functions obligatory in character. These associations acquire authority whereby they are able to devise and enforce the conditions under which that particular vocation may be pursued.

The movement toward decentralization or devolution has also been influenced by a group of political theorists who are directing their attacks on the traditional absolutist ideas of sovereignty.

Attacks upon state sovereignty take essentially the following forms:[20]

1. The state is not superior to other essential associations in society.
2. The state is not legally independent in relation to other states.
3. The state is itself subject to rules of law or rules of right.[21]

A few criticisms relative to the traditional theories of sovereignty and of the state are of peculiar significance. A group of thinkers known as the "Pluralists" contend that no such independent and supreme power exists in any political society; that the unity and all-inclusiveness claimed for this power is, in fact, broken by the divided allegiance which men give to the various social groups to which they belong; that state authority applies to only a small part of human conduct, and that this authority is subject to specific limitations, even within this restricted field.

Moreover, two continental writers, Duguit of France and Krabbe of Holland, discarded entirely the concept of an independent and supreme power as the source and sanction of law. Duguit, whose views are the better known, for years directed his criticisms against certain fundamental notions of French jurisprudence, namely, the theory of sovereignty and the theory of natural rights.

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[19] Cf. Léon Duguit, "La représentation professionelle," *Traité de droit constitutionnel* (Paris, 1923), second edition, vol. ii, pp. 596 ff.

[20] For a comparison of the pluralistic and monistic theories of sovereignty, see *supra*, pp. 50 ff.

[21] Cf. F. W. Coker, "The Attack upon State Sovereignty," in *A History of Political Theories: Recent Times*, edited by Charles E. Merriam and H. E. Barnes (The Macmillan Company, 1924), p. 89.

Among the critics of the prevailing doctrines of sovereignty, see Léon Duguit, *Law in the Modern State* (B. W. Huebsch, Inc., 1919); H. Krabbe, *The Modern Idea of the State*, translated by George H. Sabine and Walter J. Shepard (D. Appleton-Century Company, Inc., 1922); Harold J. Laski, *The Problem of Sovereignty* (Yale University Press, 1917), *Authority in the Modern State* (Yale University Press, 1919), *The Foundations of Sovereignty and Other Essays* (Harcourt, Brace and Company, 1921); and Ernest Barker, "The Superstition of the State," *London Times Literary Supplement* (July, 1918), p. 329.

After mature reflection on the matter Duguit wrote:

> The older I become, the more I study and search into the problem of the law (*droit*), the more I am convinced that law is not a creation of the state, that it exists independent of the state, that the notion of law is altogether independent of the notion of the state and that the rule of law (*la règle de droit*) governs the state as it governs individuals. It will be seen later that this work is dominated by this idea that the state is limited in its action by the rule of law, that this ought to be the case, that it cannot be otherwise, and that the social order would be impossible if it were not so. Now, this would be impossible if law were an exclusive creation of the state or the rule of law existed only when an economic or social rule is formulated or accepted by the state.[22]

Duguit continues to defend the existence of a rule of law (*règle de droit*) which imposes itself upon the governors and the governed. Laws are essentially rules of conduct which must be observed to foster the interests of society. "Law is objective; the validity of any rule depends not upon its source or origin but upon the end which it serves. The force of government is not in itself legitimate; it is legitimate only when employed to sustain law—to guarantee cooperation towards social solidarity."[23]

Approaching the same problem from a somewhat different viewpoint, Professor Krabbe, of the University of Leyden, contends that by the logic of events an independent sovereign has become an impossibility. There is, in the opinion of Krabbe, only one ruling power —the power of law. Along with other modern juristic writers, he predicates an ethical and moral basis for law. We are convinced, he says, "that in basing the validity of law upon the sense of right we stand upon the firm foundation of fact,—only by establishing the authority of law in this manner, moreover, can full account be taken of the *ethical* character of law."[24] Finding that there is no place for a sovereign in modern society and that law may not be traced to any such source, Krabbe seeks a basis of law which is regarded as better

[22] Léon Duguit, *Traité de droit constitutionnel* (second edition, vol. i, p. 33. The French distinguish between *droit* and *loi*. Though not always clearly distinguished, *loi* is commonly used to refer to written enactments or rules, and *droit* to rules or legal ideas which are inherently just and right. A similar distinction was recognized in the Roman law as between *jus* and *lex*, and has been adopted in other legal systems. No such distinction is found in Anglo-American law.

[23] *Ibid.*, p. 33.

For a brief analysis and criticism of the recent attacks upon the theories of state sovereignty, see F. W. Coker, *op. cit.*, chap. iii.

[24] H. Krabbe, *op. cit.*, pp. 47, 48. Krabbe insists that "the whole legal system under which people live finds the basis of its authority, its binding force, and its effectiveness in the operation of the feeling or sense of right." *Ibid.*, p. 126.

fitted to the views of modern social life, and discovers it in the feelings and sentiments incident to community life.

His theory involves an insistence on the ethical foundations and emotional sanctions for law, on the theory that the real source of law is in the "sense of right" or "feeling for right." The spiritual sense of man is regarded as the support of law and legal thinking. The intellect, it is claimed, must lose its primacy in the development of law; feminine emotionalism must offset masculine intellectualism.[25] The so-called sense of right, it is contended, has binding force, and rules not based on it are not law. The inherent obligatory authority arising therefrom is due to its emanation from an absolute standard, or from what is conceived as universally valid standards of right and of law. These valid standards are built on a uniform standard of right which exists in each individual, though the idea or the expression of the sense of right may be obscured by unfavorable circumstances.[26]

In order to secure unity from a diversity of opinions as to the "sense of right," superior sanction and validity are attached to the opinion of the majority. That "rule is to be obeyed which has quantitatively the highest value." In order to render feasible the rule of the majority, it is contended that the majority sense of right must be conceded to be better for the minority than their own interpretation. There is an emphatic denial of supremacy or of superior power through organization. This is indicated in the dictum, "No power on earth can control the action of the sense of right." There is, then, no authority other than the law. Law is defined as the judgment of the community on the rightness or wrongness of conduct.

The most effective defense of the pluralist doctrine is to be found in the works of Harold J. Laski.[27] To Mr. Laski the Austinian conception of sovereignty is merely a legal fiction attractive to lawyers and those legally minded, but not in accord with the actual facts of politics and government. This form of political realism Professor Elliott describes as follows: "First, every individual act of the state can be reduced simply to the act of those in power, and commands no especial moral sanction because it is the act of the state; second, as the acts of the state are to be tested in terms of the purpose they express or fulfil, they must of necessity compete for the loyalty of individuals with the purpose of other associations as real as the state. This, I take it, is tantamount to the assertion that the political framework under which the law is made, interpreted, and administered, has

[25] *Ibid.*, p. 197.

[26] *Ibid.*, p. 88.

[27] See *The Problem of Sovereignty, Authority in the Modern State, The Foundations of Sovereignty and Other Essays,* and *The Grammar of Politics.*

no claim upon obedience quâ political framework, for it must eventually face the existence of other corporate bodies with autonomous wills of their own, with ends often distinct from its ends, and a hold on the lives of their members more secure than its hold."[28]

Most critics of former theories of sovereignty appear to be seeking certain fundamental principles as the basis of political obligation. Whether the source and sanction of political control be sought in an absolute sovereign, in some kind of general will or social force, or simply in the rule of the majority, there is an insistent demand for some criterion to pass on the efficacy or validity of political acts. Such criteria were formerly found in the theory of natural rights and in the theory of a social compact.

The recent extraordinary enlargement of state functions requires that the sovereign, if there be such, must in many of its activities be subjected to certain rules of law. At the same time a similar growth of international rules and practices requires further limitations on the sovereign, according to other legal rules. From the standpoint of those interested in the growth of international law, the traditional theory of sovereignty is condemned as a political dogma no longer in harmony with the facts of international life and "incompatible with the existence of a society of states governed by a recognized and generally observed system of international law."[29] If the sovereign be made subject to a developing body of rules of law in both private and public law, a large part of the theory of an absolute sovereign has ceased to have its former significance. Older theories of sovereignty which still retain feudal and monarchic characteristics are no longer adapted to the conditions of modern society.

"The pluralist," claims Professor Sabine, "is mainly interested in

[28] "The Politics of Mr. H. J. Laski," in *The Pragmatic Revolt in Politics* (The Macmillan Company, 1928), pp. 144, 145. Professor Elliott offers an interesting and effective criticism of Laski's doctrine. "It is curious that Mr. Laski can arrive at a conclusion which strips the majesty from law without seeing that he is rendering the very individuals helpless whom he set out to protect against the absolute sovereignty of the absorptive state. The authority he has taken from law he has given to the pseudo-individuals whom he calls corporate persons. It is true that the state is a corporation among other corporations, but its purpose is one which it alone can serve. A community in which there is a general unwillingness to accept the law arrived at by constitutional means, and in which the limits that are put upon corporate interests are those merely of survival in the general conflict, is a community not under law." Cf. *ibid.*, p. 151. Reprinted by permission of The Macmillan Company, publishers.

[29] See *Harvard Law Review* (1922-1923), vol. xxxvi, p. 395. James W. Garner, "Limitations on Sovereignty in International Relations," *American Political Science Review* (February, 1925), vol. xix, p. 1; and E. M. Borchard, "Political Theory and International Law," in *Political Theories: Recent Times* (The Macmillan Company, 1924).

a problem of practical statesmanship, the juristic control of the excessively complicated social, economic, and industrial relations of our present political situation."[30] Attack is directed against a single legislature and a centralized administration as too simple to fit a situation that has become extraordinarily complex. In a certain sense, therefore, there is a kinship among the defenders of various theories of devolution or regionalism and the opponents of the traditional theories of state sovereignty.

The doctrines of the pluralists differ from those favoring some plan of devolution in that the pluralists desire not so much the restoration of autonomy to local units as a modification of the entire structure of the state. The pluralists also desire government to be based to a much larger extent upon economic, professional, social, and religious interests than upon the basis primarily of territorial units, as the devolutionists suggest. The concepts and ideas involved in pluralism, though vague and prompted by widely different purposes and ideals, are gaining adherents. Various phases of these concepts are exhibited in features of sovietism in Russia, guild socialism in England, and syndicalism in France.[31] The philosophy of pluralism as it affects political organization has been expounded most fully by M. Duguit, who says: "Every modern country, and very notably France, is a mass of groups. We have associations, federations of associations, trade unions, financial companies, industrial companies, mining companies, insurance companies, public contractors. Each constitutes a social group with its own law of life. The theory of the modern state is therefore compelled to adapt itself to the existence of these powerful groups. It must determine a method of their coordination. It must settle their relations with the government that exercises public power."[32] The pluralists contend that these groups, rather than the present political state laid out on geographical lines, will determine the social organization of the future. According to Duguit, the rapid growth of group government renders it necessary to revise all the traditional conceptions of the sovereignty of the state. He joins with those who believe that as groups expand their interests and functions there will be less for the omnipotent sovereign and more reason to doubt whether there will be any place for such a sovereign. It is conceded, however, that there will still be a place for "a central normative power to control the organization of public services and to secure to all citizens a minimum of freedom and inde-

[30] George H. Sabine, "Pluralism: A Point of View," *American Political Science Review* (February, 1923), vol. xvii, p. 42.

[31] Cf. Walter Thompson, *op. cit.*, pp. 372 ff.

[32] Léon Duguit, *Law in the Modern State*, pp. 116-117.

pendence which will allow them to pursue their several avocations with the greatest advantage to the majority."[33]

Concentration of power has been regarded as essential to efficiency in political affairs, even though it seems not to have been generally recognized that the centralization of governmental functions is in opposition to some of the accepted ideas of democracy.[34] It may not be true in all cases, as Lord Acton suggests, that concentration of authority "corrodes the conscience, hardens the heart, and confounds the understanding" of those who hold power.[35] But it frequently happens that such concentration does give rise to an indifference toward the feelings and opinions of those for whom the power is exercised, and results, usually, in a pursual of routine methods which are apt to have a devitalizing effect on the functions and interests of the local units of government. The growth of bureaucracy does not seem to be compatible with the maintenance of certain cherished notions of the spirit of freedom and autonomy.[36]

In order to avoid some of the baneful effects of centralization in the administration of government, the device of the grant-in-aid has been used extensively. By such grants it was thought the central authority might oversee the process of administration "without that detailed interference which a jealous localism might well consider excessive." But in those activities in which the grant-in-aid has been used most frequently, such as education, public health, and transportation, it is observed that the local authorities display a woeful lack of independent energy. "They earn their grants but they do little more than earn their grants."[37] In the words of Professor Finer: "The present system of areas and distribution of functions has shown itself to be incapable of dealing economically and efficiently with the problems of public health, transportation, relief of distress, supply of motive power, education, water supply, and unhealthy areas."[38] After commenting on the fact that state socialistic experiments in France and in England have not been satisfactory to the recipients of state favors nor have they aided in securing the attachment to the state as an organ of social control of the classes benefited, Mr. Laski observes, "Social legislation has the incurable habit of tending toward paternalism; and paternalism, however wide be the basis of consent upon which it is created, is the subtlest form of poison to the democratic state."[39]

[33] Carlton Kemp Allen, *op. cit.*, p. 726.
[34] Harold J. Laski, "The Problem of Administrative Areas," *op. cit.*, p. 86.
[35] *History of Freedom* (The Macmillan Company, 1909), p. ii.
[36] Harold J. Laski, *op. cit.*, p. 42.
[37] H. J. Laski, *The Foundations of Sovereignty and Other Essays*, p. 48.
[38] Herman Finer, *op. cit.*, p. 188.
[39] H. J. Laski, *op. cit.*, p. 43.

With the apparent shortcomings of the representative principle of popular government in meeting the modern social needs and with the accompanying tendency toward greater centralization of power at the expense of local autonomy, the possibility of extending the basis of representation to include occupational and professional groups in addition to the political areas, and of decentralizing governmental authority appeals strongly to many. To some it is the "glorious charter of liberty for European society and an ennobling guarantee for the brotherhood of man." On the other hand, many students of political institutions view recent tendencies in political thought favorable to decentralization and the dispersion of governmental functions as fraught with the gravest dangers, which can lead only to disaster and chaos. Autocratic and dictatorial types of government have little patience with sentiments favorable to either regionalism or pluralism. For a considerable part of the world the movement toward the centralization of authority is gaining ground.

SUPPLEMENTARY READINGS

Laski, Harold J., *Authority in the Modern State* (Yale University Press, 1919).

Duguit, Léon, *Law in the Modern State* (B. W. Huebsch, Inc., 1919).

Chiao, Wan-Hsuan, *Devolution in Great Britain* (Columbia University Press, 1926).

MacDonald, J. A. Murray, *The Case for Federal Devolution* (P. S. King, 1920).

Henderson, J. S., and Laski, H. J., "A Note on Parliamentary Time and the Problem of Devolution," *Economica* (March, 1925).

Gooch, Robert K., *Regionalism in France* (D. Appleton-Century Company, Inc., 1931).

Hauser, Henri, *Le Problème du Régionalisme* (Paris, 1924).

Garner, James W., "Administrative Reforms in France," *American Political Science Review* (February, 1919), vol xiii, pp. 17 ff.

Braun, Otto, *Deutscher Einheitsstaat oder Föderationsystem* (Berlin, 1927), second edition.

CHAPTER XXI

THE BUDGET AND PUBLIC ADMINISTRATION

THE term budget was derived from the old English word *bougette*, the pouch from which the Chancellor of the Exchequer took his papers in presenting to Parliament the financial program of the government for the ensuing year. Though the idea of the budget as a device to gain control of the purse strings through representative assemblies originated in the formative period of the English constitution, beginning with the reign of Edward I, the conception of the budget as a device to secure control and direction of the government is a modern evolution. With the establishment of parliamentary supremacy in England after 1689, it became customary for the King's Ministers to prepare for Parliament a coordinated and comprehensive financial program. As the Cabinet absorbed the functions of government it became the function of the Treasury to prepare the government's program, with the estimates to carry this program into effect. Gradually it also became the duty of the Treasury to exercise a control or visé over the expenditures voted by Parliament.

BUDGETARY PROCEDURE IN ENGLAND

The fundamental principle of the English system of financial administration is that expenditures may be made only in pursuance of appropriations by an act of Parliament. For more than a century this control has been exercised exclusively by the House of Commons. Although the ultimate authority to vote expenditures resides in the Commons, the most significant principle is that the House has conceived its function as inhering in the authority to pass upon proposals emanating from the Crown, now presented by his agents, the members of the Cabinet, whose duty it is to formulate the financial program of the government.[1] By a standing order it was provided that: "This House will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the consolidated fund or out of money to be provided by Parliament, unless recommended from the Crown." Parliament, then, has adopted the practice of considering no proposals for the expenditure of funds except such as are pre-

[1] W. F. Willoughby, W. W. Willoughby, and S. M. Lindsay, *Financial Administration of Great Britain* (D. Appleton-Century Company, Inc., 1917), p. 38.

sented by the Cabinet, and no motion is entertained to increase these amounts. As the Cabinet assumes responsibility for financial measures, reductions cannot be made without involving a change in the Cabinet. Although motions for reductions are sometimes made in Parliament for the purpose of discussion, such motions are withdrawn when the discussions are ended.

The Ministry has adopted the policy of presenting, as far as is feasible, all of its financial proposals in one consolidated document, known as the budget. This procedure is merely a matter of administrative practice. When the budget is presented to Parliament it is considered in its entirety by the House acting as a committee of the whole.

To make the provisions for a budget effective, the Treasury Department is charged with the duty not only of preparing the budget, but also of supervising the execution of appropriation acts when passed by Parliament. In the exercise of its functions of supervision and control the Treasury Department has power to modify estimates submitted for inclusion in the budget, and its approval must be secured for any transfer of funds from one department to another. All changes in personnel or salaries must also receive the approval of the Treasury.

The importance of the principles embodied in these rules as a means of preventing the ill-advised and wasteful expenditure of public funds cannot be exaggerated. It renders impossible the notorious abuses which so long prevailed in the United States, arising from the right possessed by individual members of legislatures to secure the consideration of measures calling for an appropriation of public funds.

Similar methods of preparing budgets and controlling government finances were adopted in France and Germany as well as in other European countries.

Determining the financial needs of the government, allotting these amounts among the various divisions and agencies engaged in carrying on public functions, devising ways and means of raising the necessary funds, balancing income and expenditure, and checking expenditures so as to prevent waste and corruption and to secure the largest return in public services for the money spent, are among the duties of the budget officers of the government. The preparation of the budget is one of the most difficult of government functions and requires not only the highest measure of disinterested public service but also technical training and skill in the intricacies of public accounting. The form and the character of the budget have much bearing upon the nature of services the public may be assured and

the citizens' knowledge and appreciation of the public services rendered.

Budgeting is regarded as a great help to public administrators because it substitutes planning for chance in operating the departments and agencies of the government. Under the budget system the work of the government is regarded as a whole and not as so many separate activities. Some of the principles and problems involved in budget-making may then well be briefly sketched.

The essence of a budget system, including the preparation of a program by executive agencies with the balancing of expenditures and revenues and involving recommendations for carrying out the program, which had become an established feature of many European governments, did not receive favorable consideration in the United States until the beginning of the twentieth century. Some preliminary progress was made under the leadership of the National Municipal League in establishing budget plans for city government. California, Wisconsin and Massachusetts took up the movement for better financial management in the states. And under President Taft the President's Commission on Economy and Efficiency prepared the way for a national budget law which was enacted in 1921.

Budgetary Practice of the Federal Government in the United States

By the acts of September 2, 1789, and May 10, 1800, Congress made it the duty of the Secretary of the Treasury "to prepare and report estimates of the public revenues and the public expenditures . . . and to present plans for improving and increasing the revenues from time to time for the purpose of giving information to Congress in adopting modes of raising the money requisite to meet the public expenditures."[2]

Though the wording of these acts had been changed at various times to provide in effect that the "annual estimates for the public service shall be submitted to Congress through the Secretary of the Treasury," the result was the establishment of a practice whereby the heads of departments prepared estimates for their respective services, and the Secretary of the Treasury compiled and transmitted them to Congress. The original idea of having the Secretary of the Treasury present plans for improvement was never put into practice and was gradually dropped. Prior to 1921 neither the President nor the Secretary of the Treasury assumed any responsibility for coordinating

[2] Cf. W. F. Willoughby, *The Problem of a National Budget* (D. Appleton-Century Company, Inc., 1918), pp. 131-132.

or eliminating items or for adjusting estimates to accord with the available revenues.

Formerly, the process of budget-making began with the transmission of the estimates of appropriation required for all departments and activities of the federal government by the Secretary of the Treasury to the Speaker of the House of Representatives. Jurisdiction over appropriations was distributed among seven or more committees, the most important being the committee on appropriations. Supplemental estimates were also added from a number of other sources, and individual Congressmen might add to the total considerably by bills involving further expenditures. The general result of this practice was the distribution of power among many separate agencies and individuals without any system of unified control to coordinate income and expenditures. As a result of numerous reports and investigations exposing the weaknesses of existing appropriation methods, and following a prolonged discussion as to the merits of a budget system, Congress in 1921 passed the Budget and Accounting Act.

This act places upon the President the responsibility for the preparation and transmission of the budget to Congress. The President is also authorized to coordinate income and expenditures and to recommend changes in the law rendered necessary by such coordination. The preparation of the budget is not, however, placed directly upon the President and the Cabinet, but is put in charge of a "Bureau of the Budget" in the Treasury Department. At the head of the bureau is a director, who is made responsible for the preparation of the budget.

In each department or bureau an official shall be designated as budget officer, and the order of procedure in submitting estimates shall be at the instance of each office or establishment through the budget officer of the department to the Director of the Budget and thence to the President for submission to Congress. The Bureau of the Budget is given authority to inspect all offices and services and to examine existing methods of organization and administration, and to make recommendations to the President and to Congress as to the regrouping of services or improvement in methods of administration.

To render the purpose of the act more effective, and to introduce better financial control, Congress provided for a General Accounting Office, to be independent of the executive departments. It is made the duty of this office to prescribe forms, systems, and procedure in the administration of funds and to make recommendations to Congress as to methods of improvement in existing procedure.

The first budget under this act was submitted to Congress by President Harding on December 5, 1921. It contained a proposed

budget for 1922 and an alternate budget for 1923, as prescribed by the act. Since this time a regular method of procedure has been adopted to carry out the provisions of the budget act.

Under the new system the spending departments of the government are prohibited from making any direct requests for funds from Congress. Instead, their requests must be submitted to the President, upon whom is placed the full responsibility for the formulation and submission to Congress of a consolidated statement as to the needs of the government for the ensuing year. The extent to which the President has assumed the duties of a general manager relative to the financial affairs of the government is shown by the adoption of the policy of summoning the directing personnel of the government to meet with him and with the members of the Cabinet for the purpose of considering the administrative and financial problems of the government.

After the President has indicated to the directing personnel what his general policies are to be in the making of the budget, the budget officers of the departments present preliminary estimates to the Budget Bureau. Upon their receipt the amounts are tabulated to determine the aggregates requested, and the estimates themselves are referred to budget investigators for examination and report. The Director of the Budget then presents this material to the Board of Estimates, whose duty it is to eliminate duplications and to reduce and modify the program of the department to accord with the administrative policy defined by the President and the Director of the Budget. Each department is then notified of the total amount to which its original estimate has been reduced and is directed by the President to apportion this total in such manner as will best provide for its activities. Following this, the final estimates of appropriations are prepared along with the receipts of expenditures for the ensuing year. Before the budget is put into final form the Board of Estimates gives an opportunity for a hearing to all representatives of the executive departments who desire to state their needs and justify their requests for appropriations. When the hearings are completed the estimates are finally revised and the Director of the Budget with his staff is prepared to complete the budget document. The nature of this document in its summary form may be illustrated by a recent budget submitted to Congress.[3]

As a result of the enactment of the budget law a marked change has taken place in the organization of the House and the Senate in dealing with expenditures. Today the regular annual appropriations of the government are made in bills prepared by a single committee of

[3] Secure a copy of the budget for the current year and compare items, noting present tendencies in public expenditures.

each House. This arrangement affords opportunity for comparing the estimates of one bureau or department with those of another, and permits a consideration of the needs of the country as a whole. Under the present practice budget bills are based on the departments and other units of organization.

The budget system and the single committee in the House and in the Senate have reduced the evil of legislative riders on appropriation

THE UNITED STATES BUDGET FOR 1933–1934

The budget of the United States for the fiscal year ending June 30, 1934, as presented to Congress December 5, 1932, by President Hoover, is given herewith, with the corresponding figures for 1932–33 and 1931–32.

	Estimates of Appropriations 1934 (Dollars)	Appropriations 1933 (Dollars)	Estimates of Appropriations 1933 (Dollars)	Appropriations 1932 (Dollars)
Legislative Establishment:				
Senate	3,289,759.00	3,188,615.00	3,241,564.00	3,582,417.00
House of Representatives	8,298,623.00	8,306,199.00	8,177,374.00	8,492,349.71
Legislative miscellaneous	4,000.00	4,000.00	185,050.00	24,003 37
Architect of the Capitol	3,653,679.00	1,900,580.00	4,257,415.00	10,524,023 94
Botanic Garden	177,000.00	140,000.00	231,022.00	173,882.00
Library of Congress	2,391,867.00	2,271,947.00	2,380,777.00	2,562,097.47
Government Printing Office	3,274,000.00	3,010,800.00	3,274,000.00	3,794,000.00
Total, Legislative Establishment	21,088,928 00	18,822,141 00	21,749,202.00	29,152,773 49
Executive Office	378,498.00	392,000.00	429,380.00	474,880.00
Independent Establishments:				
Amer. Battle Monuments Com'n.	143,322.00	275,000 00	400,000 00	304,250.00
Arlington Mem. Bridge Com'n	294,675.00	340,000.00	1,000,000.00	1,000,000.00
Board of Mediation	132,483.00	152,135.00	169,865.00	188,226.65
Board of Tax Appeals	556,442.00	560.000.00	635,000.00	653,640.00
Bureau of Efficiency	146,298.00	159,500 00	199,940.00	200,270.00
Chicago World's Fair		1,000,000.00		
Civil Service Commission	1,374,470.00	1,457,486.00	1,542,720.00	1,877,192.00
Commission of Fine Arts	9,258.00	7,800.00	9,775 00	9,775.00
Employee's Compensation Com'n	4,943,800.00	4,910.000.00	4,986,926.00	4,730,980.00
Federal Board for Vocational Education	9,512,743.00	9,514,300.00	10,285,405.00	10,213,981.50
Federal Farm Board			1,880,000.00	1,900,000.00
Fed. Home Loan Bank Board	322,000 00	250,000.00		
Fed. Oil Conservation Board	11,252.00	10,000.00	17,500.00	20,000.00
Federal Power Commission	317,123.00	326,750.00	362,020 00	318,470.00
Federal Radio Commission	780,427.00	872,000.00	431,360.00	1,112,080.00
Federal Reserve Board	1,731,343.00	1,692,800.00	1,692,800.00	1,609,200 00
Federal Trade Commission	1,109,550.00	1,466,500 00	1,266,500.00	1,781,766.00
General Accounting Office	3,918,000.00	4,262,620.00	4,290,820.00	4,297,620.00
G. R. Clark Sesquicentennial Commission	98,158.00	400,000.00	500,000.00	800,000.00
Geo. Wash'n Bicentennial Com'n.		200,000.00	452,230.00	563,195.00
Interstate Commerce Commission	7,637,639.00	8,048,560.00	9,661,410.00	11,912,513 93
Mt. Rushmore Nat'l Commission.		25,000.00	25,000.00	
National Advisory Committee for Aeronautics	866,030.00	920,000.00	1,012,310.00	1,051,070.00
National Park and Planning Commission				4,000,000.00
Puerto Rican Hurricane Relief Commission				1,000,000.00
Protecting interests of U. S. in oil leases and oil lands				76,000.00
Public Buildings and Public Parks of the National Capital	4,184,422.00	4,025,033.00	4,701,575.00	5,800,239.87
Public Bldgs. Commission	91,975.00	100,000.00	125,000.00	125,000.00
Railroad Administration				130.87
Smithsonian Institution	1,104,692.00	1,134,829.00	1,259,964.00	1,215,424.00
Supreme Court Bldg. Com'n	3,240,000.00	1,000,000.00	2,000,000.00	3,750,000.00
Tariff Commission	945,098.00	1,020,000.00	1,150,500.00	1,240,000.00
U. S. Food Administration				8.00
U. S. Geographic Board	9,778.00	9,678.00	11,678.00	10,678.00
Total, Independent Establishments (Group I)	43,480,978.00	44,532,891.00	50,499,688.00	61,761,710.82

THE UNITED STATES BUDGET FOR 1933–1934 (*Concluded*)

	Estimates of Appropriations 1934 (Dollars)	Appropriations 1933 (Dollars)	Estimates of Appropriations 1933 (Dollars)	Appropriations 1932 (Dollars)
Independent Establishments (Group II):				
Federal Farm Board:				
Agricultural Marketing				100,000,000 00
Red Cross distribution of wheat and cotton		40,000,000.00		
Reconstruction Finance Corp.				500,000,000.00
Shipping Board and Merchant Fleet Corporation	3,202,744.00	360,000.00	423,270.00	37,580,277.08
Veterans' Administration	1,060,976,834.00	1,020,464,000 00	1,072,064,527.00	1,215,370,310 78
Total, Independent Establishments (Group II)	1,064,179,578.00	1,060,824,000.00	1,072,487,797.00	1,852,950,587.86
SUMMARY				
Total, Executive Office and Independent Establishments	1,108,039,054.00	1,105,356,891.00	1,123,182,591.00	1,915,187,178.68
Department of Agriculture	118,814,909.00	317,883,236.00	197,454,976.00	301,569,626.13
Department of Commerce	37,934,323.00	44,784,408.00	44,719,304.00	54,117,322.19
Department of Interior	58,190,929.00	81,325,484.35	70,627,152.33	87,154,922.18
Department of Justice	45,082,487.00	45,006,000.00	53,900,364.00	51,405,929.82
Department of Labor	13,393,345.00	12,924,770.00	14,488,397.00	15,807,480.85
Navy Department	309,647,536.00	328,906,141.00	343,000,000.00	363,227,785.22
Post Office Department payable from Treasury	97,000,000.00	155,000,000.00	155,000,000.00	195,181,018.80
State Department	13,008,626.60	13,694,792.89	16,714,071.89	18,952,760.29
Treasury Department	289,861,557.00	375,027,597.00	293,735,857.00	413,328,843.08
War Department, including Panama Canal	365,009,585.00	468,604,743.00	423,940,302.00	465,649,595.22
District of Columbia	39,743,270.00	44,497,622.00	47,331,919.00	49,416,991.72
Reduction of Public Debt:				
Interest	725,000,000.00	640,000,000.00	640,000,000 00	605,000,000.00
Sinking Fund	439,658,221.00	426,489,600.00	426,489,600.00	411,771,300.00
Other redemption of debt	94,412,100.00	70,313,878.00	70,313,878.00	175,000.00
Grand total, estimates, appropriations, and expenditures	2,646,756,888.60	3,025,448,272.24	2,797,715,821.22	3,032,848,575.50
	3,775,884,870.60	4,149,027 304.24	3,942,450,498.22	4,977,188,527.67

Columns 1, 2, and 4 taken from Message of the President of the United States transmitting the Budget for the Service of the Fiscal year ending June 30, 1934, pp. 11–21, Budget Statement No. 1, Table C. Column 3 is taken from the same document for the Fiscal year ending June 30, 1933, pp. 13–125, Budget Statement No. 2.

bills. The War Department grants, for example, were formerly contained in five different measures; appropriations are now made in one bill and are divided to show the amounts for military and non-military activities.

The President under the provisions of the Budget Act possesses the actual powers and responsibilities of a general manager. Such powers would be strengthened by the establishment of a bureau of general administration which would result from various suggestions, made in connection with administrative reorganization, to merge the Budget Bureau, the Bureau of Efficiency, the General Supply Committee, the Public Buildings Commission, and the Joint Commission on Printing.

Although it is too early as yet to form a judgment on the success of the system provided under the Budget Act, the consensus of opinion is that the act has improved practically all branches of public

administration.[4] That a satisfactory beginning has been made and that the system of "logrolling" and "padding" appropriations has to some extent been checked is indicated by the opinions of the chairmen of the committees in charge of appropriations in the House and in the Senate.

Apparently, however, the change to a legalized budget system has not entirely removed the temptations of Congressmen to revert to some of the former "logrolling" and "pork-barrel" methods. In March, 1922, after the House had voted to increase the appropriations for rivers and harbors $25,000,000 above the amount recommended by the Budget Bureau, President Harding said that this action indicated a return to the "pork-barrel" practices of pre-war days and warned the members of Congress that such action would render the budget act useless. President Harding was reported as believing that this incident showed the desirability of a constitutional amendment making it possible for the executive to veto items in an appropriation bill without disapproving the entire measure. Such a power, in his view, was necessary to prevent Congress from rendering the budget machinery entirely useless. The President apparently decided against the veto of the whole measure and then let it be known that he proposed to hold back the expenditures of funds and have no contracts made for work in excess of the figures approved by the Bureau of the Budget. It was necessary, also, for President Coolidge to veto the Bursum omnibus-pension bill on the ground that adequate provisions had been made by the budget for taking care of the necessary grants of pensions. "No conditions exist," said the President, "which justify the imposition of this additional burden upon the taxpayers of the nation. All our pensions were revised and liberal increases made no longer ago than 1920." The passage by Congress of the soldiers' bonus bill despite the veto of the President showed a disposition on the part of Congress to ignore the budget recommendations of the President and the Budget Bureau when in their judgment local interests sufficiently large in number and varied in extent bring pressure to bear upon members of Congress. Moreover, the enactment of measures to meet the emergency conditions of the depression has required the setting up of new administrative agencies with separate funds over which the Budget Bureau has practically no control. For the present it is not deemed the primary object of the financial policy of the government to correlate income and expenditures. Hence the main purpose of the budget act is temporarily subverted.

The enactment of the national budget law resulted in considerable

[4] W. F. Willoughby, *The National Budget System: with Suggestions for its Improvement* (The Johns Hopkins Press, 1927), p. 286.

improvement in the methods of submitting estimates to Congress with pertinent information, and in the preparation of financial reports by department and bureau chiefs, but it falls short of the adoption of the principles of a satisfactory budget system. No provision was made for executive *visé* and control of expenditures after the passage of appropriation bills. A method of adjusting expenditures to meet changing conditions and of checking expenditures at all times—the function performed by the Treasury in England—remains to be provided. By the order and authority of President Roosevelt the Director of the Budget has been instructed to *visé* expenditures by officers and departments, and if this practice is continued American budgetary procedure will more nearly approximate the English plan.

Administrative Reorganization in the Federal Government[5]

Intimately connected with the appropriation of public money and the preparation of the budget is the problem of administrative reorganization in the federal government. Despite the handicaps under which executive departments have labored owing to congressional domination, the departments of the federal government have attained a reasonable degree of efficiency. Nevertheless, the federal departments, largely on account of the restrictions and limitations involved in the exercise of the financial powers of Congress and the loose methods of control over expenditure, have been severely criticized, and continuous efforts have been made to secure improvement of administrative organization and methods.

The problem of administrative organization has been under consideration by several general committees and by separate investigating committees for different departments. Three of the general committees—namely, the Keep Commission, the President's Commission on Efficiency and Economy, and the Joint Committee on Reorganization—are worthy of brief review.

The Keep Commission.—The Keep Commission, known as the Committee on Departmental Methods, was appointed by Theodore Roosevelt. It was made the duty of the commission to ascertain "in what respects our present government methods fall short of the best business standards of today" and to recommend measures of reform. The commission appointed subcommittees to investigate administrative practices and to describe existing conditions. It was found that the classification of positions and salaries was based upon acts of Congress passed more than fifty years before, and that "most startling anomalies and inequities existed." A complete reclassifica-

[5] Cf. Chap. xviii for a consideration of administrative reorganization in the state governments.

tion of services, with corresponding readjustments of salaries, was suggested. Some of the recommendations of the commission were put into operation by executive order when no legislative action was necessary. But Congress not only failed to enact the necessary legislation, but also included in the appropriation bill for the executive departments a proviso intended to prohibit further action of this kind by the executive department.

It seems to have been taken for granted that it was not the duty of the executive to prepare a budget, although powers accorded him by the Constitution amply warrant his assuming this function. Not until March 4, 1909, was any definite action taken looking toward the exercise of budgetary powers by the President. Congress then inserted a clause in a civil appropriation act requesting the President to suggest measures to reduce the estimates submitted by the Secretary of the Treasury when such estimates exceeded available revenues, or to recommend new taxes to cover the probable deficiency.[6] Though no action was taken under this clause, the President on his own initiative began the consideration of estimates before their submission to Congress. These measures seem merely to have brought to public attention the defects in the method of preparing estimates and to have led to further efforts to secure definite action looking to the establishment of a budget system. The repeated recommendations of the Secretary of the Treasury were followed by the request of the President for an appropriation to secure "the employment of accountants and experts from official and private life to inquire more effectively into the methods of transacting the public business of the government in the several executive departments and other government establishments, with the view of inaugurating new or changing old methods of transacting such public business so as to attain greater efficiency and economy therein."[7]

The President's Commission on Economy and Efficiency.—In pursuance of the appropriation granted for this purpose, the President's Commission on Economy and Efficiency was established. This commission, under the direction of Dr. Frederick A. Cleveland, made a survey of the various agencies of federal administration and submitted suggestions for reform. As a basis for constructive recommendations, a study was made particularly of administrative organization as embodied in the budget and financial machinery of the leading foreign countries.

After making an exhaustive study, the commission presented recommendations to the President and Congress to the effect that the Presi-

[6] 35 *Stat.* 1027, sec. 7.
[7] 36 *Stat.* 703.

dent should prepare the budget and that it should be comprised of a budgetary message, a financial statement, a summary of expenditures and estimates, with the necessary changes in law to put the budget into effect. The commission was discontinued in June, 1913, because of the failure of Congress to appropriate the necessary funds for its support. But public discussion favorable to a budget finally led to the enactment of the national budget law, the features of which have been analyzed in a previous section.

The Joint Committee on Reorganization.—The agitation before Congress and throughout the country relative to the adoption of a budget system for the national government brought anew to the public attention some of the irregularities and anomalies existing in the federal administrative machinery. With the background of the investigations and recommendations of the Keep Commission and the President's Commission on Economy and Efficiency, Congress created in December, 1920, a Joint Committee on Reorganization and later invited the active participation of the President in the study of the problems intrusted to the committee.[8]

At the request of the committee the President, in conference with the members of his Cabinet, prepared a plan for the rearrangement of the executive services which served as a basis for investigation and report. The more important changes proposed by the President were the coordination of the military and naval establishments under a single Cabinet officer as the Department of National Defense; the transfer of all non-military functions from the War and Navy departments to civilian departments, chiefly the Interior and Commerce; the elimination of all non-fiscal functions from the Treasury Department; the establishment of one new department, the Department of Education and Welfare; the expansion of the Post Office Department into a Department of Communications, and the attachment to the several departments of all independent establishments except those which perform quasi-judicial functions or act as service agencies for all departments. Certain recommendations were made by the committee, including a plan for the establishment of a new Department of Education and Relief, the creation of a central purchasing agency, and the erection of the Bureau of the Budget into an independent office under the direct control of the President.

The Bureau of Efficiency.—Along with the adoption of a budget for the national government and with the proposal of plans for the reorganization of the executive departments, officers, and bureaus, an important step was taken in the establishment of a Bureau of Efficiency, to cooperate with other agencies in improving the organiza-

[8] For a brief consideration of the work of this committee, see p. 387.

tion and administration of the services rendered by the executive department.

The statutory duties of the bureau include the establishment and general supervision of a standard system of efficiency ratings for the classified service in the District of Columbia; the investigation of the needs of the several executive departments and independent establishments with respect to personnel; and the investigation of duplication of work and methods of business in the various branches of the government service. The Bureau of the Budget transmits all reports of new activities submitted to the Bureau of Efficiency, which, by checking the new projects, has been enabled to report what work of the same or similar nature has been or is being done by other branches. Cooperation in this manner between the two bureaus has reduced duplication of work in the government service and has effected material savings, though from evidence collected by various investigating agencies a considerable amount of duplication still exists.

After numerous attempts to secure a thorough reorganization of the federal departments, bureaus, and commissions, Congress in June, 1932, as an economy and efficiency measure authorized the President:

1. To group, coordinate and consolidate executive and administrative agencies of the government, as nearly as may be, according to major purpose;

2. To reduce the number of such agencies by consolidating those having similar functions under a single head;

3. To eliminate overlapping and duplication of effort; and

4. To segregate regulatory agencies and functions from those of an administrative and executive character.

On December 9th President Hoover sent a message to Congress containing a group of executive orders intended to carry out the policy of Congress as to the reorganization of federal agencies. These orders, stated the President, "undertake to group certain executive agencies and activities in logical and orderly relation to each other as determined by their major functions and purposes, and to vest in the head of each department, subject to executive approval, the authority and responsibility to develop and put into effect the ultimate details of better organization, elimination of overlap; duplication and unnecessary expenditure." The departments chiefly affected by the orders were the Interior and Commerce. Four new assistant secretaries were to be established as follows: for public works in the Department of the Interior; for education, health, and recreation in the Department of the Interior; for land utilization in the Department of Agriculture; and for merchant marine in the Department of Commerce. Duties of fifty-eight federal agencies were involved in the

reorganization plan and the number of independent agencies and commissions was reduced.

With a new administration soon to take control of the federal government Congress refused to approve this reorganization plan and postponed for the consideration of President Roosevelt and the new Congress the problem of the consolidation of federal agencies.

As a means of reducing governmental expenditures the special session of Congress of 1933 authorized the President to investigate the present organization of all executive and administrative agencies of the government and to determine what changes therein are necessary to accomplish the following purposes:

1. To reduce expenditures to the fullest extent consistent with the efficient operation of the government;
2. To increase the efficiency of the operations of the government to the fullest extent practicable within the revenues;
3. To group, coordinate, and consolidate executive and administrative agencies of the government, as nearly as may be, according to major purposes;
4. To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the government;
5. To eliminate overlapping and duplication of effort; and
6. To segregate regulatory agencies and functions from those of an administrative and executive character.

Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies or the functions thereof is necessary to accomplish any of the purposes set forth in this act, he may by executive order:

1. Transfer the whole or any part of any executive agency or the functions thereof to the jurisdiction and control of any other executive agency;
2. Consolidate the functions vested in any executive agency; or
3. Abolish the whole or any part of any executive agency or the functions thereof.

Under the authority of this act the President by executive order is engaged in the process of regrouping, consolidating, transferring, and abolishing executive agencies and functions. The undertaking is much too complicated and too far-reaching in its consequences to be done in accordance with a single plan. Gradual reorganization, through a trial and error method, continued for many years with Congress and the President cooperating, is more likely to accomplish

the desired ends without too great interference with the necessary duties and functions of the federal government. But a defect of all reorganization plans is that the functions of the federal government change so rapidly that a plan of organization is no sooner completed than a shift in functions and methods of administration requires a different administrative arrangement.

The Adoption of Budget Systems in the States

Formerly the initiative in providing for state expenditures was the prime duty of the legislature. Each department and officer reported upon expenditures made directly to the legislature and transmitted to appropriation committees estimates of funds necessary for the ensuing year. No executive officer had anything to do with departmental estimates save to transmit his own requests. The legislature received no accurate, complete, and well-considered statement of the needs of all departments and officers, and the consideration of appropriation bills was often unsystematic and ineffective. Governor Young of California, speaking before the Commonwealth Club of San Francisco in December, 1926, described conditions as follows: "When I first entered the legislature in 1909 there was little short of chaos as far as any orderly provisions for state expenditures were concerned. There had been no audit of the state finances for over twenty years. The finance committees of the two houses were scenes of a blind scramble on the part of the various institutions and departments of the state in an endeavor to secure as large a portion as possible of whatever money might happen to be in the treasury. Heads of institutions encamped night after night in the committee rooms, each alert for his own interest regardless of the interests of other institutions. Logrolling and trading of votes on appropriation bills was the common practice among the members of the legislature." As state expenditures increased, the lack of general supervision and coordination in dealing with estimates and expenditures became more apparent, and a movement was begun to secure the adoption of budget systems in the states. Wisconsin was the first state to adopt a budget plan.

Every state in the Union now has some sort of budget legislation. Six states, namely, Maryland, West Virginia, Massachusetts, Nebraska, California, and New York, have given a certain degree of permanency to the budget system by writing provisions in their constitutions. A majority of the states have adopted the executive type of budget, under which the governor prepares and submits the budget to the legislature. The preparation of the budget in other states is placed in the hands of a board.

The elements of an effective state budget system are deemed to be:

1. Consolidation of estimates and presentation of a unified plan for state expenditures;
2. A well-rounded system of raising the revenue to meet the proposed expenditures;
3. Administrative control and supervision after the appropriations are voted.

Provisions for an Executive Budget.—Maryland was the first state to provide by constitutional amendment for a definite type of executive budget. The details of the Maryland plan are as follows:

A large deficit, due to the reckless action of the legislature, aroused the people of Maryland in 1915 to the need of an effective budget system. As a result of the public agitation, the Democratic State Convention appointed a citizens' commission, with Professor Frank J. Goodnow (former member of the President's Commission on Economy and Efficiency) as chairman, to prepare a report containing specific recommendations. The Goodnow Commission rendered a report proposing a constitutional amendment to establish an executive budget system, which amendment was approved by the legislature and ratified by the voters in November, 1916. The plan follows in certain respects the budget proposals in the New York constitution of 1915 which was rejected by the voters.

According to the provisions of this amendment, the governor shall require from the officers of all executive departments and administrative offices, bureaus, boards, commissions, and institutions expending public money, itemized estimates and other information necessary to the preparation of a budget. The governor may provide for public hearings on the estimates, may require the attendance of representatives of all agencies and institutions, and may revise at his discretion the estimates presented; those for the legislative and the judicial departments and for the public schools are not subject to revision by the governor.

Upon the convening of the general assembly, the governor shall submit two budgets, one for each of the two succeeding fiscal years, and a bill for all proposed appropriations, clearly itemized and classified. Accompanying each budget shall be a statement showing:

The revenues and expenditures for each of the two preceding fiscal years.

The current assets, liabilities, reserves, and surplus or deficit of the state.

The debts and funds of the state.

The estimates of the state's financial condition at the beginning and the end of each ensuing fiscal year.

Any explanation which the governor may desire to make as to the important features of any budget, and any suggestion as to the methods for the reduction or increase of the state's revenues.

Before final action upon the budget by the general assembly, the governor may amend or supplement it to correct an oversight, or, in case of emergency, with the consent of the general assembly, may deliver such amendment or supplement to the presiding officers of both houses.

In its action upon the budget bill the general assembly may not amend it so as to affect the guarantees of the constitution or statutes for the establishment and maintenance of a system of public schools or constitutional provisions as to salaries; it may, however, increase or diminish items relating to the legislature or the judiciary. In no other particular may it alter the bill except to strike out or reduce items, providing no salary of any public officer is reduced during his term of office.

The governor and representatives of the departments of the executive branch of the government designated by him shall have the right, and when requested by either house it shall be their duty, to appear and be heard and answer questions relating to any item of the budget bill under consideration. Until after final action upon the budget bill, neither house shall consider any other appropriation measure. Other appropriations must be embodied in separate bills, each limited to a single purpose and containing provision for the revenue necessary for that purpose. Such bills may be passed only by a majority vote of the whole number of members elected in each house, and, when passed, shall be subject to the governor's approval or veto. The governor by proclamation may extend the session in case of the failure of the general assembly to take final action upon the budget bill three days before the expiration of the regular session; and during such extended period no other matter than this bill shall be considered, except provision for the cost of the session.[9]

Many budget authorities do not approve the Maryland budget plan, and this plan has not met with general favor. Professor Willoughby asserts: "It is our belief, therefore, that, though the responsibility for the framing of the budget should rest squarely upon the chief executive, that of taking action upon such a budget should rest with equal definiteness upon the legislature."[10]

Massachusetts adopted a constitutional amendment in 1918 which,

[9] For observations on the preparation of the Maryland budget for the biennium 1933-1934, see "The Crisis in Government Economy," *National Municipal Review* (July, 1933), vol. xxii, pp. 326-328.

[10] W. F. Willoughby, *Principles of Public Administration* (The Johns Hopkins Press, 1927), pp. 479-480.

like the Maryland plan, places upon the governor the responsibility for the preparation of a budget to be submitted to the assembly. The legislature, however, may increase, decrease, add, or omit items, but after action on the governor's budget each special appropriation bill must provide means for securing the funds required to carry out its purpose. The governor is authorized to disapprove or reduce items or parts of items in any appropriation bill. The Maryland and the Massachusetts plans accomplish similar purposes; the one makes the governor's budget recommendation final, and the other gives the governor enlarged veto power after the legislature has acted.

Nebraska in 1920, California in 1922, and New York in 1927 adopted budget systems similar to that of Massachusetts. In California no appropriation bill except for the expenses of the legislature and such as the governor may approve can be passed before the budget bill is enacted. The governor may reduce or eliminate items, but the legislature can override his veto by a two-thirds vote.

Where the executive budget obtains, the governor, or some board responsible to him, is given full authority in preparing the budget and seeing it through the legislature; and where this system is established in an effective form the legislature is prohibited from increasing items in the budget submitted by the governor, and members may not introduce bills involving the expenditure of money without making provision to secure the necessary funds.

The executive budget was also adopted in Illinois by action of the legislature in 1913. Under the civil administrative code of 1917 a department of finance was established whose duty it was to prescribe and install a uniform system of bookkeeping, accounting, and reporting for the several departments; to supervise and examine the accounts and expenditures of the department; to prepare and present to the governor estimates of taxes and revenues; and, biennially, to prepare a state budget. Since the head of the department of finance is appointed by the governor and is responsible to him, a centralized supervision and control is established for all of the officers and agencies provided in the civil administrative code. The constitutional officers and departments are not affected by this centralized control, and the legislature may increase items as recommended by the governor, with the result that Illinois has adopted only partial arrangements for an executive budget.

A few states with executive budgets are experimenting with the executive allotment system whereby it is aimed to secure some of the advantages of the British Treasury system of control over expenditures after appropriations are made. Appropriations are made annually in lump sums. Before any appropriation becomes available for use, the spending agency must submit to the department of finance

an allotment of the amount estimated to be required to carry out the work of the agency during each quarter of the year, and this allotment must receive the approval of the governor. The allotment may be revised quarterly with the governor's approval. This arrangement requires a permanent and efficient staff for continuous and systematic control of expenditures; otherwise it may result in intolerable meddling with the internal affairs of the several departments, bureaus, and commissions.

As a result of new budget legislation more than half of the states have adopted the executive type of budget, and most of the remaining states provide for boards or commissions to prepare the budget, these bodies being usually composed of executive officers and members of the legislature. The commission or board form of budget is best illustrated by the arrangement in Wisconsin, whereby an effort has been made to limit the financial powers both of the legislature and of the governor. In 1911 a board of public affairs was created, consisting of the governor as chairman, the secretary of state, the president *pro tem.* of the senate, the speaker of the house, the chairmen of the senate and house committees on finance, and three additional members appointed by the governor. Soon after its establishment this board was authorized to prepare a budget for submission to the legislature. In order to perform its functions effectively, the board is authorized to devise a uniform system of accounting and to formulate plans for the improvement of administration. A constitutional amendment adopted by West Virginia in 1918 authorized a board consisting of the governor, secretary of state, auditor, treasurer, attorney-general, superintendent of schools, and commissioner of agriculture to prepare a state budget. Louisiana also in its constitution, recently adopted, follows the board plan for the preparation of the budget by placing the responsibility on the tax commission.

Though the prevailing sentiment favors the executive type of budget and the introduction of this form of budget has brought some noteworthy improvements in the administration of state finances, the enthusiastic claims of the advocates of the executive budget have not been realized. The system is predicated upon the selection of honest and capable men for the office of governor and upon the appointment of competent and dependable directors of finance, and these suppositions have not always been realized. The steadily mounting cost of state government was only slightly affected by the wave of budget reform until the distressing conditions of the economic depression necessitated drastic reductions. Budgets are, as Gladstone observed, "not merely matters of arithmetic, but in a thousand ways go to the root of prosperity of individuals and the relation of classes."

Whether the budget be prepared by the governor and his assistants or by joint action of the executive and legislative departments, the human factors of policy, expediency, and political favoritism are likely to predominate. To remove the formulation of the budget from the petty bickering of special interests in the legislative halls is a real gain, but does it not seem likely that a sound financial system must involve joint action and responsibility on the part of legislative and executive officers? Long-range financial planning with a coordinated system of raising and spending public funds remains to be accomplished in all but a few states.

Although encouraging progress has been made in the matter of budgetary legislation and administration, much remains to be accomplished. Notwithstanding the fact that several states have had budget legislation on their statute books about twenty years, they have made little progress in the direction of a real budget system. Few provisions have yet been made for careful planning and control of expenditures after appropriations have been authorized. Proper consideration has not been given to the necessary steps preliminary to the formation of a satisfactory budget, and political influences exercise as yet too much control over the entire financial procedure of the states. Each member of the legislature, with the exception of certain states previously noted, may introduce bills carrying charges upon the state treasury, with the result that when the legislature adjourns no one knows how much money has been appropriated. Though legal provisions require that all proposals for financing the state government shall be shown in the budget, certain items are frequently excluded. Among these are capital expenditures, items for departments such as highways which require long-time construction programs, and the operating expenses of publicly owned and operated utilities. Until all such expenditures are included in the document it will lack in comprehensiveness and hence fail to serve one of the main purposes of budget control.

It is apparent that a satisfactory budget plan requires a centralized administrative system. A few states have recognized the close relation of the budget to administrative reorganization, and have grouped the state services under a few department heads who are appointed by the governor and are under his direct supervision and control. Executive leadership in the formulation of the budget, however, depends more upon the type of governor and the political situation in the state than it does upon the legal provisions. So complex is our system of state government that it is difficult to determine whether the governor, the legislature, or a board is the dominant agency in the determination of the budget.

Budget-making in Cities

The grave defects in government financial methods first became evident in the management of cities, and it was in this branch of government that improved methods were first considered and adopted. In the old type of city charter the budget-making authority was vested in the council, and the annual appropriation bill frequently represented the result of systematic logrolling by the members of the council and the pressure of large interests demanding government favors. This condition was aptly described by the Boston Finance Commission, when it said of the city council of that city: "Its work on the annual appropriation bill consists generally of attempting to raise the mayor's estimates to the maximum amount allowed by law, with preference for these departments where the patronage is largest. Loan bills are log-rolled through with more regard for the demands of interested constituents and the possibility of jobs than for the needs of the city as a whole." Under this system measures of public policy were often ignored by councilmen in their efforts to secure from the city funds "jobs" for their constituents. No councilman was responsible, and the organizations supporting particular measures could not secure a hearing or a fair discussion of the merits of their demands.

When the weaknesses of the methods of municipal finance described above became notorious, a campaign of education was begun which resulted in the introduction of reforms in budget-making, in accounting, and in the purchasing of supplies. These reforms took definite shape in the provisions of new city charters, especially in the commission plan of city government. The ignorance which prevailed regarding public finance led the New York Bureau of Municipal Research to inaugurate a budget exhibit, the purpose of which was to present in graphic form the past and proposed expenditures of the city. The exhibit comprised charts, diagrams, photographs, and other methods of representation that appropriately illustrated budget requests and their relation to other expenditures and to the general growth and progress of the city. The exhibit proved to be so successful that it was repeated in New York City, and has been imitated in other cities desiring to bring about greater publicity in the preparation of the financial program of the government. The publicity given to methods of municipal finance by the New York Bureau of Municipal Research and other organized agencies led to the adoption by many cities of a revised budget procedure. The types of financial administration in cities are as follows:

1. Separate fiscal agencies virtually independent of one another and operating under general laws. San Francisco is an example of this type, with five elective officers—the mayor, auditor, treasurer, tax collector, and assessor—responsible for the financial administration.
2. Independent agencies under the supervision of a board. In this class are such cities as New York, with its board of estimate and apportionment; and St. Louis, Baltimore, and Milwaukee.
3. Executive supervision and control with
   a. Separate head of a finance department. Commission-governed cities usually are in this group.
   b. Central control in mayor with separate financial departments as, for example, in Boston.
   c. Central control with fiscal agencies consolidated. Toledo represents a city of this type with a genuine executive budget. All departments and officers of the city are directly responsible to the mayor.[11]

A further advance in budget-making in cities was the introduction of the allotment plan in the new budgets of Detroit and Philadelphia. Under this plan the head of each department or division was given a sum of money to be spent in the manner which would secure the best results. A uniform classification of accounts was introduced, and transfers between departments were largely eliminated. Other cities have taken partial steps to introduce a more satisfactory budget procedure and to interest the citizens in the intricate problems of municipal finance.

The plan of an executive budget for municipalities has been gaining adherents, just as have similar plans for the federal government and for the states. Expressing in concrete form the proposals of tax commissions and efficiency experts the idea has been incorporated into the model commission-manager charter adopted by the National Municipal League.

Essentials of a Budget System[12]

There are three necessary steps in drawing up and adopting a budget:

1. The preparation of the estimates—to be made by someone who is familiar with the work of an office or department.
2. The revision of departmental estimates—to be made by some

[11] See A. E. Buck, *Municipal Budgets and Budget Making* (National Municipal League, 1925).

[12] In the preparation of this summary of the essentials of a budget we are indebted to Luther Gulick and W. L. Rice, "The Budget," in *Outlines of Responsible Government* (National Municipal League).

officer or committee whose duty it is to revise the estimates so as to adjust expenditures to the probable income.

3. The consideration and the adoption of the budget—submission of the document to the representatives of the people, with opportunities for hearings and for public dissent.

The budget should contain information so that answers to the following questions would be forthcoming to those interested:

1. What is the government planning to do?
2. What department, institution, or office is to be immediately responsible for doing the work?
3. What will be the cost of the work?
4. How is the cost to be met?

There are certain points which may be listed as essential or extremely desirable in any budget system. These are:

1. The budget must contain a statement of *all of the revenues and all of the expenditures* of the governmental unit. It is almost impossible to make a worth-while plan with only part of the information.

2. The appropriations and revenue measures based on the budget must be final for the year and binding upon the officials, except in case of a genuine emergency. If the appropriations can be materially altered at any time during the year, it simply means that the budget plan has been discarded. If the budget is not binding, no one will take much care in preparing it.

3. The budget must be sufficiently *detailed* to form the basis for intelligent examination and should contain *comparative information.*

4. The expenditures proposed in the budget must be definitely authorized by means of appropriations. These should be made in lump sums and not in as great detail as should be shown in the budget.

5. The budget should be drawn up and adopted *before the beginning of the year* to which it applies, but the preparation and the revision of the estimates should be made as close to the beginning of the year as the time required for consideration and adoption will permit. This makes possible more accurate estimates.

6. There must be a satisfactory *accounting and auditing system.* The accounting and auditing system furnishes the comparative information used in budget-making and is the means of controlling expenditures in accordance with the budget appropriation.

7. The budget system must allow *a real opportunity for the public to understand the budget* and to let the executive and legislative officials know whether the proposed plans are approved. The budget is also one of the most important means of informing the people on what their government is planning to do and how these plans are to be financed. It gives the people a chance to say what they want and

what they think about the official plans beforehand. Public opinion has an important effect upon those who are making the plans for the government and drawing up the budget.

The essential principles of budget-making, then, are responsibility, accountability, and control. It is clear that one of the primary ends to be sought in providing for the finances of a nation is economy and efficiency in the work which the government undertakes. To accomplish this end the misapplication and waste of funds must be prevented. Such misapplication and waste may arise from expenditures for public works of relatively little value, or from fraud and carelessness on the part of those in whose custody public money is placed, or from exorbitant or unreasonable demands by heads of departments, bureaus, or commissions. In order to meet these difficulties it is necessary to provide "means by which a rigid supervision, control, and accounting may be exercised at every step from the first estimation of the needs of the several services to the final expenditure of the sums voted." This control must be exercised first by the heads of the different bureaus or divisions, whose duty it is to review carefully the requests of subordinates and to approve only those which are necessary for economical and efficient management. In addition, control may be exercised through supervision by the heads of the departments under which the bureaus and divisions belong, and through revision and review by the central executive. Finally, control is exercised through criticism and condemnation by legislative bodies and through public opinion.

In order, then, to improve the methods of handling public finances, the most important changes which are being advocated are: first, the reorganization of the legislative and administrative machinery; second, the adoption of an adequate budget system; third, the introduction of improved methods of accounting and auditing; and, finally, the centralization of the control over the purchase of supplies and materials.

Problems Involved in the Rising Cost of Government

The chief problem of government finance is conceded to be the wise expenditure of the public funds in such a manner that they promote to the greatest possible degree the general welfare of all. The advantages of civilized life are now in large part acquired by common effort. Common effort may be organized and rendered effective through voluntary private associations or through political organizations. The tendency of human development has been to extend common effort through political organization; as a consequence, with the development of civilized society the cost of these common efforts has

increased, and this increment of cost has had to be met by additional taxation. The increasing cost of government is the outstanding tendency of modern times. Milton is reported to have indicated a preference for democratic government because it was less expensive than royalty, but the facts seem to show that the development of democratic government has augmented the cost of the maintenance of public institutions. With the growth of representative assemblies, the extension of the elective franchise, the introduction of the direct primary, the adoption of the initiative, referendum and recall, the entrance of the government into the field of providing facilities for education, transportation, and for social welfare—in fact, with every step in making government responsible and responsive to public opinion—the cost of government has increased. Its maintenance in modern life is an expensive business. The increase in expenditures in England occasioned by the World War and its aftermath resulted in an outlay which in six years exceeded the total expended in 226 years, including eight major wars.[13]

Increase in Government Expenditures.—The great increase in expenditures in the national government may be attributed to the conduct of wars, past and recent, and to the continued growth of military expenditures. Prior to the outbreak of the war in 1914, more than 50 per cent of every dollar of public money was used for military purposes. This proportion was changed by the colossal expenditures of four years of war, which alone exceeded those of the federal government from 1789 to 1914. For the year 1928, over 80 per cent of the gross federal expenditures were made on account of war. In the state and city governments, the increase may be attributed to such functions as health, sanitation, education, recreation, highways and social welfare. For the state governments about one-third of the net operating expenses are allotted to education, one-fourth to roads, and one-seventh to social welfare purposes. Though these functions account for more than 70 per cent of the state budgets, they absorb in normal times a relatively small portion of the federal budget. In addition, a certain percentage in the augmented cost of government may be ascribed to the steady increase in the population and to changes in the level of prices.

But aside from the increases noted above, public expenditures during the past decades have been further augmented by the part now undertaken by the state and national governments in the operation of public works. The government today conducts many important activities that a few decades ago were managed by private enterprise. Thus, public ownership and control of the post office, irrigation proj-

[13] Sir Josiah Stamp, *The Financial Aftermath of War* (Benn Brothers, 1932), p. 13.

ects, water, gas, light, and other public utilities have added to the growing list of government expenditures. Likewise, in addition to the gradual extension of governmental activities in the fields of highways and education, there has been an extraordinary expansion in the establishment and management by the government of public institutions and agencies for the care of the insane and the sick, for the relief of the poor, and for economic reform and rehabilitation. All of these agencies have necessitated not only large expenditures for their management and maintenance, but also an increasing outlay for measures of a preventive nature. Thus, the government is spending large sums for social prevention and reconstruction. What proved to be an orgy of public expenditures took place during the last few decades and brought a rather violent reaction when income and the returns from taxation were sharply reduced as a result of economic depression. The aggregate tax bill of the country, federal, state and local, was estimated to be 2259 million dollars or $23 per capita in 1913, and 10,300 million dollars or $84 per capita in 1930. In seventeen years, the total burden of taxation had increased eight billion dollars or 355 per cent, and the per capita burden had increased by 256 per cent.[14]

Another factor which tends to augment the cost of operating governments is the adherence to antiquated methods of handling public funds. Governments, whether state or national, frequently employ inefficient systems in the administration of finances. Private and special interests, knowing that privileges and advantages are more readily secured under the present plan, have been accused of blocking changes or at least of neglecting to work for the adoption of efficient methods in the handling of public funds. One of the most persistent charges made against federal and state governments is that large sums of money are appropriated in the process of providing for special interests through "logrolling." It is, unfortunately, true that the efforts of members of Congress and of state legislatures are to a large extent devoted to the task of looking out for special interests and of providing for improvements in matters of purely local concern. Undoubtedly, the increasing public expenditures are due in no small degree to this tendency to drain the public treasury to provide for special and local interests. The entire scheme of legislation and public administration, it is claimed, is vitiated by this practice of making the legislative machinery function in conformity to a "pork-barrel" and "logrolling" system.

Whether these charges are well founded or not, the fact remains

[14] Clarence Herr, "Trends in Taxation and Finance" in President's Committee on Social Trends, *Recent Social Trends in the United States* (McGraw-Hill Book Company, Inc., 1933), vol. ii, p. 1333.

that governments have been dilatory in the development of efficient methods in public administration. And little improvement in the handling of governmental finances can be expected until the legislative bodies are taken out of the clutches of a scheme whereby a majority of the members must devote a large part of their time and attention to the distribution of the spoils of politics and to the support of local projects that are often an unwarranted drain upon the public treasury.

Growth of Public Debts.—With the extension of governmental functions to cover nearly every field of human interest and with the steady advance in the financial expenditures to meet the obligations which the performance of these functions involves, as well as those entailed by the conduct of recent wars, it is not surprising that public debts should also be increasing at an alarming rate. In fact, they have increased during the last century out of proportion to the growth of wealth and taxable capacity. The World War resulted in the accumulation of staggering debts by all of the nations which actively participated in the conflict. The extent to which national financing has been augmented by the war is apparent when it is noted that the interest on the present national debt is approximately equal to the entire expenditure of the federal government before the war.

The sudden increase in the national debts of the different countries of the world is shown by the following table:[15]

Year	Total Debt
1783	$ 2,530,000,000
1885	23,000,000,000
1908	36,548,000,000
1918	210,000,000,000

"Between 1913 and 1925 the nominal public debt principal of France rose 1550 per cent. Between 1914 and 1924 the public debt principal of the United Kingdom rose 1176 per cent, and between 1914 and 1919 that of the United States increased 2144 per cent. With the exception of a few countries, the return of peace did not end the rise in public debt principal but merely retarded it, with the consequence that today most of the countries of the world are subjected to further increases in already phenomenal burdens."

The problem of public debts has been complicated by the war debt settlements which at the time of the moratorium arranged by President Hoover involved scheduled payments among twenty-eight nations of approximately 50 billions of dollars. One-half of this amount was due to be paid by Germany under the reparations scheme, and large payments were due from Great Britain, Italy and France, with smaller amounts from lesser powers. Of this large total more than

[15] William Withers, *The Retirement of National Debts* (Columbia University Press, 1932), p. 15.

20 billions were due to be paid to the United States. With the failure of Germany to meet her reparation payments, an effort was made to adjust the settlement of international debts through the Dawes and Young plans, both of which involved public and private loans to Germany to aid in meeting the reparation claims. With the gradual decline of loans from the United States and the derangement of economic conditions in Austria and Germany, the entire scheme of reparation payments was abandoned. Since certain countries depended upon the payments from Germany to meet a large part of the annual amount due to the United States, the issue of a reduction of the payments due or a cancellation of debts was definitely raised. To the proposals for debt cancellation the United States has thus far been unwilling to accede. Most of the nations have either defaulted in their payments or have made token payments of only a small part of the amount due. Regardless of the national and international complications which may arise, a general cancellation or repudiation of the war debts among the nations participating in the World War seems inevitable.[16] To the capital losses entailed by the conduct of war itself and its aftermath must now be added from 10 to 20 billions of dollars transferred to the European nations in public and private loans, most of which may not be repaid.[17]

The chief cause, then, for the increase of public debts is war, but by the side of war must be placed expenditures for public works, building roads, and other improvements for economic, social, and educational purposes.

Since the funds raised through various forms of taxation are insufficient to meet the demands of the government, it becomes necessary to supplement the financial income with loans. The ordinary purposes of public borrowing are: to meet unforeseen emergencies, such as fire, flood, and protection; to engage in commercial enterprises; and to aid projects for general social advantage, such as highways, education, sanitation, recreation, and philanthropy.

The greatest portion of the present public indebtedness has been incurred by the national government for military purposes, and by local units for highways and education. There is an increasing tendency to borrow to engage in commercial enterprises, although, owing to the great losses incurred by local units in the attempt to aid such enterprises, constitutional restrictions are frequently imposed upon public borrowing for this purpose.

[16] For a defense of the policy of cancellation, see Harold G. Moulton and Leo Pasvolsky, *War Debts and World Prosperity* (The Brookings Institution, 1932).

[17] For a table of government and private corporate loans from 1920-1929, see Charles A. Beard, *The Idea of National Interest* (The Macmillan Company, 1934), p. 556.

Based upon estimates of the Treasury Department, the aggregate state and municipal bonded debt of the United States in January, 1933, was approximately $16,000,000,000, an increase of ten billions of dollars since 1921. The largest amount of this indebtedness has been incurred by the cities, where the per capita net debt, excluding self-supporting projects, varies from a few dollars to approximately three hundred and fifty dollars for Miami, Florida, and Atlantic City, New Jersey.[18]

To what extent is public borrowing justifiable? What proportion and what type of government operations should be met by taxation? Should war be financed by bonds or by taxation? These are questions which as yet remain far from being adequately answered. Few, if any, satisfactory principles have been developed and practiced by the nations. The purposes for which money shall be borrowed, the factors that should control borrowing, the types of bonds to be issued and the methods of retiring bonds, constitute some of the major problems of public administration.

Certain rules have been suggested which, if practiced, would obviate some of the difficulties of public borrowing. Jefferson formulated the rules: first, that bonds should not run beyond the life of one generation; second, that public funds should be raised by loans only for improvements or enterprises of undoubted permanence; third, that there should be no resort to borrowing if by any possibility the proposed expense might be met by taxes. That these rules have seldom been followed is evident in the extraordinary growth of public borrowing.

The customary answer to the query, when should public debts be paid, is that bonds should be issued for a term of years which coincides with the life of the improvement financed. But no such single principle can be invariably followed. Emergencies such as war, epidemics, floods, and other disasters may require the postponement of debt retirement far beyond the life of the immediate cause for the issuance of bonds. Professor Buck suggests a principle which leaves wide enough latitude to meet almost every situation: "A public debt should be paid off as rapidly as the government can do so in view of its other obligations, and taking into consideration the wealth of the community and general economic conditions."[19]

Governments may adopt the policy of borrowing extensively or of financing their programs largely out of current funds. Massachusetts adopted the latter policy, with fortunate results for the state. "Before the war and since," observes Governor Ely, "most states have bor-

[18] C. E. Rightor, "The Bonded Debt of 277 Cities," *National Municipal Review* (June, 1933), vol. xxii, p. 272.

[19] A. E. Buck, *Municipal Finance* (The Macmillan Company, 1926), p. 477.

rowed for everything in the way of permanent improvements. Massachusetts discovered in 1916 that this practice resulted in placing a heavy per capita load upon her citizens and thus she gave it up. Since that time we have endeavored to put as much as possible of each year's expenditures into the tax levy of that year. As a result of this procedure, the net direct debt of the Commonwealth has been reduced from $40,000,000 to $12,000,000."[20]

To the broad and perplexing question of public expenditures which are steadily increasing may be added another equally important one, namely, What can be done to assure that the money collected by taxation and otherwise may be economically spent for the best advantage of individuals and of society as a whole? The problem of appropriating and spending public money is becoming increasingly important, although equally difficult and baffling. The difficulties, however, do not appear insurmountable, for some progress has been made in improving the methods of public business. The chief object in public business, as in private business, is not to cease spending money or necessarily to reduce expenditures, but that value shall be received for every cent that is spent. It was once the popular belief that government officials were prone to be dishonest and to profit by acts of collusion. "Turn the grafters out" was the slogan of those out of office in order that they in turn might have an opportunity to plunder the public treasury. But the truth is that the average public official sets about doing things honestly and to the best of his ability, that serious obstacles are found in the way of an upright official, and that incentives and encouragement are too frequently in the direction of wastefulness, extravagance, and collusive conduct, in which, however, the officeholder is likely to be assured a share of the spoils. The matter of chief concern is the lessening of the present wastefulness and extravagance and the placing of the public treasury beyond the temptation of the local interests of unscrupulous officials.

Since the raising of such large sums of money involves fiscal policies which directly concern the economic and social welfare of each individual and since the expenditure of these sums requires millions of public employees whose conduct affects in manifold ways the lives, the liberties, and the well-being of all, the need for competency and economy in public business is a factor of supreme importance.

Some strange and indefensible consequences have followed from the recent economic depression. Depressions result from a multiplicity of causes, and attempts to single out of these the major factors which bring periodic crises lead to diverse explanations with plausible data to support them. But a few factors now stand out as obvious con-

[20] "How Massachusetts Has Kept Her Costs Low," *National Municipal Review* (July, 1933), vol. xxii, p. 321.

tributing causes to the severity of the depression which began in the United States in 1929: First, the failure to control by either public or private agencies the issuance of large amounts of stock with little or no basis in productive capital or earning capacity; second, the formation of holding companies and the use of large blocks of stock as pawns in the game of trading for the control and direction of industries and utilities; third, the payment of exorbitant salaries, bonuses and other unearned rewards to presidents, managers, friends and members of families of those participating in either the management or the stock ownership of large corporations; fourth, the use of depositors' money by those engaged in the banking business to participate in stock speculation and manipulation.

Movement to Reduce Public Expenditures.—When the stock market crash came and billions in real or fictitious value were wiped out, for which the government could have little responsibility except that means should have been provided by state and federal governments combined to require a substantial basis of value for new stock issues, and when thousands of banks failed, most of which had joined in the orgy of speculation, business and commercial leaders who were among those chiefly responsible for the economic debacle sought to turn public attention away from the disgraceful and at times criminal records of mismanagement by claiming that many of the evils incident to the depression were due to the increasing cost of government and to too much government in business. The corollary of the propaganda that was fostered was that government expenditures must be reduced and government functions curtailed regardless of the effects upon existing public agencies or upon the welfare of the millions thereby affected. An active emotional drive has been ably organized and generously financed to reduce governmental budgets. Since many parts of public budgets, such as those providing for police and fire protection, for public health, and for roads, cannot be substantially reduced without detrimental effects upon business and industry, the drive has been directed against public aid to education and social welfare, expenditures for charitable purposes, and the so-called "frills" of public and democratic government.

Taxpayers associations,[21] economy leagues, and certain civic bodies

[21] It is estimated that in 1933 there were more than 3000 lay organizations of taxpayers, a majority of them having been formed since 1930. Most of them are working on the assumption that taxes may be reduced by eliminating waste and reducing the so-called "unnecessary functions of government."

"Less government in business" has today a hollow and insincere sound. How many who favor this slogan desire to have the government cease to aid shipping and aviation; to assist the publishing business with second-class mailing privileges; to cease rendering aid to manufactures by a protective tariff; or to discontinue aid to railroads, banks and other financial institutions? There is not

have joined in the efforts to place a large share of the blame for the economic plight of the people upon the government and to demand a restoration of the pioneer formula—that "government is best which governs least." There are groups in every community urging an increase in public expenditures, but other groups with larger funds and better means of propaganda are insisting upon the deflation of public activities primarily to reduce taxes to the advantage of special interests. Dangers inherent in the current situation have been pointed out by Glenn Frank: "This very leadership that has done so much to unbalance the nation's life seems willing, with heartening exceptions, to balance the nation's budgets even if the balancing involves the wrecking of all those scientific, social, and educational enterprises to which alone we can look to produce a leadership for the future that will be less inept, a leadership that might conceivably use this magnificent machine economy of ours to free the race from drudgery, poverty, and insecurity instead of letting us starve in a world of too much food, and go workless in a world with a million undone tasks, suffering all the perils of scarcity in an age of plenty."[22]

The present movement to reduce taxes is in part the product of the *laissez-faire* philosophy to which reference has been made and arises from a desire to deflate public expenditures on the ground that a large part of them are unwise. Government as well as all other phases of public and private life must be reduced in its services and expenditures. But these reductions are insisted upon at a time when the demand for services has greatly increased. Thus with a smaller personnel and with salaries substantially reduced from a scale which never approximated the standards of private employment, the remaining personnel of branches of the public service must carry a considerably augmented burden.

And while income, inheritance, and excess profits tax collections have declined due not infrequently to methods of the evasion of existing tax laws and regulations, the total collapse of the government structure has been saved by sales and excise taxes—the larger portion of which is borne by those whose wages and salaries, formerly moderate or unreasonably low, were drastically cut in the deflation process.

It is difficult to form a judgment regarding the present trends in

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infrequently a failure to distinguish between the cost of government in a strict sense and the cost of war. Many of those who seek to secure reductions in the national budget insist upon higher expenditures for military purposes.

[22] Glenn Frank, "Constructive versus Destructive Economy," *National Municipal Review* (July, 1933), vol. xxi, pp. 313, 314.

"Industry which owes no man a job has in the process of reducing its cost made previously self-supporting citizens into public charges. It asks for reduced public expenditures." Simeon E. Leland, "Should Public Expenditures be Reduced," *Public Management* (November, 1931), vol. xiii, p. 394.

public finance. The old formulæ and generally accepted principles are no longer applicable, at least in the same way as they were several decades ago. Governments have incurred debts and assumed obligations which seem to be beyond possible payment or redemption. Defaulting on bonds or the scaling down of the interest and principal of debts has dangers and implications which do not augur well for either permanence or stability in the long-range program of political agencies. On the other hand, the meeting of the items of interest and sinking fund, if paid in full according to the standards of value at the time the obligations were assumed, will require such a large share of the reduced public income that not only will the government services, essential and non-essential, have to be seriously curtailed but the heavy demands for additional aid and services to meet the needs of those dependent upon charity and social protection will also have to be inadequately supported. At a time when there has been a drop in revenue of one-third to one-half, expenditures for charitable, welfare, and social service agencies have more than doubled. About a thousand communities have defaulted in whole or part upon their debt. The essential services of city government cannot readily be reduced, and with tax delinquencies increasing funds are not available for debt purposes. Refunding programs are necessary in many instances, and state and federal legislation will be necessary to check the extensive wave of defaulting.

No system of taxation can well be devised to weather adequately the storm of economic depression and distress. But the tax system in operation in the United States is poorly adapted to meet the changes from prosperity to stagnation in business. Until a diversified system of raising revenue is adopted by which all earnings and profits are moderately taxed, with graduated rates for excessive incomes of all kinds, the gyrations of prosperity and depression will disrupt any long-range program for the operation of public agencies. There are many who agree with the observation of David Lawrence: "I do not believe that we are in any way deriving the income from taxation we have a right to collect; I do not believe the tax system has by any means exhausted the proper amount of revenue that can be collected from our people in any of the three levels of government."[23]

It is doubtful whether in the aggregate public expenditures can be greatly reduced. President Roosevelt, who was elected on a platform calling for economy in public expenditures and who set out to balance the national budget, found the need for public aid and services so great that he recommended a budget for 1933 and 1934 involving a deficit of several billion dollars, and did not suggest the possi-

[23] "Retrenchment in Government," *City Manager Yearbook* (1933), p. 72.

bility of having income and expenditures on a relatively equal basis until 1936. The indebtedness of the United States, it is estimated, will reach a total considerably greater than that at the close of the World War which amounted approximately to 30 billion dollars. Budgets of state and local units have not been reduced to the extent necessary to equal the falling off of revenue. Other factors than the balancing of budgets are likely for some time to control the policies of those in charge of public activities. The day of reckoning is sure to come, but it is obvious that in times of serious emergency there are matters of more significance than budget balance sheets. The high cost of local government may in reality be the high cost of living according to the standards of the twentieth century; and, if properly appraised, the actual cost of public service proves to be an inconsiderable part of the budget of the rank and file of citizens.[24]

The extent to which government services and functions have been reduced as the result of the shrinkage in revenues cannot at this time be estimated, but some typical examples of drastic retrenchment programs may be cited. To keep within estimated revenues, the Maryland legislature approved a budget which cut the allotments 30 per cent or more in every department and institution. The city of Los Angeles received from its tax levy in the fiscal year 1928 to 1929 more than 33 million dollars, and in 1933 to 1934 less than 20 million dollars, or a reduction of approximately 40 per cent. Since many of the charges which the city must meet are fixed and cannot be reduced without danger of bankruptcy or without seriously impairing the lives, health, and property of the citizens, it can readily be understood what such a reduction in income means to the carrying on of the essential functions and services of the city.[25]

What the deflation program means in city administration may be shown by the following report: The elimination of 1133 positions and the reduction of salaries from 10 to 28 per cent with a corresponding reduction in working time has reduced the salaries and wages budget of the city of Los Angeles below the former peak (1929-1930) by almost $6,000,000. The remaining 30 per cent of the reduction was made up by the decline in commodity prices, by curtailment in the purchase of equipment, by miscellaneous economies, by minor reductions in service rendered, and by a major reduction in street maintenance service. Owing to the failure of the city to secure its proportionate share of gasoline tax revenues rebated to the county

[24] C. A. Dykstra, "The Real Cost of Municipal Retrenchment," *Public Management* (November, 1932), vol. xiv, p. 345.

[25] Clarence E. Ridley and Orin F. Nolting, "How Cities Can Cut Costs: Practical Suggestions for Constructive Economy in Local Government," The International City Manager's Association, 1933.

by the state, it was necessary to dismiss 41 per cent of all street maintenance employees and to reduce the working time of the remaining organization by 25 per cent, with corresponding reductions in salaries and wages.[26] While the city administration was dismissing employees to balance its budget, the federal government was devising ways and means to secure at least part-time employment on public works for those who were otherwise dependent upon charity to keep their families from suffering and destitution.

The following principles of expenditure control have been formulated by a committee of the National Tax Association:

1. Jurisdictional administrative organization should be appropriate to the governmental functions to be performed. This means the redistribution and allocation of functions among governmental units adequate in area and resources for the economical performance of public functions.

2. The revenue resources of any governmental unit should be commensurate with the burden of services to be performed by it. Units of government which have the greatest share of services to render seldom have access to the most productive sources of revenue.

3. As far as possible, there should be but a single local administrative authority over any given area and over the population within that area. The present system of multiple and overlapping agencies within a given area is deemed necessarily wasteful and inefficient.

4. The personal responsibility of administrative and financial officers should be direct and inescapable. Too much diffusion of responsibility leads to corruption and extravagance.

5. The policy-determining authority and the administrative authority should be vested in different groups of persons.

6. Adequate agencies and instrumentalities of expenditure control must be provided. These agencies include a budget system, a centralized purchasing scheme, uniform accounting, and procedure for public visé of expenditures.

7. Standards of service and of cost should be developed and applied in the measurement of governmental services and their cost. Such standards are in process of formulation by research organizations and certain governmental bureaus.

8. Proper training should be provided for the permanent personnel in the public service. There are large groups of public employees for which appropriate training should be provided.

9. Comprehensive financial planning should precede all concrete proposals for expenditures. The method of undertaking a series of projects without a considered long-range program, now so generally

[26] For these data we are indebted to Roy A. Knox, Director of the Bureau of Budget and Efficiency.

followed, has contributed materially to excessive outlays and burdensome debt obligations.[27]

Limitations of the Efficiency Movement

The movement for the attainment of economy and efficiency in local, state, and national governments is predicated upon rather simple formulæ and expedients. It is contended that there should be, first, centralization of authority, with a hierarchical type of political organization; second, adoption of a budget system with definite plans for raising revenue and expending public funds and adequate authority to direct the allotment of funds so as to render the best service possible in accordance with available funds; third, establishment of uniform and cost accounting systems, centralized purchasing plans, lump sum allotments with visé of actual items spent, and other mechanical devices, to have the budget balance sheets portray more accurately what becomes of money turned over to public authorities.

Thus budget experts and efficiency engineers object to separate allocation and administration of funds such as prevails in relation to the schools generally and to a lesser degree to parks and libraries. From the standpoint of their formulæ, public agencies in any degree financially independent of the local government are deemed objectionable. According to Professor Buck: "The school men still cling to the idea of administering the public school system as a separate entity, claiming that to associate it with the other activities of the city government is to put it into politics. They have apparently become so engrossed in the work of education that they have forgotten about the other functions that must be carried on by the city government, many of which are equally as important as education."[28]

But desirable as unification and centralization in administration may be from the standpoint of budget control, few would deny that advantages have been gained by semi-independence on the part of educational administration which in large measure account for the high standard of excellence prevailing in many communities. Separate boards of lay citizens with a relatively definite budget provided often by special taxes have attained a unity of purpose, a permanence in planning for the future, and a merit system for appointments and promotions which are singularly lacking in the typical administration of cities and counties. It may seem logical and necessary for the symmetry and completeness of the budget to include in its broad

[27] Report of Committee of National Tax Association, Professor Harley L. Lutz, Chairman.

[28] A. E. Buck, *Municipal Finance*, p. 28.

scope all public activities. But from a practical standpoint would we not have sustained inestimable losses with schools subjected to the uncertainties and whims of partisan politics to a much greater degree than is now customary, and would many local divisions have developed the literary, artistic, and recreational monuments which form some of the bright spots in an otherwise rather sordid story of political mismanagement? May it not seem wise to extend the areas of semi-independence, to cultivate the cooperation of groups of citizens, and to encourage the continuance of expert administrators with lay advisory boards in developing the educational and cultural as well as certain other interests of community life? Necessary as it is to have unity and central control, there are other values which cannot be ignored.

In this connection the question may fairly be raised whether the efficiency experts have not confined their attention too closely to accounting and governmental balance sheets and to the efforts to check graft or wasteful expenditures. Even though the necessity of proper accounting methods and budget control and of taking every possible step to avoid waste in the handling of public funds is granted, there are problems in the financial operation of governments which go deeper into human needs and values than balanced budgets or scientific cost accounting. One need refer only to the general disarrangement of finances which has accompanied the recent depression. It may be claimed these were emergency conditions, but emergency conditions have a rather systematic habit of afflicting many communities. And is it not necessary that the budget be considered not only in the light of the objectives of government as a functioning organism, but also from the point of view of the conservation of human values in both a normal and an abnormal environment?

The movement for efficiency in the management of political affairs conflicts in a measure with one of the primary principles on which the American government was founded, namely, that the preservation of liberty and individual initiative is more important than the maintenance of strong government. Strong government was identified with tyranny, and tyranny was to be avoided at any cost. Moreover, popular participation in government in the United States was extended on the theory that it was desirable to interest many citizens in the conduct of political affairs even though there might be some loss in vigor and effectiveness of administration. From a belief in this and similar theories, regarded as essential to democratic government as conceived in America, came a tolerance of governmental imperfections which were regarded as the necessary price for the maintenance of democracy in government. The conflict between this

fundamental tenet of American political philosophy and the standards and ideals of the efficiency movement was described by Professor Ernst Freund in these words: "Had a commission of economy and efficiency presided over American government from the beginning, it would tax the imagination to think of the millions that might have been saved from waste; but could there have been that spirit of individualism, that glamour of liberty, that made American institutions attractive to aliens coming to this country, and that made possible a national assimilation and consolidation which is without parallel in history? Surely, that is a political asset which no mere technical perfection of government could have won for us, and it warns us not to value the traditional essentials of American institutions too lightly."[29]

European nations have secured efficiency in government by the establishment of bureaucracies or dictatorships. American principles and ideals do not at present sanction the control of government by either bureaucrats or dictators. Among the leaders who have defended the democratic management of government there have been two distinct groups. Some, following the tenets of Jefferson, trust the good sense and judgment of the people to select, in the long run, those who by training, experience, and general ability are qualified to be the natural leaders of state and nation. This group regard it as the function of the electorate to select such leaders and to give them public support; and, in their opinion, there is no inherent reason why democratic government cannot be as economical and efficient as monarchy or bureaucracy. Others, following the precepts formulated by Jackson and his successors, contend that rotation in office is necessary to prevent the development of bureaucracy and to interest and educate the masses in the operation of government. To those accepting this philosophy it is much more important to keep the government near to the sources of public power and to keep the people interested and satisfied than to save money or to secure efficient services. The problem today for those who wish to sustain the principles of popular government is to reconcile the principles and philosophy of these two groups and to introduce such features of the movement for efficiency and economy as will not undermine the fundamental tenets of American democracy.

SUPPLEMENTARY READINGS

Buck, A. E., *Public Budgeting* (Harper & Brothers, 1929).

Willoughby, W. F., *The Problem of a National Budget* (D. Appleton-Century Company, Inc., 1918).

[29] "Principles of Legislation," *American Political Science Review* (February, 1916), vol. x, pp. 1-2.

Willoughby, W. F., *The National Budget System: With Suggestions for its Improvement* (Johns Hopkins Press, 1927).

Willoughby, W. F., Willoughby, W. W., and Lindsay, S. M., *The System of Financial Administration of Great Britain* (Johns Hopkins Press, 1917).

Moulton, Harold G., and Pasvolsky, Leo, *War Debts and World Prosperity* (The Brookings Institution, 1932).

Withers, William, *The Retirement of National Debts* (Columbia University Press, 1932).

The Internal Debts of the United States, edited by Evans Clark, assisted by George B. Galloway (The Macmillan Company, 1933).

Upson, L. D., *Practice of Municipal Administration* (D. Appleton-Century Company, Inc., 1926).

Blachly, Frederick F., and Oatman, Miriam E., *The Government and Administration of Germany* (Johns Hopkins Press, 1928), chap. viii.

CHAPTER XXII

PROBLEMS IN THE ORGANIZATION OF COURTS AND IN THE ADMINISTRATION OF JUSTICE

I do know that the United States, in its judicial procedure, is many decades behind every civilized government in the world; and I say that it is an immediate and an imperative call upon us to rectify that, because the speediness of justice, the inexpensiveness of justice, the ready access to justice, is the greatest part of justice itself.

—WOODROW WILSON.

Justice in the minor courts—the only courts that millions of our people know—administered without favoritism by men conspicuous for wisdom and probity, is the best assurance of respect for our institutions.

—CHARLES E. HUGHES.

GENERAL CHARACTERISTICS OF JUDICIAL ORGANIZATION IN THE UNITED STATES

ACCORDING to Chief Justice Taft, "The greatest question before the American people is the improvement of the administration of justice, civil and criminal, both in the matter of its prompt dispatch and the cheapening of its use." The problem of securing an efficient judicial system has been especially difficult in America, where the theory has prevailed that all departments of government must be based on popular approval and sanction. In many respects the judiciary is the most important branch of the American government. Because of the extraordinary authority accorded to the courts to review and to pass upon the validity of legislation, and because of the general phrases in constitutions by which legislative acts are measured on the basis of reasonableness and justice, the judiciary of the American government exercises a greater supervision and control over other departments than does the judiciary in any other government. Moreover, the failure to provide administrative supervision over subordinate officers has left a large responsibility to the courts, whose duty it becomes to scan the authority of these officers, to decide whether their acts are within the law, and, at times, to determine whether the public authority has been exercised arbitrarily. In each of these rôles the American judiciary has performed distinct services in addition to its normal functions, which are the settling of controversies that arise and the protecting of the citizen in his rights.

Although in England and the United States the courts exercise a determining influence on the process of law-making, it is probable

that in no other instance have legislatures turned out such an extensive and significant body of statute law as is now represented by the product of American legislatures.

Our "experiment stations," as Lord Bryce termed them, have been turning out thousands of volumes of statute law which constitute a veritable library, including session laws, general statutes, and codes with numerous compilations and annotations for each state and for the federal government. This voluminous product of lawmakers has called for a mass of interpretative judicial decisions which, for any one state, has become so extensive as to lead to bewildering confusion, to which lawyers often testify but for which no satisfactory remedy seems available. The Library of Congress reported that in a five-year period 610 volumes of state reports were issued, containing 64,318 decisions, and for the same period there appeared twenty volumes of federal reports, containing 1061 decisions. The number of statutes added to American law during this same period is estimated at 62,014. It is, indeed, true that "with 13,000 decisions of courts of last resort being made each year, and 12,000 laws annually enacted by the legislatures, no man could determine his rights without employing attorneys."[1]

Common law, statutes, and judicial decisions combine to make law in the United States insurmountably involved and complex. The recognition of this undue complexity and of the need of an authoritative statement of the fundamental rules and principles in the leading branches of American law has led to the formation of the American Law Institute. The Institute is a private organization comprised of justices of the higher courts, professors in the leading law schools, lawyers interested in legal and judicial reform, and other jurists and citizens. Through the Institute a group of legal scholars and specialists are at work on the formulation of the essential and fundamental principles of some of the most important divisions of the law. Restatements of the law of contracts and agency have been prepared and published, and similar condensations of important rules and principles for other branches of the law will soon be available.[2]

Judicial organization in the United States was originally established in accordance with the English model, which at that time involved a multiplicity of courts. Under the pioneer conditions which then prevailed in the United States the main object was to keep the peace, and to accomplish this end it soon became necessary to develop

[1] R. H. Smith, "Justice and the Poor," *Bulletin* of the Carnegie Foundation for the Advancement of Teaching (1919), no. xiii, p. 7.

[2] The publications of the Institute may be secured from the Director, William Draper Lewis, 3400 Chestnut Street, Philadelphia, Pennsylvania.

rules.[3] At the beginning of the nineteenth century, "American law was undeveloped and uncertain. Administration of justice by lay judges, by executive officers, and by legislatures was crude, unequal, and often partisan, if not corrupt. The prime requirement was rule and system, whereby to guarantee uniformity, equality, and certainty."[4]

Thus the chief problem of the formative period of American law was to discover and to lay down rules which would meet the requirements of American life and which would effectively restrict the powers of the magistrate by leaving as little to his personal judgment and discretion as possible. The chief design was to leave as much freedom as was feasible to the initiative of the individual and to confine governmental action to the minimum required to keep the peace. This purpose determined the course of our legal development and the organization of courts until the last quarter of the nineteenth century.

The general type of judicial organization in American states provides for four courts or sets of courts: (1) There is a supreme tribunal of appellate jurisdiction, composed of a fixed number of judges who sit in this tribunal and who review the work of the superior, district, or circuit courts. Sometimes an intermediate court is established between the superior court and the supreme court. (2) There is a group of superior, district, or circuit courts of general jurisdiction at law and equity, with authority to try more serious offenses and to review the decisions of inferior magistrates. (3) There are in each county and municipality, county and municipal courts with a limited jurisdiction in civil and criminal matters and a variety of duties administrative in nature, such as the disposal of probate matters; and in certain communities a separate tribunal for the trial of equity cases. (4) There are local peace magistrates and inferior courts for petty causes. These courts are frequently presided over by laymen and are often supported by fees.[5]

Though the plan of judicial organization as above described served well the needs of the country during the first decades of the establishment of state governments, certain defects have become apparent as the courts have had to deal with the more complex and intricate conditions of modern society.

[3] See Roscoe Pound, "Organization of Courts," American Judicature Society, *Bulletin*, no. vi.

[4] *Ibid.*, p. 13.

[5] See Charles Grove Haines, "The General Structure of Court Organization," in *The Annals* of the American Academy of Political and Social Science (May, 1933), from which some extracts are used with the permission of the editors.

Defects of American Judicial Organization

Legislative Control of Procedure.—A fundamental difficulty in court organization in the United States is that constitutions and legislative acts regulate courts and judicial procedure in too great detail. "The legislative attempt to fix the machinery of justice in all its details," says Mr. Smith, "made of procedure a maze which precluded litigation unless the suitor could engage counsel to guide his case through all the technicalities."[6] In England and in European countries it is customary for the legislature to organize courts and to lay down certain general principles, leaving to the courts the completion of the details of organization and administration, and the determination of rules and regulations in matters of procedure. On the contrary, legislatures in the United States attempt to regulate in detail not only the organization of courts, but also matters of procedure. The essential element of flexibility and the adjustment to meet special conditions which other countries provide are thus lacking in the United States. Experience has demonstrated that it is impossible for a court of justice to function effectively unless it can have considerable freedom in the preparation of rules and regulations applicable to its work. Elihu Root, speaking before the American Bar Association in 1916, called attention to this defect: "A large part of the detailed and specific legislative provisions regulating practice is really designed to enable law business to be carried on without calling for exercise of discretion on the part of the court, and the evil results of the absurdly technical procedure which obtains in many states really come from intolerance of judicial control over the business of courts. A more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive, and effective."[7]

Establishment of Separate Courts.—In the establishment of courts in the United States, separate courts are often created without any definite system of unification or central control.[8] A hierarchy of courts has been constituted, but in the general administration of judicial affairs the supreme court does not control the inferior courts and the inferior courts cannot control the justices. Each court works under general laws embodied in constitutions or legislative acts,

[6] R. H. Smith, *op. cit.*, p. 7.

[7] American Bar Association, *Reports* (1916), vol. xli, p. 364.

[8] See "Justice Through Simplified Procedure," *The Annals* (September, 1917), vol. xxxiii, pp. 23 ff., for proposed sections of a state constitution embodying certain reforms.

without any direct control by a higher authority. The absence of a general plan of centralization in administrative matters has often resulted in the organization of too many separate courts without an adequate arrangement for an adjustment of functions and without the necessary provisions for unity of action. Thus it often happens that some justices with little to do cannot be transferred to adjacent districts where an overcrowded docket compels other justices to work overtime and still leave controversies undetermined. Furthermore, it is impossible to differentiate in functions so as to give a judge who is a specialist in some particular branch of the law an opportunity to use his ability where it would count most. Judges must often cover all branches of the law and decide every variety of controversy, a condition which encourages superficiality and entails a waste of time and effort.

Selection of Judges.—The ordinary method of selecting judges in the states is by the ballot and by a system of nomination which places the original choice in the hands of party organizations. Though the character and the ability of judges selected under this system have been on the whole satisfactory, it is nevertheless true that the elective system does not secure the best men available for the position of judge. It is generally considered that the best state courts in the United States are those in which the judiciary has been appointed, and the appointive feature of the federal judiciary is generally commended. If a well-guarded appointive system can be provided in which experience, training, and merit count, it is conceded that this is the best method of securing judges.

Under the American system, it is exceedingly difficult to retire judges whose unfitness has become even notorious. The method of impeachment has been found unsatisfactory because it is too slow and cumbersome. The proposed remedy for this difficulty is to appoint judges for a long term and to put into operation a system of recall with a sufficiently high percentage of votes so that a judge could be recalled only in case of flagrant abuse of power, or for other reasons which would take from him the confidence and support of a large majority of the electors.

Much time and constructive thought have been given to the reform of executive and legislative machinery in cities, counties, and states. And substantial progress has been made in the adoption of the short ballot, the commission and city-manager forms of government for cities, civil service reform, a budget system, and the reorganization of the administrative departments of state government. It is only within recent years that similar attention has been given to the reform of the machinery for the administration of justice.

To realize that reform and reconstruction are necessary in judicial procedure, we need only turn to the testimony of legal specialists.

Criticisms of Present Methods of Administering Justice

In 1906 Roscoe Pound delivered before the American Bar Association an epoch-making address on "The Causes of Popular Dissatisfaction with the Administration of Justice." At this time many lawyers were unwilling to admit that there were any serious defects in the administration of justice. But evidence had been accumulating to the effect that "the administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the door of the courts to the poor and has caused a gross denial of justice in all parts of the country to millions of persons."[9] On this situation Dean Pound commented as follows: "Our system of courts is archaic and our procedure behind the times. Uncertainty, delay, and expense, and, above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice—direct results of the organization of our courts, and the backwardness of our procedure—have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community."

According to the Secretary of the American Judicature Society (an organization interested in judicial reform), "It is no secret that promptness and certainty of conviction constitute the most effective deterrent to crime. But our courts yield neither promptness nor certainty."[10] Moreover, "we have made it altogether too easy to get into court and quite difficult to get out of court. In every large city, there is a host of lawyers and would-be lawyers hungry and ready for business; and while the high-minded attorney strives to keep his client out of court and seeks to serve him with all honorable means at his command, there are many who encourage litigation and derive their largest fees from the very entanglements into which they thrust their clients. And when you add to these lawyers the ambulance chaser, the runner, the officer, the collector, and the constable, you have a veritable army lying in wait for clients and lawsuits."[11]

[9] R. H. Smith, *op. cit.*, pp. 7-8.

[10] Herbert Harley, *Journal* of American Judicature Society (June, 1919), vol. iii, no. i, p. 7.

[11] Judge Manuel Levine, "The Conciliation Court of Cleveland," American Judicature Society *Bulletin*, no. viii (April, 1915), p. 5; for illustrations of denial of justice because of defects in the administration of justice, consult R. H. Smith, "Justice and the Poor," chap. ii.

Despite noteworthy reforms already accomplished in one of our greatest states, a special committee reported that "there still exist anomalies, duplications of effort, unnecessary cogs in the judicial machine creating friction, arresting the prompt and expeditious functioning of the machine," which condition leads to the indictment that the administration of justice does not progress so as to conform to modern conditions. Before undertaking a consideration of the steps in judicial reform, it will be necessary to review briefly some of the obvious defects which have helped to render the administration of justice ineffective and unsatisfactory.[12]

Defects in Judicial Administration.—Certain defects in the methods of administering justice have become so pronounced as to call forth serious criticisms. It is possible to present only a mere outline of the defects which have occasioned the greatest objections. Among these defects is the difficulty involved in the mechanical operation of the law, wherein frequent application of technical rules results in a denial of justice. The tendency of law is to become fixed and crystallized into settled rules which apply unreasonably or unfairly in concrete cases. In European countries it is customary to give the judge discretion to decide contrary to the rule when it is necessary to do so in order to give justice. In France, judges are forbidden to lay down general rules of conduct or to decide cases by holding that they are governed by previous decisions. This principle tends to take away the emphasis upon precedent, and the technical rules which at times bind the judges too strictly in the United States.

Another difficulty is involved in the practice which encourages appeal of cases on technicalities. Appeals mean delay and additional expense. Delay frequently results in the formulation of a device by which the guilty may escape. Liberality of appeal is of benefit chiefly to the rich man and to corporations. The expenses of appeal to the supreme court of a state and of the United States are very great; accordingly, only the wealthy, the corporate interests, or large organizations can as a common practice afford to carry cases to these higher courts. In the judgment of President Taft, the lack of appeal would be the greatest blessing for the poor litigant, pro-

[12] An exhaustive and critical study of the administration of justice in an American city was made in the reports of The Cleveland Foundation Survey on "Criminal Justice in Cleveland," prepared under the direction of Felix Frankfurter and Roscoe Pound and with the cooperation of a number of special investigators. See, especially, the conclusions and summary by Dean Pound on the difficulties encountered in the administration of the criminal law. See also the state crime surveys, such as those of Illinois and Missouri.

vided, of course, that there would be a possibility of a new trial in case of error.

Too much contentious delay occasioned by the employment of lawyers in minor cases is another objection to the present administration of justice. Many of the small causes which should be settled out of court or by some system of arbitration are contested with the employment of counsel, and a considerable amount of time and expense is unnecessarily wasted. Other countries have provided simple and expeditious methods of disposing of minor cases. These methods will be briefly considered in connection with proposed remedies for the existing defects in the administration of justice.

The administration of justice is hampered also by the lack of adequate records and scientific methods. A mere beginning has been made in the securing of criminal statistics. The settlement of controversies has been in the nature of a slot-machine process, decisions being rendered often in a mechanical fashion without full recognition that criminals are individuals who may need medical treatment or perhaps may be aided by the investigations of psychology, sociology, and economics.

One of the worst features of the administration of justice is the cruel and unfair treatment which has too frequently been accorded to prisoners in the county jails, prisons, and penitentiaries. Frequent investigations have brought to the attention of the public the fact that revolting conditions have been allowed to prevail under the old method of crowding prisoners in old and dingy penal institutions. According to the Wickersham Law Enforcement Commission, most of the penal institutions are defective in sanitation, light and ventilation, and deficient in the arrangements for segregation, recreation and education.[18]

Weaknesses of the Jury System.—A conspicuous failure of the present system of administering justice is the jury system. The character of the jurors usually selected is such as to discredit the method for the determination of many cases now requiring a jury. As often operated in the courts, the jury system puts a ban upon intelligence and honesty and a premium upon ignorance, stupidity, and perjury. The difficulty of selecting a jury in important cases has tended to delay the trial and to discredit the entire process of justice. Furthermore, the jury is frequently called upon to decide questions which are beyond the range of possibility of determination by any except experts trained in the law and in the principles of evidence. A further difficulty lies in the fact that the judge, in most states, is permitted merely to charge the jury as to the law

[18] Cf. Report No. 9.

and is not allowed to give his advice with regard to the facts. This consideration renders the judge, who should be the most competent to advise and in the best position to give direction, unable to express an opinion which might be of service to the jury in coming to a correct and equitable conclusion. One student of judicial reform is of the conviction that "no more persistent barrier to the achievement of a just result could be conceived by a malignant enemy of mankind than the civil jury system as administered in practice. We hamper it as a popular tribunal by limiting the evidence which it may consider, and by instructing it unintelligently concerning the law which it is to apply. Then we let its uneducated prejudices produce the results and point to them with superstitious pride, while we erect alongside of it another system, that of equity in which the worshiped jury plays no calculable part. Yet with a straight face, and with a legal mind apparently all unconscious of inconsistencies, we praise both systems as having equal claim to our admiration."[14]

But the most significant tendency in criminal prosecutions is the disposition of cases without the use of the jury. In Cook County, Illinois, out of 13,117 felony prosecutions only 492 cases were tried with a jury. As a result of these trials, 283 were acquitted, and 209 were convicted. The part played by the petit jury in criminal trials may be very small since as many as 90 per cent of the cases may be disposed of without a jury. Criminal justice is administered mainly through the prosecutor, the preliminary magistrate, and the judge, the cases usually being settled through some sort of compromise. From 10 to 25 per cent of all cases initiated by indictment are terminated by the procedure known as *nolle prosequi* or some form of dismissal. In place of the "nolle pros" there has developed a form of bargaining for pleas of guilty with such alternatives as assurance of a light sentence, probation or suspended sentence, subsequent support for parole or pardon, or a plea of guilty to another or lesser crime. Since prosecuting officers seek reelection or other political favors, such compromises prove advantageous for many reasons, but particularly as they increase the rate of convictions to acquittals.[15]

Various estimates place from 50 to 70 per cent of the responsibility for the administration of criminal justice upon the prosecuting attorneys. They frequently have their own detectives and perform functions which properly belong to the police. They are often the

[14] C. A. Boston, in *The Annals* (September, 1917), vol. xxxiii, pp. 114-115. See also *Criminal Justice in Cleveland* (The Cleveland Foundation, 1922), pp. 340-353.

[15] See Raymond Moley, *Politics and Criminal Prosecution* (Minton, Balch & Company, 1929), especially chaps. vii and viii.

center and source of illegal practices adopted in administering the criminal laws. They do not hesitate to conduct searching and often brutal examinations of accused or suspected persons. The office of prosecutor has rightly been declared to be one of enormous significance in the life of the nation,[16] as nearly 50 per cent of the men in high public offices were formerly prosecuting attorneys. "Politics," observes Professor Moley, "embodied in the prosecutor, administers the criminal law, for its own objectives and in its own image." With the close relations of the police with the interests that desire lax enforcement of the laws and with the political power and affiliations of the prosecutor's office and the pandering to public sentiment and approval on the part of judges who must seek favorable action on the part of the voters, it is not surprising to find a lack of confidence in the law-enforcing agencies of the community. Selfish and profit-seeking interests have at times gained a notoriously strong hold on the machinery for administering justice. Increased effectiveness in the methods employed by bands of organized criminals has complicated the problems of the police and the courts and has created a condition of panic which breaks out in riots and lynching. To secure better methods of administration of state and federal criminal laws and to restore public confidence in the organized agencies for this purpose requires unflagging interest and devotion on the part of those who wish to preserve the principles of law and order in modern society.

Illegal Practices in Law Enforcement.—The somewhat frantic effort to secure a more active and rigid enforcement of criminal laws has some unfortunate consequences in fostering illegal practices on the part of public officials. As a result of the World War, there was a rather astonishing outbreak of illegal acts by judges, prosecutors and attorneys.[17] Subsequently a committee under the auspices of the National Popular Government League expressed apprehension at the continued violation of the Constitution and the breaking of laws by the Department of Justice of the United States. These preliminary investigations were followed by more extensive analyses by a committee of the American Bar Association and by the Wickersham Law Enforcement Commission.

Summarizing the procedure in the apprehension and examination of those charged with a crime or misdemeanor, the American Bar Association Committee noted that, "at all stages of the proceedings until verdict or judgment of guilt, the accused is presumed

[16] *Ibid.*, p. 94.

[17] See note, *Harvard Law Review* (May, 1920), vol. xxxiii, pp. 956 ff., for a summary of cases reversed in the federal courts because of the use of illegal methods.

innocent, is entitled to humane treatment and assured by the law that no more force will be exercised upon him than sufficient to bring him to court, hold him in custody and compel him to conform to reasonable rules of the jail or other place of confinement. In other words, a man who submits to arrest who obeys the prison rules is entitled to freedom from molestation, to food, water, opportunity to sleep, and humane treatment generally. He also may employ counsel, who may visit him at reasonable hours, and confer with him out of hearing of third persons. The prisoner may be visited at reasonable hours and under reasonable regulations by relatives and friends."

In the face of these constitutional and legal requirements, the committee observed that in the larger cities at least 90 per cent or possibly more of all the arrests are made without a warrant. Arrests are often made through raids or round-ups, and officers pick up anyone they believe may in any way be connected with an offense or whose conduct is under suspicion. Quoting from numerous court decisions in which the actions of officers were contested and condemned by the higher courts, the committee noted that officers frequently break into and search dwellings without a warrant. It is common practice to ignore the law which requires that an arrested man be promptly brought before a magistrate. The prisoner may be unlawfully held for an indefinite term, perhaps days, a week, even a month. The holding may be without an arrest or without any particular charge. The person may be held incommunicado, a Spanish term signifying that the prisoner is not to be seen by anyone except the police or such as they choose to admit. He is not allowed to see or communicate with an attorney, relative, or friend. In the meantime, all sorts of methods and devices are used to secure a confession or the admission of facts which may possibly lead to conviction. The boldness with which the sheriff, police, and state attorneys practice this lawlessness is astonishing, and goes on in spite of protests and rebukes from the court.

Among the devices used under the so-called third degree are: resort to force, even to the extent of a severe beating, or turning the suspect over to a cell specially chosen for the purpose of securing an early confession. The sweat box, a small cell heated to unbearable temperature, may be used. If these devices fail there may result whipping, beatings with rubber hose, clubs, or fists, or kicking. The committee described a few of the distressing cases in which such illegal methods were used. Sometimes the ends are sought by threats or promises, or by turning a powerful light upon the prisoner's face, or by placing him upon an electric chair. The most common method is persistent questioning, continuing hour

after hour, sometimes by relays of officers, often with the threat of physical force in the background. These practices are not engaged in by police alone, but often the prosecuting attorneys participate. In most instances, however, the inquisition with accompanying brutality is conducted by detectives. It is impossible to say to what extent such practices now obtain in the United States. Wherever investigations have been made—and as yet no thorough inquiry has dealt with the matter—the conclusion has been arrived at that the use of the third degree and the unlawful methods connected therewith are applied in an astonishingly large number of instances by public officers in the United States.

The committee pointed out that these lawless practices which have such a vogue in the United States have very little basis, and are seldom employed in Great Britain and the Self-Governing Colonies, or in most European countries. The one serious case in England which barely approximates a third-degree examination resulted in a parliamentary commission which expressed severe condemnation of any conduct approximating what is generally recognized as third-degree methods. The committee believed that the ultimate basis for a change in existing practices is through public opinion. Suggesting that citizens and interested organizations join in the movement to demand that public officers follow the law in apprehending and examining those charged with misdemeanors or more serious offenses, the committee offered recommendations in part as follows:

1. That persons taken into custody be brought before a magistrate as soon as physically practicable.
2. That every person taken into custody be given opportunity forthwith to employ counsel and to confer with counsel.
3. That every person taken into custody be permitted at reasonable hours to be visited by relatives.
4. That no police officer or detective be allowed to interrogate a person in custody except in the presence of the prisoner's counsel or the public defender, and then only in case the prisoner says that he wishes to make a statement.
5. That examinations of persons in custody by police or detectives not in the presence of prisoner's counsel or the public defender are unlawful.
6. That the extortion of confessions or admissions by prolonged secret interrogation, by depriving the prisoner of opportunity to sleep, depriving him of food or drink, holding him incommunicado, or by any of the methods of the so-called "third degree" are abhorrent to all who value the liberties declared in our Constitution, and are indefensible upon any ground.

7. That state's attorneys and other prosecuting officers ought, as officers of the law and of the courts, to be alert to protect arrested persons in their constitutional rights and ought never to take part in or to countenance the holding of men incommunicado, or any attempt by secret inquisition or other lawless means to get confessions or admissions.

It is significant that these recommendations involve little more than the requirement that the existing constitutional protection and legal procedure be followed with a reasonable degree of care and attention. The entire report is predicated upon the basis that the remedy for the ills which afflict the administration of justice will not be found in measures which violate the law.

After reviewing the evidence obtainable, the authors of the report on "Lawlessness in Law Enforcement" presented to the President by the Wickersham Commission reached the conclusion that "the third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread. Protracted questioning of prisoners is commonly employed. Threats and methods of intimidation, adjusted to the age or mentality of the victim, are frequently used, either by themselves or in combination with some of the other practices mentioned. Physical brutality, illegal detention, and refusal to allow access of counsel to the prisoner is common."[18]

The commission called attention to the fact that such illegal practices do not occur in certain communities which have substantially the same legal provisions to protect citizens as prevail in sections where illegal methods are common. And though certain recommendations are made to eliminate such unfair practices, the report concludes with the observation: "But changes in machinery are not sufficient to prevent unfairness. Much more depends upon the men that operate the machinery. And whatever limits are imposed by statute, prosecuting officials and trial judges must necessarily be left with great powers and wide discretion." Much depends, therefore, upon the vigilance of individuals and groups in a community who insist on censuring unfair tactics when employed by public officials.

Freedom and equality of justice are designated as the "twin fundamental conceptions of American jurisprudence. Together they form the basic principle on which our entire plan for the administration of justice is built."[19] These principles, embodied in the declaration of rights of the Massachusetts constitution of 1780, have

[18] Report No. 11, p. 4.
[19] R. H. Smith, *op. cit.*, chap. i.

been reenacted in practically every constitution since adopted, and they represent an ideal which is regarded as the corner stone of the American government. They involve the protection of the individual with respect to life, liberty, and property, and the enjoyment of those things upon which human life and happiness depend, in so far as such enjoyment does not infringe upon the rights of others.

Denial of Justice to the Poor.—Freedom and equality of justice depend upon two things, namely, an impartial substantive law and a just administration of the law.[20] With regard to these, it is generally conceded that the body of the substantive law, with few exceptions, is free from partiality and class bias; and yet, due to defective methods of administration, obstacles have been placed in the path of those who most need protection, so that litigation becomes impossible, rights are lost, and wrongs go unredressed.

The three defects which have resulted in a denial of justice to the poor are, according to Mr. Smith: (1) delay; (2) court costs and fees; (3) expense of counsel. The evil of delay is, in fact, a serious defect. It results in the defeat of justice by making the time required to bring a case to final judgment so long that parties frequently do not go to court at all, and by forcing unfair settlements and compromises. Fortunately, the difficulty of delay can be in part remedied, and the way to reform is now clear. That the existing system closes the courts to the poor is apparent. A plaintiff must not only pay the cost for summons, service, entry, trial and judgment, but he must also furnish a bond to guarantee that the defendant, if successful, shall not be out of pocket. Though in theory a form is supposed to exist whereby one unable to pay can bring suit, yet in practice such a right is often denied. Court costs, it has been shown, can be greatly reduced. A part of the expense can be borne by the state, and by a special form of proceeding the poor may be accorded a hearing in court. Though the lawyer is indispensable in the conduct of proceedings, the fees which he charges for his services render it impossible for millions to be benefited by his advice and help. It is essential that means be provided whereby the millions who cannot afford to employ counsel may yet be assisted in the protection of their rights and the settlement of their legal obligations. Methods by which the administration of the law is rendered more fair and equitable to the average person deserve more careful consideration than they are usually accorded. But the majority of judges and lawyers view this situation with indifference. They fail to see behind this denial of justice the suffering and tragedy which it causes.

[20] *Ibid.*, pp. 13 ff.

No doubt the seriousness of these defects has been greatly increased by the growing complexity of modern economic life and by the rapid influx of immigrants. The failure of the bench and bar, however, to recognize the facts and to bestir themselves to bring about judicial reform has tended to delay the adoption of well-known methods to improve the administration of justice. Fortunately the attitude of the bar is changing and many lawyers are foremost advocates of reform programs.

Methods and Procedure to Improve Judicial Administration

One of the primary steps toward the establishment of an efficient judicial system is generally conceded to be the consolidation of the courts into a single administrative system, with a Chief Justice and a Judicial Council at the head and with broad powers of rule-making and discretionary authority in adjusting the procedure of the courts to meet changing situations. To remedy unsatisfactory and deplorable conditions in England the English courts were formed into a single unified system.

English Judicature Acts.—By the Supreme Court of Judicature Act of 1873 the several courts of the realm were consolidated into a single supreme court with two permanent divisions, namely, a high court of justice, and a court of appeal. The administration of the court is centralized and unified, with ample authority to subdivide for the purpose of an effective division of labor. Judges are appointed by the Crown and have a permanent tenure unless removed by the King on an address from both Houses of Parliament. A significant feature of the reform act is the arrangement by which details of practice and procedure are left to a committee of nine justices, including the Lord Chancellor. Under this provision, a complete code of procedure has been prepared by the justices relative to form and commencement of actions, pleadings, trial, judgment, execution, appeals, provisional remedies, special proceedings, and costs. To nearly every rule is added the provision that the court or judge may, "in the interests of justice or convenience, make such an order and on such terms as shall be deemed just." A critical observer of the English courts under this reformed code found that in the conduct of a trial little time was lost in selecting a jury, the examination of witnesses was seldom interrupted by objections, and the administration of justice in England was simple, direct, and inexpensive.[21]

[21] For additional data on court procedure in England, consult Report of the Special Committee on Law Enforcement, American Bar Association, *Reports* (1923), vol. xlviii, pp. 415 ff.

Centralized Plan of Court Organization.—In the United States many lawyers, judges, and publicists favor a unified system of courts in which the supreme court of a state would be under the direction of a presiding judge or judicial superintendent, who, with associates appointed on the basis of merit, could control all subordinate tribunals necessary for the administration of justice. The chief principles involved in a centralization program were defined by a committee of the American Bar Association and were presented to that organization in 1909.[22]

Principle I. The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments, and divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public.

The object of this principle was to unify the conduct of judicial business and to place the supervision of the business of the court under one official.

Principle II. Whenever in the future, practice acts or codes of procedure are drawn up or revised, the statutes should deal only with the general features of procedure, and prescribe the general lines to be followed, leaving details to be fixed by rules of courts which the courts may change from time to time as actual experience of their application and operation dictates.

The application of this principle in England has, according to Chief Justice Taft, "worked with great benefit to the litigant, has secured much expedition in the settlement of controversies, and has practically eliminated the discussion of points of practice and pleading in the appellate courts."

Principle III. Wherever the error complained of is a defect of proof of some matter capable of proof by record for other incontrovertible evidence, defective certifications or failure to lay the proper foundation for evidence which can, in fact, without involving substantial controversy, be shown to be competent, the court of review should be given power to take additional evidence for the purpose of sustaining a judgment.

Lack of power in appellate tribunals to take evidence to correct mere formal defects or to supply deficiencies in the record or in the evidence, the committee maintained, was a serious defect in our procedure.

[22] See "Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation," American Bar Association, *Reports* (1909), vol. xxxiv, pp. 578 ff.

Principle IV. All clerks and other employees of court and all persons having permanently to do in any way with the administration of justice should be compensated by fixed salaries and all fees collected should be paid into the public treasury.

Most of the reforms of the last decade have been in the direction indicated in these principles. Though there has been considerable discussion of plans to unify the system of courts in many states, and proposals for unification have been included in a few of the drafts of new constitutions, a general scheme of consolidation has not received public approval in the states.

Judge-made Rules.—Whether or not a centralized system of court organization is adopted, it is believed to be essential to any program of judicial reform that the courts be authorized to prepare and develop their own rules of procedure and practice instead of having such rules under the control of the legislature. The English system of rules made by judges which has been applied in the English dominions and colonies and has done away with procedural tinkering in the legislatures was first applied in the Chicago Municipal Court. A partial step toward judicial control of procedure was taken by the proviso in the New Jersey Practice Act of 1912 to the effect that "these rules shall be considered as general rules for the government of the courts and the conducting of causes, and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice." The legislature of Michigan authorized the supreme court to prepare a code of procedure, but judges imbued with the traditions of the common law refused to act. A similar act by the legislature of Colorado resulted in a number of procedural changes to expedite judicial administration.

But the most important step to facilitate rule-making by judges has been taken in the states which have established judicial councils or rules committees and have conferred rule-making power on these bodies. California, Washington and Wisconsin have moved in this direction, the last state having adopted a plan similar to the English procedural reform act. "The creation of judicial councils is now clearly the trend in all the states," concludes Mr. Harley, "and the idea of an educated and disciplined bar, organized by statute or under rule of court, is on the way to complete supremacy. A little more slowly marches the principle of judicial coordination for responsible, business-like administration."[23]

[23] Herbert Harley, "The Argument for Judicial Rule-Making," *The Annals* (May, 1933), p. 99.

Judicial Councils.—The first judicial council was established in Ohio in 1922 when provision was made for a council to consist of four judges of appellate courts, two nisi prius judges and three practicing attorneys. It was made the duty of the council to render biennial reports to the legislature and to make suggestions to the judges for the improvement of judicial procedure. No funds having been provided by the legislature, the members of the council refused to carry out the purposes of the act. The idea of a council, however, was one which soon took definite and concrete form. In 1914 ex-President Taft proposed the formation of a federal judicial council "to consider each year the pending federal judicial business of the country and to distribute the federal judicial force . . . through the various districts and intermediate appellate courts" in accordance with the amount of business to be done. Congress in 1922 carried out part of this plan in providing for a conference of senior circuit judges which has assumed the function of a judicial council for federal judicial business. More than a score of other states have followed the Ohio and the federal conference plan.

As a rule the councils include members from the appellate and nisi prius courts, and practicing attorneys. They are usually limited to fact-finding and the making of recommendations. The general authority exercised by councils may be summarized briefly as follows: (1) To conduct a survey of the volume and condition of business in the various courts. (2) To devise ways and methods of simplifying judicial procedure and improving the administration of justice. (3) To acquaint the courts with the results of experiments in other jurisdictions and to aid in the adoption of such changes as seem in the interests of uniformity and the expedition of business. (4) To aid the legislative and executive departments in formulating policies and problems in relation to the administration of justice.[24]

The judicial council of California has been given rather extensive powers, and a brief description of the operation of this council may indicate the opportunities and possibilities of such an organization for the improvement of the administration of justice.[25] Court practice in California until recent times, as in other states, had been governed largely by rigid statutes. In 1925 a plan for a judicial council was proposed and on vote of the people was approved. The original proposal for a council was intended to place the authority for the

[24] Cf. J. A. C. Grant, "The Judicial Council Movement," *American Political Science Review* (November, 1928), vol. xxii, p. 941.

[25] For this account of the judicial council and the state bar plans of California we are indebted to Chief Justice William H. Waste. See "Are Our Courts Keeping Step?" *California Monthly* (January, 1934).

adoption or amendment of rules of practice and procedure for the courts in the hands of the council. This provision was changed before final passage by the legislature by the addition of the proviso that such rules shall not be inconsistent with the laws then in force or that may thereafter be adopted by the legislature. Consequently, though the judicial council has been given authority to assist in the preparation and adoption of rules of practice and procedure, the ultimate authority in this matter still resides, as it does in most of the states, with the legislature.

Working under this limitation, the council has prepared a number of rules modifying procedure and establishing new methods in the administration of justice which have been adopted by the courts with important and beneficial results. Under the former organization of the courts in the states, the only remedy to meet the increase of judicial business was by the creation of new judgeships and the filling of the places so created by appointment by the governor. Notwithstanding the attempt made to increase the work done by the courts, the general result was that the courts were practically a year or more behind in their work.

Under the judicial council plan, the chief justice as its chairman is vested with wide administrative and executive powers over the entire judicial department of the state. It is made his duty to seek to expedite the judicial business of the state and as far as it is possible to equalize the work of the judges. For this purpose he may assign judges of courts in the smaller communities having little litigation to the courts in the populous centers where the court calendars are congested or the judges are disqualified or for any reason are unable to act. In case a vacancy occurs in the courts, the chairman of the council may assign to such court a judge or justice of another court to sit *pro tempore* and care for the work of that court until the vacancy is filled by appointment by the governor or election by the people. When the calendars of any of the courts become congested or the work of a court is falling behind, the chief justice may in like manner assign judges of other courts to assist in relieving the situation.

Another important duty imposed by the constitution on the judicial council is that of surveying the condition of business in the several courts with a view to simplifying and improving the administration of justice, and to submit to the court suggestions that may seem in the interests of uniformity of procedure and tend toward the expedition of court business.

California, along with several other states, has also taken an important step in the improvement of the administration of justice by

the creation of a state bar.[26] The state bar of California was created by the legislature as a public corporation with powers to provide for reform, organization, and government, and was given authority to regulate the practice of law and to provide penalties for misconduct of its members. No one not an active member of the state bar is permitted to practice law in the state. One of the duties of the state bar has been the effort to rid the profession of some of the undesirable members who are bringing the administration of justice and the carrying out of legal practice and procedure into disrepute. The board of governors of the state bar have recommended that a considerable number of members of the profession be disbarred, that others be reprimanded, and that many be given warning in relation to what are deemed undesirable methods. With the approval of the Supreme Court, the governors of the state bar are formulating and enforcing rules of professional conduct for all members of the profession practicing within the state. The state bar act also authorized the governors to aid in the advancement of the science of jurisprudence and in the improvement of the administration of justice. Various committees and groups of members of the bar are engaged in studying means and methods to adapt present judicial machinery to markedly new conditions, and, as was anticipated by the proponents of the state bar plan, a well-organized state bar is serving as a useful and efficient instrument in concentrating and directing the efforts for better administration of justice.

In addition to the rule-making power, judges in continental European countries are accorded much greater control over matters of procedure and trial, and their position differs in a marked degree from that of judges in the United States. One of the points of difference may well be illustrated by the Swiss Civil Code, recently adopted, which provides as follows: "The written law governs all matters to which either the letter or the spirit of any of its provisions refer. In the absence of a provision of such law applicable to the case, the judge shall decide according to the customary law and, in the absence of custom, according to the rule which he would establish were he acting as legislator. He shall base his decisions upon the solutions adopted by text writers and in judicial decisions." A similar duty to render a decision in every cause, whether covered by the law or not, is contained in the French Civil Code, to the effect that "the judge who refuses to render judgment under the pretext of silence, obscurity, or inefficiency of the law may be prosecuted as guilty of denial of justice."

[26] On the formation of state bar organizations, see G. W. Adams, "The Self-Governing Bar," *American Political Science Review* (June, 1932), vol. xxvi, p. 470.

It is frequently not realized that much greater flexibility both in the methods of trial now in use and in the administrative adjustments among other courts could be secured without drastic changes in the legal arrangements now prevailing regarding court organization in the United States. Some of the most important and effective changes in law enforcement can be accomplished by the adoption of simple, reasonable, and effective administrative devices with a minimum of permissive legislation. Effective as the administration of criminal justice in England is, it is carried on through a set of courts which have not been seriously changed for generations. Such devices as have been evolved in England and continental countries for securing and sifting the evidence prior to the trial of a case could be adopted to great advantage in this country.

Without any marked changes in the structure of courts, it would be possible to accomplish the result which was thus described by Lord Bowen as applicable to the administration of justice in England. In every case, whatever its character, said Lord Bowen, "every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes—upon oral evidence or affidavits, as is most convenient. Every amendment can be made at all times and all stages in any record, pleading or proceeding, that is requisite for the purpose of deciding the real matter in controversy." Could not the English plan of summons for direction before a master, by which the vast scheme of discovery is largely administered, be adopted without waiting for the adoption of an elaborate scheme of court organization?

Three significant factors account in large part for the efficiency which prevails in the administration of justice in England and in France. They are: first, the central position and the authority of the judge; second, the lack of technical rules of evidence and the relative informality of procedure which prevails in the actual trial and consideration of cases; third, the subordinate position of the lawyer who is deemed primarily an agent and assistant of the court, aiding the judge in securing accurate data regarding the case and the selection and determination of the vital issues involved. Most of these advantages could be gained in the actual administration of justice in the United States with relatively few important changes in court organization. In practice individual judges assume the functions comparable to those of a French or an English judge with results that are considered satisfactory to all parties concerned.

Principles which require special consideration in any plan to revise existing judicial machinery may be briefly summarized as follows:

First, flexible constitutional provisions for court organization. The

federal plan vesting judicial power in a Supreme Court and such inferior courts as Congress may establish, which has been followed in a few states, is preferable to the usual clauses of the state constitutions covering the details of court organization and jurisdiction. Progress in remolding judicial machinery is always slow and is greatly retarded by the difficulties involved in the adoption of frequent constitutional amendments.

Second, establishment through constitutions and statutes of a certain degree of unification of the court system, involving a limited supervision over all inferior tribunals by the Supreme Court and a Judicial Council authorized to prepare and issue rules of procedure, to assign judges for special duties in accordance with the pressure of causes to be determined and the special capabilities of the judges, and to develop uniformity in records and statistical information.

Third, expeditious procedure in the preparation of affidavits and in the discovery of documents, with greater use of masters and judicial assistants, to dispose of issues before the stage of trial is reached, as is done in a large percentage of cases in England.

Fourth, flexible administrative arrangements, to permit specialization where required, to provide for conciliation and arbitration as well as other devices to secure informal and inexpensive proceedings in the adjustment of small claims; and to facilitate the settlement of controversies by summary judgments, declarations of right or any other device which serves to secure the ends of justice. The adoption of the above principles will require not a few structural changes in court organization, but they can be applied by degrees without a radical reconstruction of present judicial machinery.

However necessary it may be for an effective system of administering justice to have a unified system of courts with rule-making authority in the hands of the courts themselves, it is claimed that many improvements might be made in judicial administration without waiting for complete reorganization. Courts for the trial of small claims, for conciliation and arbitration, and for commercial arbitration are practical methods for improving judicial administration without serious changes in court organization.

Small Claims Courts.—One of the chief weaknesses in our judicial machinery has been the inability to provide for a satisfactory method of disposing of small causes. Because of the expense involved, long delay, and inconvenience, the majority of the poor find it impossible to secure a settlement of small claims in the courts. To remedy this defect small claims courts or courts or boards of conciliation are being established. These courts and boards differ in certain vital respects, though the tribunals are frequently confused. A few of the essential differences should be noted:

First. A small claims court is a court and a conciliation tribunal is not a court. In upholding the constitutionality of the North Dakota conciliation act the state supreme court says: "A conciliation board such as is provided for is not a court; it is a tribunal, a board, a table of peace where those who have certain kinds of controversies are invited to sit; this tribunal possesses none of the attributes of a court."

Second. A small claims court, like any other court, has power to render a decision and to enter a judgment which is as binding and as enforceable as the judgment of any other court in the land. A conciliation tribunal has no power to make a binding decision; the only judgment it can enter is one to which both parties voluntarily consent.

Third. A small claims court has a compulsory jurisdiction over the defendant; its writ or summons is a legal process and the penalty for disobeying it is a default. A conciliation tribunal has no power to compel the attendance of the defendant; it invites him to come and tell his story, but he may defy the invitation with impunity.

Finally, the small claims court is a court of law. Cases in a small claims court are heard by a judge and his decision is based on the rules of substantive law. Conciliation tribunals are commonly presided over by laymen and the judgment, if any, need bear no relation whatsoever to the rules of law.[27]

In both small claims courts and conciliation tribunals the procedure is informal; rules of pleading, trial procedure, and evidence are largely dispensed with. Judges of small claims courts frequently use the methods of boards of conciliation.

The first small claims court was established in Cleveland in 1913, though it was designated as the conciliation branch of the municipal court. "Small debtors' courts," which were in most respects conciliation tribunals, were authorized in Kansas in 1913, where a statute provided for the appointment of a judge of a debtors' court, "who is sympathetically inclined to consider the situation of the poor, friendless, and misfortunate." The judge was to serve without pay and was authorized to hold court in his home or place of business. The procedure was informal, no costs were to be assessed, and no lawyer was permitted to participate in the proceedings. The court was restricted to debts and accounts not exceeding twenty dollars, and to the service of those who could not afford to employ counsel or use the regular courts. This act represented a rather violent reaction against the old formal method of trying small cases and was in the nature of a sanction for the method of legal aid societies. Though certain marked defects are involved in the act, "the great accomplish-

[27] Reginald Heber Smith and John S. Bradway, "Growth of Legal Aid Work in the United States; A Study of our Administration of Justice primarily as it Affects the Wage Earner and of the Agencies designed to Improve his Position before the Law," *Bulletin* No. 398 of the Bureau of Labor Statistics, p. 21.

ment of these courts is that they have concretely demonstrated that justice administered without regard to procedural and evidential rules of law not only meets with popular approval, but also is entirely feasible; in other words, that as to small civil causes the three defects in the traditional administration of justice can be readily overcome."[28]

Divisions for the trial of small claims were established in connection with municipal courts such as those of Chicago and Philadelphia. The Massachusetts legislature took an important step in 1921 when the justices of the district courts were authorized to adopt rules for informal procedure in small causes, and thus the first attempt was made to establish simple and inexpensive procedure for small civil controversies in the regular system of the state courts. Courts designed to secure informal and inexpensive procedure and to obtain speedy justice in minor controversies have been established in a number of states. In most instances where small claims courts have been established the evidence indicates that satisfactory results were secured. Thousands of cases are disposed of by these courts with apparent satisfaction, for few cases are appealed. But most significant of all is the fact that these courts render justice in a class of causes heretofore entirely without the range of the regular judicial machinery.

Conciliation Procedure.—One of the greatest deterrents in the administration of justice is the clogging of the judicial machinery and the consequent delay entailed by the trial of controversies which could be settled by means of arbitration and conciliation. Probably one-half or more of the cases which come into the courts of justice could be settled reasonably and equitably by means of arbitration when the machinery for such settlement is provided. In European countries, particularly in France and in Germany, the judge is given the authority to act as arbitrator. Many minor controversies are settled by the hearing of both parties, with witnesses involved, and an adjustment is made by the judge, all of the parties agreeing thereto. Such courts of conciliation have been used extensively for commercial purposes in England and have been established in the United States, particularly in Cleveland, Minneapolis, Chicago, and New York. It will be a step forward in improving administration of justice when conciliation courts are provided and when petty controversies can be settled without the expense of attorneys and the consequent delay of regular trials in courts of justice.

The first step toward an amicable settlement of controversies consists in the frank telling, by both parties, of all they know about a matter. According to the principle of conciliation, which should oc-

[28] R. H. Smith, *op. cit.*, p. 46.

cupy a conspicuous place in any complete system of administering justice, a neutral agency is established whereby parties to a controversy may meet without prejudice and disclose every material fact.

The machinery and the procedure of conciliation are extremely simple and inexpensive. The principle is applicable to nearly every kind of civil controversy. Briefly, the plan which has been proposed as a supplement to existing courts is that no civil action shall be commenced until the claimant shall have given the opposing party an opportunity to discuss a settlement in the presence of an assistant of the court known as a conciliator. If the defendant does not appear in response, the conciliator certifies that the attempt at conciliation has been made and has failed, and the claimant is then entitled to obtain judicial process. When the defendant appears it is then the duty of the conciliator to hear the statements of both parties and their witnesses, and to suggest an amicable settlement agreeable to law and equity.[29] Conciliation procedure has been in effect for more than a century in Scandinavian countries and is held in such high regard that nothing could induce the people of these nations to abandon the system. In Norway and Denmark from 75 to 90 per cent of the civil cases arising are disposed of by means of conciliation. The results of conciliation procedure in the United States have thus far been rather disappointing, though it is still believed that the underlying ideas are practicable and can be developed to advantage in the settlement of many minor civil causes.

The early merchant courts of England developed a new kind of justice. Courts of pie-poudre gave their decisions while the dust fell from the applicant's feet and in the maritime towns gave justice while the mariners waited for the tide. The judges were merchants who were familiar with the conditions out of which the controversies arose. It was not the law of England which was applied, but the customs prevailing among merchants. Lord Mansfield developed these customary ways of deciding cases into a part of the law administered by the courts.[30] But as the procedure of the regular courts in commercial matters grew overformalized, another movement toward commercial arbitration was inaugurated.

Commercial Arbitration.—One of the interesting facts concerning British litigation is the relative absence of commercial disputes from the calendars of the principal trial courts.[31] The prac-

[29] For a proposed act embodying these principles, consult *Journal* of the American Judicature Society (February, 1919), vol. ii, no. 5, p. 151.

[30] Lord Justice Scrutton, "The Work of the Commercial Courts," *Cambridge Law Journal* (1923), vol. i, p. 8.

[31] Cf. Samuel Rosenbaum, "A Report on Commercial Arbitration in England," American Judicature Society, *Bulletin* no. xii (October, 1916).

tice of commercial arbitration which has developed in England in the past forty years saves the courts a great amount of business. It is estimated that more than 100,000 causes are arbitrated every year. Arbitration differs from conciliation in that "it is a regular and recognized method sanctioned and governed by law, for the determination of rights and the enforcement of remedies, by which a party aggrieved may ascertain and obtain all that he is entitled to from his opponent, without instituting an action in the courts of law." The practice of arbitration is assured by the fact that trade agreements made in England contain, as a rule, a clause requiring the submission of disputes to arbitration.

While arbitration was practiced for centuries in England, the modern method had its beginning at the time of the American Civil War, when the Liverpool Cotton Association set up an arbitration committee to determine the many disputes arising in the cotton trade. The success of the efforts of the committee led to the application of the principle of arbitration to other controversies. Other trades established similar committees. In 1889 an act was passed consolidating and revising the law of arbitration and providing in a schedule a simple set of rules to govern the procedure in all arbitrations where no agreement to the contrary was made by the parties.

Today there is not a trade or professional organization in England that does not provide some means for the arbitration of disputes that arise among members or between members and others, and frequently between non-members engaged in similar work. The opportunity to benefit by arbitration has been one of the factors leading to the organization of almost every existing kind of trade. In each trade there has been developed a body of experts available as arbitrators, men who have mastered the mysteries and intricacies of their respective trades.[32]

Among the advantages of arbitration, the elimination of questions of jurisdiction, the employment of experts in the business of a given trade, and a flexible procedure which can be adapted to the convenience of the parties and the character of the dispute are probably most noteworthy.

In the United States little progress was made prior to 1900 in the development of the practice of commercial arbitration. Commercial bodies, such as the New York Chamber of Commerce, provided, at times, facilities for the settlement of disputes between merchants through committees or specially designated arbitrators. Various efforts were made to secure a legal basis and sanction to such arbitral procedure, but on the whole little was accomplished until commercial

[32] Consult *Journal* of the American Judicature Society (August, 1918), vol. ii, no. 2, p. 43, for details as to the practice of arbitration.

organizations, lawyers, and judges combined to secure laws giving legal validity to agreements with a clause providing for arbitration in case of dispute and to formulate a more definite set of rules for procedure in commercial arbitration. The New York Chamber of Commerce, the Chicago Board of Trade, and the municipal courts of Cleveland, Cincinnati, Chicago, and New York have aided in the preparation of such rules and in encouraging the submission of disputes to arbitrators. A forward step was taken in rendering procedure for commercial arbitation effective by the passage of the United States Arbitration Act on February 12, 1925. This act makes valid, irrevocable, and enforcible written provisions or agreements for the arbitration of disputes arising out of contracts or maritime transactions, in interstate or foreign commerce.[33]

The chief defects of the administration of justice—delay, costs, and attorneys' fees—are eliminated in conciliation and arbitration, which, as a voluntary method of settling disputes, serves to secure an amicable and fair adjustment, and thus to relieve the courts of much unnecessary business. Due to the conservative attitudes and reactions of the people and to rather persistent opposition on the part of many lawyers and judges who have failed to encourage informal and amicable settlement of disputes, arbitral methods have had a quite limited application in the United States.

A part of the aims and purposes of methods of conciliation and arbitration has been attained by the device of declaratory judgments. A declaratory judgment is in the nature of a binding determination of rights made by the courts where legal relations are in controversy. The idea is one which has not infrequently been applied where ideas of equity are introduced in legal systems. The device was adopted in the United States in 1919 and since this time many of the states have enacted laws authorizing such procedure. In a few states the courts were disposed to check declaratory judgments by declaring them in conflict with the constitution. Gradually, however, the judges have come to favor such judgments and to hold that no express constitutional obstacle stands in the way of their enforcement. Since the general purpose of the declaratory judgment is to enable disputed rights to be litigated so as to avoid undue cost and irremediable damage, such procedure is especially necessary in an industrial society which operates under long-term contracts and where social and economic relations are becoming ever more complicated.

Another field in which the principles of judicial reform have been applied is that of domestic relations. For cases of this type, unification of jurisdiction and specialization by judges has to a great degree been

[33] See "The United States Arbitration Law and Its Application," *American Bar Association Journal* (March, 1925), vol. xi, p. 153.

accomplished in the domestic relations courts of such cities as Chicago, Cincinnati, New York, Philadelphia, and Boston. In these courts, as in the small claims courts and courts of conciliation, delays and court costs do not seriously interfere with the administration of justice, and the expense of an attorney is either eliminated or provided at little or no expense to poor litigants.[34]

These remedial agencies, now frequently utilized to adapt the administration of justice to the needs of modern society, should be supplemented by legal aid facilities. Legal aid societies have become a well-recognized device to give legal advice and counsel to the millions who cannot afford to employ a lawyer or to suffer the expenses and inconveniences of court trials. The first legal aid organization was formed in New York in 1876 to protect immigrants from the frauds and impositions to which they were subjected. Under the efficient leadership of Arthur V. Briesen, the efforts of the New York society were extended to grant aid to anyone who because of poverty was in danger of a denial of justice. Similar organizations sponsored in many communities at times received public support and were strengthened in a few instances by the active aid of the faculty and students of law schools. The establishment of public defenders in criminal causes was an outgrowth of the experience of the legal societies. The progress along this line has been summarized as follows:

> The history of the development of legal aid work represents an idea that originated in 1876 and germinated very slowly during the first 25 years. The community was not aware of the difficulties of the poor man who needed legal protection. The situation was most manifest in the largest cities and the legal aid idea naturally first took root in our two largest cities—New York and Chicago. From 1900 to 1917 we find the idea extending at an accelerating pace, first into the next largest cities such as Philadelphia, Boston, and Cleveland, and finally reaching across the continent to Los Angeles and San Francisco. During the war the movement was checked and suffered a momentary setback, but by 1920 it was well under way again; it has regained its momentum and the current of events flows steadily ahead under the intelligent guidance and leadership of the National Association of Legal Aid Organizations.[35]
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> . . . The existing organizations now serve a territory in which 25,000,000 persons live; each year they assist more than 125,000 clients; they collect approximately half a million dollars in amounts that average little more than $15 per case. The maintenance of legal aid work now costs nearly a third of a million dollars a year, which

[34] R. H. Smith, *op. cit.*, chap. xi.

[35] R. H. Smith and J. S. Bradway, *op. cit.*, pp. 66, 67; for the nature, progress and problems of legal aid work, see *ibid.*, pp. 73 ff.

means that they are able to extend legal advice to a client and to render whatever legal assistance he requires at the average cost of $2.50 per case.[36]

Justice Through Administrative Tribunals.—More important than the various courts established to remedy defects in the traditional method of administering justice is the effort to secure justice through administrative tribunals. Commenting on this practice, Mr. Smith says: "Such tribunals have sprung up with amazing rapidity, they have taken over an enormous amount of litigation formerly handled by the courts, and the law concerning administrative justice is the most rapidly growing branch of law in our entire jurisprudence."[37] The two leading types of these tribunals are the industrial accident commissions and the public service commissions.

In the settlement of claims by injured workmen, delay and costs resulted in gross injustice. The time and great expense involved rendered it practically impossible for an injured workman to secure justice. Out of this condition grew the contingent fee system and the ambulance-chasing lawyer. Under the workmen's compensation acts the contingent fee system has been in large part eliminated. The expense of counsel and other costs have been greatly reduced. The application of the law to individual cases has been put on a systematic basis, rendering an appeal unlikely. The settlement of the claims of injured workmen by industrial accident commissions has proved so satisfactory that there is a movement to extend the method of such commissions to the adjustment of injuries to passengers on all railways and to automobile accidents.[38]

The public service commissions, which were established to secure a more effective control over public utilities, have also developed a method of settling disputes through the aid of investigators and experts, which operates to the benefit of the poor litigant as well as of

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[36] *Ibid.*, p. 74.

[37] R. H. Smith, *op. cit.*, p. 83.

[38] According to Judge Marx, "Three-fourths of all civil jury trials are concerned with personal injury claims largely arising from automobile accidents. The major portion of the time of all civil courts in the trial divisions is consumed in the trial and disposition of these cases which also take the time of appellate courts to a greater extent than we realize. . . .

"All of you know from personal experience of the futility of these personal injury suits as a means of doing justice. . . . For practical purposes the personal injury suit in automobile accident cases is frequently entirely worthless and at best is slow, uncertain, wasteful, and unsatisfactory. It is a survival under modern conditions of a legal system which has outlived its usefulness and its retention is working irreparable injustice." Judge Robert S. Marx, "Compulsory Automobile Insurance," American Bar Association *Journal* (November, 1925), vol. xi, p. 732.

those more fortunately situated. The commissions investigate individual cases and often grant redress, with little or no expense to the complainant. Frequently, legal advice is given to the parties involved in controversies and steps are taken to effect a settlement by conciliation. Numerous complaints are thus disposed of quickly and satisfactorily which, under former conditions, would never have been presented to a judicial or administrative tribunal or would have dragged on indefinitely through the hierarchy of courts. Another field in which the settlement of claims has been placed to a limited extent under the supervision and control of administrative officers is the payment of wages. Labor commissioners not only decide many wage controversies, but they also provide free legal advice for employees.[39]

The future of such administrative tribunals, or what their ultimate status will be, is a perplexing problem. Some of the advantages of these commissions are due, no doubt, to the fact that they can administer claims and settle controversies free from the harassing restrictions of formal law. But administrative tribunals tend to develop a law and practice of their own. As procedure becomes better defined it tends to follow more nearly the channels of regular judicial procedure, and eventually the commissions may be merged with other courts in a reorganized judicial system. If such a union takes place it is clear that certain features of the administrative tribunals, such as the use of investigators, simple procedure, and the more direct settlement of claims will be retained. Administrative tribunals, it has been well said, "have much to teach judicial tribunals about promptness, inexpensiveness, and limiting the attorney to clearly defined functions."[40]

Furthermore, the administration of justice is undergoing changes due to the results obtained by other sciences, such as sociology and psychology. The courts of the United States have been slow to realize the necessity of full and complete court records in which the history of criminals is fully analyzed, and to utilize the advice of experts, particularly psychopathologists, sociologists, and criminologists, in examining those apprehended for crime and recommending treatment in accord with their mental, social, or physical deficiencies. The remarkable record of the municipal court of Chicago indicates the possibilities for development in this procedure. Every court will in due time have a complete and adequate system of records which will be in charge of experts trained in the science of criminology, and criminals will be treated in accordance with the developments of mod-

[39] See R. H. Smith and J. S. Bradway, *op. cit.*, pp. 32 ff.
[40] R. H. Smith, *op. cit.*, p. 91.

ern scientific knowledge as well as with the principles of legal justice and criminal law.

Parole System and Indeterminate Sentence.—A more extensive use may be made of the parole system and the indeterminate sentence. Many who are apprehended for crime can, under the parole system, be returned to their regular occupations and be held under surveillance until all danger of recurrence of the original breaking of the law may be removed. "If parole is to succeed," Professor Moley observes, "it must be established upon a basis quite different from that which now exists in any of the states where it is operating. A number of fundamental conditions are necessary to its success, most of which are lacking in all the states where it is recognized in law." The six principles which follow were formulated by and are stated in a report of a committee appointed in 1930 by Governor Franklin D. Roosevelt, to plan a parole system for the State of New York.[41]

1. It is important that the state itself recognize that parole is a state function, and that the responsibility for its maintenance rests upon the state. In many instances, supervision of paroled prisoners is assumed by private agencies or individuals.

2. The parole function, both in the determination of the persons who should be paroled and in their supervision, should not be exercised by the prison authorities themselves, as is the case under most parole systems at the present time.

3. The body charged with the duty of carrying on the parole work must have broad powers in law, high prestige and a definite procedure in the release and after-care of prisoners.

4. The prisons and reformatories themselves must be reorganized to such an extent that they will truly become schools of industry and training in the responsibilities of right living.

5. A parole board must be provided which has prestige, tenure and salary equal to or greater than that of the judiciary. If such qualities are proper to be invested in judges, whose functions and jurisdiction are rather strictly limited by law, surely those who exercise the power of release in the way a parole board should, ought to be equally endowed. Such boards are supposed to exercise broad discretion in a field in which technique is as yet only a subordinate consideration. They are judges and users of the technique of others, and within their staff they should have psychiatric, legal and other technical services to provide material on which judgments may be made. The judgments themselves are of necessity lay judgments, unfettered by dogmatic professional rules.

6. The state should make adequate provision for an organization and staff of sufficiently high-grade individuals to assure that parole supervision and selection will be exercised intelligently and effectively.

[41] Condensed from account by Raymond Moley, *Our Criminal Courts* (Minton, Balch & Company, 1930), pp. 169 ff.

By the provisions of the indeterminate sentence it is possible for those in charge of the prisoners to examine carefully those who show signs of improvement and to return them to the normal conditions of life. Thus the sentence may be shortened for many who would otherwise be held indefinitely and probably be forever lost, as far as a return to decency and right conduct is concerned. Furthermore, the conditions and quarters of prisoners are being improved, and the former cell system in some instances has been eliminated. Some sort of cottage system with provisions for working out of doors and in factories, along with industrial training, will tend to restore to useful and peaceful occupations the majority of those who by some misstep or willful breaking of the laws become wards of society and in need of its protection. The experience of Montpelier, Vermont, and of other cities where those convicted for minor offenses have been put to useful work under a system of parole and supervision demonstrates that the majority of criminals can be restored to usefulness and effective work, and that this method is far superior to the old plan of incarcerating criminals and holding them under conditions which degrade and make it often impossible for them to be restored to respectable citizenship. According to a recent estimate, the United States spends annually $500,000,000 more in fighting crime than on all its works of charity, education, and religion. It is needless to argue that such a condition ought not to continue.

The application of scientific methods in the administration of justice is revolutionizing some of the former methods in dealing with delinquents and criminals. Psychopathology, or the science of mental abnormality, includes a study of all of the defects of the individual, physical as well as mental. The psychopathologist must be a specialist in medical science, and, in view of the intimate relation between physical and mental abnormality and degeneration, he needs to be a neurologist. Finally, he must be a psychiatrist, versed in all the subtle knowledge of mental diseases. Thus equipped and permitted to cooperate with the court, there is now opportunity for the psychopathologist to penetrate the mysteries of personality, to aid in understanding and classifying the delinquents so as to give a better basis for a judgment designed to fit the needs of the individual and to conserve the interests of society.

A generation ago lawyers and justices were loath to admit any defects or weaknesses in the legal system of the United States. It was customary to laud the virtues of the common law and the courts and to express contempt at "futile legislative attempts to interfere with the inevitable course of legal history." The first attacks on the methods of administering justice were so exaggerated as to receive but scant support. But the persistence of attacks and the accumula-

tion of evidence on the failures of judicial administration have changed the attitude of the bar, and many lawyers are now willing to sponsor concrete efforts toward improvement.

In law and jurisprudence a functional attitude is developing comparable to the instrumentalist or pragmatist movements in philosophy. To the jurist this attitude means the consideration of law in action, as well as law in books and court decisions. The functional purpose is designed to frame legal precepts in respect to social interests and needs. As expressed by the Lord Chancellor of England in a recent address, "The merely practical lawyer today, however able, is not enough, the courts are becoming more and more concerned with great social experiments. Law joins hands as never before with problems of economics, problems in political science, problems in the technique of administration. It is important that the curricula of our law schools shall send out lawyers trained to appreciate the meanings of these relationships."

In accordance with this point of view, lawyers and judges in the United States are beginning to think not merely in terms of paper rules and precedents, but also in the light of the personality of the judges. It is recognized as never before that the inheritance, training, traditions, and associations of judges, as well as of all other individuals who participate in the processes of making and enforcing the laws, are significant factors which cannot be overlooked.[42] More time and attention, it is believed, should be given to the selection and controlling of judges in their work of law administration. In addition to the present emphasis upon personality in the administration of law, a new school of jurists, among which Justices Brandeis and Cardozo are the foremost representatives, look upon the law as necessarily in a process of adjustment to accord with the changing conditions of modern life. The view which these leaders of our highest court defend was recently stated by Attorney-General Cummings, "I have never considered the law as a mere body of precedents; to my mind it is a vital growing thing fashioned for service and constantly refashioned for further service. Properly administered it should be the trusted servant of the people and not their hated ruler. It should strengthen, not weaken, the bonds which exist between the people and the government which they themselves have created."

The realists in jurisprudence are calling attention in particular to the urgent need of the adjustment of the law to meet rapidly changing conditions of economic and industrial life. In a recent analysis before the American Bar Association, Professor Harno noted that what

[42] See Jerome Frank, *Law and the Modern Mind* (Brentano's, 1930), and "Are Judges Human?" *University of Pennsylvania Law Review* (November and December, 1931), vol. lxxx, pp. 17 and 233.

law-making agencies have not adequately recognized is that law is inseparably interwoven with the economic, political, and social elements of our social institutions and that it is a primary function of these agencies to coordinate these forces through law into dynamic and constructive programs. Noting the failure of the judiciary as a law-making agency and of the legislature to develop constructive plans to meet modern conditions, Professor Harno inquires, "Shall the lawyers leave the matter to haphazard processes of lay agencies or shall they take a directive part in the process?" In this connection he raised a query similar to one proposed by the eminent lawyer and political scientist, Professor Edouard Lambert of the University of Lyons, referring to the tendencies in the silk industry of France to develop its own system of law and to have this law interpreted by members of its own group, in other words, to establish a thoroughgoing self-government in industry. Professor Lambert asks the question, "Will the lawyers recognize, appreciate, and cooperate with the processes under way, or will they be forgotten and ignored as the new order moves on into wider and more significant areas?"

Essential Needs for an Efficient Judicial System.—The problem of securing an efficient judicial system in the United States involves, then, it is generally agreed, certain essential changes in court organization and procedure. Among these changes are the unification of courts under a flexible form of organization which can be adjusted so as to dispose effectively of judicial business; rule-making power in courts, and the simplification of judicial procedure in order to remove obstructive tactics and technicalities which entail delay and high costs of litigation; and the provision of an informal and inexpensive procedure for the trial of small claims and for minor controversies which can readily be disposed of by some form of arbitral procedure or administrative agencies.

These changes, however, will not bring the desired reformation in judicial administration unless the judges selected for the bench have the training and qualifications to administer the system with scientific care and accuracy and with a spirit of fairness and justice that inspires public confidence. Such judges, when selected, must be assured of permanent tenure during good behavior and faithful performance of their duties. Nor will the administration of justice be greatly improved until more and better professional training is required of those who enter legal practice, and a higher standard of legal ethics is formulated and enforced by the bar associations.

Despite apparent weaknesses and defects, the American judicial system stands forth as one of the achievements of the founders of government in state and nation. Nowhere has such a heavy responsibility been placed upon the judicial department. It is surprising that

these responsibilities have been discharged so efficiently as to call forth so few criticisms and attacks. And whatever changes may be undertaken must be conceived and executed with sufficient caution and reserve not to interfere with the main principles of the administration of justice which have been demonstrated as necessary and efficacious through centuries of trial and experiment. To develop a spirit of distrust and dissatisfaction with the fundamental institutions of securing justice, without demonstrating ways of reform which can readily be adopted, would be to lead in the direction of disaster. On the other hand, to uphold the existing order and to be unwilling to consider changes and improvements would inevitably lead to results even more disastrous, namely, unrest and ultimate revolution.

The problem, then, in court reform, as in the introduction of changes in other departments of government, is to build upon the foundations of organization and practice which have been proved successful, and to make such changes as seem consistent with these foundations to adjust judicial machinery to meet the extraordinary conditions which have developed as a result of the complex conditions of modern life.[43] Says Elihu Root: "I do not think that we should be overharsh in judging ourselves, however, for the shortcomings have been the result of changing conditions which the great body of our people have not fully appreciated. We have had, in the main, just laws and honest courts to which people—poor as well as rich—could repair to obtain justice. But the rapid growth of great cities, the enormous masses of immigrants (many of them ignorant of our language) and the greatly increased complications of life have created conditions under which the provisions for obtaining justice which were formerly sufficient are sufficient no longer. I think the true criticism which we should make upon our own conduct is that we have been so busy about our individual affairs that we have been slow to appreciate the changes of conditions which to so great an extent have put justice beyond the reach of the poor. But we cannot confine ourselves to that criticism much longer; it is time to set our house in order."[44]

SUPPLEMENTARY READINGS

Crawford, Finla Goff, *Readings in American Government* (F. S. Crofts & Co., 1933), revised edition, chap. xxiii.

Cardozo, Benjamin N., *The Nature of the Judicial Process* (Yale University Press, 1922).

[43] Secure and discuss a plan for judicial reorganization in your state. Cf. *Bulletins* of the American Judicature Society for model acts.

[44] R. H. Smith, *op. cit.*, Foreword.

Pound, Roscoe, *The Spirit of the Common Law* (Marshall Jones Co., 1921).

Smith, Reginald Heber, "Justice and the Poor," *Bulletin* no. xiii of the Carnegie Foundation for the Advancement of Teaching.

Moley, Raymond, *Politics and Criminal Prosecution* (Minton, Balch & Company, 1929).

——— *Our Criminal Courts* (Minton, Balch & Company, 1930).

Criminal Justice in Cleveland, Reports of the Cleveland Foundation Survey (The Cleveland Foundation, 1922).

Blachly, Frederick F., and Oatman, Miriam E., *The Government and Administration of Germany* (Johns Hopkins Press, 1928), chap. xiii.

Reports of National Commission on Law Observance and Enforcement, George W. Wickersham, Chairman.

Secure *Bulletins* and *Journal* of the American Judicature Society, Ann Arbor, Michigan. The object of the society is "to promote the efficient administration of justice."

For a symposium on "The Administration of Justice," see *The Annals* of the American Academy of Political and Social Science for May, 1933. Other issues of *The Annals* devoted to the administration of justice may be consulted: September, 1917; March, 1928; and September, 1929.

CHAPTER XXIII

PROBLEMS OF INTERNATIONAL RELATIONS AND WORLD POLITICS[1]

Foreign policies are not built upon abstractions. They are the result of practical conceptions of national interest arising from some immediate exigency or standing out vividly in historical perspective.[2]
—CHARLES E. HUGHES.

THE UNITED STATES AND INTERNATIONAL AFFAIRS

Beginnings of Foreign Relations.—From the inception of the United States as a separate government and an independent state it has been the policy of the nation to establish and foster relations with foreign countries. The Declaration of Independence and the advocacy of the theories and policies involved marked the beginning of an era in the development of international relations. Of these theories and policies, "the keynote was freedom: freedom of the individual, in order that he might work out his destiny in his own way; freedom in government, in order that the human faculties might have free course; freedom in commerce, in order that the resources of the earth might be developed and rendered fruitful in the increase of human wealth, contentment and happiness."[3]

Soon after the formulation of these principles in the Declaration of Independence an effort was made to enter into diplomatic relations with other powers. For this purpose a "Committee of Secret Correspondence" was appointed by the Continental Congress, and agents were at once sent to negotiate with certain European nations which were thought to be friendly to the American cause. On February 6, 1778, the advent of the United States into the family of nations was signalized by the signing of two treaties, one of commerce and one of alliance. It is significant that in the latter of these treaties the United States, in return for aid from France in the establishing of independence, agreed that in the event of war between France and Great Brit-

[1] In the revision of chaps. xxiii and xxiv, we are indebted to Professor Malbone W. Graham, of the University of California at Los Angeles, for suggestions and emendations.

[2] See *The Annals* of the American Academy of Political and Social Science, vol. cxi, Supplement, p. 7; and Charles A. Beard, *The Idea of National Interest* (The Macmillan Company, 1934), chap. i.

[3] John Bassett Moore, *Principles of American Diplomacy* (Harper & Brothers, 1918), p. 2.

ain, the United States would aid France in every way, including military assistance, if necessary. It was this alliance which brought France to the support of the United States with money, munitions of war, and military and naval forces. The success of the American Revolution was hastened, if not, indeed, made possible, by the aid thus secured from France. The career of the United States was begun through the medium of a very important "entangling alliance" with one of the foremost powers of the world.

Diplomatic representatives were dispatched to other European countries, but only one other treaty was signed prior to the treaty of peace, namely, one of amity and commerce with The Netherlands. The period immediately following the Treaty of Paris in 1783 and closing with the adoption of the Constitution in 1789 was one of more extended and successful negotiations with foreign countries. Within this time fourteen treaties were entered into by the United States: six with France, three with Great Britain, two with the Netherlands, and one each with Switzerland, Prussia, and Morocco. The attitude toward foreign relations maintained during this period, says Professor Fish, "was recognized by the intelligent to be as essential to the establishment of our national existence as arms; diplomats were as carefully chosen as generals; the news of the negotiations of Franklin, Adams, and Jay was as anxiously awaited as that from the army, and their success brought almost as great a reward of popular acclaim as did those of commanders in the field."[4]

"Though the foreign policy of the United States has undergone the necessary modifications of time and circumstance," notes Professor Perkins, "it is not too much to say that it has been dominated by, if not always directed by, a single principle," namely, the principle of the two spheres based in effect on the belief that "the Old World and the new represent separate areas of international action, and that the less political contact there is between them the better. It is easy to trace the development of this principle from the earliest days of the republic."[5]

The Development of Principles and Policies in the Conduct of Foreign Relations[6]

Isolation Policy.—The signing of the treaty of peace at Paris, when the United States commissioners broke faith with France as the

[4] C. R. Fish, *American Diplomacy* (Henry Holt & Company, Inc., 1923), fourth edition, p. 1.

[5] Dexter Perkins, *The Monroe Doctrine 1826-1867* (Johns Hopkins Press, 1931), p. 1.

[6] For an estimate of major policies adopted by the United States in its foreign relations, consult Pitman B. Potter, "The Nature of American Foreign Policy," *American Journal of International Law* (January, 1927), p. 53 ff.

ally of the United States and entered into separate negotiations with Great Britain, was regarded as a diplomatic triumph. It was the beginning of a somewhat selfish policy,[7] which was later formulated into the noted American "isolation theory." When in the course of the French Revolution France became involved in a general European war, she called upon the United States to fulfill the terms of the treaty of alliance of 1778 and to come to the aid of the French cause. American opinion was divided. Washington submitted the question to his chief advisers in the Cabinet, Hamilton and Jefferson. Hamilton contended that the government of France having been overthrown and changes in conditions since the treaty of 1778 was signed having resulted, released the United States from any obligation to aid France. Jefferson, on the other hand, regarded the treaty of 1778 as in full force and effect, and advised that it was the duty of the United States to furnish aid to France. Washington, regarding the treaty as purely defensive in character, followed the advice of Hamilton, and in his neutrality proclamation announced a policy which later became known as the isolation policy.

In his proclamation Washington declared it as the intention of the United States to remain "friendly and impartial toward the belligerents." Citizens were warned that in trading with the warring powers in articles which in the usage of international law were regarded as contraband they would not receive the protection of the United States. The Genêt incident and the retirement of Jefferson from the Cabinet rendered difficult the enforcement of the neutrality proclamation. Finally, in 1794, Congress came to the support of the President with the enactment of the first neutrality law. This act made liable to a fine and imprisonment all persons entering the service of a foreign state, and also prescribed penalties for fitting out or augmenting the equipment of any foreign ship within the territorial waters of the United States.

The policy of isolation first announced in Washington's neutrality proclamation was later put into definite language in his farewell address, in which he stated: "Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us

[7] Professor Garner believes that "a study of the foreign policy of the United States will show that the reasons which have determined its attitude upon most questions were predominantly those of self-interest. This is true, for example, of its attitude upon the question of immigration, naturalization, expatriation, the freedom of the seas, neutrality, recognition, the open door, and many others. This is not saying that idealistic considerations were entirely lacking, but it would obviously be claiming too much to assert that they were paramount." Cf. James W. Garner, *American Foreign Policies* (New York University Press, 1928).

to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities. Our detached and distant situation invites and enables us to pursue a different course." During the formative period of our nation, interests which were of primary importance to Europe were of very little concern to us. Naturally, Europe from time to time would be engaged in controversies the causes of which would be essentially foreign to our interests. It would have been inexpedient, therefore, for us to assume obligations which would involve us in the changing policies of European nations, in their friendly combinations, and in their disruptions among themselves. It appeared to Washington that the best policy was "to steer clear of permanent alliances with any portion of the foreign world."

Jefferson, too, expressed this idea in his first inaugural address in these terms: "Peace, commerce and honest friendship with all nations, entangling alliances with none." To him, "our first and fundamental maxim should be never to entangle ourselves in the broils of Europe." In formulating the position of the United States on the recognition of states, Jefferson as Secretary of State, defended the policy of non-intervention as follows:

> I consider the people who constitute a society or nation as the source of all authority in that nation, as free to transact their common concerns by any agents they think proper, to change these agents individually, or the organization of them in form or function whenever they please: that all the acts done by those agents under the authority of the nation, are the acts of the nation, are obligatory on them, to inure to their use, and can in no wise be annulled or affected by any change in the form of the government, or of the persons administering it. . . . We surely can not deny to any nation that right whereon our own government is founded that every one may govern itself under whatever form it pleases, and change these forms at its own will, and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, or president. . . . The will of the nation is the only thing essential to be regarded.[8]

It became the conviction of our first Presidents and those in charge of our foreign affairs that the United States ought to keep out of the contests of European nations.[9]

[8] *Writings* (Ford ed.), vol. vii, pp. 198, 398.

[9] "This policy thus announced remained the unchallenged and revered policy of this nation for one hundred and twenty-odd years. Whatever differences of view may have arisen in most recent years, none were found, and none will be found, I venture to believe, to question the wisdom of this policy at the time it was announced or for more than a century thereafter. Without it, the Republic could not in all probability have withstood the ordeal of those formative years.

Nevertheless, although this policy announced by our early statesmen has throughout influenced the international affairs of the United States, and has served on a number of occasions to keep our foreign relations free from entanglements,[10] the connection between the American government and foreign nations has become steadily closer.

At the same time that the United States entered upon her policy of "entangling alliances with none," she sought to safeguard her commercial interests. As far as commercial interests are concerned, the United States has been a world power from the beginning of her history as a nation. The treaty of 1778 with France secured to the United States certain commercial privileges. In 1803, in the affair with Tripoli, a difficulty arising from the Pasha's demand for tribute, the United States government sent armed cruisers to the Mediterranean and conducted a short but effective war, which brought speedy peace between this country and the Barbary States. In 1815 Congress passed an act to protect American commerce against Algerian cruisers, and another squadron soon secured a treaty stipulating that no further tribute should be demanded from the United States. The United States in 1844 sought to obtain from China commercial privileges and advantages similar to those which China had granted to Great Britain; and a little later, in 1854, the United States demanded of Japan "those acts of courtesy which are due from one civilized nation to another." The same attitude was maintained with regard to the Hawaiian Islands and Cuba. Thus the United States, while professing to avoid political alliances, has, from the beginning, protected her commercial interests. It was the fear of entering political alliances and the desire to protect American commerce that resulted in the well-known neutrality policy of the United States.

Neutrality Policy.—When the machinery of our government was actually put into operation in 1789 and the country was forced to decide the question as to the part we should take in the conflicts between European governments, it was thought necessary and expedient to avoid, as Washington expressed it, "entangling alliances." Hence, the United States took the position of reserving the right to protect its sovereignty, to refuse permission to arm vessels and raise men to assist foreign countries, and to assure a condition of neutral-

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It was an indispensable part of the scheme of free government. Together with the declaration of independence, the treaty of peace, and the Constitution of the United States, this policy made up the title deeds to our liberty and the guarantees of our independence." Senator William E. Borah, "American Foreign Policy in a Nationalistic World," *Foreign Affairs*, Special Supplement, vol. xii, no. 2, pp. iii-iv.

[10] For three-quarters of a century after Monroe's declaration the policy of isolation was more rigidly adhered to than ever, the principal departure from it being the signature and ratification of the Clayton-Bulwer Treaty in 1850.

ity. Thus, in her foreign relations the United States adopted in the early years of her history a policy of neutrality largely formulated by Jefferson, whose work in this connection according to a leading authority on international law "constitutes an epoch in the development of the usages of neutrality."[11] It was the Dutch or continental view rather than the English view that was adopted in the first American commercial treaties. The United States and the continental European countries made common cause against England because of her control of the sea. By these treaties the belligerent right of search was definitely limited, contraband was narrowly interpreted, and neutral ships were to be permitted to carry enemy goods.

The United States not only laid down certain principles of neutrality, but protested against infringement of neutrality, met instances of interference with embargoes and non-intercourse acts, and, finally, in the case of Great Britain, went to war. The principle of the maintenance of neutral rights was put to the test in the controversies between the United States and the brigands of Tripoli, in which it was declared by Jefferson to be the doctrine of the United States "to prefer war in all cases to tribute under any form. Not to stoop to dishonorable condescension for the protection of our rights to navigate the ocean freely." In applying this principle the United States insisted on the impossibility of allowing the right of search of American vessels, and her position was eventually accepted by England and other European countries. We have, indeed, been the leading champion of the rights and duties of neutrals, and the principles which our statesmen have espoused have been written into the modern law of nations; however, the World War and its consequences seriously affected the international customs and practices relating to neutrals. The declaration of war by the Congress and the President of the United States in April, 1917, to support the freedom of commerce was directly in line with the principles maintained and supported by the leaders in international affairs in the history of American diplomacy.

Monroe Doctrine.—One of the most important policies of the diplomacy of the United States is the Monroe Doctrine. This doctrine was a counterpart of the maxim of no entangling alliances and abstinence from participation in the political affairs of Europe.[12] Shortly after the War of 1812, when the position of the United States as an independent nation was assured, the American colonies of Spain rose in revolt and severed their connections with the mother country.

[11] W. E. Hall, *International Law* (Oxford Press, 1904), fifth edition, p. 503.

[12] Dexter Perkins, *op. cit.*, p. 3. Jefferson, who deemed it a fundamental maxim that we should never be entangled in the broils of Europe, suggested a second maxim, "never to suffer Europe to intermeddle in cis-Atlantic affairs."

These revolutions were the culmination of a series of uprisings which to the monarchs and conservative leaders of Europe represented a continuation of the earlier revolutionary movements in America and in France; and efforts were made, particularly through the Holy Alliance formed by the monarchs of Russia, Austria, and Prussia, to defend monarchical governments.

Much interest was manifested in the United States in the incipient revolutionary movements of South America, but as our government was in the process of completing negotiations with Spain for the cession of Florida, it was necessary to give at least the appearance of neutrality. As soon as the Florida treaty was consummated the President recommended the recognition of the new governments. Meanwhile England had begun to realize the benefits of Spanish-American trade, and under the leadership of Canning a policy was formulated to the effect that England and America should join in an expression of disapproval of the proposed interference of European nations in the affairs of Spanish America. This view was communicated to the Secretary of State, John Quincy Adams, and led to a long Cabinet discussion, which resulted in a refusal to cooperate with England because such cooperation was regarded as contrary to the policy of isolation, and in the announcement of the Monroe Doctrine.[13]

The fundamental policy as at first formulated was that the American continents are henceforth not to be considered as subject to future colonization by any European power. This policy was stated in the following language by President Monroe:

> We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it and whose independence we have, on good consideration and on just principles, acknowledged, we could not view any interference for the purpose of oppressing them or of controlling in any other manner their destiny, by any European power in any other light than as a manifestation of an unfriendly disposition toward the United States.

The principle of the two spheres was clearly stated to the effect that with regard to Europe it would be the policy of the United States not to interfere but to cultivate friendly relations with all govern-

[13] President Monroe, with whom Jefferson and Madison concurred, appeared to favor an alliance with Great Britain. Secretary of State Adams held out for independent action on the part of the United States, and he finally succeeded in winning the President to this view.

ments. On the other hand, the President announced that the United States would view with disfavor any attempt at interference by European powers on this continent. Secretary Adams insisted on this proviso as a warning against further colonization in the Americas.

It is generally conceded that the boldness of the language in this message was in part occasioned by the assurance that the British navy was ready to support the doctrine announced. But Canning, annoyed at the refusal to cooperate in the protection of South America from Spain and her allies, set himself to offset the influence of the United States in Spanish America by securing commercial and diplomatic privileges which in the long run gave the advantage to England. The plan of Adams to secure the leadership of the United States in Latin-American affairs was temporarily thwarted, but certain important gains resulted from President Monroe's message, which may be summarized in the words of Professor Fish, that the policies "to which Monroe's message was confined—the separation of the American and European spheres of influence, and the closing of the era of colonization—were grounded on facts, permanent interests, and the waxing strength of the United States. Although not incorporated in law, either national or international, they have stood. Europe has actually respected the territorial integrity and political independence of the Americas, and our people have until today embraced as one of their most cherished ideals the statement of Monroe's policy, founded as it was on their fundamental desire to pursue untrammelled the course of their own development and to hold Europe at ocean's length."[14]

Latin America and the Monroe Doctrine.—Prior to the Mexican War the policy of the United States with respect to the Monroe Doctrine was largely negative in character.[15] The European powers, although they objected to the doctrine, were obliged to admit its potency. They aimed to avoid its extension to Cuba and other dependencies, and tried by indirect methods to gain a foothold in portions of South and Central America. President Polk added a corollary to the doctrine, to the effect that it was the duty of the United States to occupy territory, if necessary, to prevent the introduction of European political systems. At this time certain designs of foreign powers

[14] C. R. Fish, *op. cit.*, pp. 217-218.

[15] According to Professor Perkins, "We are aware of the growth in the American mind of a great principle of action, little noticed in the thirties, revived in the forties, taking root in the fifties, consolidated and indicated in the sixties. . . . In the actual operation of American diplomacy, fundamentally conservative, involving no absolute veto on the political or military action of European states in the New World, it none the less contained as developed by a Polk, a Douglas or a Buchanan the elements of an aggressive and of an exclusive policy." Dexter Perkins, *op. cit.*, pp. 546-547.

upon Yucatan, Honduras, and Mexico proved abortive. During the administrations of Pierce and Buchanan, the original Monroe Doctrine was extended to the protection of the lives and property of American citizens in Latin-American countries whose governments were unstable. At first the Latin-American states were friendly toward the Monroe Doctrine, and they showed an appreciation of the protection accorded them by reason of the closer relationship among the various American governments. But after the Mexican War, when the United States greatly enlarged her territory at the expense of Mexico, Latin-American nations began to realize that the Monroe Doctrine was not wholly an unselfish and humanitarian principle.

Prior to the Mexican War, then, the Monroe Doctrine had been looked upon as a policy adopted for the benefit of the Latin-American states, a policy conceived in a spirit of helpfulness toward weaker nations which might become a prey to the stronger European nations. But since the Mexican War the advocates of expansion and the supporters of the growing commercial interests changed the interpretation of the doctrine to one which ascribed to the United States the purpose of dominating and preserving the Latin-American nations as the legitimate field for the extension of American commercial dealings.

Thereafter the theory began to develop that, when the people of a Latin-American country show an inability to govern themselves and a disposition to keep the border states stirred up with misrule and anarchy, it is the duty of the United States to act as pacifier and policeman in such territory. In accord with this policy, Presidents Cleveland, Harrison, and Theodore Roosevelt supported the principle of the paramount interest of the United States in South American affairs. The intention was declared not only to protect South American countries from European interference, but also to refuse to allow the collection of debts or the assumption of obligations which would in any way interfere with the territorial integrity of Latin-American nations. An extreme form of the doctrine of paramount interest was that announced by Secretary Olney, to the effect that "the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interpositions." Although the broad claims of Secretary Olney could not be supported, President Cleveland won a notable victory when his ultimatum to Great Britain, in the Venezuela affair, constrained Great Britain to adopt arbitration instead of force as the method of settling her territorial difficulties with Venezuela. A series of events, therefore, raised suspicions among the leaders in the Latin-American countries that the Monroe Doctrine, instead of serving as a means of protection to

weak and struggling nations, was being used as a cloak for designs in the way of national aggrandizement by the United States.

Extensions of the Monroe Doctrine under various circumstances have involved the following propositions: that no Latin-American state may voluntarily transfer its territory by sale, lease, or gift to any non-American state without the consent of the United States; that no non-American agency or authority may acquire a harbor on the American continent, if its occupation for military purposes would threaten the safety of the United States; that if a Latin-American state is unable to maintain domestic order and to discharge its international obligations the United States may assume control of such a state; and that the United States looks with disfavor upon the granting of economic concessions to non-American companies.[16] The repeated claim that the Monroe Doctrine being distinctly the policy of the United States, its definition, interpretation, and application rest solely with the United States, aroused a feeling of resentment and bitterness on the part of Latin-Americans which has interfered with cordial diplomatic and commercial relations with these countries.

It is this change in the policy and attitude of the United States that has led to the growing belief among Latin-Americans that the Monroe Doctrine was not adopted for their benefit, but for the special interest and profit of the United States. It is claimed that Latin-American nations have a just right to participate in the forming of international policies and particularly to regulate their own concerns. These countries claim that their population and resources, potentially at least, are fully as great as those of the United States and deserve as important consideration. The interest of the Latin-American states in their own common problems, and their tendency to combine for the purpose of fostering those interests, were evidenced by the formation of three unions, namely, one composed of Central American states; one, of Colombia, Peru, Venezuela, and Uruguay; and one, of Argentina, Brazil, and Chile.

Every Latin-American country is in form a republic, although not all the governments are based on popular sanction. A tradition exists in Latin America that the upper class should rule. From this class come the presidents, judges, and other officers. By the side of the political aristocracy are to be found business men, merchants, and capitalists, who share in the interests and advantages of government. Below these classes is a body of soldiers who participate in war, conquest, and revolution. Unfortunately, in many South American states this latter class is still powerful, and few Latin-American governments are entirely free from the danger of revolution. It is this

[16] Cf. James W. Garner, *op. cit.*, pp. 98, 99.

condition which renders it advisable that the protection of the United States be not entirely withdrawn.

A consideration of the issue as to the need of continuing the Monroe Doctrine was involved in the settlement of the question whether the occupation of territory for refusal to pay debts is justifiable. The South Americans have themselves aided in the formulation of various doctrines relating to this matter. The first of these is the Calvo doctrine. The principle laid down by Calvo, an Argentine authority on international law, was to the effect that in view of the generally acknowledged rights of nations the recovery of debts and the settlement of private claims do not justify armed intervention. He meant by this principle to deny foreign governments the right to insist on the collection of debts due to their subjects. A revised form of this view was announced by Drago, the Minister of Foreign Affairs of Argentina. Drago maintained that, since the collection of loans by military means implies territorial occupation to make them effective, and since territorial occupation signifies the suppression or the subordination of government of the countries on which it is imposed, such measures are obviously at variance with the doctrines which have been many times proclaimed by the nations of America. This principle is held to admit of diplomatic action, but to preclude the use of force in securing the payment of debts.

Though it is no longer possible for the United States to assume the position of general policeman for Latin America, as was suggested by President Theodore Roosevelt in 1904, it is nevertheless true that the United States is in a position to exercise considerable influence over South American countries. Latin-American writers admit, as a rule, the service which the United States has rendered by supporting the principle of America for Americans. Nevertheless, the time has passed when this principle can be upheld without the active assistance and cooperation of South American countries. It is now necessary to look upon the South American states as co-equal and co-responsible in the maintenance of the principle of non-intervention of European powers.

The Monroe Doctrine has been subjected to rather caustic criticisms both in Latin-American countries and in the United States. An authority on Latin-American affairs characterized the doctrine as "an obsolete shibboleth."[17] "It is hard to see," says Professor Garner, "what we are getting out of it today except ill-will, abuse, loss of trade and increased taxes for the upkeep of a navy which we are constantly told must be powerful enough to enable us to defend the

[17] Hiram Bingham, *The Monroe Doctrine, an Obsolete Shibboleth* (Yale University Press, 1913).

doctrine as we interpret it."[18] The spirit of opposition to the Monroe Doctrine has developed to a point where its specific efficacy will, it is contended, be greatly reduced unless the United States can join with the leading South American countries in a combined effort to support and defend the principle of non-intervention, and thus to assure the unification, the independence, and the harmonious development of all of the states of the American continent. That such a combination is feasible has been indicated by various diplomatic and political developments; and that the Monroe Doctrine will be given force and prestige through such a union of American states seems well within the bounds of possibility. Such a combined support for the Monroe Doctrine will, it is believed, require a modification of the Caribbean policy and other imperialistic tendencies in the United States which look toward Spanish America with a view to "the establishment of protectorates, the supervision of finances, the control of all available canal routes, the acquisition of coaling stations, and the policing of disorderly countries."[19]

Expansion Policy of the United States

From the beginning of the United States as a nation, a policy of territorial expansion has played a prominent part in internal politics and in the negotiations with foreign powers. The representatives of the United States who participated in the making of the Treaty of Paris made sure of the control of the United States over the territory to the westward as far as the Mississippi River, and the Northwest Ordinance confirmed the plan by which a large part of this region became a domain of the federal government. The way was left open for Canada to join the United States, and for certain portions of Spanish America, such as Florida and Cuba, to come within the sphere of influence of the new country. It was not long after the inauguration of the federal government that a train of fortunate circumstances rendered it possible to secure, by means of the Louisiana Purchase, a large part of the territory west of the Mississippi River. Furthermore, by a series of negotiations Florida was secured from Spain. The expansion policy of the first few decades was described by Lucas Alaman, Mexican Secretary of Foreign Affairs:

The United States of the North have been going on successfully acquiring, without awakening public attention, all the territories adjoining theirs. Thus we find that in less than fifty years they have

[18] James W. Garner, *op. cit.*, pp. 130, 131.

[19] J. H. Latané, *From Isolation to Leadership* (Doubleday, Doran and Company, Inc., 1919), p. 132.

succeeded in making themselves masters of extensive colonies belonging to various European Powers, and of districts, still more extensive, formerly in possession of Indian tribes, which have disappeared from the face of the earth; proceeding in these transactions, not with the noisy pomp of conquest, but with such silence, such constancy, and such uniformity that they have always succeeded in accomplishing their views. Instead of armies, battles, and invasions, which raise such uproar, and generally prove abortive, they use means which, considered separately, seem slow, ineffectual, and sometimes palpably absurd, but which united, and in the course of time, are certain and irresistible.[20]

The gradual growth of a policy of expansion in the period from 1830 to 1840 brought forward three great controversies, namely, those over the ultimate control, respectively, of Texas, Oregon, and California. Missionaries, merchants, and political adventurers vied with one another in carrying American laws, customs, and institutions into territories which, it was contended, were destined to be transferred from other powers to the United States. The popular slogan that Great Britain was secretly designing to seize these territories, and the visions of a great American nation, led one administration after another to champion the cause of expansion. The great bone of contention, slavery, alone seemed to prevent immediate action. After long and wearisome negotiations Texas was admitted into the American Union by a joint resolution of Congress on March 1, 1844, the Senate previously having refused to approve a treaty for this purpose. In June, 1846, a treaty with England was ratified which fixed the northern boundary of the United States at the forty-ninth parallel, and thus assured the possession of the Oregon territory to the United States. It was in a message concerning the refusal of Great Britain to accept the line of the forty-ninth parallel that President Polk reaffirmed the Monroe Doctrine for the first time since its formulation. The President said: "It should be distinctly announced to the world as our settled policy that no future European colony or dominion shall with our consent be planted or established on any part of the North American Continent." The brusque method of stating American claims, supported, no doubt, by the bluff involved in the popular slogan, "54-40 or fight," led Great Britain to accept a compromise which she had previously regarded as impossible.

Finally, after an aggressive war upon Mexico, the United States

[20] Quoted in C. R. Fish, *op. cit.*, p. 243. "Our own history since independence," claims Professor Sloane, "is an unbroken record of expansion and imperialism. Our contiguous territories have been acquired by compulsion, whether of war, or purchase, or occupation, or of exchange." *Current History* (1914-1915), vol. i, p. 515.

acquired by treaty the extension of Texas to the Rio Grande, and the large territories of New Mexico, Arizona, and California. In 1853 this territory was rounded out by the Gadsden Purchase. For a long time the expansion policy was submerged in the turmoil of internal politics. Alaska was acquired in 1867 by purchase, although at the time it was regarded as practically uninhabitable and worthless. It was not until the Spanish-American War that the advocates of expansion again had an opportunity to extend the territorial domains. At this time the much-coveted island of Porto Rico was annexed, as well as the Philippine Islands, and a protectorate was established over Cuba.

Relations with Cuba.—The relations with Cuba reach back into the early history of the United States. In 1823 Secretary of State Adams suggested that the annexation of Cuba had become "indispensable to the continuance and integrity of the Union itself." In 1827 the government of the United States showed its interest in the matter of slavery in the island of Cuba, and a few years later the principle was announced that the United States could not see with indifference Porto Rico and Cuba pass from Spain into the possession of any other power. In 1848 a movement was initiated looking to the purchase of the island of Cuba. No progress in this direction could be made with the Spaniards. Following a series of revolutions in Cuba, a proposal was made to secure order and peace in the island by a joint agreement among France, England, and the United States to secure the island to Spain. This was objected to by Secretary of State Everett, and it was again insisted that no European power could, with the sanction of the United States, establish itself in power in this island. As early as 1853 the policy of annexation was growing and received support on the part of the administration. President Pierce, in his inaugural address, declared that "our attitude as a nation and our position on the globe render the acquisition of certain possessions not within our jurisdiction eminently important for our protection." It was the slavery issue that prevented, at this time, the consummation of the President's will.

In 1869 President Grant announced the policy of the United States toward Cuba, to the effect that "these dependencies are no longer regarded as subjects of transfer from one European power to another by which the present relation of colonies ceases. They are to become independent powers exercising the right of choice and of self-control in the determination of their future condition and relations with other powers." After several other efforts at joint intervention the difficulty culminated with the sinking of the battleship *Maine* and the declaration of war upon Spain by the United States in April, 1898. As a result of American victories, Spain was forced to come

to terms, ceding to the United States the Philippine Islands and Porto Rico and relinquishing entirely her control over Cuba. The United States indicated its attitude in relation to Cuba by agreeing not to assert its dominion over the island and to turn the government over to the people on condition that Cuba would agree never to enter into any treaty or compact with any foreign power which would interfere with the independence of the island and would concede to the United States the right to intervene for the preservation of the Cuban government and for the protection of life, liberty, and property. Cuba agreed also to render available to the United States lands for coaling or naval stations, and practically granted the United States a protectorate over the island, otherwise continuing as an independent state. In recent years opposition to the Platt Amendment has become one of the prime issues of Cuban politics. Recognizing that the American protectorate over Cuba has proved to be a detriment in many respects, both economically and politically, President Franklin D. Roosevelt with the approval of the Senate abrogated the conditions of the Platt Amendment.

Caribbean Policy.—The plan to build an interoceanic canal resulted in the inauguration of a new feature in the expansion policy of the United States, i.e., the advance into a position of dominance in the Caribbean Sea. The relinquishment of Spanish control in the Caribbean in the first quarter of the nineteenth century was followed by the supremacy of Great Britain. To strengthen the position of the United States an effort was made as early as 1867 to purchase Santo Domingo and the Danish West Indies. A treaty was drawn up which received the approval of Denmark and was supported on a popular vote by the inhabitants of the islands, but the Senate refused to sanction the transfer of jurisdiction. It was not until the close of the Spanish War that the United States began to secure a foothold in the Caribbean Sea, but by a succession of acts American control was rapidly extended.

A series of incidents in the carrying out of the Caribbean policy of the United States appears to bear out the prophecy of President Roosevelt voiced in his annual message to Congress in 1904.[21] The President said: "Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society may, in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to

[21] On American imperialism in the Caribbean, see Frederick L. Schuman, *International Politics: An Introduction to the Western State System* (McGraw-Hill Book Company, Inc., 1933), pp. 407 ff.

the exercise of an international police power." Acting on this policy the President, following a series of fruitless negotiations with Colombia relative to the building of an interoceanic canal, gave encouragement to the revolt of Panama and precipitately recognized the Republic of Panama. Under the protection of an American squadron the new state was formed and Colombian authorities were prevented from interfering. This action was held to be justified by the refusal of Colombia to sign a treaty containing a reasonable offer for the right over Panama necessary for the construction of a canal.

The new republic granted to the United States a zone of five miles on each side of the proposed canal. The protection of the United States was to extend over Panama and was recognized in the constitution of Panama, which states that "the government of the United States of America may intervene anywhere in the Republic of Panama for the re-establishment of constitutional peace and order if this should be disturbed, provided that by virtue of public treaty said nation should assume or have assumed to guarantee the independence and sovereignty of this Republic."

Some of the results of the policy of the United States toward Latin-American states are summarized by Professor Shepherd as follows: "In about thirty years, we have created two new republics—Cuba and Panama; converted both of them and three other Latin-American countries, the Dominican Republic, Nicaragua, and Haiti, into virtual protectorates; intervened by force at least thirty times in the internal affairs of nine supposedly sovereign and independent nations; made the period of intervention last anywhere from a few days to a dozen years; and installed in four states our own collectors of customs to insure payments on American credits and investments. Incidentally, we have annexed Porto Rico and the Virgin Islands, built a canal, served an option to construct another, and gathered in several naval stations."[22]

Thus, while objecting to territorial aggrandizement in America by foreign powers, and while disclaiming any intention to acquire and govern large colonial dominions, the United States has come into possession of extensive territories in North America and has brought under her control by annexation, protectorates, or spheres of influence islands in the Atlantic and Pacific Oceans and portions of Central America.

There are indications that a new foreign policy, particularly with respect to Inter-American relations, is in process of formulation. At Mobile, Alabama, in 1913 President Wilson enunciated the doctrine that "the United States will never again seek one additional foot of

[22] *The New Republic*, January 26, 1927, p. 266.

territory by conquest." On December 28, 1933, speaking in Washington at a dinner in honor of the birthday of President Wilson, President Franklin D. Roosevelt observed that "largely as a result of the convulsion of the World War and its after-effects, the complete function of that policy of unselfishness has not in every case been obtained. And in this we, all of us, have to share the responsibility." And then he declared:

It therefore has seemed clear to me as President that the time has come to supplement and to implement the declaration of President Wilson by the further declaration that the definite policy of the United States from now on is one opposed to armed intervention.

The maintenance of constitutional government in other nations is not a sacred obligation devolving upon the United States alone. The maintenance of law and the orderly processes of government in this hemisphere is the concern of each individual nation within its own borders first of all.

It is only if and when the failure of orderly processes affects the other nations of the continent that it becomes their concern; and the point to stress is that in such an event it becomes the joint concern of a whole continent in which we are all neighbors.

A marked change in the application of certain principles of American foreign relations would be necessary to accomplish the proposed objects. The method of implementing the Wilson doctrine and of rendering effective the Roosevelt extension of the doctrine has been applied in the withdrawal of the marines from Nicaragua and Haiti.

American Control in the Pacific.—American influence in the Pacific was first asserted over Hawaii, where as early as 1820 a representative was sent to foster commercial interests. In 1842 it was made evident that we were interested in the islands, and from that time Hawaii was regarded as being within the sphere of influence of the United States.[23] Though there was a sentiment in the islands in favor of annexation, the feeling against such a move was so strong in the United States that annexation was temporarily delayed. A change in administration and the successful conclusion of the Spanish-American War in 1898 gave an opportunity to complete annexation, which had been agreed upon by the leaders of the Republican party.

In 1872 a foothold was gained in Samoa, and by 1878 a sort of

[23] The influence of the United States in the Pacific was extended by a plan, approved by Congress and the President, whereby American citizens were permitted to take possession of small uninhabited islands for the purpose of extracting guano. It was understood that jurisdiction would be exercised only temporarily, but more than fifty islands in the Pacific Ocean and in the Caribbean Sea have for varying periods of time been held to be under the jurisdiction of the United States.

protectorate was established by treaty. Great Britain and Germany contended for supremacy over these islands, and for a while there was grave danger of international complications. Joint control was exercised temporarily by the United States, Great Britain, and Germany under the Act of Berlin concluded in 1889; but, such control proving unsatisfactory, a treaty was signed by which the islands were divided between the United States and Germany. New Zealand now controls the former German islands as a mandatory under the League of Nations.

Relations with China and Japan.—But by far the most significant move in respect to foreign affairs in the Pacific Ocean and the territories bordering it was taken from 1840 to 1860 when commercial and diplomatic relations were established with Japan and China. And contrary to the announced policy of non-interference in the affairs of foreign powers, the representatives of the United States showed a willingness to cooperate with European powers in establishing peace and extending commercial dealings in Asia. In a number of instances the United States joined with European powers in helping to secure order, the most notable occasion being the joint expedition to suppress the "Boxer" uprising in China in 1900. The United States refused, however, to become a party to some of the designs for the dismemberment of the Chinese Empire, and became an upholder of the integrity of China and an advocate of an "open door" in commercial relations. Through this attitude the United States has gained the confidence and good will of China, and to a certain extent the suspicion and hatred of Japan; for Japan, since her rise as a world power, has had designs upon portions of China, and, following her victories in the wars with Russia and Germany, has taken active steps to extend her control over Russian and Chinese territory. Japan, too, has formulated a doctrine for Asia which corresponds to the Monroe Doctrine for America. The acquisition of Hawaii, the Philippines, and other islands in the Pacific, as well as the leadership assumed by the United States in the adjustment of the relations of other powers with China, has brought the two great powers in the Pacific, Japan and the United States,[24] into occasional controversy and misunderstanding.

Thus American foreign policy has been shaped to a certain extent by the belief that free states should remain free, that peace is or should be the norm in human relationships, and that important among the conditions essential to the maintenance of peace are respect by states for the rights of other states and fair treatment for those

[24] For current problems in the relations of the United States and Japan, see p. 630.

who come within their jurisdiction. In the realm of formulated effort, maintains Dr. Hornbeck, "the principal major objectives of American foreign policy since the earliest days of the Republic have been, first, to safeguard this country's position as a free and sovereign state and, second, to obtain for American nationals and American trade assurance of equal opportunity and fair treatment in every place to which American citizens, American ships and American goods may choose to go."[25]

Problems of Colonial Government[26]

Among the difficulties which confront modern governments are those which have to do with the control of dependencies or subject territories. Since the time of the Greeks, parent states have maintained close connections with and some form of political control over outlying provinces or over distant territories. While the colonies of Greece were politically free and self-governing units, those of Rome were brought under the centralized dominion of the Roman government. Subsequent territorial governments have followed one or the other of these main types. One of the greatest movements of modern times was the result of the persistent effort to parcel out and to secure control of all the portions of the world not under the dominion of great political powers. By means of commercial agents, missionaries, and other emissaries, an entering wedge was acquired for the first form of political control known as the sphere of influence. Thus a nation acquired by treaty or by mutual concessions "the exclusive privilege of exercising political influence, or concluding treaties or protectorates, of obtaining industrial concessions, and of eventually bringing the region under its direct political control." The sphere of influence is always regarded as a transitional stage, and it is usually expected that it will be followed by occupation and political conquest or the establishment of a protectorate. Large parts of Africa have been brought under the sphere of influence of European powers, and Japan now claims large portions of China as being within her sphere of influence.

The protectorate differs from the sphere of influence in that the state holding the protectorate exercises control over certain foreign relations. Subject to some restrictions affecting foreign affairs, local government is not interfered with unless the local peace is disturbed by uprisings or revolutions. England's relation to Egypt from 1914

[25] Stanley K. Hornbeck, "Principles of American Foreign Policy in Relation to the Far East," Address, Washington, D. C., January 18, 1934.

[26] For the principles and policies involved in "the quest for empire," see Frederick L. Schuman, *op. cit.*, chaps. xi-xiii.

to 1922 was that of a protectorate, and such was the relation of the United States to Cuba under the Platt Amendment. The protectorate normally leads to the next step, that of direct dependency.

Types of Colonies.—Direct dependencies are of three main types: (1) self-governing colonies; (2) colonies with representative government; (3) colonies under direct control of the mother country. In the first class are Canada, Australia, and South Africa, which possess rights and powers of self-government amounting almost to independence, yet have relations with the home government based largely upon mutual ties of interest, race feeling, and political sentiment. When the home government permits the establishment of a representative body in the colony but retains control through the governor, his council, and appointed representatives, the arrangement is known as the representative type of colonial government. Canada and Australia had representative governments prior to the establishment of self-government, and numerous English colonies have been governed in this way. The first regular form of government granted to the Philippines and to Porto Rico was of this type. Representative government frequently proves unstable, and it is customary for the colonies to demand greater freedom, amounting ultimately to a modified form of self-government. In the third group are those colonies of which the government is completely in the hands of officials appointed by the home government. This type is usually established after conquest or cession of territory until a regular form of government can be provided, and it is also the form of colonial government maintained for the control of savage, semi-barbarous or sparsely populated communities. One of the best examples of direct control was England's government of India. Recent reforms in the government of India have changed direct colonial government to a type of representative government with beginnings in the direction of self-government. But the unstable conditions which obtain under a government of a direct type generally lead to an effort to establish a modified form of representative government or self-government.

The government of the United States in the acquisition and settlement of a vast territory has developed a unique colonial policy. When the Northwest Territory was acquired, the announcement was made, by way of explanation of the general principles of the system, that the territory "shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal Union, and have the same rights of sovereignty, freedom, and independence as the other states." This general principle was made a part of the Ordinance of 1787, and the fundamental principles of civil and religious

liberty enjoyed by the citizens of the original states were granted to the inhabitants of the Northwest Territory. They were assured likewise that representative government would be granted and that in due time the territories would be admitted as states. The plan of government arranged by the Ordinance and the whole tenor of its provisions suggest the view that Congress was making these regulations in the execution of a solemn trust, and that the inhabitants were to be protected in their rights until state constitutions should be prepared and application should be made to Congress for admission as states. The acts providing for the organization of subsequent territory embodied the same principles. Prior to 1898 treaties of acquisition generally contained clauses granting the advantages, privileges, and immunities of the citizens of the United States to the inhabitants, together with the express promise that the states formed out of the territory should at the discretion of Congress be admitted into the Union. As soon as possible, therefore, Congress divided the area into separate territories, and established a government in each, with the expectation that each would go through the necessary preparation and in due course be ready to enter the Union. Under such acts Congress and the courts have carefully guarded the private rights of the inhabitants. The Constitution and the laws of Congress which were applicable have been considered in force.

The treaties by which Alaska and Hawaii were acquired contained no express provision as to future statehood, but these territories have been governed on much the same principles as other territories, and may be considered as in tutelage preparatory to admission to the Union. When Porto Rico and the Philippine Islands were acquired from Spain, it was maintained that control over these territories was absolute and not subject to the limitations under which previous territories were governed. Though these colonies were at first managed practically as executive colonies, the President through his appointees, the governor and council, maintaining his supremacy, the tendency in both has been to extend a greater degree of self-government and to turn over local affairs more and more to the inhabitants of the islands.

By an act of Congress passed in January, 1933, over the President's veto the United States defined the conditions by which its sovereignty over the Philippine Islands might be relinquished and an independent state established. Subject to approval by the Philippine legislature, a convention was to be called to draft a constitution which when approved by the President of the United States and by the majority of the Philippine electors would become the organic law for the new state. Certain features of this law proving objectionable to the majority of the Philippine Assembly, a new law was

enacted in March, 1934, providing for the abandonment of all army posts as soon as a temporary autonomous government has been set up. The United States retains certain rights and privileges for a ten-year period, after which complete independence is granted.

The United States maintains, then, a diversified policy of colonial administration involving a limited control over certain territories regarded as being within its sphere of influence, direct control over certain island possessions, and a form of representative government for a few territories.[27]

Mandate System.—A new venture in colonial government, for which General Smuts and President Wilson were largely responsible, was established in the mandatory system of the Covenant of the League of Nations. An attempt was made to apply the principle that the well-being and development of peoples in the territories formerly controlled by Germany and who are "not yet able to stand by themselves under the strenuous conditions of the modern world" form a sacred trust of civilization. The principle was adopted of placing these lands and their people under the tutelage of advanced nations as mandatories on behalf of the League. Hence the Allied Powers who were responsible for the terms of the treaty of peace distributed the various colonies, in accordance with the classes defined in the Covenant, among the nations as follows:

Certain communities formerly belonging to the Turkish Empire, which had reached a stage of development where their existence as independent nations could be provisionally recognized subject to the rendering of administrative advice and assistance until such time as they are able to stand alone, were called Class A mandates. The wishes of these communities were to be a principal consideration in the selection of the Mandatory.[28]

Territory	Mandatory
Palestine	Great Britain
Syria and the Lebanon	France
Iraq[29]	Great Britain

Those of Central Africa, being deemed less advanced, were placed in charge of a mandatory who became responsible for the administration of the territory under certain safeguards as to political and social conditions, and were designated as Class B mandates.

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[27] For present trends in American colonial policy, consult Frederick L. Schuman, *op. cit.*, pp. 470 ff.

[28] Covenant, Article 22. Upon the entry of an area under mandate into the League of Nations, its independence is recognized and the country is, by Article 10, guaranteed against external aggression.

[29] In 1932 Iraq was admitted to full membership in the League of Nations.

Territory	Mandatory
Cameroons	France
Cameroons	Great Britain
East Africa	Belgium
East Africa	Great Britain
Togoland	France
Togoland	Great Britain

Territories, such as Southwest Africa and certain of the South Pacific islands, which, owing to the sparseness of their population or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the mandatory, or other circumstances, could best be administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned, were placed under Class C mandates.

Territory	Mandatory
Southwest Africa	Union of South Africa
Samoa	New Zealand
Nauru	Great Britain and Australia
Former German Pacific islands south of Equator	Australia
Former German Pacific islands north of Equator	Japan

By the Covenant, the Council of the League has authority to prescribe the terms of the mandate and receives an annual report from the mandatory.[30] The direct supervision of the mandates is in charge of a Permanent Mandates Commission whose duty it is to examine the reports of the mandatories and to advise the Council in relation to the administration of these territories. The final arrangement as to the "A" and "B" mandates was made difficult by the demand of the United States that she be guaranteed the same preferential rights as are accorded to the League members. This was accomplished by separate treaty agreements, with each country acting as a mandatory power. The theory of the Class A mandates is that they shall ultimately be accorded independence, and this policy was carried out by the relinquishment of authority over Iraq by Great Britain. For territories under B and C mandates the status appears to be permanent subject to changes made with the approval of the Council of the League.

Certain problems connected with the status of mandates remain to be determined. A variety of opinions have been expressed on the question where the sovereignty over a mandate resides. Is it in the mandatory, in the League of Nations, or in the Council? Or has sovereignty been so divided that it resides nowhere? Moreover, to what nationality do the natives of a mandated territory belong? The

[30] On the mandate system, see Frederick L. Schuman, *op. cit.*, pp. 609 ff.

answer to this query differs for the A mandates and the B and C mandates, but in either case doubts have been raised which are difficult to resolve. "The significance of this experiment in colonial administration," it has been observed, "can hardly be exaggerated. . . . That the system is working surprisingly well appears to be the general opinion of those who have studied it in operation."

As already stated, the pivotal factor in the system is the Mandates Commission. Although clothed with power merely to receive and examine the annual reports of the mandatories and to advise the Council on matters relating to the observance of the mandates, it has steadily exerted an influence out of all proportion to its formal powers. Its work has been characterized by tact as well as independence; its recommendations carry weight because its members, many of whom have had actual experience in colonial administration, understand the practical difficulties that beset the relations of white administrators with backward native populations. Its reports embody many suggestions helpful to the mandatories, while on occasion it does not hesitate to condemn practices and policies inconsistent with the spirit of the mandates.[31] In the opinion of Professor Mower, "The reports of the Commission, embodying as they do comment and suggestions on a wide variety of colonial problems, set forth certain fundamental principles of colonial administration—the duty to promote the health and education of the natives, to protect them against excessive demands upon their labor, to safeguard them against oppressive contracts for service, and against unjust deprivation of their lands. These principles, steadily adhered to by the Commission and widely understood and approved, will tend to be universally recognized as characteristic of enlightened colonial administration."[32]

The plan of colonial administration put into operation under the guidance of the League of Nations accords in some important respects with the territorial policy followed by the United States, at least to the beginning of the twentieth century.

Modern Interpretation of Isolation Policy.—Two factors have tended to draw the United States away from its former theory of isolation, namely, the territorial and colonial expansion which has necessarily involved the nation in some of the main currents of international events; and the commercial and industrial developments of the last century which have resulted in extending the interests and influence of the United States to every quarter of the globe. The Spanish-American War brought, for the first time, an avowed recognition of the fact that the United States intended to assume the rôle

[31] Edmund C. Mower, *International Government* (D. C. Heath and Company, 1931), p. 444.

[32] *Ibid.*, pp. 449-450.

of a world power. Presidents Theodore Roosevelt and Taft followed the policy of participating in world affairs and of assuming some of the duties and responsibilities thereby involved.

The connection between our foreign affairs and those of other countries has steadily become closer, and the tendency within recent years has been to have the United States join in the consideration of the fundamental policies and issues of international affairs. President Wilson, in an address before the League to Enforce Peace on May 27, 1916, made it clear that he was disposed not only to follow in the path of his immediate predecessors, but also to go farther in accepting international obligations.[33]

Subsequent events, however, carried the United States into war instead of peace and involved the nation more definitely than ever before in the intricacies and difficulties of international diplomacy and world politics. In his war message to Congress, April 2, 1917, President Wilson recognized the profound significance of the declaration of war which would involve the utmost practicable cooperation in counsel and in military action with the governments at war with Germany, and the extension to those governments of the most liberal aid, commercial and financial.

The story of the aid of the United States in men, money, and other resources cannot be rehearsed. Suffice it to say that after joining with the enemies of Germany and her allies, and generously assisting in their defeat, President Wilson again reiterated his belief that it was the duty of the United States to help maintain the peace of the world, and outlined some of the conditions necessary to secure this end, as follows:

Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view.

Absolute freedom of navigation upon the seas outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.

Adequate guaranties given and taken that national armaments will be reduced to the lowest point consistent with domestic safety.

A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that

[33] *The Public Papers of Woodrow Wilson*, edited by Ray Stannard Baker and William E. Dodd (Harper & Brothers, 1926), vol. ii, pp. 184 ff. See also address to the Senate on January 22, 1917.

in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined. . . .

A general association of nations must be formed under specific covenants for the purpose of affording mutual guaranties of political independence and territorial integrity to great and small states alike.

The treaty of peace signed at Versailles, containing a Covenant for a League of Nations, involves some international problems of the greatest concern to the United States. Among the provisions of the Covenant it was prescribed that all nations joining the League shall coöperate in "the firm establishment of the understandings of international law as the actual rule of conduct among governments" and in "the maintenance of justice and a scrupulous respect for all treaty obligations in the dealing of organized peoples with one another"; that plans shall be formulated for the reduction of armaments; that members shall agree to submit controversies to inquiry and arbitration before going to war; and that a permanent court of international justice be established to determine questions of a justiciable character. Two of the chief provisions of the Covenant, which have been modified considerably by certain amendments and general understandings among the members, are Article 10, which obligates the members of the League to "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League"; and Article 16, which provides that the members shall join in severing diplomatic relations with members who refuse to abide by the terms of the Covenant, shall sever all trade and financial relations, and shall, in case of necessity, "contribute to the armed forces to be used to protect the covenants of the League."[34]

Although the important nations of the world, with but a few exceptions, were among the original members who joined the League soon after its formulation, the Senate of the United States, returning to the former theories of isolation and national independence, rejected both the Covenant and the treaty of peace. Objections were raised principally to Article 10 and to the obligations which it was thought the League involved in the way of rendering military assistance in the maintenance of peace and order in Europe. The election of Senator Harding, the nominee of the Republican party, to the office of President on a platform which practically condemned the League of Nations and asserted again a policy of national isolation or the principle of entering into an association of nations largely dictated in its terms and conditions by the United States, raised anew

[34] For further consideration of Article 16 of the Covenant, see pp. 628, 629.

the question whether the American nation should aim to act to a large degree independent in its foreign interests and obligations or whether international cooperation should be fostered and extended.[35] It may well be asked whether the policy of isolation which was the aim of some American statesmen in the early part of the nineteenth century is compatible with the new interpretation of the Monroe Doctrine, with the colonial expansion of the United States in the Atlantic and Pacific Oceans, and with mutual international obligations previously assumed.[36]

The Attitude of the United States toward International Arbitration

Another phase of foreign affairs in which the United States has played an important rôle is that of the development of mediation and arbitration. Mediation is an advisory process, in which recommendations are made and considered by the contending parties. Arbitration is a semi-judicial process, in which matters of international controversy are placed before some tribunal that acts, in part at least, according to judicial regulations and procedure. Mediation may be a very important auxiliary to arbitration. But mediation acts through the forms and agencies of diplomacy; arbitration is an impartial settlement before a tribunal of which at least a single member, usually serving from a third state, acts as umpire.

The United States soon after its establishment made use of arbitration for the settlement of international difficulties. As early as the Jay treaty, arrangements were made for the arbitration of the eastern boundary question. The commission that was appointed to decide upon the eastern boundary of the United States rendered its report in 1798, and this arbitral award was the first to which the United States was a party. Several difficult questions have been determined by arbitration between the United States and France, and between the United States and England, as well as between this government and the Central and South American governments.

Arbitration has evolved from its occasional use in ancient and modern times to its present status through the following rather distinct steps: first, the voluntary submission of a dispute to one or more

[35] For an account of the relations of the United States to the League since 1920, see pp. 613 ff.

[36] "I do not believe that when Washington warned us against entangling alliances he meant for one moment that we should not join with the other civilized nations of the world if a method could be found to diminish war and encourage peace." Senator Lodge, in address before the League to Enforce Peace, Washington, May, 1916.

arbitrators, the conditions of the arbitration being embodied in an agreement applicable to this case only; second, the inclusion in treaties of clauses for the arbitration of special types of controversies; third, the signing of permanent arbitration treaties; and fourth, the acceptance of agreements for obligatory arbitration. Permanent arbitration treaties and arrangements for obligatory arbitration are recent developments and have indicated possibilities for the peaceful adjustments of disputes which have been realized only to a small degree.[37]

The first Hague conference, which met in 1899, was the initial instance in which the United States participated in a general congress of European powers. By some this action of the United States was regarded as a marked departure from previous practice. In order to meet criticisms and to indicate the intention not to cast aside traditional policies, the American delegation was instructed to sign the final treaty with the reservation: "Nothing contained in this convention shall be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions."

At this conference conventions were adopted arranging for the pacific settlement of international disputes, and for the regulating and humanizing of the laws and customs of land warfare. The second Hague conference approved a resolution providing for a permanent court of arbitration, with an office and staff, and making provisions for the settlement of questions arising before the court.[38]

The oft repeated claim that the arbitration of international disputes should be recognized "as the leading feature of our foreign policy" and that the United States "has assiduously exerted all proper pressure to induce the world to adopt the principle of arbitration as a means of settlement of international disputes,"[39] scarcely seems to be borne out by an impartial survey of the facts. Authorities on international law credit the United States during the first century of its existence with a good record in the practice of arbitration.[40] During the latter part of the nineteenth century the attitude toward arbitration changed and there has been a rather consistent refusal to permit questions to be submitted to arbitration. Among such refusals were

[37] See Edmund C. Mower, *op. cit.*, p. 304 ff.
[38] For the organization and work of this court, see *supra*, p. 604.
[39] See Secretary of State Knox, *Congressional Record*, July 12, 1910, p. 9778.
[40] John Bassett Moore, *op. cit.*, p. 306.

the questions of the responsibility for the destruction of the battleship *Maine*, of the issues with respect to the violation of treaties with Colombia relating to Panama, and of the controversy over the Panama Canal tolls.[41]

The chief obstacle to the extension of the principle of arbitration on the part of the United States in the settlement of international disputes is the unsympathetic and at times unreasonable attitude of the Senate. In 1890 the Senate emasculated an arbitration treaty with Great Britain, and later amended treaties negotiated by Secretary of State John Hay so that President Theodore Roosevelt withdrew them, refusing to "give the impression of trickiness and insincerity which would be produced by solemnly promulgating a sham."

Secretary of State Root in 1908 negotiated treaties whereby the United States agreed to arbitrate "differences which may arise of a legal nature or relating to the interpretation of treaties . . . provided, nevertheless, that they do not affect vital interests, the independence, or the honor of the two contracting states and do not concern the interests of third parties." But no question which embodied the principle of compulsory arbitration could be submitted to arbitration without the consent of two-thirds of the Senators. An effort was made to improve upon these treaties, which practically excepted most questions that were likely to result in serious controversies, by the Taft-Knox treaties, but the Senate refused its sanction because of a clause referring the question of the justiciability of a dispute to a commission of inquiry. And President Taft regretfully said: "So I put them on the shelf and let the dust accumulate on them in the hope that the Senators might change their minds, or the people might change the Senate; instead of which they changed me."

Similar treaties, involving the postponement of hostilities from whatever cause pending an investigation of the facts, were prepared by Secretary of State Bryan and submitted to the Senate by President Wilson, with the result that favorable action was secured. As part of the new agreements it was provided that before declaring war or engaging in hostilities the nations concerned should submit the question in controversy to The Hague Court, or some other international tribunal, for investigation and report, each party reserving the right to act independently afterward. A further step was taken in a peace proposal presented by President Wilson, to the effect that "the parties agree that all questions of whatever character and nature in dispute between them shall, when diplomatic efforts fail, be submitted for investigation and report to an international commission (the composition to be agreed upon); and the contracting parties agree not

[41] Cf., for other instances, James W. Garner, *op. cit.*

to declare war or begin hostilities until such an investigation is made and reports submitted."

All of these treaties were followed by certain others embodying a more comprehensive plan of conciliation and arbitration for the settlement of questions between the United States and foreign powers. In the treaties of this latter class, it is stipulated that "the high contracting parties agree that all disputes between them of every nature whatsoever, which diplomacy fails to adjust, shall be submitted to investigation and report to an international commission, and they agree not to declare war or hostilities during such investigation or report." Provision is made for an International Commission of five members, one member to be chosen from each country by the government thereof, to which all controversies which cannot be settled by diplomacy shall be referred.[42] A number of treaties of this type are now in force but have not been applied to any questions in dispute and are likely to have little effect upon the nature and scope of international relations.

In 1928 Secretary of State Kellogg negotiated a series of arbitration treaties providing for the submission of justiciable disputes to arbitration, with the exceptions of disputes (1) within the domestic jurisdiction of the contracting parties, (2) involving the interests of third parties, (3) involving traditional American questions, such as the Monroe Doctrine, (4) depending upon obligations assumed in accordance with the League of Nations.[43]

A plan to establish a method of arbitration among all the leading powers of the world was incorporated as a feature of the Covenant for a League of Nations in Articles 12 and 13. Members of the League agree that if a dispute arises between any two members they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council. The Committee of Jurists which prepared the statute for the establishment of a Permanent Court of International Justice recommended a provision for obligatory arbitration. But the Council of the League, regarding such procedure as not sanctioned by the Covenant, substituted an arrangement by which states may agree to a form of obligatory arbitration. Under the so-called "optional clause" Article 36, a number of treaties have been signed by which states agree to submit to arbitration questions relative to international law, to the interpretation of treaties, to breaches of international obligations and to the

[42] For a list of these treaties with the conditions applied to each, consult vol. vi, no. 5, of the pamphlet series of the World Peace Foundation.

[43] Cf. Edwin M. Borchard, "International Arbitration," *Encyclopædia of the Social Sciences*, vol. ii, pp. 157 ff.

nature and extent of reparation for such a breach. After several unsuccessful attempts to broaden the scope of obligatory arbitration the committee on arbitration and security of the League of Nations prepared model conventions for arbitration and conciliation whereby "legal" disputes would be submitted to arbitration and "non-legal" disputes to conciliation. The model conventions have so far not proved acceptable to many nations interested in arbitral procedure.

Because arbitration is in the nature of a compromise and because political factors and expediency influence arbitral decisions, there is a tendency to discredit this method for the settlement of international disputes. But even though arbitral methods vary from those followed by courts in judicial decisions, the difference is often exaggerated. Criticizing the unwarranted assumptions often indulged in, John Bassett Moore, the leading authority on international arbitrations, maintains "that the decisions of those international tribunals are characterized by about as much consistency, by about as close an application of principles of law, and by perhaps as marked a tendency on the part of one tribunal to quote the authority of tribunals that preceded it, as you will find in the proceedings of our ordinary tribunals. One cannot study these records without being deeply impressed with that fact, and without discovering how lacking in foundation is the supposition that when we talk of the 'judicial settlement' of international disputes we are presenting some new device or new method."[44] The problem of the execution of awards is not a serious one, for in thousands of cases of arbitration very few have failed to be executed. It has been truly observed that the difficulty is not in executing awards but in persuading parties to arbitrate. In comparing the two methods of resolving disputes it is customary to overemphasize the detached, formal procedure and settlement-by-rule features of judicial administration and to undervalue the adjustment of disputes by umpires according to somewhat different standards. The increased use of arbitration in the settlement of commercial disputes, of labor controversies, and of small civil causes is bringing favorable consideration to arbitral methods as supplementary means of maintaining peace in the conduct of world affairs.

SUPPLEMENTARY READINGS

Moore, John Bassett, *The Principles of American Diplomacy* (Harper & Brothers, 1918).

Fish, Carl Russell, *American Diplomacy* (Henry Holt and Company, Inc., 1923), fourth edition.

[44] *Proceedings of Academy of Political Science,* vol. vii, p. 22.

Latané, J. H., *From Isolation to Leadership, A Review of American Foreign Policy* (Doubleday, Doran and Company, Inc., 1919).

——— *The United States and Latin America* (Doubleday, Doran and Company, 1920).

Adams, Randolph Greenleaf, *A History of the Foreign Policy of the United States* (The Macmillan Company, 1924).

Mathews, John Mabry, *American Foreign Relations: Conduct and Policies* (D. Appleton-Century Company, Inc., 1928).

Schuman, Frederick L., *International Politics: An Introduction to the Western State System* (McGraw-Hill Book Company, Inc., 1933), especially chap. xi.

Vinacke, Harold M., *International Organization* (F. S. Crofts & Co., 1934), chap. iii.

CHAPTER XXIV

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

Methods of Conducting International Negotiations

To understand the significance of the growth of international law and the processes now at work in making international rules and regulations, it is necessary to consider briefly the various methods of conducting international negotiations and of settling disputes. International communications and cooperation have been carried on chiefly under six main headings: (1) diplomacy; (2) conferences; (3) mediation and good offices; (4) arbitration; (5) international administration through various commissions and agencies; and (6) the making and enforcing of international law itself.

Diplomacy.—It has been the common practice of nations in ancient, mediæval, and modern times to conduct negotiations through official representatives, such as ambassadors, ministers, consuls, and special diplomatic agents.[1] For a long time this was the only method by which common agreements and general understandings could be arrived at. The consul was the pioneer in the conduct of international negotiations, and out of the consular systems of ancient and mediæval times grew many of the customs and practices familiar in diplomatic intercourse.[2] In the Middle Ages, when the basis of modern diplomacy was laid and the consular functions were in a great measure taken over by regularly appointed diplomatic agents, the Machiavellian policies so characteristic of the rulers of Italian cities and of feudal princes made of these ambassadors special agents to conceal their own intentions and desires, and in every way to take advantage of the ruler to which they were accredited for the benefit of their masters. These policies of misrepresentation, chicanery, and subterfuge characterized a large part of the diplomatic dealings among the ruling classes of Europe well into the seventeenth and eighteenth cen-

[1] For a suggestive account of the practice of diplomacy, see Frederick L. Schuman, *International Politics: An Introduction to the Western State System* (McGraw-Hill Book Company, Inc.), chaps. v and vi.

[2] Pitman B. Potter, *An Introduction to the Study of International Organization* (D. Appleton-Century Company, Inc., 1928), third edition, chap. vi. Certain rules and principles developed in the practice of consular duties were compiled about the thirteenth century into what is known as the *Consolatio del Mare*, a legal document, the issuance of which marked the beginning of a new period.

turies. The welter of secret alliances and other unfair dealings which characterized the courts of Europe at this time was forcibly brought to the attention of the American colonies when they sent representatives abroad to plead the cause of the American Revolution.

The somewhat precarious position and the questionable functions performed by the diplomats of Italian princes and of other feudal rulers resulted eventually, however, in the establishment of a new position, that of a permanent, resident diplomatic representative. Though diplomacy has had disreputable associations and tendencies and has always been looked upon with more or less suspicion, the diplomats have come to be regarded as one of the permanent bonds that unite states in times of peace; they are among the chief agents for the establishment of mutual understandings and cooperation among the nations of the world. As the policies of secrecy and misrepresentation have declined and diplomacy has become fairer and more open, a large part of the diplomatic dealings has tended in the direction of the establishment of peaceful relations among nations. Modern diplomatic intercourse through protocols, agreements, and treaties has accomplished much in the direction of the cooperative activities now carried on among the nations of the world. Hence, diplomacy must always be looked to as a prime method of international negotiation and be depended upon for the settlement of numerous matters which cannot be adjusted in any other way.[3]

Conferences.—When matters involve more than two nations and are of general interest to large groups of persons, it has been customary to call together in general conference representatives selected by the nations chiefly interested. Originally such conferences were primarily convoked to bring about peace after a period of warfare and to provide for the processes of reconstruction, but it has become an increasing practice of nations to meet together during times of peace to consider problems of vital interest to all the nations represented.[4] Types of gatherings which met during the nineteenth century are illustrated by conferences such as The Hague Conferences of 1899 and 1907, as well as those called at Washington in 1921 to consider the matter of disarmament, and at London in 1933 to discuss economic relations. At these conferences rules and regulations, which in large part have been formulated by the individual nations or by groups of nations through common agreement, are, as a rule, systematized and codified. The conference method of forming treaties and conventions has certain inherent defects, because it is extremely

[3] See Pitman B. Potter, *op. cit.*, chaps. vi and vii, on the present consular and diplomatic organization; and Harold M. Vinacke, *International Organization* (F. S. Crofts and Co., 1934), chap. iii.

[4] See Pitman B. Potter, *op. cit.*, chap. xii.

difficult to get many nations to agree to a program which they are willing to carry into effect. The result is that conferences may be satisfactory in laying down general policies and in suggesting ideals, but they are frequently ineffective in that the principles and policies formulated may not be carried out as adopted. This has been especially true in the results accomplished through the conventions formulated at The Hague Conferences and also in the treaties prepared and submitted to the nations through the Washington Conference. Nations do not as yet regard the conference system as a natural and normal method of settling international differences and they have not set themselves seriously to the task of solving the problems of procedure connected therewith.[5]

Mediation and Good Offices.—When nations face a difficulty which cannot be settled through the ordinary diplomatic channels it is at times possible and practicable to turn the matter over to a disinterested party as mediator. Such was the practice followed by Russia and Japan in asking for the good offices of President Theodore Roosevelt to bring about a settlement of the difficulties which resulted in the Russo-Japanese War, and also by Chile and Bolivia in requesting President Harding to advise upon the problems arising out of the Treaty of Ancon. The age-old device of calling upon a third and disinterested party to adjust a difficulty is unfortunately seldom resorted to, because controversies usually become so involved and acute that neither party is willing to submit its interests to the decision of an impartial mediator.[6]

Arbitration.—A somewhat more formal and systematic method of turning a controversy over to disinterested parties has gradually developed through the growth of arbitration. It has been a not uncommon practice since the time of the Greeks to submit to arbiters certain questions for adjustment either through arbitral clauses inserted in treaties or in separate agreements.[7] The process of arbitration was put upon a somewhat more permanent basis by the conventions for the Pacific Settlement of International Disputes adopted at The Hague in 1899 and 1907, by the provisions in connection therewith for a Permanent Court of Arbitration, and by a model Arbitration Act prepared by a committee of the League of Nations.

The method of arbitration is more difficult to put into operation but is more likely to arrive at a fair and just settlement than the methods of either diplomacy, conference, or mediation. Normally, each of

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[5] For a brief account of important international conferences, see Harold M. Vinacke, *op. cit.*, chap. vii.

[6] Pitman B. Potter, *op. cit.*, chap. ix.

[7] For the participation of the United States in the settlement of controversies by arbitration, see pp. 583 ff.

the parties defines in a *compromis d'arbitrage* or special arbitral agreement the difficulties to be adjusted, the procedure to be followed, and the methods of the selection of arbitrators. Implicit in the agreement to arbitrate is the understanding that whatever the decision may be, the award of the arbitrators will be carried out. The matter is then submitted for decision according to the rules and regulations laid down. Many important and exceedingly difficult international controversies have been settled by this method, among which were the Alabama claims, the North Atlantic coast fisheries, and the Venezuelan boundary controversy.

But all of these methods combined—diplomacy, conference, mediation, and arbitration—fall short of the settlement of international difficulties through definite administrative or legal channels. It is significant, however, that for a considerable group of questions, especially those arising out of war, such as disarmament, reparations, disposition of conquered colonies, and territorial difficulties, including transfers of territory and other matters largely of political import, these methods will have to be depended upon primarily as the most effective means devised to handle such delicate questions. Considerable misunderstanding results from expecting and demanding of international law and the agencies provided for its enactment and enforcement that their chief purposes must be the settlement of these involved and difficult political questions. It is easy to forget that even municipal or national courts frequently refuse to settle questions which they regard as political in character, and the field of international relations furnishes a much larger group of controversies of this character which perhaps never can be made entirely justiciable and will always have to be settled, at least in part, through political and diplomatic channels.

International Administration.—An increase in international communication and cooperation along a multitude of lines has led to the development of numerous organizations, commissions, and other agencies for the purpose of international administration. When the League of Nations attempted to form a list of such agencies it was discovered that there were more than three hundred such boards, commissions, etc. About forty-five of these are official in character.[8] Among these organized agencies are: (1) those which relate to international communications, such as river navigation, police matters, and transportation—the Central Rhine Commission, the Danube Commission, and the Universal Postal Union being examples of this type; (2) those whose functions pertain to health and morals, including a group of sanitary councils and health committees; (3) those which

[8] Cf. Pitman B. Potter, *op. cit.*, chap. xi.

refer to commercial and financial affairs such as the commissions dealing with customs, tariff, debts, and general financial affairs; (4) those which relate to scientific matters, such as the International Institute of Seismology and the Pan-American Scientific Congresses.

From the standpoint of administrative powers, these bodies may be divided into three classes. The first consists of international bodies with comparatively few powers; there are today more than thirty such public and official organizations formed in response to a growing necessity for control over matters relating to international trade, communications, or commerce. A leading example of this type is the Universal Postal Union, which was formed in 1874, and provides for a congress called by two-thirds of the member states at least every five years, a conference to decide simple administrative questions, and an international bureau as a permanent administrative body. The bureau collects and distributes information, advises members, and acts as a financial clearing house. Although the powers of the union are quite limited, within its sphere it has rendered an effective and useful service. Similar unions have been established for the protection of industrial property, and for the regulation of wireless telegraphy and air navigation, as well as for other purposes of general international interest.

The second group of administrative agencies comprises those with power of control over local situations. An example of this group is the European Danube Commission, which was formed in 1856, composed of one delegate each from Great Britain, France, Austria, Prussia, Russia, and Turkey, to provide for the regulation of the navigation of the Danube River. The jurisdiction of the commission has from time to time been extended; it imposes fines, collects tonnage dues, has been self-supporting, and has exercised an effective control over the navigation of the Danube. Similar organizations are the Sanitary Council established in 1892 to control conditions or epidemics where the local authorities are unable to cope with the situation; the Suez Canal Commission formed by the Treaty of Constantinople in 1888, in order to regulate traffic through the canal; the International Congo River Commission in 1885; the Chinese River Commission, and similar bodies—all formed to deal with special local situations.

A third group of such administrative bodies is comprised of international bodies with power of control over the member states. Among such organizations was the Sugar Commission created by the International Sugar Union of 1902, which was later dissolved. The signatory powers to this commission agreed to abolish sugar bounties and not to impose any duties beyond a certain maximum. A feature of

this commission was that it was given power to act by a majority vote, and certain states were compelled to change their tariffs against their wishes. Important matters requiring general regulation have thus been turned over to commissions for administration, and in a number of instances have been handled satisfactorily.

In the main these international administrative agencies are formed for the purpose of collecting, digesting, and distributing information. Some of them serve as central clearing houses for discussion and conferences, and a few carry on actual administrative work and control. The characteristic feature of a typical union is the bureau or central office which is set up as a permanent body to carry out the functions of the union. It is usually non-political in character and made up of a group of experts.[9]

During the war, central administrative agencies, such as the Allied Maritime Transport Council and the Supreme War Council, were effective as agents in carrying on the activities of some of the states engaged in war. The efforts to carry out the plan of international administrative agencies have been continued in the treaty of peace and through the League of Nations by the establishment of bodies and commissions organized to govern territory, and the various plebiscite commissions provided for throughout the treaty of peace. Thus, a growing field of experience has been accumulating for the administration of matters of general interest to groups of nations or which in some cases, as in those of postal affairs, affect the entire family of nations. Taken all together, the commissions and agencies established either through the treaties of peace or as instrumentalities of the League of Nations have greatly extended the scope of international administration and are developing principles and methods on a scale heretofore unknown.[10]

All of these methods, such as diplomacy, conference, mediation, arbitration, and international administration, though designed to provide for the settlement or adjustment of certain types of international controversies, and especially those along political, economic, and sanitary lines, are but preliminary to the more systematic and effective methods for the peaceable settlement of international affairs through the development of international law. But any consideration of the place and importance of international law in modern society must answer the oft-repeated query: Is there any international law?

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[9] Cf. Harold M. Vinacke, *op. cit.*, chap. xiv.

[10] For a good account of international administrative organization, see Edmund C. Mower, *International Government* (D. C. Heath and Company, 1931), chap. xiii. *The Handbook of International Organizations,* published by the League of Nations, gives interesting statistical data regarding most of the existing unions.

International Law

It seems desirable, therefore, to consider the rather common charge that there are no international rules that are consistently enforced and that consequently no substantive international law exists. Those who hold this view point to the repeated ineffective efforts to prepare rules and regulations for warfare, and especially to the conventions adopted at The Hague in 1899 and 1907, and they call attention in particular to the lack of their enforcement and the failure of nations to abide by these regulations during war. International law, they say, is futile; it does not stop war; and, moreover, it does not regulate war while in process. An international sovereign is lacking; there is no sanction for or power to enforce international law; consequently it does not exist.[11]

In answer to those who hold this position it may be said that one might as well contend that there is no municipal or national law. Municipal law does not stop murders, does not stop robbery and thieving, and does not control riots. Every time a riot occurs, a murder is committed, or a daring robbery is consummated successfully, one might equally well argue that there is no municipal law. But some writers hasten to reply that when one commits murder or robbery he is sure to be punished. In other words, the wrongdoer in due course of time receives retribution through legal channels. But upon examination it can scarcely be claimed that municipal law exists primarily on the basis of the effectiveness of its enforcement. An investigation of more than a hundred murders in a large city indicated that only a few of the murderers were apprehended, a smaller number were brought to trial, less than ten per cent were convicted, and only a few capital punishments resulted. A recent report of the American Bar Association has again emphasized the ineffectiveness in the enforcement of the criminal law in the United States, a condition which was characterized by Chief Justice Taft as a national disgrace. A special report of the city council of Chicago, dealing with crime in that city, summed up the situation by saying that the law in Chicago catches the poor and petty thieves and punishes them severely but allows the rich and those guilty of wholesale crimes and illegalities to escape. The effectiveness in the enforcement of law in the United States, unfortunately, is weakened by many factors which, so far, have been dealt with only with moderate success. Most American citizens deplore this condition, but it cannot be argued as a result

[11] On the nature and significance of international law in modern society, see Harold M. Vinacke, *op. cit.*, chaps. ii and vi.

that there is no law against murder, or robbery, or other crimes in the United States.

On the other hand, in the field of international affairs, poor and weak nations that go to war may suffer severely and are at times unduly punished. Even great nations which are considered as bringing on war without just cause are likely not only to suffer in public sentiment, but also to be subjected to various penalties and punishments. In the words of an English justice:

A law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law such law had no existence? The answer to such contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it.

The United States has from the beginning recognized international law as part of the law of the United States. As early as 1796 Justice Wilson said that "when the United States declared their independence they were bound to receive the law of nations in its modern state of purity and refinement."[12] The federal Constitution gave to Congress authority to define and punish offenses committed against the law of nations. After the Constitution went into effect, it was decided by the Supreme Court, speaking through Chief Justice Marshall and Justice Story, that in the absence of an act of Congress to the contrary, "the court is bound by the law of nations which is a part of the law of the land."[13] This view has always been followed by American courts, the prevailing opinion being stated clearly by Justice Gray:

International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by

[12] Ware *v.* Hylton, 3 Dallas 199, 281.

[13] The Nereide, 9 Cranch 388, 423 (1815).

years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.[14]

The statesmen and jurists of the United States, then, have regarded the acceptance of the rules of international law as a part of the conditions on which a state is originally received into the family of nations. They have not placed as narrow an interpretation upon the application of the rules of international law as have the courts of England in certain cases,[15] nor have they been disposed to follow the courts of some other countries in a contemptuous disregard of the law of nations.

Periods in the Growth of International Law.—Three periods are apparent in the growth of the legal phases of international relations. In the first period, as in the development of national or municipal law, self-help and wager of battle were the chief methods of settling international difficulties. Nations, like individuals, on the least provocation, without delay and without submitting controversies to any outside party, went to war to settle petty quarrels and to forward selfish national interests. Under this condition, it was not only the common practice but it was also regarded as quite honorable to go to war on a flimsy pretext or even no pretext at all. It was the sovereign right of any nation to depend upon the god of battle to decide any question which might arise or to satisfy any desire of the sovereign ruler.

A second period resulted when self-help, the wager of battle, and the element of force still dominated, but when many matters which formerly would have led to political conflicts and ultimately to war were settled through peaceful methods, judicial or diplomatic, in accordance with a developing body of rules and customs. Moreover, an increasing number of controversies formerly settled by diplomacy, by conferences, or by arbitration were now turned over for settlement to the nation's courts and were adjudicated on principles of justice and equity in accordance with regular judicial processes. At the same time, an effort was made, by a series of conventions, agreements, and understandings, to regulate the nature of warfare when nations turned to war to settle disputes. Such agreements were those made at St. Petersburg, where a distinction was drawn between combatants and non-combatants, and at the Geneva Conference, where steps were taken to formulate rules for the protection of the sick and wounded—these and other agreements and understandings culminating in the elaborate conventions to regulate warfare formulated at The Hague and adopted by a large number of nations.

[14] The Paquete Habana, 175 U. S. 677 (1900).

[15] See West Rand Central Gold Mining Company *v.* Rex, 2 K. B. 391 (1905).

Though no longer regarded as a natural and normal activity of states, war could still be resorted to whenever a state desired, and was regarded as entirely proper from the standpoint of international rules and regulations. War, when begun, was to be conducted according to certain rules, there being a code for combatants as there was once a code for dueling among those who regarded themselves as gentlemen. And though not entirely respectable, and though subject to certain regulations, war was not outlawed.

A third period in the development of international law coming within recent times is one in which self-help, wager of battle, and appeals to force are reduced and are gradually suppressed and steps are being taken to outlaw war itself. According to the concepts applicable in this period, it is no longer regarded as just and honorable to go to war without giving reasons therefor and without justifying the belligerent nation's conduct before the other nations of the world. Public opinion, it is thought, should operate so as to prevent matters of international concern from being left to the arbitrament of a single state, whether strong or weak, and to the application of penalties of its own devising. In various provisions of the League of Nations significant features of the third step in the growth of international law were in process of accomplishment. But the provisions of both the League and the Pact of Paris designed to check aggressive warfare have failed to apply legal sanctions and criteria to the warlike conduct of nations.

The three periods covering the development of international law as outlined above show characteristics which are paralleled in the growth of all law, and especially in the evolution of the common law in England.

First, the early common law was based largely upon self-help and the wager of battle, in which each individual was expected to defend himself and to get such reparation as he could from those who wronged him. As time went on, this practice of self-help was tempered and moderated by a system of arbitral justice, in which the aggrieved parties could take their difficulties to an impartial umpire who would hear the evidence and give his judgment as to the merits of the controversy. Settling a matter in this way, however, was altogether voluntary on the part of the citizen. The umpire had no way of enforcing the decision, nor power to carry out his judgment. Enforcement of the award was left entirely to the community sentiment. It is well known, however, that many controversies were thus submitted to arbitration and that the judgments of the arbiters were, as a rule, carried into effect. This informal and non-compulsory system of securing justice formed the basis of the modern common law, and of the establishment of courts in connection therewith.

In the second period, when kings by the force of arms conquered Anglo-Saxon territory and set about to assert their authority over the common law tribunals, the element of force was introduced by the sheriffs and other executive officers, who came to be all-important agents in the crystallization of the common law into a definite legal system. Compulsion supported by the king and his subordinates was superimposed upon the element of arbitration and common agreement which prevailed in early Anglo-Saxon times. As the kings grew in power and authority and the baronial lords lost their grip, force and compulsion came to dominate more and more the English administration of justice. This practice prevailed at the time the American colonists settled this country, and continued in large part to control English legal thought until the nineteenth century.

The third and modern period comes into importance as the resort to force is gradually replaced by the principles of common consent and popular approval which have been characteristic of the eighteenth and nineteenth centuries. Though the element of force is still retained and holds a dominant place in certain branches of the law, common consent through such devices as arbitration has come to play a significant rôle in the settlement of civil controversies which arise between individuals. Thus, arbitration takes the place of judicial settlement in the determination of many controversies which arise in the ordinary course of business.[16] This is especially true in England and is coming to be a more common practice in the United States. Similarly, a general system of arbitration for all civil controversies has taken its place in Denmark and Norway and is finding its way through conciliation courts into certain jurisdictions of the United States. The same tendency to subordinate the appeal to force and to restrict its application is indicated in the use of the declaratory judgment in England and the efforts to extend this device in the United States. Summarizing the underlying motive and principle of such judgments, Professor Sunderland said:

> In early times the basis of jurisdiction is the existence and the constant assertion of physical power over the parties to the action, but as civilization advances the mere existence of such power tends to make its exercise less and less essential.
>
> If this is true, it must be because there is something in civilization itself which diminishes the necessity for a resort to actual force in sustaining the judgments of courts. And it is quite clear that civilization does supply an element which is theoretically capable of entirely supplanting the exercise of force in the assertion of jurisdiction. This is respect for law. If the parties to the action desire to obey the law,

[16] Cf. Samuel Rosenbaum, "A Report on Commercial Arbitration in England," American Judicature Society, *Bulletin* no. xii (October, 1916).

a mere determination by the court of their reciprocal rights and duties is enough. No sheriff with his writ of injunction or execution need shake the mailed fist of the state in the faces of the litigants. The judgment of the court merely directs the will of the parties, and the performance of duty becomes the automatic consequence of the declaration of right.[17]

Just as public and community sentiment exercises a powerful influence in the development of arbitration, conciliation, and the declaratory judgment in municipal law, it can be truthfully stated that a potent influence is exercised by the general opinion of the world; even strong governments recognize this influence and act with reference to it.

Divisions of International Law.—International law in its growth and development is comprised of two rather distinct divisions, varying considerably in content, definiteness, and sanction of enforcement.[18] The divisions may for convenience be termed: (1) the body of international law proper; and (2) international rules and regulations with political sanction chiefly, enforcement being only slightly legal in character, if so at all.

Turning to the first of these two divisions we find that the body of international law is comprised of three types of rules and principles: first, those which are general and form what is sometimes termed the common law of nations. These rules arise largely on the high seas or under such conditions that it is impossible for one nation to apply its laws to the settlement of the controversies and issues involved. Examples of this type are to be found in the rules of navigation and other general maritime regulations which were long recognized and followed in ancient and mediæval times and came to modern nations with only occasional amendments and changes. No nation has formed them, and no nation is in a position to lay down the principles applicable to their enforcement. They constitute a veritable international common law relative to a status wherein the individual nation's law must be modified by circumstances and conditions over which it has comparatively little control. Though the scope of such rules is naturally a limited one, there is a sufficient body of formulated laws and regulations so that it is possible to speak of a common law applicable to this branch of maritime affairs.

The second type of rules has been well characterized by Professor Dicey in his *Conflict of Laws*, when he notes that in a controversy

[17] Edson R. Sunderland, "A Modern Evolution in Remedial Rights—The Declaratory Judgment," *Michigan Law Review* (November, 1917), vol. xvi, p. 69.

[18] For the sources and sanctions of public international law, see Frederick L. Schuman, *op. cit.*, chap. iv.

involving as one of the parties a citizen of a foreign country, the courts of necessity are obliged in their application of existing local laws to modify their decisions according to the laws of the country to which the foreign citizen belongs. Such controversies are again subdivided, some falling within what is known as the conflict of laws or private international law, and some within the field of public international law. The term "conflict of laws" or *private international law* has come to be applied to the decisions relating to contracts, property rights, taxation, domestic relations, citizenship, and the manifold controversies in which the private rights of individuals are involved, one or the other of the parties being a citizen of a foreign country.

When the determination of private rights at the same time involves rendering a judgment upon the rights, privileges, and duties of the state to which either of the litigants belongs, the matter is likely to come within the scope of *public international law.* Among such controversies are included the settlement of matters involving the rights and duties of sovereigns and of the recognition of states, the effect of a change of sovereignty, control over foreign merchant vessels in territorial waters, jurisdiction over the high seas, issues of citizenship and naturalization, the privileges of diplomatic agents and consuls, and the effect of treaties and their status as a part of the law of the land. Courts when faced with controversies of this type must take into account not only the laws of the country of which the foreign citizen is a member, but also the political and public relations and attitude of the governments concerned, for decisions in this field are often of such character as to involve serious political consequences.

The corpus of international law proper includes a third division, differing to some extent from either of the other two, namely, the adjustment of the rights of persons and property of non-combatants as affected by the conduct of war. The questions which arise under this division pertain to the effect of war on property, contracts, and debts, on the rights of alien enemies, and on the regulations of commercial intercourse with enemy individuals and enemy countries. As far as is practicable, the courts attempt to define the rights of property and contracts and commercial intercourse among neutrals and those engaged in war, subject to as little interference as the conditions of war will permit.

In all three of the above groups of international controversies the rights, duties, and obligations involved are based on legal considerations and are usually decided by courts of justice which apply with modifications and relaxations the rules which are pertinent to the decisions of controversies between private citizens within a single

jurisdiction or state. It is within this field—and a large and growing field it is—that one may speak of an international law with a relatively definite and positive sanction. To a certain extent these phases of international law may be considered as that part of the law made, interpreted and applied by the regular agencies of the state in the settlement of controversies of individuals when international rights and obligations are involved.

In addition to the extensive field of international law proper as defined above, efforts have been made to prepare rules and regulations applicable to the conditions of war and to the conduct of warfare itself. Efforts of this character include rules to distinguish between combatants and non-combatants, and regulations for the care of the sick and wounded, for prisoners of war, and for numerous other matters intimately connected with the general conduct of warfare. Attempts have also been made to regulate the opening of hostilities, the bombing of defenseless towns, the use of poison gases, and the exemption of private property from confiscation or destruction except as a result of military necessity. By common agreement a considerable portion of the rules formulated at The Hague was thought to be a part of international law when the World War began. Soon after the outbreak of the war it was discovered that some of these rules were not technically applicable to the conflict and that their formulation and adoption were to have relatively slight effect upon the conduct of the war itself.

In the first place, certain conventions to regulate war were rendered futile from the outset, as they contained a provision that they were applicable only when all of the combatants had accepted them. When one nation had refused acquiescence, as did Turkey, other nations were automatically freed from applying them except in so far as they might in honor and good conscience see fit to use them as guides. Furthermore, it was obvious from the beginning that some of the attempted regulations of war would not be followed to any appreciable degree in practice, because of the variations in the conduct of warfare due to modern conditions and to changes in economic and social conditions, and also because of the more important factor that war itself negatives law and is conducted on the principle of the Roman proverb, "Amidst war laws are silent." A part of these rules and regulations were rendered ineffective by the mobilization of entire nations and the requisition of foodstuffs and other war products, so that extreme difficulties arose in applying the distinction between combatants and non-combatants. Therefore, the laws of warfare and the rules intended to regulate the conduct of warfare, such as the regulations respecting blockade, contraband, and the right of

search, were made difficult of enforcement as the conflict involved many nations and became more and more desperate.

To many, the failure of these rules to bind the combatants was ample evidence of the utter repudiation of international law itself. International law did not prevent the war, and, what was worse, it failed to regulate its conduct in any appreciable degree. As this phase of international rules and regulations loomed foremost in the popular mind, the failure of enforcement appeared strikingly disastrous. It was not commonly recognized that a considerable portion of international law proper was interfered with only to a quite limited degree as the result of the war, nor was it appreciated that certain of the international rules and regulations formulated in the Geneva Conventions and in the conferences at The Hague are merely the formulation of ideals—ideals which, in certain instances, are still in the process of legal formulation. They depend now to a certain extent, and will depend for a long time in the future, upon political sanctions and the pressure of public opinion for their enforcement, and in some respects they cannot be regarded as legal at all. Moreover, nations differ widely in the way they regard international law. It is still true that "a sharp and growing chasm divides the fields of theory and practice. The account given by legal scholars of the operation of the institution of international law gives us no reliable basis of forecasting how particular issues will be decided in the future. Government officials, with all the good will in the world, experience the greatest difficulty in discovering what the 'law' is in particular cases. The results of extensive 'factual' investigations of scholars are of little help in solving current problems."[19] Until the distinction is recognized between international law definitely made and positively enforced, and such rules and regulations as may be laid down as a sort of guide to the sentiment of the nations, it will be impossible to combat the popular assumptions that there is no international law, and that international law, such as there is, ceases to have validity when war begins.

The greater part of what might be termed international law proper is the result of the decisions of the courts of the separate countries in the interpretation and application of the common rules and regulations applicable to international affairs, and of the treaties and regulatory decrees laid down by the separate nations in defining their rights and duties in dealing with other states. It is nevertheless true that the body of international law is now being added to considerably by various permanent agencies for international negotiation and for

[19] Frederick Sherwood Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Johns Hopkins Press, 1932), pp. 7, 8.

the settlement of disputes. The most important of these agencies are the Permanent Court of Arbitration; the League of Nations, with its Assembly, Council, Secretariat, and the various commissions and committees established in connection therewith; and the Permanent Court of International Justice. Each of these agencies has such an important rôle in the adjustment of international matters that a somewhat detailed consideration of their organization and functions seems desirable.

The Permanent Court of Arbitration

The conferences which met at The Hague in 1899 organized what is known as the Permanent Court of Arbitration. In 1907 it was agreed to maintain the court which the earlier conference had established, with certain changes in its organization and methods of procedure. The court is situated at The Hague and is authorized to hear and decide all arbitration cases unless the parties agree to institute a special tribunal.

To attend to the administrative affairs of the court an international bureau was established, which has charge of the archives and is expected to communicate with the governments which undertake to arbitrate through the court as to special agreements, arbitral awards, and other matters bearing upon the decisions rendered.

The term "Permanent Court of Arbitration" is somewhat misleading for, properly speaking, there is no court. A special agreement to arbitrate or a *compromis* is necessary to bring the case before the court. There is only a panel of judges from which the parties who have agreed to arbitrate may select judges. When the case arises the arbitrators are selected from this general list. Provisions are made for the selection of arbitrators in case the nations are unable to agree upon the judges to be selected from the list contained in the international bureau. The *compromis* usually defines the nature of the controversy to be decided and the procedure to be followed by the arbitrators, with any limitations or exceptions to be made in the consideration of the dispute. Recourse to the court is entirely voluntary, the plan for compulsory arbitration having been rejected at both of The Hague Conventions.

The conference of 1907 provided in detail for the procedure to be followed by the nations in securing awards from the court. Though the arbitral procedure as outlined is rather informal and need not follow the strict methods usually adopted in the settlement of controversies by courts of justice, it has been found desirable to regulate the method of giving testimony and the discussion or pleas before

the court, and to place certain restrictions upon the officers and agents who present the cases for their nations before the tribunal.

Though the number of cases settled by the Permanent Court of Arbitration has been comparatively small, a few important matters, such as the North Atlantic fisheries controversy, were decided by this court to the entire satisfaction of the parties concerned. In the cases thus far presented to the court and in the procedure which has been developed, considerable progress has been made in outlining methods and rules of procedure by which cases may be arbitrated not only through the panel of judges which comprises the present court at The Hague but through special boards of arbitration to which nations may prefer to submit their controversies. The experience gained in the establishment of and in the practice before courts of arbitration materially facilitated the steps which were taken later to establish a League of Nations and to secure a Permanent Court of International Justice.

The League of Nations[20]

The most comprehensive effort which has thus far been made to adjust international questions is that comprised in the Covenant of the League of Nations, which was made a part of the treaty of peace between the Allied and the Central powers.

The idea of a league or congress of nations had been suggested and advocated by many prominent men, including William Penn, Abbé de St. Pierre, and Immanuel Kant. In his essay on perpetual peace published in 1795 Kant formulated what seemed to him some of the necessary principles for an enduring international organization. To assure perpetual peace it was necessary to establish popular governments in the member states, and there must be no forcible intervention by one state in the internal affairs of another. Wars and international negotiations during the nineteenth century indicated how far the nations were from accepting the basic features of Kant's ideal scheme. But men refused to let the idea become inert and to engage the attention only of theorists and philosophers.[21]

Prior to and during the World War various proposals were advanced to establish an international agency to assure peace among nations, the most important of which was the League to Enforce

[20] For a satisfactory account of the organization and functions of the League of Nations, see Edmund C. Mower, *op. cit.*, pp. 361 ff. A more comprehensive account may be found in C. Howard-Ellis, *The Origin, Structure and Working of the League* (Houghton Mifflin Company, 1928).

[21] Consult Frederick L. Schuman, *op. cit.*, pp. 231 ff., for an account of some of the proposals to establish an international government.

Peace—a society enlisting the interest of many eminent men and women in the United States. President Wilson, who endorsed the plan, included among his fourteen points a proposal for a general association of nations "under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike." Through Wilson's leadership and the cordial support of General Smuts and others, the League of Nations Covenant was made a part of the treaty of peace and came into force in January, 1920.

It is provided in the Covenant that "any fully self-governing state, dominion or colony not named in the annex may become a member of the League if its admission is agreed to by two-thirds of the assembly, provided it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces, and armaments." In accordance with the provisions for original membership, forty-two states participated in the first meeting of the Assembly. States may withdraw from the League; and four states—Brazil, Costa Rica, Japan, and Germany—severed connections with the organization.

Due to the importance of the provisions of the Covenant and to the extended discussion which has arisen over this document, a brief analysis of the organization of the League and of the functions which it is designed to perform is here given.[22]

The purpose of the League of Nations, as provided in the preamble of the Covenant, is "to promote international cooperation and to achieve international peace and security" (1) by acceptance of obligations not to resort to war; (2) by the prescription of open, just, and honorable relations between nations; (3) by the firm establishment of the understandings of international law as the actual rule of conduct among governments; (4) by the maintenance of justice and respect for all treaty obligations in the dealings of organized peoples with one another." To assist in the attainment of these important objects, there are established an Assembly, a Council, a Secretariat, and various technical organizations, commissions, and committees.[23]

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[22] When the first Assembly met in 1920, 42 states had joined the League. Six states were admitted at this session. Ten more states have been admitted. States which have not become members of the League are Afghanistan, Ecuador, Egypt, the Union of Socialist Soviet Republics, and the United States. Italy has signified its intention to withdraw unless amendments to the Covenant are agreed upon.

[23] See Frederick L. Schuman, *op. cit.*, pp. 258 ff., for a brief survey of international organization today.

The Assembly.—The Assembly or legislative body of the League is composed of representatives from all of the member states of the League, each member being permitted to have as many as three official representatives. Meetings of the Assembly are held annually in September and on extraordinary occasions when a special meeting seems necessary. Voting in the Assembly is by states, each member state having one vote. Resolutions of the Assembly require the unanimous vote of all members present and voting. Various matters of procedure, amendment of rules, amendment of the Covenant, etc., require either a majority or a two-thirds vote, the latter being necessary to admit new members to the Assembly. Much of the business is conducted, as is the case with other legislative bodies, through various committees. The jurisdiction of the Assembly comprises any matter within the sphere of action of the League or affecting the peace of the world. The Assembly supervises the work of the Council, Secretariat, and International Labor Office; determines the budget for the League; and elects non-permanent members of the Council and, in conjunction with the Council, the judges of the Permanent Court of International Justice. It is within the competence of the Assembly to hear any dispute referred to it and to make recommendations on matters of international cooperation or those affecting international peace. In practice, the Assembly has become the general directing force of all League activities. It reviews the work of the past and indicates the lines of progress for the future.

The Assembly opens under the temporary presidency of the acting President of the Council. Its first business is the election of its President and six Vice-Presidents. They, with the chairmen of the main committees who become *ex officio* Vice-Presidents, form the General Committee for the conduct of the business of the Assembly. These elections, as far as possible, have regard to the main groupings of international life, so that the various forms of civilization and the various political interests may have their representation.

The actual work of the session begins with the discussion of the report on the work of the Council and the action taken on the decisions of the preceding Assembly; and after this general debate the Assembly divides its work among six general committees, which in themselves are small assemblies as every state has one representative on each of them. These committees deal with different groups of subjects as follows:

1. Constitutional and Legal Questions
2. Work of the Technical Organizations
3. Disarmament
4. Budget and Financial Questions

5. Social and Humanitarian Questions
6. Political Questions

The committees consider the reports presented by various League bodies and make final recommendations to the Assembly. The plenary sessions of the Assembly afford an opportunity for a final debate on any point still at issue, and they take the final vote. The Assembly has gained in power and prestige and performs important functions in the discussion, formulation, and adoption of general policies.

"It is as an open forum of discussion," claims Professor Mower, "that the Assembly serves its most valuable purpose. It always sits in public, and so far as the limited time for the transaction of its growing volume of business will permit, an opportunity is given to the delegates, regardless of the importance of the states they represent, to air grievances and debate policies. . . . Important as this quasi-legislative function may be, however, its most useful contribution to international government is as a great world conference wherein the representatives of the member nations meet to promote a better acquaintance, to discuss current problems, and to focus attention upon proposals for the betterment of international relations."[24]

The Council.—The Council, which was originally composed of five major powers—namely, the British Empire, Italy, Japan, France, and the United States—and four elected members, was reorganized to comprise representatives from the British Empire, France, Italy, Japan, and six other members elected annually by the Assembly.[25] In 1926, when arrangements were approved to accord Germany a permanent seat on the Council, it was necessary to satisfy the wishes of some of the minor states to increase the non-permanent members to nine and to provide for a three-year term, three members retiring each year. The retired members are ineligible for reelection for the ensuing three years unless an exception is made by a vote of two-thirds of the Assembly. Thus the way has been prepared for a class of semi-permanent seats. In 1933 the Assembly expanded the Council's membership by adding a new rotating non-permanent seat. Any member not represented on the Council may send a representative to participate in its sessions while any matters are under consideration affecting its interests. The Council holds four sessions annually and may be called together when special affairs require attention. Mat-

[24] Edmund C. Mower, *op. cit.*, p. 377. According to Professor McClure, "The Assembly of the League has undergone a truly remarkable development during the thirteen years of its history. It is now indisputably the seat of final authority in League organization." Wallace McClure, *World Prosperity as Sought through the Economic Work of the League of Nations* (The Macmillan Company, 1933), p. 589.

[25] See Edmund C. Mower, *op. cit.*, pp. 382-383.

ters of procedure are determined by a majority vote, but resolutions, in order to be enacted, must have the unanimous vote of all members present and voting.

It is within the competence of the Council to deal with any matter within the sphere of action of the League or affecting the peace of the world. It is required to make an annual report to the Assembly, to approve the terms of mandates, to receive annual reports from mandatory states, and to prepare plans for the limitation of armaments. The Council drafts the budget of the League, appoints all commissions and controls their conduct and operation; coordinates the work of the International Bureaus; supervises the action of the technical organizations; and hears all disputes referred to it under Articles 12, 13 or 15. Article 16 places upon the Council a duty concerning which there has been considerable doubt and controversy, namely, to eject from the League a member who refuses to abide by its covenants and to make recommendations as to the use of force to protect the Covenant of the League. This provision has been interpreted so as to render the action of the Council advisory and to place greater responsibilities upon the individual members of the League.

The Council was apparently designed to be the central and most important factor in the League machinery. It was intended to serve primarily as an executive body, and some difficult administrative problems, such as the control of Danzig and the Saar, were placed in its charge. To a certain extent it was expected to serve in the capacity of a tribunal of conciliation to hear and consider disputes not settled by diplomacy. In general, the main function of the Council has been its service as a coordinating and conciliating body.

The Secretariat.—A significant part of the League organization is the provision relating to the Secretariat, or the permanent administrative apparatus of the League. A Secretary-General is appointed by the Council with the approval of a majority of the Assembly. It is his duty to make a preliminary examination of questions to be taken up by the Council or by the Assembly; to keep all members informed of the League's activities; to keep the records of the League and preserve all reports, records, and documents; and to distribute to the public, as far as possible, accurate information on all phases of the work being done by the League. In a large measure, the effectiveness of the League organization depends upon the efficiency of the work being done by the Secretariat, and the Secretary-General has been called the "Director of the League."

Special and Technical Organizations.—Though the main agencies of the League are the Assembly, Council, and Secretariat, a good part of the functions performed by it is taken care of through

the special organizations, committees, and commissions. The peace treaties provided for one of these special organizations by establishing an International Labour Organization, of which all members of the League automatically become members. The purpose of the organization is to secure and maintain fair and humane conditions of labor for men, women, and children, and the intellectual and moral welfare of industrial wage earners. The various principles recognized by the organization indicate the nature and scope of its work. Among these are: that labor should not be looked upon merely as a commodity or article of commerce; that the employee as well as the employer should have the right of association for all lawful purposes; that a wage adequate to maintain a reasonable standard of living as this is understood at present in their country should be paid to all employees; that child labor should be abolished; that such limitations should be placed upon the labor of young persons as shall permit the continuation of their education and assure their proper physical development; and that men and women should receive equal remuneration for work of equal value.

A general conference is held once a year to consider matters of interest to the member states concerning labor, each member state being entitled to four delegates, two representing the government and one each from employers and workers. In contrast to the practice of the League, the delegates vote as individuals on the projects under consideration. Recommendations are made to the members, and conventions are signed to be submitted to the members for ratification. The work of the International Labor Organization is in charge of the International Labor Office, an autonomous organization with its own governing body, its own general conference, and its own secretariat, controlled by a governing body consisting of twelve representatives of governments, six representatives selected by employers and six by employees.[26]

The aims of the organization are declared to be: "The regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labor supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of employment, the protection of children, young persons and women, provisions for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of the freedom of association, and the organization of vocational and technical education." In short, the

[26] Cf. Francis G. Wilson, "The International Labor Organization," *International Conciliation*, No. 284 (November, 1932).

primary object is to establish an international code of labor standards.

The accomplishment of these aims frequently requires common international action. In the main, the work of the International Labor Organization has centered around the holding of labor conferences, the drafting of treaties regarding the improvement of labor conditions in the member states, and the collection and distribution of information relating to labor conditions and industry. Professor Wilson summarizes the results accomplished, as follows: "In sixteen sessions of the International Labor Conference from 1919 to 1932 thirty-three conventions and forty-one recommendations have been adopted. This constitutes in fact the formal sum total of its international legislative work. Behind these seventy-four declarations of the international minimum of labor protection stand years of research by the Labor Office, nearly fourteen years of international negotiation and the twists of politics, unnumbered compromises, frequent false starts, disappointments to all those connected with the Labor Organization, and, perhaps more significant, a growing sense of international reality by governments, employers, workers, and international labor officials."[27]

The many tasks devolving upon the League necessitated the creation of various auxiliary bodies, such as permanent commissions, technical organizations, and advisory committees. Two commissions, the Permanent Advisory Commission on Armaments and the Mandates Commission, are provided for in the Covenant. Three important technical organizations, namely, the Economic and Financial Organization, the Communications and Transit Organization, and the International Health Organization have been created by the Council. Each of these large units performs much of its work through permanent and temporary committees dealing with special phases of work. Advisory committees have been formed to deal with military, naval, and air questions, and with the opium traffic, the protection and welfare of children and intellectual cooperation. Some of the most effective work of the League has been accomplished by these advisory committees and technical organizations. Two general features of these technical organizations and some of the advisory committees should be noted: one is that they are steadily building up new international law by a series of conventions, and the other that they frequently have secured the collaboration of non-member states, including the United States and Russia.

Accomplishments of the League.—The League has rendered advice and assistance in the internal financial administration and re-

[27] *Ibid.*, p. 10.

construction of Albania, Austria, Estonia, Hungary, and Greece. Among some of the difficult international controversies which were brought to a successful settlement largely by the agencies of the League are a difference between Sweden and Finland regarding the sovereignty of the Aaland Islands; the delimitation of the frontier and the settlement of other points of disagreement between Germany and Poland in relation to Upper Silesia; assistance in preventing hostilities between Poland and Lithuania regarding the frontier in the Vilna region, though in this instance the League failed to secure an agreement between the parties concerned as to the fixing of the frontier line; and the adjustment of boundary disputes between Albania and Jugoslavia on the one hand and between Greece and Albania on the other. It has, in fact, played the part of an authoritative international body, bringing into focus international efforts, and has been able to command the disinterested and voluntary services of a great number of specialists and distinguished men in most walks of life, for the detailed study of the problems with which it has been called upon to deal.

The purposes which the League of Nations is intended to fulfill, through these various organs and agencies, are: First, to formulate restraints which may limit wars or prevent military action. The Covenant makes provision for the formation of commissions of inquiry, for arbitration, and for judicial settlement of disputes, with a period of delay before beginning war, and for united action against a state which goes to war without just cause. Second, to provide a permanent investigating body and a fact-finding agency in order to bring into play the force and pressure of publicity and to make public opinion more effective. Provision is made for the publication of all treaties. And, as in the case of the settlement of industrial disputes by such devices as provided in the Canadian Industrial Disputes Act, it is believed that by preliminary investigations and by directing the agencies of public opinion many controversies will be amicably adjusted when the facts are carefully investigated and made known through League agencies. Third, to serve as an administrative agency for the holding of plebiscites, for governing certain territories, and for promoting intergovernmental cooperation. It constitutes, therefore, a central agency and clearing house for all international administrative agencies. Fourth, to provide for the surveillance of the government of large controlled areas under the mandatory system. Fifth, to provide for the guidance and leadership in the world movement for disarmament. Through the Permanent Court of International Justice the League has laid the basis for the legal settlement of controversies heretofore left to diplomacy or to arbitration.

It is impossible to describe in detail the manifold activities, interests, and functions of the League. Suffice it to say that through its agencies a number of important disputes have been amicably adjusted and threatening wars have been averted. But in the limited time in which the League has been in existence it has been chiefly engaged in the work of preliminary organization and in laying the groundwork for the carrying out of its functions. Enough has been accomplished to give the assurance that, in the League, an important organization has been designed to assist in the maintenance of peaceful relations among the nations and to aid in the adjustment of controversies which arise among the states of the world. But the high hopes of the founders of the League have not been realized. And many are disappointed with the accomplishments of the League as an agency for international cooperation. "Whatever the achievements of the League, whatever elation its statesmen have a right to feel because they have made it live and move steadily forward in the performance of useful work," observes Professor McClure, "there seems to be one and only one really outstanding conclusion to be drawn from the experience of its thirteen years of economic effort, namely, that even in the face of world economy, overwhelming economic nationalism everywhere prevails."[28]

America's Rôle in the League.—No account of the work of the League of Nations would be complete that did not consider the rôle of the United States in relation to the international agencies which have their center and direction in Geneva. "Whatever the seven millions of voters who constituted President Harding's majority in 1920 may have desired at that time," says Professor Hudson, "the government of the United States has since interpreted their votes as a determination that the United States should not accept membership in the League, and it has proceeded on the theory that that issue is closed."[29] With the United States not only professing its interest but actively participating in so many of the political, economic and humanitarian efforts to improve international conditions, it is a discreditable record that must be recorded in appraising the participation of the American government in the activities of the League of Nations.

Though more than fifty nations began to carry on cooperative endeavors in January, 1921, under a Covenant for which the United States more than any other nation was responsible, the Department of State at first refused to reply to communications from the Secretary-General of the League, and then adopted the policy of sending "stereotyped and negative replies." Because of indignant protests and

[28] Wallace McClure, *op. cit.*, p. 586.

[29] Manley O. Hudson, "America's Rôle in the League of Nations," *American Political Science Review* (February, 1929), vol. xxiii, p. 17.

an aroused public sentiment, the policy of official snubbing was changed to permit the appointment of representatives to act in "an unofficial and consultative capacity," particularly in the economic and humanitarian phases of the League's work. Thus, Miss Grace Abbott was permitted to sit as an observer in the meetings of the Committee on the Traffic in Women and Children, and unofficial delegates participated in a series of economic conferences and the sessions of the Preparatory Disarmament Commission. But to give assurance that the government of the United States was not too neglectful of its international duties and obligations, Secretary of State Kellogg in 1928 informed the public that "the government of the United States has continued its policy of friendly and helpful cooperation with the League of Nations on subjects of international humanitarian concern" and expressed the willingness of the United States to cooperate freely, fully, and helpfully with the League in matters of genuine international concern.

Reviewing the extent of American cooperation for the greater part of the first decade of the League's existence, Professor Hudson finds that in the most important field of humanitarian endeavor, the Health Committee, the League has had little cooperation from officials at Washington. In the League's efforts to control the traffic in opium and dangerous drugs the United States has been represented unofficially at conferences but has refused to sign the Opium Convention and to participate in the formation of a permanent central board to deal with opium questions. Similar cooperation has taken place in various economic and disarmament conferences, but the present situation may be summed up as follows: "More than fifty other peoples are maintaining an organization for international cooperation with reference to a variety of subjects, and the United States joins in such cooperation, to a very limited extent, after it has been put under way. Numerous multilateral conventions have resulted from it, constituting for most of the world a new body of international law. None of these conventions has been ratified by the United States. . . . In the use of the quasi-administrative machinery which exists, the United States either acts unofficially or in most instances not at all."[30] Though Great Britain contributes approximately half a million dollars

[30] *Ibid.*, p. 30. "Gradually a form of cooperation has been evolved, which has made it possible for the United States to play an increasing rôle in the League of Nations, and which, at the same time, does not involve the United States in the work of the Assembly and Council." Ursula P. Hubbard, "The Cooperation of the United States with the League of Nations and with the International Labour Organization," *International Conciliation*, No. 274 (November, 1931). Consult this pamphlet for details regarding the steps taken by the United States to cooperate with these international agencies.

a year to support the activities of the League, the payments from the government at Washington for indirect participation in its activities have been negligible.

Indicating a gradual change in attitude toward League activities by the government of the United States, President Franklin D. Roosevelt, speaking on December 28, 1933, said: "Today the United States is cooperating more openly in the fuller utilization of the League of Nations machinery than ever before.

"I believe that I express the views of my countrymen when I state that the old policies, alliances, combinations and balances of power have proved themselves inadequate for the preservation of world peace. The League of Nations, encouraging as it does the extension of non-aggression pacts, of reduction-of-armament agreements, is a prop in the world peace structure.

"We are not members and we do not contemplate membership. We are giving cooperation to the League in every matter which is not primarily political and in every matter which obviously represents the views and the good of the peoples of the world as distinguished from the views and the good of political leaders, of privileged classes, or of imperialistic aims."

In view of the scope, significance and urgency of much of the work undertaken by the League, should the United States take an indifferent and unsympathetic attitude toward international government as it is evolving at Geneva?

The Permanent Court of International Justice

For a long time efforts were made to establish not only a permanent court of arbitration but also a court of justice which might deal with matters more nearly along the lines of procedure of ordinary courts. Proposals for the establishment of such a court of justice were presented at the Hague Conferences, but, except for the provision for a panel of judges to hear arbitral disputes and a proposed plan for an international prize-court which failed for lack of agreement among the nations, nothing definite was accomplished at these conferences.

Article 14 of the Covenant of the League of Nations provided that the Council was to formulate and submit plans for the establishment of a Permanent Court of International Justice.[31] In February, 1920,

[31] See pamphlet, *The Permanent Court of International Justice,* Information Section, League of Nations Secretariat, Geneva; and articles by Manley O. Hudson, on the Permanent Court of International Justice, *American Journal of International Law,* beginning January, 1923, and in succeeding years.

the Council, in accordance with this provision, took action for the appointment of a committee of jurists to consider the creation of a Court. The committee appointed submitted a draft project for a permanent Court which, with some amendments, was unanimously adopted by the League of Nations on December 16, 1920. The protocol of signature was submitted to each nation, and with the ratification by the majority of the members of the League the statutes organizing the Court went into effect in September, 1921.[32] Judges were elected the same month under the provisions of the statute prescribing the procedure for the nomination of justices by the members of the existing court of arbitration at The Hague, and the selection from this list, by the Assembly and Council, of those to be chosen. The membership of the Court consisted of eleven regular and four deputy judges until 1930, when the number of regular judges was increased to fifteen. On January 30, 1922, the Secretary-General of the League was able to assemble the judges for the first session at The Hague. Details of the statute organizing the Court cannot be given, though a few words as to the jurisdiction of the Court and its procedure in deciding international disputes seem appropriate. The judges are authorized to hear and decide cases of a legal nature involving (1) the interpretation of treaties; (2) any question of international law; (3) the existence of any fact which, if established, would constitute a breach of an international obligation; (4) the nature and extent of any reparation to be made for the breach of an international obligation; and (5) the interpretation of a judgment rendered by the court. Furthermore, the Court is authorized to give advisory opinions upon questions referred to it by the Assembly or by the Council. There has been quite a little discussion of this phase of the Court's work and it was made the basis of one of the objections on the part of those who oppose American accession to membership.

Article 34 of the draft statute which provided for obligatory jurisdiction was struck out and an optional clause inserted which states might adopt if they agreed in advance to compulsory jurisdiction; in addition, a number of treaties have made obligatory the reference of certain matters to the Court. There seems to be a growing tendency to insert in commercial treaties a clause conferring jurisdiction on the Court. The optional clause permitting obligatory jurisdiction was inserted in the hope that experience with the tribunal would convince

[32] States which are members of the League but not of the Court are: Argentina, Honduras, Mexico, Turkey. States which are members neither of the League nor of the Court are: Afghanistan, Ecuador, Egypt, Union of Socialist Soviet Republics, and the United States.

the nations that they could safely accept obligatory jurisdiction within prescribed limits.[33]

The Court is authorized to deal with disputes under two sets of circumstances:

1. The jurisdiction is voluntary where two states by a special agreement decide to submit a certain dispute to the Court for judgment.

2. The jurisdiction is compulsory, that is to say, a state can summon another state to appear before the Court with or without its consent: (a) where it is especially provided in a treaty or convention in force that any or certain disputes arising out of such a treaty or convention shall be submitted to the Court; and (b) where the parties to a dispute have specifically accepted the jurisdiction of the Court as compulsory. The draft statute limited the Court to cases arising among the members of the League. This provision was amended so as to open the Court to non-members. States not accepting the jurisdiction of the Court in advance may present cases by special agreement.

When deciding disputes of a legal nature, the Court is directed to apply, first, international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; second, international custom, as evidence of a general practice which is accepted as law; third, the general principles of law recognized by civilized nations; and, fourth, judicial decisions and teachings of the most highly qualified publicists of the various nations, for the determination of rules of law.

The Court is a court of law and not a political institution. Only states may appear as parties in cases before the Court. Most of the great political and economic issues of the world will necessarily be dealt with in political and economic spheres, except, doubtless, in so far as the elucidation of legal points may be concerned. Nevertheless, the continually increasing intimacy of state relations gives rise almost daily to questions which, in the interest of all, should be decided according to law, and an increasing number of such questions will, in the natural course, be referred to the Permanent Court of International Justice for consideration. Only to a limited extent can such matters be determined by the tribunals of arbitration.

From a strictly legal point of view, the difference as regards the jurisdiction of the new Court and that of the Permanent Court of Arbitration may be slight; but the fact that the new Court consists of a limited number of permanent salaried judges, that it is always available, that it has a fixed procedure of its own, and that it is

[33] To September, 1933, fifty-one states had signed the optional clause accepting the jurisdiction of the Court in certain cases as compulsory. See Document A 6 (a) 1933 V Annex, pp. 10-15.

bound to apply positive international law, fit it to accomplish in the international sphere functions similar to those which in individual states are exercised by the national judicature—a thing which cannot be said of arbitral tribunals, whose members are elected by the contesting parties, are paid by them, work according to a procedure agreed on by the parties, and apply to a lesser degree principles and rules of law.

Work of the Court.—The first important work of the Court was to draft rules of procedure. For this purpose seventy-five articles were formulated, thirty-one relating to the constitution and working of the Court, and forty-four to amendments and procedure. At its first session the Court was chiefly concerned in passing in an advisory way upon certain terms of the Treaty of Versailles. At its later sessions, the number of disputes presented to the Court has increased both in number and in importance. One of the first controversies presented to and decided by the Court related to the interpretation of certain nationality decrees issued by the French government and by the native princes in Tunis and Morocco, which affected the rights of British subjects. Failing to secure an agreement, Great Britain brought the matter to the attention of the Council of the League, which secured the consent of the nations interested to submit to the Permanent Court the main issue concerned, namely, whether the matter was or was not within the exclusive competence of the French government. The Court decided that it was a matter of international law and not solely for domestic jurisdiction. Neither government was satisfied with the decision, but the matter was amicably settled along the lines suggested by the Court.

When the question relating to Eastern Carelia was presented, Russia having refused to accept the jurisdiction of the Court, the majority of the judges thought it impossible for them to give an advisory opinion. The first real case before the Court was the case of the *S. S. Wimbledon,* referring to the refusal by Germany to grant the use of the Kiel Canal, which involved the construction of Article 380 of the Treaty of Versailles. This was the first instance in which one party to an interstate dispute summoned the other to appear before an international court for judgment without its previous consent. It was also the first case in which the Court rendered a judgment. By an opinion of the Court, divided nine to three (the German national judge selected to sit in this case being among the dissenters), it was held that the Kiel Canal was an international waterway open equally to the vessels of commerce. Germany was therefore required to allow access to the *Wimbledon* and to make good the damages sustained in refusing passage.

The Court has been called upon frequently to render advisory

opinions, twenty requests for such opinions having been made by the Council during the first decade. Questions raised have included the interpretation of provisions of the peace treaties relating to the International Labour Organization, to the rights of minorities, to frontier controversies, and a number of minor disputes among European nations. The judgments rendered by the Court have involved very largely the interpretation of treaty provisions, though the Court was called upon to settle the relative rights and interests of France and Turkey arising out of the collision of two vessels. Few important controversies have been presented to this tribunal for determination, but in the relatively short time it has been functioning, the Court has steadily increased in prestige.

One of the indications that the Permanent Court is destined to fill an important place in the field of international negotiations is the extent to which provisions for resort to the Court have been inserted in international treaties. Many treaties contain agreements to submit to the Court questions that arise among the nations concerned.[34] The Court has, indeed, "more than justified the expectations of its founders. It stands today thoroughly embedded in the world's treaty law. It is not merely an ornament, but a vital force in world affairs."[35]

Failure of United States to Join the Court.—The most disappointing feature of the attitude of the Senate in relation to the arbitration of disputes and the practice of judicial settlement of controversies in accordance with the rules and principles of international law has been the failure to approve the plan for the adherence of the United States to the protocol of signature of the statute of the Permanent Court of International Justice. Though the United States took the lead in the efforts to establish a World Court and participated in the process of its formation to such an extent that Elihu Root claims the present court is largely an American product, the Senate has consistently refused to agree to the arrangements for participation in the Court by the United States, or has attached such conditions to American adherence that joining in this significant development of international adjudication has proved to be impossible. Subsequent efforts to secure favorable action in the Senate resulted in agreement to have the United States become a member of the Court subject to a series of reservations and understandings. While some of these conditions are unobjectionable, two have thwarted

[34] To November, 1932, Great Britain had signed 107 such treaties; France, 107; Italy, 94; Belgium, 92; Czechoslovakia, 87; Greece, 83; Poland, 78; Germany, 77; with sixteen other nations having signed 50 or more treaties.

[35] Manley O. Hudson, *The World Court, 1921-1931* (World Peace Foundation, 1931), p. 10.

favorable action on the agreement by the states now members of the Court.

In accordance with one provision, all amendments to the statute creating the Court would be prohibited unless consented to by the United States, thus giving a virtual veto on all changes unless agreed to in advance by the American government. The other provision would prohibit the Court, without the consent of the United States, from considering a request for an advisory opinion on any dispute in which the United States has a claim or interest. The agreement to have the United States accept membership in the Court with the conditions attached was considered by a conference of representatives of the states constituting the Court membership, and it was made clear that the member states were willing to make any reasonable concessions to admit the United States on a basis of equality with all other nations but that they could not agree to provisions which would accord the United States a power of veto denied to other nations. Thus far it has been impossible to overcome the ignorance and prejudices of those Americans who oppose the membership of the United States in the Court because they think American policies and interests would be endangered; and our country remains aloof from participation in the most definitive and permanent machinery yet devised to substitute judicial procedure for the political methods of diplomacy and direct action by the nations concerned in the adjustment of international disputes.

Codification of International Law.—The work of the Permanent Court of International Justice and affiliated agencies in interpreting and applying international law would be greatly facilitated by the preparation and acceptance of codes for various divisions of the field. A code of law to guide and control the conduct of international relations is one of the ideals toward which men have directed attention. In order to pave the way for the attainment of this ideal, a few legal scholars have attempted to prepare draft codes or manuals, among which is Fiore's *International Law Codified*.[36] These efforts have had little effect upon the course of international legislation or interpretation. During the latter part of the nineteenth century a great deal of time and effort was given to the preparation of codes relating to land and naval warfare. Through a series of conferences, conventions were drafted and adopted which were supposed to render warfare more humane. Nevertheless, the refusal of certain nations to accept the terms of these conventions and marked changes in the methods of warfare rendered much that was included in these con-

[36] Translation by E. M. Borchard (Baker, Voorhis & Company, 1918). Among earlier drafts were those of Bluntschli, Bentham, and David Dudley Field.

ventions inapplicable to the conduct of nations in the World War. The periods of war and reconstruction tended to renew interest in the codification of rules governing the normal relations of states rather than "rules as to how the general killing should be carried on and the instruments which may be employed in doing it."[37] The steps to aid the movement for codification since 1920 may be briefly summarized.

The committee of jurists which prepared the statute of the Permanent Court of International Justice advised the holding of a conference with a view to the preparation of a code embodying the changes in international law resulting from the World War, but the Assembly of the League of Nations ignored the request. In 1924, however, the Council of the League was authorized to appoint a committee of experts for the "Progressive Codification of International Law." Sixteen jurists were chosen by the Council to prepare a list of the subjects, the regulation of which would seem to be desirable at that time. After a survey of the field, the subjects of territorial waters, nationality, and the responsibility of states were selected as most likely to result in international agreement. At the first codification conference held at The Hague in 1930 some progress was made toward the codification of the law of nationality and of territorial waters, though on the whole the results accomplished were rather disappointing.[38]

The controversy as to whether codification should involve merely the collection and systematization of existing rules or whether it should also include the alteration of these rules to bring them into accord with changing conditions was resolved by a declaration of the Assembly that the aim should be, as far as possible, to adapt rules to the contemporary conditions of international life, and the recommendation that some plan should be devised for subsequent revisions of the code as agreed upon.

Various unofficial organizations are participating in the movement for codification, such as the American Society of International Law, the Institute of International Law, and the Faculty of the Harvard Law School;[39] and a rather ambitious attempt in this direction has been undertaken in connection with a series of recent Pan-American Conferences. All of these indications exhibit, as Elihu Root observes, "a general sense that the time has come when there should be no

[37] Cf. James W. Garner, "The Function and Scope of the Codification in International Law," American Society of International Law, *Proceedings* (1926), p. 27.

[38] For the participation of the United States in the League projects for codification, see Ursula P. Hubbard, *op. cit.*

[39] For the Harvard Research draft conventions on the subjects considered at The Hague, see Supplement to the *American Journal of International Law*, April, 1929.

further delay in the necessary preparation for a general international code which shall make more definite and certain and comprehensive the body of law by which international conduct is to be ruled."[40] Codification of international law remains as one of the foremost problems for international negotiation and adjustment.

Proposals for International Security and Disarmament

One of the most pressing of the unsolved problems in national and international affairs is involved in the movement to secure agreement among the nations to reduce and limit armaments. A number of attempts were made in Europe during the nineteenth century to limit the size of armaments, with rather negligible results.[41] The most ambitious attempt in this direction was made when in the convening of the First Hague Conference in 1898 the Czar of Russia addressed a memorandum to the nations requesting the holding of a conference to consider the problem of armaments. Calling attention to the current situation, the Czar requested nations to consider "the most effectual means of insuring to all peoples the benefits of a real and durable peace, and, above all, of putting an end to the progressive development of the present armaments." Though the Czar's proposal led merely to the request that governments consider the possibility of limiting budgets for military purposes, it was the beginning of a series of similar suggestions to have the nations confer on armament limitations. The only successful attempts to limit armaments before the World War were the agreement between Great Britain and the United States to limit the number of warships on the Great Lakes, and the agreement between Argentina and Chile to "desist from acquiring the vessels of war which they had in construction, and from henceforth making new acquisitions." Due to the failure of Brazil to cooperate, the beneficial effects of the latter agreement were largely frustrated.

It was generally believed at the end of the World War that armaments would be reduced by international agreement, but due to the fears and animosities aroused by the war no immediate action could be taken to secure this end, except to provide for the disarmament of the defeated states. Military conscription was forbidden in Ger-

[40] "The Codification of International Law," *American Journal of International Law* (October, 1925), vol. xix, p. 684.

[41] "In turning from theoretical considerations to the practical efforts of governments to cope with the problem of abolishing war," says Professor Schuman, "one is confronted with what appears on the surface to be a vast futile confusion occasionally relieved by limited achievements in the desired direction." Frederick L. Schuman, *op. cit.*, p. 672.

many and the German army was limited to 100,000 men.[42] Some first steps were taken at the Washington Conference in 1921-1922 when the United States, Great Britain, Japan, France, and Italy agreed to limit the number of their capital ships[43] to a fixed ratio. Other restrictions were agreed to as to the size of guns and as to aircraft carriers. After repeated failures to secure agreement on limitations applicable to cruisers, destroyers, and submarines, the London Naval Conference was called for this purpose in 1930, and certain restrictions were agreed to by Great Britain, the United States, and Japan. Because France and Italy could not settle their differences as to parity they refused to join in the acceptance of the proposed limitations. No attempt was made to limit competition in the building of submarines, light cruisers and aircraft.

League of Nations and Disarmament.—Since drastic limitations had been imposed on the defeated states, it was thought necessary to secure joint action by members of the League of Nations looking toward the reduction of armaments. The League Covenant provided for the "reduction of armaments to the lowest point consistent with national safety and with the enforcement by common action of international obligations." Plans for armament reduction were to be formulated by the Council and to be submitted to the governments for their action. League members were expected to "exchange full and frank information as to the scale of their armaments, their military, naval and air programs and the conditions of such of their industries as are adaptable to warlike purposes." A permanent commission was created to advise the Council on military, naval, and air questions. Since its organization the League has treated the problem of the limitation of armaments as one of its chief objectives. In fact, "no other single subject has claimed so much of the attention of the annual assemblies and to no other has such thorough study been given by broadly representative technical commissions forming part of the general organization of the League."[44]

A Permanent Advisory Commission was established, composed of a naval, a military and an air representative from each state. As a committee composed of military experts seemed ill adapted for the purpose of outlining proposals for disarmament, a Temporary Mixed Commission was created, made up of experts in political, social and economic matters. A great deal of information was secured and an armaments year book was published giving detailed data regarding the naval and military establishments of all nations. One of the first

[42] Cf. *ibid.*, pp. 686 ff.

[43] Capital ships were defined as those with from 10,000 to 35,000 tons displacement.

[44] Edmund C. Mower, *op. cit.*, p. 551.

projects considered was to secure some measure of agreement among the nations to control the manufacture by private enterprise of munitions and implements of war. A group of conventions have been drawn up to control traffic in arms and to prohibit the use in war of asphyxiating, poisonous, and other gases and of bacteriological methods of warfare, which have been ratified by a number of states.[45] But the chief energy has been directed to the calling of and the preparations for a World Disarmament Conference. Pending the calling of such a conference the two commissions, the Assembly, and the Council have dealt with some subsidiary matters such as the limitation of budget expenditures on armaments, the carrying on of investigations concerning chemical warfare, and the reduction of naval armaments.

After discussions pro and con on many proposals, Lord Robert Cecil presented a plan to the Temporary Mixed Commission involving the following points: that no scheme for the reduction of armaments could be successful unless it were general; that in the present state of the world the majority of governments could not carry out a reduction of armaments unless they received satisfactory guarantees for the safety of their respective countries; that such guarantees should also be of a general character; and, finally, that there could be no question of providing such guarantees except in consideration of a definite undertaking to reduce armaments. These proposals were accepted in their general lines by the Temporary Mixed Commission, with the adoption by the Assembly of a resolution that "in the present state of the world, many governments would be unable to accept the responsibility for a serious reduction of armaments unless they received in exchange a satisfactory guarantee of the safety of their country."

The result of the consideration of these proposals was the preparation and presentation to the Assembly in 1923 of a Draft Treaty of Mutual Assistance, the object of which was to secure the gradual reduction of armaments by guaranteeing mutual assistance in case any state wages a war of aggression. Aggressive war was declared to be an international crime.

The Treaty of Mutual Assistance did not meet with favor and was rejected by so many nations that it was realized that some other plan would have to be devised. In the meantime a group of private citizens of the United States prepared a Draft Treaty of Disarmament and Security which was also designed to make aggressive war a crime. Because many distinguished Americans had cooperated in the preparation of the document, the Council of the League of Na-

[45] Document A 6 (a) 1933 V Annex, p. 45.

tions decided to submit the Draft Treaty as an official document for the consideration of the members of the League. Thus the way was prepared for a new move when the Fourth Assembly met in September, 1924. Under the leadership of Foreign Minister Beneš of Czechoslovakia and with the assistance of Premiers MacDonald of England and Herriot of France, a Protocol of Arbitration, Security and Disarmament was drafted, accepted, and submitted for adoption to the members of the League.

The fundamental idea of the Geneva Protocol was the recognition of aggressive war as an international crime. Each signatory state was to renounce war against every other state which accepted the obligations imposed by the Protocol. In case a nation was declared by the Council of the League to be an aggressor, the Protocol extended and rendered more effective the sanctions provided in the Covenant. The Council was limited, as in the Covenant, to the making of recommendations as to the necessary steps to be taken against an aggressor, and no nation was obligated to make any specific use of its military or naval forces against an aggressor. To render more effective the sanctions and procedure devised in the Protocol and to deal with other relevant matters, provision was made for the calling of a World Conference on Disarmament. Though the Protocol was adopted by a few states and approved in principle by others, it did not meet with sufficient favor to render it effective. Certain states, including Great Britain, were unwilling to accept indefinite obligations to defend other states in controversies in which they had no direct and immediate interest. The Geneva Protocol, however, has considerable significance as the first serious effort on the part of the nations to take official steps to outlaw war. The basic aims of the Protocol—arbitration, security, disarmament—were further considered in a series of subsequent steps.

With the failure of the Protocol to accomplish the desired ends, an effort was made to secure similar results through the Locarno treaties of 1925. In a treaty of mutual guarantee Belgium, France and Germany renounced the resort to war except in self-defense and agreed "to settle by peaceful means and in the manner laid down herein all questions of every kind which may arise between them, and which it may not be possible to settle by the normal methods of diplomacy." Controversies were to be settled by judicial procedure or by the reference of matters to a conciliation commission. Great Britain and Italy joined the other three powers in giving their aid and sanction to assure the carrying out of the mutual obligations involved. Poland and Czechoslovakia also participated in a group of arbitration treaties designed to provide for the peaceful settlement of all disputes not otherwise disposed of. The Locarno treaties paved

the way for an amicable adjustment of relations between France and Germany and for the admission of Germany to the League.

Disarmament Conference.—After repeated attempts by the League to secure agreement as to certain preliminary steps toward land and naval disarmament, with almost negligible accomplishments, the Council established in 1925 a preparatory commission for a Disarmament Conference with the aim of interesting in the movement states not members of the League. Differences as to the subjects to be considered by the Conference and the order of preference in dealing with various phases of disarmament delayed the calling of the Conference. Proposals were made, first, by Russia and a few minor powers, to secure complete disarmament; second, by France and her allies to insist on security guarantees before proceeding to consider disarmament; and third, by Great Britain, the United States and many other powers, to consider disarmament first and security pledges afterwards. A draft convention for the calling of the Conference was prepared and presented to the Council in January, 1931, and the Conference was called.[46]

As a result of a decade of preparation, a general Disarmament Conference met in Geneva in February, 1932. With Japan engaging in an aggressive war on China and refusing to abide by her obligations as a member of the League, the sessions did not have an auspicious beginning. Despite the unfavorable outlook, there were many who believed that agreements might be reached on a few fundamental issues. "The world has never seen before so impressive a popular demand for peace as occurred on February 6," said Viscount Cecil, "when, at the very beginning of the Conference, the spokesman of 9,000,000 petitioners—women, students, ex-service men, religious bodies, the workers' international organizations and the League of Nations societies of the world—called upon the official delegates to give mankind that real beginning of international disarmament which had so long been awaited."[47]

Several hundred proposals to secure disarmament were presented and many of them were considered by the members of the Conference. Among the proposals generally discussed were a French scheme for the creation of a "preventive and punitive international police force," a British proposal for a general limitation of armaments of all kinds, an American suggestion that a beginning be made by agreement for the abolition of offensive weapons;[48] and a proposal of

[46] See Text of the Draft Convention for the Disarmament Conference, *International Conciliation*, No. 275 (December, 1931).

[47] Disarmament, *International Conciliation*, No. 285 (December, 1932), p. 462.

[48] But the members of the Conference could not reconcile their differences as to the distinction between offensive and defensive weapons.

President Hoover for a general one-third cut in all arms. Unable to agree on these or on any other proposals, the Conference adjourned temporarily. "When the conference reassembled in 1933," notes Professor Schuman, "nothing was certain save that it was foredoomed to failure." No significant reduction of armaments could be achieved, and no amount of postponement, evasion, or rationalization could conceal the tragic fact.[49] Japan had flouted the League and its agencies and continued its policy of aggression in China; Germany withdrew from the League and the Conference and indicated its intention to ignore all armament limitations, while other European powers were taking steps preparatory to war inimical to any disarmament plan.

Speaking at Geneva, Premier Ramsay MacDonald ascribed the slow progress and the unsatisfactory results of the Conference to the "diverse interests, diverse points of view, and diverse needs in disarmament" and the "tremendous differences which separated delegation from delegation and nation from nation," and above all to the fact that the last word in these matters is the political word. And then referring to a background full of shadows and uncertainties, the Premier declared that Europe is very unsettled and that, unfortunately, "the one thing" that could "save us all," well-founded confidence in each other, was more lacking today than it had been for a very long time.[50]

Can War Be Outlawed?

Building on the recognition of the ancient distinction between a just and an unjust war, philosophers and jurists in the latter part of the nineteenth and early twentieth centuries began to consider methods of preventing wars. To a certain extent the Bryan treaties marked the beginning of the modern movement to outlaw war. These treaties aimed to prohibit any war which was not preceded by an international investigation or inquiry.

While the World War was being carried on, public sentiment seemed to center on various proposals to prevent war in the future.[51]

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[49] Frederick L. Schuman, *op. cit.*, p. 715.

[50] John Bassett Moore, "An Appeal to Reason," *Foreign Affairs* (July, 1933), vol. xi, pp. 556, 557.

[51] Hans Wehberg, *The Outlawry of War* (Carnegie Endowment for International Peace, 1931), p. 1.

See the proposal of S. O. Levinson in "The Legal Status of War," *The New Republic*, March 9, 1918; and Walter Lippmann, "The Outlawry of War," *Atlantic Monthly*, August, 1923. For a list of articles relating to the American movement for the outlawry of war, consult Hans Wehberg, *op. cit.*, pp. 17, 18. The American movement, Wehberg observes, "considers it an error to assure

Public opinion naturally turned at first to the program of the League to Enforce Peace, which had been organized in the United States in 1915 and had been supported by such men as Theodore Roosevelt, William Howard Taft, and Woodrow Wilson. It was thought that by strengthening such an organization steps might be taken to make war a crime punishable under the rules of international law. President Wilson became the spokesman of a group, which grew in numbers and in influence as the war progressed, who were determined that measures must be taken to prevent wars in the future. He developed this idea in various public addresses and became the leader of those who insisted that some plan to prevent wars in the future must be made a part of the treaty of peace. As a result of the movement thus begun and participated in by eminent men and women and various organizations and societies in many countries, certain provisions tending in the direction of the outlawry of war were made essential parts of the Covenant for a League of Nations.

The Covenant of the League of Nations contains the principle that as between members of the League wars are to a certain extent prohibited. An effort is made to distinguish between permissible and prohibited wars. War is prohibited until a conflict has been submitted to arbitral or judicial settlement or to the consideration by the Council, and if a dispute is submitted to arbitration the decision of the arbitrator must be deemed as obligatory.[52]

The problem of sanctions was considered to be the central feature

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peace by a political organization of the world, by treaties of alliance, and by sanctions."

[52] Due to objections to the original form of Article 16 of the Covenant, the main provisions of the article were amended to read as follows:

1. ". . . which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between persons residing in their territory and persons residing in the territory of the Covenant-breaking state, and the prevention of all financial, commercial, or personal intercourse between persons residing in the territory of the Covenant-breaking state and persons residing in the territory of any other state, whether a member of the League or not."

2. "It is for the Council to give an opinion whether or not a breach of the Covenant has taken place. In deliberations on this question in the Council, the votes of members of the League alleged to have resorted to war and of members against whom such action was directed shall not be counted."

3. "The Council will notify all members of the League the date which it recommends for the application of the economic pressure under this article."

4. "Nevertheless, the Council may, in the case of particular members, postpone the coming into force of any of these measures for a specified period where it is satisfied that such postponement will facilitate the attainment of the object of the measures referred to in the preceding paragraph, or that it is necessary in order to minimize the loss and inconvenience which will be caused to such members."

of the efforts to prevent war. Some prefer to depend upon non-coercive sanctions such as public opinion; others see hope for effective action only in an international organized force. Devices of international economic pressure and military measures against aggressors were the means to be employed by the League of Nations to prevent war. In 1921 the economic boycott was made optional and discretionary rather than obligatory and automatic by the adoption of a proviso that "it is the duty of each member of the League to decide for itself whether a breach of the Covenant has been committed." The breakdown of the League method to assure peace in the Sino-Japanese conflict made it apparent that the sanctions system as incorporated in the Covenant is unworkable. Failure to apply Article 16 in any international conflict has led to the gradual abandonment in League objectives, for the present at least, of schemes to define aggression and mobilize sanctions.

Kellogg-Briand Pact.—The efforts of the League and other international agencies to secure the outlawry of war not being participated in actively by the United States, an effort was made to secure similar results by the Kellogg-Briand Pact, or the Pact of Paris, signed in August, 1928.[53] The main provisions of the Pact are:

Article 1. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

In the negotiations preceding the signature of the Pact by all but a few of the nations, it was made clear that wars of self-defense are not condemned nor are wars resulting from the duty to enforce the provisions of the League of Nations or other treaties. The effect of the Kellogg Pact must be considered in relation to reservations insisted upon by the British government and those deemed implicit in the Pact by most of the states approving it. Certain regions of the world which constitute "a special and vital interest" for a nation and which affect the peace and safety of the nation may as "a means of self-defense be reserved from interference by other nations." Mr. Kellogg himself declared that the treaty in no way impaired "the right of self-defense"—a right inherent in every sovereign and im-

[53] On the history of the Kellogg Pact, see James T. Shotwell, "The Pact of Paris with Historical Commentary," *International Conciliation*, No. 243 (October, 1928); and Raymond Leslie Buell, *International Relations* (Henry Holt and Company, Inc., 1932), revised edition, pp. 657 ff.

plicit in every treaty—and that each nation "alone is competent to decide whether circumstances require recourse to war in self-defense." Thus each nation agreeing to the Pact is free to determine what regions come within its special sphere of interest and what measures of a military nature are necessary for national self-defense; and it is difficult to know to what extent nations under the Pact renounce war "as an instrument of national policy." The Pact is primarily a general declaration of policy, as no means are suggested for its enforcement. Proposals to amend the League of Nations Covenant to bring it into closer accord with the Kellogg Pact have not resulted in any definite action, though a committee is engaged on the problem of devising some necessary readjustments.

When in September, 1931, hostilities broke out between the armed forces of Japan and China, the United States was requested to confer with the Council of the League of Nations regarding the bearing of the Kellogg Pact upon the controversy. This request was acted upon favorably and the United States joined a group of nations in calling the attention of Japan and China to their obligations under the Pact. After the protracted efforts toward conciliation by the Council had failed, the United States informed the disputants that it would not recognize any situation, treaty, or agreement which might be brought about by means contrary to the Covenant or the Kellogg Pact. Later this action was indorsed by the Assembly of the League of Nations, Japan alone refraining from voting.

A commission appointed by the League to investigate the controversy between Japan and China, after a thorough review of the background of the conflict, concluded: "It is a fact that, without declaration of war, a large area of what was indisputably Chinese territory has been forcibly seized and occupied by the armed forces of Japan and has, in consequence, been separated from and declared independent of the rest of China."[54] The Japanese government claimed that its acts were consistent with its international obligations and that all military operations were legitimate acts of self-defense. Though the commission did not directly condemn Japan's policies and did not believe that the *status quo ante bellum* should be restored, it nevertheless declared that the maintenance and recognition of the present regime in Manchuria would be unsatisfactory. Finding the agencies of the League unfriendly, Japan decided to withdraw from the League of Nations. With the powers unwilling to apply any of the anti-war sanctions of the League, the first major conflict in which League members were involved resulted in a defiance of League efforts and activities.

[54] The Far Eastern Problem: Official Texts and Summary of the Lytton Report, *International Conciliation,* No. 286 (January, 1933).

Though the Paris Pact, except in a general clause of the preamble, contains no suggestion as to the consequences which may result from its violation, M. Briand was of the opinion that few states would run the risk of having the other states of the world gather against it and that for an unwarranted aggression such action would be likely to follow. The chief objection, however, to the Geneva Protocol, the Locarno treaties and the Paris Pact is that they aimed to guarantee the *status quo* and to prevent it from being changed by force. No means were provided for changing the terms of inequitable treaties or for modifying unjust relations between states then in existence.

Attempts were made to secure the peaceful settlement of disputes among Latin-American states through a conciliation treaty concluded at the Santiago Conference in 1923 and through conciliation agreements signed at the Washington Arbitration Conference of 1929. Since not all of the Pan-American states signed these conciliation measures and certain states have not ratified the Kellogg-Briand pact or have not adhered to the obligations of the League covenant for the pacific settlement of controversies, an effort was made to supplement existing means for conciliation procedure.

Under the direction of the Foreign Minister of Argentina an anti-war pact was drafted and signed by six American states at Rio de Janeiro, in October, 1933. The main provisions of this pact are as follows:

1. The high contracting parties solemnly declare that they condemn wars of aggression in their mutual relations.
2. They shall recognize no . . . acquisition of territory brought about by armed force.
3. In case of a dispute between any of the parties the others, in their character of neutrals, . . . shall adopt a common and solidary attitude; they shall exercise the political, juridical or economic means authorized by international law; they shall bring the influence of public opinion to bear; but in no case shall they resort to intervention, either diplomatic or armed.
4. Disputes are to be submitted to commissions of conciliation to be set up in each case.
5. During the deliberation of the commissions the disputants shall abstain "from every act capable of aggravating or prolonging the controversy."

It was decided at the Seventh Pan-American Conference in Montevideo in December, 1933, that new institutions for pacific settlement should await a detailed study of the relationship of Pan-Americanism to the League of Nations and of the reorganization of the Pan-American Union.

Though recent developments in the relations among states in North

and South America do not in concrete instances accord with the ideals enunciated, it is significant that more attention is being given to ways and methods of ending aggressive warfare.

One of the most difficult problems to adjust in attempting to provide ways and methods to outlaw war is to be able to define justifiable acts of force as contrasted with unwarranted acts of aggression. Private law systems allow self-help and self-defense under certain conditions; and it has been truly observed that any plan which purports to prohibit self-defense against assaults upon the territory, citizens, or the vital rights and privileges of a state is doomed to failure.[55] But nearly all wars are begun on a pretext of self-defense, and international practice accords a wide range in which certain acts of force are regarded as justifiable. Among these may be noted: (1) necessity for defense of territory or citizens; (2) redress for properly validated legal claims; and (3) action to prevent flagrant violations of international law. It appears, then, that the circumstances in which the use of force is justified offer a fairly large choice of pretexts to the state bent on aggression. And until the nations acting in unison are able to assure security for territory and citizens, to redress legal claims, to prevent flagrant violations of international law, and to preserve reasonable order, it will be well-nigh impossible to secure agreement among nations to relinquish self-help and to resort on occasion to what they regard as justifiable use of force.[56] The attempts to define aggressive war, though leading in the direction of the solution of this problem, have tended so far mainly to bring to the front the outstanding difficulties to be faced.

Whether the problem is to be solved by practically a new approach and a new point of view in which much that has been done in the development of the rules of international law will be ignored or set aside,[57] whether the substantial basis and content of international law as it is made and applied today will be merely extended and enlarged, with better and more effective machinery for its making and enforcement, remains to be determined. It is to the latter approach that the chief energies of those interested in improving international relations are now being directed. In the minds of many this procedure offers the only practicable solution of the problem.[58]

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[55] Quincy Wright, "The Outlawry of War," *The American Journal of International Law* (January, 1925), vol. xix, pp. 89 ff.

[56] *Ibid.*

[57] For an able defense of the view that international law is based on unsound theories and indefensible practices and that relatively a new start must be made, consult Jackson H. Ralston, *Democracy's International Law* (John Byrne & Co., 1922).

[58] A presentation of the argument that the steady, slow, evolutionary method must be freely consulted and followed as a guide for the future, is presented by

Whatever may be the prospects for a practicable and effective plan to abolish or to control war, it is encouraging that with the various agencies for the conduct of international affairs and for the settlement of disputes, such as the Permanent Court of Arbitration, the Council and Assembly of the League of Nations, and the Permanent Court of International Justice, along with numerous other administrative agencies to carry on international affairs, law and legal methods are gradually closing in upon the domain previously ruled by Machiavellian politics and diplomacy.

Furthermore, it is not primarily the business of international law to prepare a code for war or to prevent the recurrence of wars, but rather to declare and protect the rights and obligations of the states in time of peace. Controversies between states, it has often been observed, will not cease any more than controversies between individuals within the state; "for a long time to come those controversies which are dangerous to the peace of the world are likely to be political and non-justiciable. Nevertheless, as order proceeds, as it must proceed, out of the present chaos, as interdependence goes forward among nations, further areas of international life are to be recovered from policy to law. The causes of war lie deep in political controversies. The occasions of war are frequently found in the violation of recognized legal right and duty."[59]

Peace and security in the future may be assured to a considerable degree by the extension of law and legal methods to the many questions now regarded as political and non-justiciable. Though existing agencies for the settlement of international difficulties do not as yet cover the entire field, a significant beginning has been made. If these agencies or international organizations could be supplemented by a permanent international conference of the powers, meeting periodically for the purpose of making and of codifying international law, a considerable part of the field of politics and diplomacy could be brought within the realm of legal consideration and adjustment. Not only is it necessary that existing agencies be strengthened but also new machinery will have to be devised to clarify and render effective the agreements and understandings among nations and to aid in the enforcement of the obligations assumed. From present indications there are retardations and retrogressions which make it apparent that the process of forming an international public opinion to support adequate methods and machinery to secure peace and order in international relations is more difficult and uncertain than many idealists

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John Bassett Moore in *International Law and Some Current Illusions and Other Essays* (The Macmillan Company, 1924).

[59] J. S. Reeves, "The New International Law," *American Journal of International Law* (April, 1921), vol. xv, p. 361.

believed. On the other hand, it does not seem that the problems involved are insoluble. In the perspective of the centuries, if not in decades, some lines of progress and accomplishments have marked the way for future advances.

"I agree wholeheartedly with President Roosevelt," said Norman H. Davis, "that the vast majority of the peoples are in favor of disarmament and a peaceful settlement of international controversies. It is for the statesmen to find the means to give effect to the will of mankind."[60]

SUPPLEMENTARY READINGS

Potter, Pitman B., *Introduction to the Study of International Organization* (D. Appleton-Century Company, Inc., 1928), third edition.

Mower, Edmund C., *International Government* (D. C. Heath and Company, 1931).

Vinacke, Harold M., *International Organization* (F. S. Crofts & Co., 1934).

Moore, John Bassett, *International Law and Some Current Illusions and Other Essays* (The Macmillan Company, 1924).

Hill, Norman L., "International Commissions of Inquiry and Conciliation," *International Conciliation,* No. 278 (March, 1932).

Buell, Raymond Leslie, *International Relations* (Henry Holt and Company, Inc., 1929), revised edition, part iii.

Howard-Ellis, C., *The Origin, Structure and Working of the League* (Houghton Mifflin Company, 1928).

Schuman, Frederick L., *International Politics: An Introduction to the Western State System* (McGraw-Hill Book Company, Inc., 1933).

Eagleton, Clyde, *International Government* (The Ronald Press Company, 1932).

McClure, Wallace, *World Prosperity as Sought through the Economic Work of the League of Nations* (The Macmillan Company, 1933).

Berdahl, Clarence A., *The Policy of the United States with Respect to the League of Nations* (Geneva, 1932).

Jessup, Phillip C., "The United States and the Permanent Court of International Justice," *International Conciliation,* No. 273 (October, 1931).

Series of pamphlets dealing with various phases and activities of the League of Nations, prepared under the direction of the Secretariat of the League (World Peace Foundation, 40 Mt. Vernon Street, Boston, Massachusetts).

[60] Introductory remarks in "American Foreign Policy in a Nationalistic World," *Foreign Affairs,* special supplement to vol. xii, no. 2, p. 1.

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