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READINGS IN AMERICAN STATE GOVERNMENT

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PREFACE

Two considerations have guided the editors in compiling this collection of materials. In the first place, we have sought to keep the number of documents small enough to make a book which is not formidable in bulk. We have conceived our function as limited to illustrating those principles and devices usually described in the standard textbook on state government. In the second place, we have deliberately omitted any illustrations of the more technical functions of state government. We are of the opinion that such functions cannot be fruitfully dealt with in the classroom on the basis of documents alone. It has been our experience that they can be discussed most realistically by the experts concerned immediately with their performance. Where such experts are available they usually welcome the opportunity to talk about their work.

The arrangement of the material follows the plan adopted by most of the descriptive textbooks for which our collection is designed as a companion. We have thought it well, however, to innovate by reprinting a number of important legal forms. All of these are mentioned in most textbooks, but too frequently students have never actually seen them; it is quite common to find even law students who have completed their professional training without ever having seen, for example, a writ of *habeas corpus*. The inclusion of these materials requires, we think, neither extended explanations nor justification.

In preparing these documents for publication we have incurred a number of obligations in addition to those acknowl-

edged in the proper places in the case of authors and journals. We record here our thanks for the help cheerfully given by Ida S. Cohen, Florence and Ivan Ponedel, Shirley Haugse, Mr. Gordon P. Weir, assistant attorney-general of Missouri, and Mr. Homer Kyle, assistant attorney-general of Nebraska.

Lincoln, Nebraska,
December, 1949.

LANE W. LANCASTER,
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READINGS IN AMERICAN STATE GOVERNMENT

Chapter One

THE STATE AND THE UNION

No. 1

A federal type of governmental organization is bound to lead to many complications because of the simple fact that it involves dividing something, i.e., the power to govern, which tends to be a unit. Perhaps no experience that the American people have had illustrates more clearly our possession of a disciplined political genius than our efforts to make an awkward form of organization work. It is true that our long struggle with the problem involved a destructive civil war; but it is equally true that, in spite of the growth of "centralization," a large measure of local self-government persists. The following study is an excellent summary of the high points in our dealing with the problem.

GROWTH OF A COOPERATIVE FEDERALISM [1]

When governmental power is divided up and distributed instead of being concentrated in one authority, there is likely to be jealousy, encroachment, and conflict. Our federal Constitution set the stage for just such jurisdictional disputes. It gave certain specified powers to the federal government. It left with

[1] Reprinted with permission from *What's Happening to Our Constitution*, by Robert E. Cushman, published by the Public Affairs Committee, Inc. (1942).

the states all other powers except a few which were forbidden. The states and the federal government were each to be independent within their own areas of power. If clashes of authority arose, federal law, if validly exercised, was declared to be supreme. Perhaps the most important duty which has fallen to the Supreme Court of the United States has been that of "umpiring the federal system"—of drawing jurisdictional lines and settling disputes between the federal and state governments.

EARLY COMPETITIVE FEDERALISM

For 100 years or more American federalism—a term we may use to describe the relations between federal and state governments—seemed to be dominated by a high degree of mutual suspicion. It tended to be an antagonistic and competitive federalism. This was probably inevitable. The creation by the new Constitution of a strong central government was a bold experiment, a challenge to those whose loyalties centered around "states' rights." In that early day many a man felt himself a Virginian or a New Yorker first, and an American second. The growth of federal power was watched with hostility and was met in some cases with open defiance.

John Marshall dominated the early history of American federalism. With telling blows he spiked down the foundation planks of our constitutional system. He set up judicial review as a working principle and protected contracts against being impaired by the states. But most important of all, he laid down liberal principles for the construction of federal power and he relentlessly maintained the supremacy of national law. When Maryland and Ohio passed laws to tax out of existence the Bank of the United States, a fiscal agent of the federal government, the Supreme Court struck those laws down. When Virginia defiantly refused to allow the Supreme Court to review a decision of the state's highest court on a question of federal law, the Supreme Court asserted and exercised its jurisdiction. When New York attempted to create a state monopoly of steamboat navigation on New York waters, the Court announced the freedom of interstate commerce from state ob-

struction. These decisions helped to create a powerful and independent national government. But the very process of dealing with the state and federal governments as litigants kept antagonisms alive and riveted the attention of the two governments on their disagreements rather than on the interests they had in common.

The competitive federalism of the Marshall period was followed by the increased bitterness of the slavery struggle, and it look a civil war to destroy the old doctrine of state sovereignty and to establish the unquestioned dominance of the federal government in the broadening areas of national interest. But competitive federalism survived the Civil War. It was kept alive, in fact, by the Supreme Court itself through certain doctrines which have only recently been abandoned or modified.

GOVERNMENTAL TAX IMMUNITY

The first of these doctrines was developed to deal with the problems of intergovernmental taxation. When Marshall held that Maryland could not levy a discriminatory and destructive tax on the Bank of the United States, he grounded his decision on the doctrine of the supremacy of national law. What the federal government may lawfully create, the states may not destroy, and "the power to tax involves the power to destroy." In 1871 the Court held that the federal government could not tax the salary of a state judge, on the theory that "the state is as independent of the general government as that government is independent of the states." Thus tax immunity worked both ways. Neither the states nor the federal government could tax each other. The rule was made absolute, and its application was pushed to absurd extremes. A seller of gasoline could not be required to pay a state sales tax on gasoline sold to a federal hospital since the federal government was one of the parties to the sale and would, therefore, be affected by the tax. A professor in a state university could not be required to pay a federal income tax on his salary, since this would offend the dignity and burden the financial resources of the state which paid the salary. Thus the state and federal governments found them-

selves glaring at each other across widening areas of tax immunity.

"DUAL FEDERALISM"

A second and more recent judicial doctrine contributed to an antagonistic and competitive federalism. This was the doctrine called by Professor Corwin "dual federalism." It holds that the scope and purpose of the delegated powers of Congress are limited by the reserved powers of the states. In other words, Congress must not use its granted powers for objects falling within the range of state-reserved powers. The reserved powers of the states are, it is true, those left over when the powers of Congress were delegated. If a power is delegated to Congress, then by definition it cannot be a power reserved to the states. Nevertheless the judges held that the delegated powers are limited by the reserved powers. The Court relied in part upon this theory in throwing out the first federal child labor act in 1918. Even if the child labor law could be regarded as an exercise of the federal commerce power (which the Court did not admit), it was nevertheless void because it was an exercise of the commerce power for a purpose (the regulation of child labor) reserved to the states. The AAA was held unconstitutional in 1936 by the same line of reasoning. The Court did not deny that Congress had exercised its delegated power of taxation in levying processing taxes on agricultural commodities. Nor did it deny that Congress is delegated power to spend the money that it raises by taxation. But it held that Congress could not lawfully raise money by taxation in order to spend it to support a regulation of agricultural crop production which, the Court believed, fell within the reserved powers of the states. Thus was the ghost of the old states' rights doctrine resurrected to prevent Congress from using its plainly delegated powers to deal with new problems.

THE NEW FEDERALISM

The building of a friendly and cooperative federalism to replace the antagonistic and competitive federalism just de-

scribed is a major achievement. It has not been wholly accomplished, but much progress has been made. It has not been done by the Supreme Court alone, but it has been done with the aid of the Court, and with its approval. Of the many aspects of this steady growth of cooperation within our federal system, four may be briefly discussed.

GRANTS-IN-AID

Over a period of eighty years Congress has spent millions of dollars in grants-in-aid to the states. Beginning with the Morrill Act of 1862—under which the federal land-grant colleges were organized—Congress has attached strings to these grants. Sometimes the states must put an equal or specific amount of money into the joint enterprise, as in the case of forest fire prevention, agricultural extension, or road building. In all cases the national government controls the purpose for which the money is to be spent, sets up the policies to be followed and the standards to be met, and supervises and audits the actual administration of the project. An example of the federal grant-in-aid policy is found in the Social Security Act of 1935. Congress raises large sums to be used for old-age benefits and unemployment compensation. These funds are distributed to states which cooperate in the social security program by making payments of their own, and by passing laws for the administration of the system within their borders. These laws must meet the standards set forth in the federal act. The Supreme Court held the Social Security Act constitutional against contentions that Congress was spending money for purposes outside the range of its delegated powers, and that it was encroaching upon the independence of the states by "threats of punitive measures or offers of seductive favors." The Morrill Act of 1862 had been attacked in Congress as "an unconstitutional robbing of the Treasury for the purpose of bribing the states," and there are still those who criticize federal grants-in-aid on the ground that they undermine state independence. It must be admitted that this type of cooperation strongly suggests a big brother leading a little brother by the hand. The Supreme Court, however, has

upheld these federal subsidies, and no one can doubt that through them important social gains have been achieved.

COOPERATIVE LAW ENFORCEMENT

There has been a steady growth of cooperation between federal and state governments in law enforcement and administration. Some of this is informal and results from the intelligence and good will of state and federal officials in the field. Some of it is directed by law. Some of it comes from formal contracts between the two governments. For many years the federal government has borrowed state administrative machinery and state law for certain federal purposes. Federal elections are conducted by state officers under state law. State courts naturalize aliens under the federal laws, and have jurisdiction to enforce some other federal statutes, such as the Employers Liability Act. There is cooperation between state and federal governments in the prosecution of criminals. If a criminal is wanted by both governments, he is dealt with first by the one that gets him first. But in a notable case a convict serving time in a federal prison was taken to Boston by a federal deputy marshal to be lent to the state of Massachusetts, which wished to try him on certain state charges before the evidence became cold and the witnesses disappeared. This kind of cooperation raises no serious constitutional issues.

CHANGES IN TAX IMMUNITY

In recent decisions the Supreme Court has liberalized the whole doctrine of governmental tax immunity. The Court's refusal to allow the federal and state governments to tax each other rested partly upon a sentimental regard for the dignity of the two sovereigns, partly upon a wholly unrealistic fear that otherwise the two governments would, like the gingham dog and the calico cat, eat each other up by destructive taxation. In 1928 Mr. Justice Holmes, in a dissenting opinion which has become classic, punctured the prestige of Marshall's decision that "the power to tax involves the power to destroy," by observing that "the power to tax does not involve the power to

destroy as long as this Court sits." Eleven years later the Court, overruling a line of decisions dating back to *Collector v. Day* in 1871, held that the salaries of state and federal officers and employees could be taxed by the other government. The change was less drastic than it sounds. The decision did not hold that the state and federal governments may now tax each other; it held that in taxing official salaries they are not taxing each other because an income tax on an officer's salary does not burden the government which pays the salary. The new rule makes the actual burden on the government the test on which to judge intergovernmental taxation. In later cases the rule permitted states to collect sales taxes from those selling to or performing contracts for the federal government, and the Court explained that any extra "overhead" cost was "but the normal incident of the organization within the same territory of two governments, each possessing the taxing power." The Court has come to see that the practical necessity of raising revenue is more important than tax immunity based solely on theory or prestige.

FEDERAL PROTECTION OF STATE POLICE POWER

Another type of cooperation is found in the growing body of federal legislation forbidding the use of the facilities of interstate commerce to aid in the violation of state law. A recent example is the Convict-Made Goods Act, which forbids the shipping of prison-made goods into states where such products cannot legally be sold or used. These laws represent a voluntary federal protection of state self-government. They had their origin in the problems arising from the dual jurisdiction over the liquor traffic. Some states passed prohibition laws in the 1880's, under which contraband liquor could be confiscated and destroyed. But when these dry states tried to confiscate liquor shipped in from other states, they were told by the Supreme Court, in the famous Original Package Case in 1890, that liquor was a legitimate article of interstate commerce which could not be touched by state law until the "original package" had been broken or the liquor sold. This decision paralyzed the enforce-

ment of state prohibition laws. Bootleggers came out of hiding and advertised their places of business as "Original Package Saloons." One boldly displayed a sign reading "Uncle Sam Is Our Partner." Congress promptly came to the rescue. It passed a law permitting state prohibition laws to reach liquor shipments "upon arrival" in the state, regardless of the unbroken original packages. When this proved inadequate, it forbade completely, in the Webb-Kenyon Act of 1913, the shipment of liquor into dry states. Congress has dealt similarly with interstate shipments of colored oleomargarine, convict-made goods, and prize-fight films.

These federal laws did not escape constitutional attack. They have been labeled "divesting" statutes since their effect is to deprive these "bootleg" commodities of constitutional protection as articles of interstate commerce. It was argued that Congress had in effect delegated its power over interstate commerce to the states by allowing state laws to bar interstate transactions. But the Supreme Court has repeatedly decided in favor of these laws. It has upheld the principle that Congress may see that the facilities of interstate commerce are not used to aid in the violation of the police regulations of the states.

The modernization of the Constitution through the promotion and recognition of federal-state cooperation is by no means complete, and there are still spots in which the relations between the two governments show more hostility and suspicion than friendly partnership. It must also be remembered that the supremacy of federal law is a basic principle governing federal-state relations. There cannot be complete constitutional equality between the federal-state partners. National interests take precedence in cases of conflict or doubt, and we may as well recognize that much of the new federal-state cooperation is sugar-coated centralization.

No. 2

In a federal state such as the United States certain problems are sure to arise which do not belong legally to the national govern-

ment but which involve the interests of more than a single state. Since the national government is without constitutional power to act in such cases, and since no one of the states involved can act beyond its own borders, considerable ingenuity has been shown in devising apparatus for interstate cooperation to solve such regional problems. The article reprinted here gives examples of such devices. It should be pointed out that in some cases it has been found possible to obtain the cooperation of the national government as well. The genius of politicians and administrators has in this way modified the rigidity of the federal system of organizing power.

INTERSTATE COOPERATION IN RIVER BASIN DEVELOPMENT[2]

DEVELOPING MACHINERY FOR INTERSTATE COOPERATION

Forces which after 1900 induced the rapid and far-reaching extension of federal jurisdiction over water resources likewise affected state government. Beginning in 1916 the compact device for effecting interstate agreements was revived and of particular significance for interstate river basin development was the Colorado River Compact of 1925 ratified by Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; the Red River Compact of 1937 between North Dakota, South Dakota, and Minnesota; and the Potomac River Compact of 1941 approved by Maryland, West Virginia, Virginia, Pennsylvania, and the District of Columbia. Relating to coastal rather than inland waters was the Atlantic States Marine Fisheries Compact, to which Congress consented in 1942 and which has now been ratified by fourteen states.

Organized under the compact of 1941, the Interstate Commission on the Potomac River Basin affords an example not only of interstate but also of interstate-federal cooperation in the solution of a major river basin problem, the control of water

[2] Lynton K. Caldwell, *Iowa Law Review*, Vol. 32, No. 2, pp. 232–243.

pollution. Representing the signatory states and the federal government, this agency affords informational, advisory, and coordinated planning services to the states and localities of the Potomac valley. The commission does not itself undertake to abate pollution but utilizes the existing machinery of federal, state, and local government in securing voluntary application of its recommendations.

Similar in purpose is the Interstate Commission on the Delaware River Basin (Incodel), established in 1936 by concurrent state action rather than by compact, and without federal representation. Four representatives are appointed to the commission by the Commissions on Interstate Cooperation in each of the member states of Delaware, New York, New Jersey, and Pennsylvania. Technical advisory committees assist the commission in conducting studies and in formulating plans and recommendations for action by the member states.

The establishment of these river basin commissions and the formation of a large number of interstate committees and cooperative relationships in the consideration of nation-wide and regional water utilization problems have resulted largely from the development of machinery for interstate cooperation through the Council of State Governments. Established in the mid-twenties as an organization primarily of American legislators, the council was reorganized and broadened in the early 1930's to serve state government generally. Supported by the states for service to the states, the council was early called upon to assist states in working out cooperative solutions to river basin problems and to explore ways and means for securing a definition and integration of federal and state water policies.

Alarmed by the flood control legislation of 1938 and the Supreme Court decisions of 1940 and 1941 which threatened to deprive the states and localities of a voice in the development or control of even the smallest streams, the states called upon Congress to correct omission of the states from participation in the flood control and rivers and harbors programs. Acting through their organization, the Council of State Governments, and the several organizations of state officials concerned with

water problems, the states in 1944 and 1945 and again in 1946 secured enactment of legislation establishing their right to be consulted in the planning and execution of river basin projects. Meanwhile, Congress refused to consider favorably proposals to extend the TVA pattern to all of the major river valleys of the nation. Clearly the time had come for a redefinition of the proper relationship between state and federal government in river basin development.

Recognizing this need, the Board of Managers of the Council of State Governments in January, 1945, created a Committee on Water Resources "to encourage the development and maintenance of democratic and constitutional working relationships among and between the various levels of government in the formulation and execution of programs for the unified development of the nation's water and other natural resources." Reporting to the board of managers in November, 1945, the committee urged, among other recommendations, that a comprehensive, unified plan of development should be formulated for each major river basin of the United States, and that such plans be developed cooperatively by local, state, and federal participation and be jointly administered. Regarding state-federal relations, the committee advocated integration of the plans of the federal agencies concerned with water resources development and emphasized that the states be consulted through appropriate state agencies designated by their governors.

The Committee on Water Resources was authorized by the board of managers to continue its activities and, to direct its efforts, the committee formulated the following work program:

The committee, in cooperation with other agencies, should review pending Congressional legislation with the view of securing, where desirable, the inclusion therein of principles for the preservation and protection of states' interests similar to those in the 1944 Flood Control Act and the 1945 Rivers and Harbors Act.

The committee should initiate investigations to determine the nature and relative importance of the items of water resources development programs in the major drainage basins throughout the country.

The committee should arrange to hold a series of regional conferences or hearings in the various drainage basins, giving early and particular attention to those regions in which the problems are pressing.

The committee should appoint a small working committee to study and prepare a report on the water laws of the states and their relations to national policies in order to preserve the integrity of state water laws.

The committee, in cooperation with other agencies, should study the advisability of, and methods for, creating a permanent federal interagency committee, with representation from the states, to exercise full responsibility for coordinating federal water development programs, and for cooperating with state and interstate agencies.

Regional interstate meetings and conferences with representatives of federal agencies have been held by the committee during the past year, and the committee is continuing its work in active cooperation with state and interstate water resources agencies and with national conservationist groups.

Meanwhile, in the various river basins of the country, states are demonstrating that the cooperative solution of regional problems can be successfully undertaken. Interstate litigation regarding the utilization of rivers has largely given way to the adjustment of differences through state commissions on interstate cooperation. Joint and cooperative state planning of river valley development is now under way in several of the major river basin areas, frequently in collaboration with agencies of the federal government.

In New England the Interstate Flood Control Committee is drafting an interstate compact under which solutions to flood control problems mutually acceptable to the states affected can be worked out. The states of the Connecticut valley are particularly concerned with the control of floods but are seeking solutions which will improve the recreational values in the river and its tributaries, increase fish resources and water power, and reduce the extent of water pollution.

In the Ohio valley problems of flood control, navigation, and

pollution abatement have been foremost. Currently water pollution is the most serious difficulty confronting the Ohio valley states, but a comprehensive survey by the United States Public Health Service has defined the scope and nature of the problem, and the Ohio River Sanitation Compact, drafted by the valley states, will become effective upon ratification by Virginia.

In the Tennessee, Missouri, Columbia, and Colorado river basins the states have worked together in close collaboration with federal agencies. In these valleys coordination of federal water policy has been undertaken by the TVA in the Tennessee, and by interagency committees in the Missouri and the Columbia. In the Tennessee valley the state departments, acting with corresponding agencies within the TVA, have developed common plans and programs covering not only water usage but in addition broad aspects of conservation and social welfare generally. Committees representing the governors of the Missouri and Columbia valley states meet regularly and through technical subcommittees work together with federal interagency representatives. In the Colorado basin water allotment and irrigation are the basic problems, and the valley states, through a series of compacts and interstate committees, have been working out water utilization problems with the assistance of the Federal Bureau of Reclamation.

EMERGING PATTERNS OF INTERSTATE-FEDERAL COOPERATION

Given the concurrent jurisdiction of the federal government and the states over the nation's waterways, the planning and development of major river basins of necessity involves federal-state and interstate cooperation. Under the reasoning of the *New River* and *Red River* decisions, Congress could authorize federal agencies to undertake far-reaching programs of river valley construction without reference to the states, although such action would be at variance with the pattern of federal-state cooperation which has long been established in this union and has been successfully applied in such diverse fields as agri-

culture, education, public health, highway construction, and social security. In fact, Congress has declared as a matter of policy that the rights and interests of the states in water utilization and control shall be recognized.

Illustrative of the necessity of state and interstate cooperation in basin-wide river projects is Section 3 of the Flood Control Act of 1944, which stipulates that no federal funds may be used to construct channel rectification or improvement for purposes of flood control until the state, political subdivisions thereof, or other responsible local agencies have given assurance that they will

1. Provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project, except as otherwise provided
2. Hold and save the United States free from damages due to the construction works; and
3. Maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of War.

At the request of the Interstate Committee on the Missouri River Basin, the Council of State Governments recently analyzed flood control legislation in the four lower valley states of Iowa, Nebraska, Missouri, and Kansas as a part of a larger effort to assist the Missouri valley states and their local subdivisions to comply with requirements of the Flood Control Act of 1944 and to work together in the solution of their common river valley problems.

Emerging from the experience of the states and the federal government during the years since 1900 is a variety of patterns of interstate and federal-interstate relationships in the conservation and development of our waterways resources: interstate commissions by concurrent legislation in the Delaware and by compact in the Potomac basins, state cooperation with an integrated federal agency in the Tennessee, and interstate and interagency federal committees in the Missouri and Colum-

bia basins, and state cooperation by compacts and interstate committees particularly with the single federal agency most directly concerned in the Colorado basin. The growth of these and other patterns of cooperative government suggests that no single type of basin-wide organization is suitable for the planning and execution of river valley development the nation over. Without doubt there will be a growth and perfection of existing patterns of cooperation and new forms of intergovernmental organization may be devised. River valley development in the United States has not been frozen into a uniform pattern and the states, their local subdivisions, and the federal government are free to work out those particular relationships and organizations that will best answer the needs and aspirations of the American people both collectively and in relation to the communities in which they live.

No. 3

The Constitution of the United States in Article I, Section 10, prohibits any state from laying "any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." It is clear that the intent of this provision is to prevent the laying of tariffs by the individual states upon commodities brought in from other states—a practice rather widely followed during the years just before the adoption of the Constitution. Without resort to tariffs, however, other ways have been found by the states in recent years to prevent competition with domestic producers. Some of these devices have been ingenious enough to avoid condemnation by the Supreme Court; others have not been so fortunate. The opinion presented here not only shows the sort of state interference with interstate trade which the Supreme Court will not tolerate, but contains also a very able discussion of the legal and constitutional questions involved.

BALDWIN v. SEELIG[3]

Mr. Justice Cardozo delivered the opinion of the Court.

Whether and to what extent the New York Milk Control Act (N.Y. Laws, 1933, Chap. 158; Laws of 1934, Chap. 126) may be applied against a dealer who has acquired title to the milk as the result of a transaction in interstate commerce is the question here to be determined.

G. A. F. Seelig, Inc., . . . is engaged in business as a milk dealer in the city of New York. It buys its milk, including cream, in Fair Haven, Vermont, from the Seelig Creamery Corporation, which in turn buys from the producers on the neighboring farms. The milk is transported to New York by rail in 40-quart cans, the daily shipment amounting to about 200 cans of milk and 20 cans of cream. Upon arrival in New York about 90 per cent is sold to customers in the original cans, the buyers being chiefly hotels, restaurants, and stores. About 10 per cent is bottled in New York, and sold to customers in bottles. By concession title passes from the Seelig Creamery to G. A. F. Seelig, Inc., at Fair Haven, Vermont. For convenience the one company will be referred to as the Creamery and the other as Seelig.

The New York Milk Control Act with the aid of regulations made thereunder has set up a system of minimum prices to be paid by dealers to producers. The validity of that system in its application to producers doing business in New York State has support in our decisions. . . . From the farms of New York the inhabitants of the so-called metropolitan milk district, comprising the city of New York and certain neighboring communities, derive about 70 per cent of the milk requisite for their use. To keep the system unimpaired by competition from afar, the act has a provision whereby the protective prices are extended to that part of the supply (about 30 per cent) which comes

[3] Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, et al., Appellants, v. G. A. F. Seelig, Inc., Appellee [249 U.S. 511 (1934)].

from other states. The substance of the provision is that, so far as such a prohibition is permitted by the Constitution, there shall be no sale within the state of milk bought outside unless the price paid to producers was one that would be lawful upon a like transaction within the state. . . .

Seelig buys its milk from the Creamery in Vermont at prices lower than the minimum payable to producers in New York. The Commissioner of Farms and Markets refuses to license the transaction of its business unless it signs an agreement to conform to the New York statute and regulations in the sale of the imported product. This the applicant declines to do. Because of that refusal other public officers, parties to these appeals, announce a purpose to prosecute for trading without a license and to recover heavy penalties. This suit has been brought to restrain the enforcement of the act in its application to the complainant, repugnancy being charged between its provisions when so applied and limitations imposed by the Constitution of the United States. . . . A district court of three judges . . . has granted a final decree restraining the enforcement of the act insofar as sales are made by the complainant while the milk is in the cans or other original packages in which it was brought into New York, but refusing an injunction as to milk taken out of the cans for bottling, and thereafter sold in bottles. . . .

1. An injunction was properly granted restraining the enforcement of the act in its application to sales in the original packages.

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. Accepting those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York.

The importer in that view may keep his milk or drink it, but sell it he may not.

Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imports or duties upon commerce with other countries are placed, by an express prohibition of the Constitution, beyond the power of a state, "except what may be absolutely necessary for executing its inspection laws." . . . Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress (Constitution, Article 1, Paragraph 8, Clause 3). "It is the established doctrine of this Court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." . . . Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded . . . that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the states, taking form in customs barriers and other economic retaliation." . . . If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary

and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

We have dwelt up to this point upon the argument of the state that economic security for farmers in the milkshed may be a means of assuring to consumers a steady supply of a food of prime necessity. There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. This temptation will affect the farmers outside New York as well as those within it. For that reason the exclusion of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify impediments to commerce between the states. There is neither evidence nor presumption that the same minimum prices established by order of the board for producers in New York are necessary also for producers in Vermont. But apart from such defects of proof, the evils springing from uncared-for cattle must be remedied by measures of repression more direct and certain than the creation of a parity

of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere . . . milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. . . . One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy.

Many cases from our reports are cited by counsel for the state. They do not touch the case at hand. The line of division between direct and indirect restraints of commerce involves in its marking a reference to considerations of degree. Even so, the borderland is wide between the restraints upheld as incidental and those attempted here. Subject to the paramount power of the Congress, a state may regulate the importation of unhealthy swine or cattle . . . or decayed or noxious foods. . . . Things such as these are not proper subjects of commerce, and there is no unreasonable interference when they are inspected and excluded. So a state may protect its inhabitants against the fraudulent substitution, by deceptive coloring or otherwise, of one article for another. . . . It may give protection to travelers against the dangers of overcrowded highways . . . and protection to its residents against unnecessary noises. . . . None of these statutes—inspection laws, game laws, laws intended to curb fraud or exterminate disease—ap-

proaches in drastic quality the statute here in controversy which would neutralize the economic consequences of free trade among the states.

2. . . . The test of the "original package," which came into our law with *Brown v. Maryland,* 12 Wheat. 419, 6 L. ed. 678, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. . . . The test of the original package is not an ultimate principle. It is an illustration of a principle. . . . It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.

The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership—the privilege of

sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to anyone, whether the orders were given in advance or came to him thereafter. The decisions of this Court as to the significance of the original package in interstate transactions were not meant to be a cover for retortion or suppression. . . .

No. 4

The machinery of interstate rendition of fugitives from justice is set forth in the series of official documents which follow. A careful reading of these will show better than a descriptive summary what actually happens in such cases.

RENDITION OF FUGITIVES FROM JUSTICE

STATE OF MISSOURI

To His Excellency, the Governor
Of the State of Oklahoma.

Whereas, it appears from the annexed copy of petition for requisition and papers, which I hereby certify to be authentic, and duly authenticated according to the laws of the State of Missouri, that John Doe stands charged by the accompanying certified copy of an affidavit with the crime of grand larceny committed in the county of Polk in this State; and it has been represented to me that John Doe fled from justice of this State, and has taken refuge within the limits of the State of Oklahoma.

Now, therefore, I, Phil M. Donnelly, Governor of the State of Missouri, pursuant to the provisions of the Constitution and laws of the United States, in such case made and provided, do hereby make requisition for the apprehension of said John Doe and for his delivery to Claude A. Hopkins who is authorized to receive and convey him to the State of Missouri, there to be dealt with according to law.

In testimony whereof, I hereunto set my hand and cause to be affixed the Great Seal of the State of Missouri. Done at the City of Jefferson, this 10th day of August in the year of our Lord One Thousand Nine Hundred and Forty-Seven.

BY THE GOVERNOR:
Phil M. Donnelly

s/. .Wilson Bell
Secretary of State

PETITION FOR REQUISITION

TO THE GOVERNOR OF MISSOURI:

The undersigned, ...Frank M. Adams....., Prosecuting Attorney for the County of ..... Polk..... and State of Missouri, represents that .....John Doe..... stands charged by the accompanying certified copy of an ..... affidavit ..... with the crime of ..... Grand Larceny committed in the County of .....Polk..... and State of Missouri, on or about the ....7th.... day of ....April...., 19..47... That at the time of committing said crime said .....John Doe..... was personally present in said County and State.

That on or about the ....7th.... day of .....April...., 19...47.... the said .....John Doe..... fled from the State of Missouri, and is now, as your petitioner believes, in the County of .....Jefferson..... and State of .....Oklahoma..... a fugitive from Justice of Missouri, and the grounds for such belief are: (briefly set out contents of correspondence, telegrams, etc.)

"Claude A. Hopkins .....
Sheriff Polk County, Bolivar, Mo.,.....
We are holding John Doe for you. Extradition requested.....
.....W. B. Allen, Sheriff...

.....Jefferson County.....
.....Oklahoma".....

The above telegram received by Sheriff of Polk County, Missouri, Dated Aug. 7, 1947, Received Aug. 7, 1947.....
That he is familiar with the evidence, and verily believes that in the event of a trial the accused will be convicted; and that the ends of justice require that .....he..... should be brought back to this State for trial. Wherefore, your petitioner asks that a requisition issue upon the Governor of the State of .....Oklahoma..... and that .....Claude A. Hopkins may be appointed messenger of the State of Missouri to go after, receive and return to said County of .....Polk..... State of Missouri, the said fugitive for trial, and that said Claude A. Hopkins be allowed one guard.

s/..Frank M. Adams.....
Prosecuting Attorney

TO SECRETARY OF STATE
ISSUE REQUISITION

Meals & Lodging only for Guard,
Phil M. Donnelly, Governor.

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*AFFIDAVIT WHERE PROSECUTING WITNESS HAS A PECUNIARY INTEREST

STATE OF MISSOURI } ss.
County of .....Polk.....

I, ...Claude A. Hopkins....., being first duly sworn, do solemnly declare that I have read the foregoing application for a requisition, and that a requisition for the above-

named fugitive is not sought by me for the purpose of collecting a debt, to allow any person to travel at the expense of the State or to answer any private end whatever, but only to serve the ends of public justice.

s/..Claude A. Hopkins....
Prosecuting Witness

Subscribed and sworn to before me, this .....8th..... day of .....August..... A.D. 19..47..

Witness my hand and seal of office.

..Charles E. Robertson....
Clerk of Magistrate Court

(SEAL)

* NOTE—The necessity of this affidavit may be waived at discretion of Missouri Governor.

AFFIDAVIT OF PROSECUTING ATTORNEY

STATE OF MISSOURI } ss.
County of .....Polk.....

I, ...Frank M. Adams....., being first duly sworn, do solemnly declare that I have read the foregoing application for a requisition, and that the facts therein set forth are true, and that a requisition for the above-named fugitive is not sought for the purpose of collecting a debt, to allow any person to travel at the expense of the State, or to answer any private end whatever, but only to serve the ends of public justice.

s/..Frank M. Adams.....
Prosecuting Attorney for ..Polk.. County.

Subscribed and sworn to before me, this .....8th..... day of .....August..... A.D. 19..47..

Witness my hand and seal of office.

..Charles E. Robertson....
Clerk of Magistrate Court

(SEAL)

AFFIDAVIT OF PRESIDING JUDGE OF MAGISTRATE COURT

STATE OF MISSOURI } ss.
County of .....Polk.....

I, ...Willard B. Leavitt....., Presiding Judge of Magistrate Court of the County of .....Polk....., which said Court is a Court of Record, having a Clerk and seal, certify that .....Charles E. Robertson....., whose true and genuine signature appears to the attached certificates is, and was at the time of signing same, the duly appointed, qualified and acting Clerk of said Court, and that full faith and credit is due to all his official acts as such, and that said certificate is in due form.

Witness my hand and seal hereto affixed, this .....8th..... day of .....August..... A.D. 19..47..

s/..Willard B. Leavitt.....
Presiding Judge of Magistrate Court

(SEAL)

AFFIDAVIT OF PROSECUTING WITNESS

STATE OF MISSOURI } ss.

County of Polk.

Before me, W. B. Leavitt, Magistrate within and for Polk County, in the State of Missouri, this 8th day of April, 1947, personally appeared Claude A. Hopkins, a person competent to testify, who being duly sworn upon his oath states that John Doe on or about the 7th day of April, 1947, at the said County of Polk, in the State of Missouri, did then and there wilfully, intentionally, feloniously, fraudulently, and unlawfully steal, take and carry away one motor vehicle, to-wit: one 1936 Model Ford, of the value of Two hundred dollars, the goods and chattel of one Lee Jump, contrary to the form of the Statute therein and against the peace and dignity of the state.

s/. .Claude A. Hopkins
Prosecuting Witness

Subscribed and sworn to before me, this 8th day of April, A.D. 1947.

s/. .Willard B. Leavitt
Judge of Magistrate Court
Polk County, Mo.

WARRANT IN FELONY CASE
(Magistrate Court)

STATE OF MISSOURI } ss.
County of Polk

In the magistrate court of Polk County, Missouri
district (division)

State of Missouri
Plaintiff

vs

No.

John Doe
Defendant

State of Missouri

To the sheriff of Polk County, Missouri, Greetings:

WHEREAS, on this 8th day of April, 1947, Claude A. Hopkins has filed in and with this court his affidavit wherein it is charged that heretofore, to-wit: upon the 7th day of April, 1947, at the said County of Polk and State of Missouri, the defendant, John Doe did then and there unlawfully, feloniously, knowingly, maliciously, wrongfully, on purpose, deliberately with specific criminal intent, and with malice aforethought steal, take and carry away one motor vehicle, to-wit: one 1936 model

Ford, of the value of Two Hundred dollars, the goods and chattel of one Lee Jump, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Missouri.

And that he, the said complainant, is a competent witness in said cause.

These presents are therefore to command you that you forthwith apprehend the said John Doe if he be found in your county and bring him immediately before the Judge of this court to answer the charge made in said information, and for preliminary examination, and thereupon be dealt with in accordance with law.

WITNESS THE Honorable Willard B. Leavitt, Judge of said court at his office on this 8th day of April, 1947.

s/..Willard B. Leavitt

Judge of the Magistrate Court

AFFIDAVIT OF CLERK OF MAGISTRATE COURT

STATE OF MISSOURI } *ss.*

County of .....Polk.....

I, ...Charles E. Robertson....., Clerk of Magistrate Court of the County of .....Polk....., which said Court is a Court of Record, having a clerk and seal, certify that .....Willard B. Leavitt....., whose true and genuine signature appears to the foregoing certificate is, and was at the time of signing the same, the duly elected, commissioned, qualified and acting and presiding Judge of Magistrate Court within the County of .....Polk....., and that full faith and credit are due to all his acts as such, and that said certificate is in due form.

WITNESS my hand and the seal of the said Court hereto affixed, at office this .....8th..... day of ....August.... A.D. 194..7..

s/..Charles E. Robertson....
Clerk of Magistrate Court

(SEAL)

AFFIDAVIT OF MAGISTRATE

STATE OF MISSOURI } ss.
County of .....Polk.....

I, ...Willard B. Leavitt....., the duly elected, qualified, commissioned and acting Magistrate, within and for .....Polk..... County, State of Missouri, do solemnly swear, and state under oath that the attached is a true and correct copy of an affidavit and statement; also the State warrant filed in my office on the .....8th..... day of .....April..... 194..7..

..Willard B. Leavitt.....
Magistrate.

Subscribed and sworn to before me, the legally appointed, qualified, and acting Clerk of Magistrate Court of ....Polk... County, Missouri this .....8th..... day of .....August....., A.D. 194..7..

s/..Charles E. Robertson....
Clerk of Magistrate Court

(SEAL)

AFFIDAVIT OF CLERK OF MAGISTRATE COURT

STATE OF MISSOURI } ss.
County of .....Polk.....

I, ...Charles E. Robertson....., Clerk of Magistrate Court within the County of .....Polk....., which said court is a court of record, having a Clerk and seal, certify that .....Willard B. Leavitt..... whose true and genuine signature appears as Magistrate to the foregoing certificate, is, and was at the time of signing same, the duly elected, commissioned, qualified and acting Magistrate, and that full faith and credit are due all his acts as such.

s/..Charles E. Robertson....
Clerk of Magistrate Court

(SEAL)

Chapter Two

STATE CONSTITUTIONS

No. 5

In spite of the apparent frequency with which state constitutions are changed in a piecemeal fashion, it remains true that many of them stand in need of a general overhauling if they are to provide governmental machinery adequate to modern problems. That serious difficulties stand in the way of such comprehensive revisions is made clear by the article here reproduced. Whatever may be one's belief as to the desirable content of a state's fundamental law, little exception can be taken to the proposition that the people should have an opportunity to review its provisions without the necessity of overcoming such formidable obstacles.

ROAD-BLOCKS TO CONVENTIONS[1]

It is commonplace to point out that America is the land of the written constitution, and that we have had some 200 constitutional conventions since the revolution. This statement is generally made in a spirit of complacency, not to say smugness.

Actually, it is a remarkable achievement that the number of constitutional assemblies in this country has reached such a substantial total. For in order to be held at all, constitutional conventions must overcome a host of interrelated hurdles, ranging from the legal through the political to the psychological.

[1] Wilbert L. Hindman, *National Municipal Review*, March, 1948.

One result is that, despite all the revisions which have taken place, there are many state constitutions in substantial need of modification and rewriting. These include the famous unamended document of Tennessee and California's constitutional colossus. (Alas for Hollywood—we have to concede to Louisiana the right to use the term "supercolossal" in describing that state's basic law.) The instances of Tennessee and California are typical demonstrations that constitutional change is needed both to modernize the archaic and to organize the chaotic.

If the need for revision can be regarded as self-evident in many states, the three factors which stand in the way of change —legal, political and psychological—require careful analysis.

Without commenting upon the elaborate legal restrictions imposed in many states on submission of individual amendments, it is important to note that the question of calling a constitutional convention may be submitted to the people in nineteen states only after a two-thirds vote of the legislature, and in four states a majority of all the legislators must support such a measure. In ten states ordinary majorities suffice and in eight there must be a submission of the question at definite intervals, ranging from seven to twenty years.

Interestingly enough, twelve states have no specific provisions in their constitutions for calling conventions. It is now generally held in these states that authority to establish conventions exists, stemming from the provisions found in many bills of rights asserting that the people may "alter their govenment as they deem proper."

Actually more important than legal limitations, although related to them, are political barriers to conventions. The precise nature of these obstacles will differ in each state, but it is important to understand that substantial political opposition to constitutional change exists everywhere and will, if possible, take advantage of any and all legal impediments to revision of the basic law. Minority groups hostile to constitutional modernization are greatly fortified by any requirement of a two-thirds vote in each house of a legislature as a prerequisite to submitting the question to the people.

While political opposition to constitutional change varies from state to state, one may safely generalize to the extent of asserting that change will be opposed by interest groups afforded special protection in the existing basic law. Such groups are easily discerned where tax limits are severe, where taxes are earmarked by constitutional fiat for such specific purposes as highway construction, or where there is inadequate constitutional support for existing regulations. Groups profiting from such weaknesses will fight change with every device at their command. On the one hand they will fall back upon legal restrictions and on the other hand they will use every technique they can muster to bolster a psychology which will defeat reform.

One political problem in many states is the relationship between the reapportionment issue and constitutional revision. Domination of legislatures by minorities in the rural areas is the order of the day in virtually all states, even those which are principally industrial and urban in composition.

Agricultural ascendancy was but fair and equitable in the nineteenth century, and of course no one in that period argued that the minorities who lived in cities had any superior right to majority representation in one or both houses of the legislature.

In the twentieth century, however, refrigeration and rapid transit enabled the metropolis to override Malthus, and great cities burgeoned into fantastic growth. Men alive today—and not remarkably old at that—can remember when Los Angeles, now America's fourth city, had, in 1880, only 12,000 people.

REAPPORTIONMENT PROBLEM

The rise of the city has been acknowledged reluctantly or not at all in state legislative representation. Reapportionment has largely ignored the facts of life as revealed by census figures. Rural folk have tried to justify their retention of legislative dominance by falling back on Jefferson's libel concerning city people as "sores on the body politic." This rural rationalization of its superiority to urban majorities is unconvincing. While

nothing can be done about it in many cases, let's not pretty up rural machine domination of cities by pretending it is either benevolent or disinterested.

To be realistic, however, we must concede that we are really up against it on this issue. One way around the problem in relation to conventions is the 1947 New Jersey procedure, which excluded reapportionment from consideration. It is ordinarily the case, however, that constitutional conventions are made up of members elected or otherwise chosen from existing legislative districts. Often these are senate districts, which are almost completely based upon scenery rather than population. Where this is true, the rural voice will be strong enough in a convention to cry down urban insistence upon the creation of representative assemblies.

Protected by assured majorities, therefore, rural interests are thus not everywhere hostile to conventions from fear of losing their power in legislative affairs. The most that can be expected of a constitutional convention at present seems to be that more of the industrial states at least will assent to the plan finally established in California which gives the people some measure of representation in accordance with numbers in the lower house of the legislature while retaining pastoral predominance in the senate.

It must be stressed at this point that the district system of choosing delegates, even if supplemented as in New York and Missouri by a number of delegates chosen at large, not only overweights the convention in favor of the rural elements—upstate, downstate, or outstate as the case may be—but in any event makes no provision, except by chance, for the representation of the principal interests of the state. So long as the legislatures cannot cope directly with this problem of interest group, or functional representation, it is of course too much to expect it to be solved in constitutional conventions.

Conventions commonly operate under closer public scrutiny than legislatures do, however, and they also tend to bring out in the delegates an unusually strong sense of public respon-

sibility. This means that the excesses of the lobby are more likely to be restrained at conventions, while the services of the lobby such as affording useful technical as well as political information, are likely to be given full play.

It might be mentioned in passing that at least partial functional representation in constitutional revision is most likely to be secured under present circumstances through the creation of appointive constitutional commissions. Appointments to these commissions, however, seem to go largely to lawyers who may or may not represent points of view beyond those of their vocation.

A LEGISLATIVE COMMITTEE

In California a resolution of the 1947 legislature, providing for appointment of ten assemblymen and ten senators to a Legislative Constitutional Revision Committee, provides also for an advisory committee of lay citizens. This large advisory group, which includes among others many of the interest group spokesmen who in any event would work with the revision committee informally if not formally, seems a realistic recognition that the people will insist on a functional voice in policy matters, as well as a regional or population voice. The lobby, contentious or constructive as the case may be, will be needed and should be heeded so long as popular ratification is the order of the day.

The psychological barrier to conventions is made up again of a number of attitudes. On the one hand there is the citizen who has the approach indicated in Kentucky: "If it was good enough for grandfather it is good enough for me." Related to this is the point of view reported from Missouri in the slogan: "Why rewrite the Bible?" There was an example of this in the Los Angeles press recently, where one newspaper argued that California did not need constitutional revision. After all, it said, the state has grown big (that's our chief criterion of success, of course) under the 1879 constitution, and certainly its 256 amendments have kept it up to date!

PEOPLE ARE CONSERVATIVE

Another psychological obstacle, and probably the major one, is mistrust of the people themselves. That sounds strange in a democracy, but it is true. This is simply to ignore history, however, for the record of constitutional change in this country shows that if there is one thing above all else calculated to bring out in the electorate a sense of cautious responsibility, it is the selection of delegates to a constitutional convention.

The people will not support moves for revision of basic law on trivial grounds, nor will they ordinarily approve a constitution that embodies matters currently regarded as radical or unsound. Although the written constitution itself was a radical and experimental device at the time of the American Revolution, today the people will not depart too markedly from the basic constitutional pattern established in any state. Professor McIlwain refers to constitutions as the "appeal from the people drunk to the people sober," and the public adopts a temperate attitude toward all aspects of constitution-making.

So, whatever the fears may be in some quarters that constitutional conventions may produce a document tinged with pink instead of red, white, and blue, the principal psychological fact about such conventions is that they are constrained by the community and the dignity of their responsibility to be sincere, cautious, and moderate. This, rather than ill-advised mechanical impediments to change, is the greatest check on unwarranted constitutional revision.

I am thoroughly in favor of provisions permitting the people to call constitutional conventions with reasonable ease and frequency. The people in each generation are entitled to solve their own political problems, or even to make their own mistakes, rather than to be saddled with the errors of the past or suffer from the consequences of the fact that no earlier convention, however distinguished its membership, possessed divine omniscience.

Not only, then, do most constitutional provisions for calling

conventions require liberalization, but a decision of the people favoring a convention should be supported by a self-executing clause clearly setting forth the essentials involved in electing and holding the gathering.

This is stressed in the *Model State Constitution*, and absence of such a self-executing provision leads to the situation which has developed in California at the present time. The people of that state voted for a convention in 1934. Since the legislature has failed to take the steps necessary to put the plan in motion, its provision for the present revision committee is the closest we have come to the implementation of that mandate. Our present procedure is better than nothing in the way of revision, but it is a substitute procedure none the less.

We make much these days, and rightly so, of the importance of strengthening our democracy in an era of renewed external challenge. Certainly we must do this, and one effective phase of the program is to modernize the basic laws of our states instead of letting them be diluted with statutory content or permitting them to weaken from inapplicable and dead sections which do not apply in the atomic age.

As believers in democracy we should have sufficient confidence in our own people to give them the utmost freedom to decide when to have constitutional conventions and whether or not to approve the changes recommended. This is one sure way to combine the enduring fundamentals of the past with a dynamic adjustment to the needs of today. Constitutional flexibility is fundamental in ensuring a system of government responsive to constructive suggestions and therefore impregnable in the face of subversive attack.

No. 6

The relative merits of constitutional revision by commission and by convention are discussed in more or less general terms in most textbooks on state government. The specific influences of a recent commission's suggestions are set forth in the selection which follows. The New Jersey revision of 1947, although produced by the

standard convention device, was considerably influenced by the previously appointed commission. The procedure followed on that occasion illustrates both the advantages and shortcomings of the commission.

CONVENTION OR COMMISSION?[2]

Constitutional revision is a live issue in at least a third of the states. In many the problem of how to obtain constitutional reform obscures, and in some instances seems to outweigh, the substantive issues.

One procedural device, the appointive constitutional commission, has been seized upon during the past few years by California, Georgia, Michigan, Minnesota, New Jersey, and Tennessee as the means to achieve revision. This procedure is not new. The constitutional commission has been used for almost a century.

Ordinarily the commission has its origin in a resolution of the legislature authorizing appointment of a small group by the chief executive, or jointly by the governor and the legislature, to consider constitutional revision in whole or in part.

A variation of this procedure is for the governor on his own authority to appoint a commission. Michigan's thirty-two-member commission of 1942 was appointed in this manner.

Another variation is for the legislature to act without reference to the governor at all. California's Legislative Constitutional Revision Committee of 1947, made up of ten assemblymen and ten senators, illustrates this type.

Proponents of the appointive commission cite an impressive list of advantages:

1. The commission is inexpensive.
2. It is small, permitting informal discussion and thorough deliberation.
3. Experts and outstanding public and private leaders of the

[2] Bennett M. Rich, *National Municipal Review*, Vol. XXXVII, No. 3, March, 1948, pp. 133–139.

state can be selected without being forced to seek election to a constitutional convention.

4. The commission is not so susceptible to political pressures and to logrolling as a convention.
5. It can work more expeditiously than a convention.
6. It can study more effectively the experiences of other states.
7. Since continuous sessions are not held the commission has greater opportunity to reflect on problems.
8. The final product of the commission is superior to that of a convention.

It is the purpose of this paper to examine the case history of the 1941–1942 constitutional commission in New Jersey and to compare its proposals to the new Constitution drawn up in convention at Rutgers University, June 12–September 10, 1947. New Jersey, incidentally, has had greater experience with the commission than any other state. Of twenty-four known commissions in fourteen states, seven were in New Jersey.

The first constitutional commission in New Jersey was created by joint resolution in 1852, two decades before that of any other state. Its purpose was to amend the Constitution "in its entire system of legal and equitable jurisprudence." This limited commission of three persons appointed by the governor failed in its objective.

COMMISSION'S ACTIVITIES

The seven-man commission appointed in 1941 was composed of a county freeholder and a judge appointed by the Speaker of the House, a state Senator and the director of the Princeton Surveys, appointed by the president of the Senate, a state Senator and a prominent legal and political figure appointed by Governor Charles Edison, and the editor of a leading newspaper, chosen by the six appointed members. The commission appointed a secretary and two assistants, one in public relations and one in research and drafting. All three nonmembers participated in discussions.

The commission first considered its approach to the problem, whether to propose a series of amendments or to draft a new document. Because of the number of amendments involved and the difficulty of working them into the old Constitution, it was decided to draft a new constitution—notwithstanding the realization that authorization for preparation of a draft constitution was lacking in the law creating the commission.

The commission did most of its work at the University Club in New York, where the members spent Friday afternoons and evenings and Saturday mornings and afternoons over a three-months' period in intensive study. It held no public hearings although it invited written suggestions and on a few occasions persons were asked to testify. Technical assistance was furnished by the Princeton Surveys. The commission report was issued in May, 1942.

The legislature blocked the commission's suggestion that a public referendum be held on the question of permitting the legislature to submit a revised constitution at the general election of 1942. Instead, it held lengthy hearings and came to the conclusion that because of the war it was inadvisable to do anything.

A year later, as a result of pressure from Walter E. Edge, Republican candidate for governor, the legislature placed before the people the proposal that it sit as a constitutional convention. The proposal carried by a large majority in the general election of 1943.

The legislature then dusted off the commission report and, after certain modifications, presented the proposed constitution to the people in November, 1944. This constitution was defeated after a bitter partisan battle.

Governor Alfred E. Driscoll revived the issue and, in his inaugural address of January, 1947, called for a limited convention, popularly elected. At the primary election on June 3 the people approved a convention and selected 81 delegates. The convention met at Rutgers University on June 12 and by September 10 had drafted a new document. On November 4, 1947,

the new Constitution was accepted by an overwhelming majority, to become effective January 1, 1948.

COMMISSION'S INFLUENCE

In attempting to assess the impact of the 1941–1942 commission upon the new Constitution, it should be pointed out that not every proposal made by the commission and later made a part of the new Constitution may fairly be attributed to the commission's influence.

New Jersey's Constitution had been subjected to no substantial change since 1875, when a series of amendments were adopted. These amendments, incidentally, were proposed by one of the state's seven commissions, the only one, in fact, whose efforts were crowned with almost complete success.

In the years following 1875 the need for certain changes was more or less taken for granted. For example, the casual observer, as well as the student of government, tended to accept the principle of a longer term for members of the legislature. New Jersey stood out like a sore thumb in its retention of annual elections. Changes of this character probably would have been made under any plan for revision.

There can be little doubt, however, that the proposals of the commission of 1941–1942 made a deep impression on the thinking of the 1947 convention delegates.

First of all, the language of the two in some respects is identical. The legislative article of the commission report recognized the right of labor to organize and bargain collectively. The Bill of Rights of the new Constitution states that persons in private employment shall have the right to organize and bargain collectively, and that persons in public employment shall have the right to organize and make known their grievances through representatives of their own choosing.

The commission report's prohibition on the legislative election or appointment of any executive, administrative, or judicial officers is carried into the new Constitution almost verbatim, as are prohibitions on certain special laws.

The commission's recommendation that gubernatorial elec-

tions be held in odd-numbered years is carried over; so also are the clauses authorizing the governor to investigate state officers and to appoint all officers whose election is not otherwise provided by law. Numerous other instances might be cited.

But a follow-up of language is obviously much less important than a follow-up of basic ideas. Here the influence of the commission is in some respects quite pronounced. Probably the most important carry-over is in the judiciary article where the basic principles of court unification and centralized administration were recommended by the commission. Vehemently denounced in 1942, these ideas were accepted without much argument in 1947.

The similarity in the drafts is not accidental, for the authors of the proposed judicial system in 1942 were to a substantial degree the authors of the judicial article in the new Constitution. To the commission must go a major share of the credit for this, the most far-reaching change made by the new Constitution. Five years of discussion, climaxed by extensive public hearings in 1942, 1943, and 1947, brought minor changes, of course—some good, some bad.

EXECUTIVE PROVISIONS

The commission set the stage also for administrative reform by giving the governor wide powers to reorganize the state's sprawling administrative structure. The challenge which they threw out was accepted only partially by the convention. The commission proposed that the governor be authorized to allocate, by executive order, all agencies among nine named departments.

The convention balked at this as being a usurpation of the legislative function and adopted instead the proposal that only if the legislature refused to act by a given time should the governor act. Even then he was limited to presenting to the legislature, in a special session, his plans for reorganization.

In the matter of appointing department heads also, the convention was unwilling to take the commission's advanced

position. Rather than permit the governor to appoint single executives to head all departments, the convention made possible the preservation of certain politically powerful commission-governed agencies by providing that all departments should be headed by a single executive "unless otherwise provided by law."

The commission's proposals were in some cases more advanced than the corresponding provisions of the new Constitution. For example, the commission's draft allowed the legislature to provide for absentee voting at any time. The new Constitution prohibits civilian absentee voting by its assertion that the legislature may provide for absentee voting by the military in peacetime. Also the legislative council was spelled out by the commission while the new Constitution is silent on the subject.

In a surprising number of instances the proposals of the commission were less advanced than the position adopted by the convention. Outstanding failures of the commission to represent the best thinking were its recommendations: (1) prohibiting a second term for the chief executive and (2) requiring limited biennial sessions of the legislature.

The commission repeated a mistake in the old constitution by proposing a definite sum, $1,500, to be paid legislators. It provided for the election of the treasurer, as well as the comptroller, by the legislature. It named the departments among which the administrative agencies were to be allocated. It retained as constitutional officers the county clerk, sheriff, surrogate, and coroner. The coroner, incidentally, is not mentioned in the new Constitution.

The commission's proposal for amending the Constitution was less advanced than the hesitating forward step taken in the new Constitution.

In some instances the commission took no action at all despite obvious need. The $100,000 debt limitation was retained, for example, notwithstanding the growth of the state's budget from $100,000 in 1844 to $150 million a hundred years later.

The commission is open to criticism for an undiplomatic

display of political one-sidedness. Membership of the commission consisted only of anti-Hague representatives.

HAGUE OFFENDED

When the report was released, the Hague faction took immediate offense at certain clauses which, they argued, were specifically designed to harass them. One would have overthrown a decision of the Hague-dominated top court, which seriously hampered the legislature in its efforts to investigate cities. Another would have denied a position on the new supreme court to Hague's son, by requiring ten years' experience as a member of the bar. At the time the report was issued he was a member of the top court, having been appointed by the previous governor because "it would please his daddy."

Perhaps the greatest weakness of the commission was in its failure to question, let alone attack, what were referred to in the recent convention as the "hot potatoes" of the Constitution. The convention was prohibited by law from considering the problem of rural versus urban representation in the legislature —people versus acres. There was no prohibition upon the commission, but the problem was untouched. Nor was the true value tax clause disturbed. This requirement that property be assessed at true value had for years been a subject of intense controversy. The clause on gambling, which permitted big time betting at horse races yet forbade a church or firemen's bingo game, was unchanged.

It is difficult to avoid the conclusion that the commission report was something less than a complete overhauling of the Constitution. It attacked vigorously and well certain of the basic weaknesses of the Constitution. Much credit is due the commission for its work on the executive and the courts. On the other hand, its omission of important problems, its obvious effort to embarrass the Hague forces, its outdated proposals, its avoidance of controversial issues—all these must be placed to the debit side of its ledger.

On the credit side, however, in addition to the commission's substantive contributions must be recorded its educational

value. The commission report was a challenge. It kept the revision issue alive. It set more people to talking about the Constitution. It stepped up the educational campaign to make the people constitution-conscious. Had it not been for the commission, it is doubtful whether New Jersey would have a new Constitution or one so far ahead of the old as it has today.

The weaknesses revealed in the commission report are not peculiar to New Jersey. In actual practice, few commissions measure up to expectations. Their members appear to be subject to the same prejudices and the same political pressures as the members of a legislature or a convention.

But beyond these natural human failings, the commission has one inherent and fatal weakness;' its every act is measured in terms of what the legislature will accept. The members of the New Jersey commission realized full well the futility of making any recommendations whatever on some of the most controversial issues.

CONVENTION ZEALOUS

The recent convention was under no such handicap. Fired with an extraordinary zeal to produce a progressive constitution and put an end to seven years of bickering, the delegates worked vigorously and with an unusual degree of harmony. Then, having completed their task, they appropriated a considerable part of the money set aside for the convention to publicize the new Constitution. More than that, the delegates themselves worked arduously after the convention adjourned to sell the new document to the people.

All this is beyond the appointive commission. The acceptance or rejection of its proposals is strictly a legislative matter. The commission can pressure the legislature by stirring up public interest through timely press and radio releases. The New Jersey commission did precisely that. Citizens' organizations helped out. But it was not enough. The fact that the commission must report to the legislature is almost certain to be an insurmountable handicap to thorough-going revision.

Nor do many of the advantages claimed for the commission

stand up under analysis. A commission is inexpensive, for example, only if its efforts prove successful. The appropriation for the New Jersey commission of 1941–1942 was only $5,000; the appropriation for the convention was $350,000. But the one failed; the other succeeded.

The ultimate tests of a commission are: (1) the quality of the final product and (2) the success or failure of the effort. Professor Dodd, writing in 1910, said that "the constitutional commission is useful under proper limitations as an advisor of the legislative bodies, but should not be employed . . . to make a complete constitutional revision through legislative proposal."

Professor Dealey, writing in 1915, makes the much stronger statement that "as a substitution for a convention, for revision purposes, it has so far proved to be a flat failure." There seems to be little reason to modify their pronouncements. A state contemplating over-all revision is courting disaster if it relies exclusively upon the commission.

The commission is not without merit, however. As a device for recommending incidental changes, especially those of a technical character, its record is better. Georgia illustrates the recent successful use of the commission as a means of effecting fairly numerous and important modifications short of general revision. Governor Arnall, who writes glowingly of the commission, observes nevertheless that if a wholly new constitution were to be written, "the commission method would be undesirable and, perhaps, impractical."

The commission has a second function, the importance of which has not been sufficiently appreciated. The commission can be of extraordinary value in stimulating public discussion of constitutional issues and of helping in the formation of policy. This was the one great value of the New Jersey Commission. If the commission were freed of the fear of a legislative veto of its proposals, it would be in a position to perform a valuable service for the state.

This restriction could be achieved simply by an understanding that the commission was being created as a preliminary to,

and not as a substitute for, a constitutional convention. The commission would then have an opportunity to raise the constitutional sights of the people and of the subsequent convention. This suggestion is predicated upon the hypothesis that the commission genuinely desires constitutional reform. That this may not be correct is demonstrated by Tennessee's disappointing experience in 1946 when the commission recommended that the legislature call a convention to revise only those limited sections of the Constitution selected by the commission.

AN EDUCATIONAL DEVICE

Aside from its use as a device for recommending incidental changes, the chief asset of the commission is educational in nature. It can be used to explore the subject of revision, to examine the best thinking and experience of the country, to assist in stimulating popular discussion, and in formulating and crystallizing public opinion. If the commission is used to perform these services, rather than to act as a substitute for a convention, it can help the state take a firm step toward the ultimate goal of a modern constitution.

This, in the end, is what the 1941 commission did for New Jersey. To that extent the commission was a great success, although it failed in its immediate objective. In fact, it is proper to go even further and to say that the 1947 convention, with only three months in which to work, could not possibly have succeeded as it did had it not been for the commission and the five-year discussion of its work. Without the preliminaries a 1947 convention in New Jersey would certainly have needed many months and the outcome would still have been doubtful.

No. 7

The following selections from the Missouri Constitution of 1945 are printed as illustrations of matters which are still regarded as important enough to be placed in the fundamental law and thus beyond the reach of the legislature. Section 7 is intended to ensure

a reapportionment of the seats in the state Senate by taking the matter out of the hands of the legislature. The other sections deal with matters which, it is felt even now, may not be safely left to legislative discretion.

CONSTITUTION OF THE STATE OF MISSOURI

Section 7. Within sixty days after this Constitution takes effect, and thereafter within sixty days after the population of the state is reported to the President for each decennial census of the United States, the state committee of each of the two political parties casting the highest vote for governor at the last preceding election shall submit to the governor a list of ten persons, and within thirty days thereafter the governor shall appoint a commission of ten members, five from each list, to reapportion the thirty-four senators and the numbers of their districts among the counties of the state. If either of the party committees fail to submit a list within such time the governor shall appoint five members of his own choice from the party of such committee. Each member of the commission shall receive fifteen dollars a day, but not more than one thousand dollars. The commission shall re-apportion the senators by dividing the population of the state by the number thirty-four, and the population of no district shall vary from the quotient by more than one-fourth thereof. The commission shall file with the secretary of state a full statement of the numbers of the districts and the counties included in the districts, and no statement shall be valid unless approved by seven members. After the statement is filed senators shall be elected according to such districts until a re-apportionment is made as herein provided, except that if the statement is not filed within six months of the time fixed for the appointment of any such commission it shall stand discharged and the senators to be elected at the next election shall be elected from the state at large, following

which a new commission shall be appointed in like manner and with like effect. No such re-apportionment shall be subject to the referendum.

LIMITATION ON LEGISLATIVE POWER

Section 36. All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:

First: For payment of sinking fund and interest on outstanding obligations of the state.
Second: For the purpose of public education.
Third: For the payment of the cost of assessing and collecting the revenue.
Fourth: For the payment of the civil lists.
Fifth: For the support of eleemosynary and other institutions.
Sixth: For public health and public welfare.
Seventh: For all other state purposes.
Eighth: For the expense of the general assembly.

Section 37. The general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefore, except (1) to refund outstanding bonds, the refunding bonds to mature not more than twenty-five years from date, (2) on the recommendation of the governor, for a temporary liability to be incurred by reason of unforeseen emergency or casual deficiency in revenue, in a sum not to exceed one million dollars for any one year and to be paid in not more than five years from its creation, and (3) when the liability exceeds one million dollars, the general assembly as on constitutional amendments, or the people by the initiative, may also submit a measure containing the amount, purpose and terms of the liability, and if the measure is ap-

proved by a majority of the qualified electors of the state voting thereon at the election, the liability may be incurred, and the bonds issued therefor must be retired serially and by instalments within a period not exceeding twenty-five years from their date. Before any bonds are issued under this section the general assembly shall make adequate provision for the payment of the principal and interest, and may provide an annual tax on all taxable property in an amount sufficient for the purpose.

Section 38. The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States.

The general assembly shall provide an annual tax of not less than one-half of one cent nor more than three cents on the one hundred dollars valuation of all taxable property to be levied and collected as other taxes, for the purpose of providing a fund to be appropriated and used for the pensioning of the deserving blind as provided by law. Any balance remaining in the fund after the payment of the pensions may be appropriated for the adequate support of the commission for the blind, and any remaining balance shall be transferred to the distributive public school fund.

Section 39. The general assembly shall not have power:

1. to give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;
2. to pledge the credit of the state for the payment of the

liabilities, present or prospective, of any individual, association, municipal or other corporation.

3. to grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;
4. to pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law;
5. to release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation;
6. to make any appropriation of money for the payment, or on account of or in recognition of any claims audited or that may hereafter be audited by virtue of an act entitled "An Act to audit and adjust the war debts of the State," approved March 19, 1874, or any act of a similar nature, until the claim so audited shall have been presented to and paid by the Government of the United States to this state;
7. to act, when convened in extra session by the governor, upon subjects other than those specially designated in the proclamation calling said session or recommended by special message to the general assembly after the convening of an extra session;
8. to remove the seat of government from the City of Jefferson;
9. to authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery;
10. to impose a use or sales tax upon the use, purchase or ac-

quisition of property paid for out of the funds of any county or other political subdivision.

Section 40. The general assembly shall not pass any local or special law:

1. authorizing the creation, extension or impairment of liens;
2. granting divorces;
3. changing the venue in civil or criminal cases;
4. regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, of the enforcing of judgments, or prescribing the effect of judicial sales of real estate;
5. summoning or empaneling grand or petit juries;
6. for limitation of civil actions;
7. remitting fines, penalties and forfeitures or refunding money legally paid into the treasury;
8. extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of their duties, or their securities from liability;
9. changing the law of descent or succession;
10. giving effect to informal or invalid wills or deeds;
11. affecting the estates of minors or persons under disability;
12. authorizing the adoption or legitimation of children;
13. declaring any named person of age;
14. changing the names of persons or places;
15. vacating town plats, roads, streets or alleys;
16. relating to cemeteries, graveyards or public grounds not of the state;
17. authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys;
18. for opening and conducting elections, or fixing or changing the place of voting;

19. locating or changing county seats;
20. creating new townships or changing the boundaries of townships or school districts;
21. creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts;
22. incorporating cities, towns, or villages or changing their charters;
23. regulating the fees or extending the powers of aldermen, magistrates or constables;
24. regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes;
25. legalizing the unauthorized or invalid acts of any officer or agent of the state or of any county or municipality;
26. fixing the rate of interest;
27. regulating labor, trade, mining or manufacturing;
28. granting to any corporation, association, or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track;
29. relating to ferries or bridges, except for the erection of bridges crossing streams which form the boundary between this and any other state;
30. where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.

Chapter Three

POPULAR PARTICIPATION IN GOVERNMENT

No. 8

When the direct primary method of choosing party candidates was introduced about fifty years ago, it was widely believed that it would increase the interest of the rank and file of the party membership. This expected wider participation of the voter in party affairs was contrasted with the caucus or convention system, much to the disadvantage of the latter. Mr. Porter's article makes clear that, at least for county offices and in one state, these optimistic predictions have not been realized. The article is worth study not only because of its analysis of the facts but also because of its shrewd comments on the behavior of voters at the level of local politics.

THE DESERTED PRIMARY IN IOWA[1]

For many years it has been apparent to the most casual observer that relatively few candidates for county office appear in the Iowa primaries. Very frequently indeed, only one aspirant for nomination will have his name on a party ballot as a candidate for a given office; and often there will be no candidate at all on the other party ballot for that office. This means,

[1] Kirk H. Porter, *The American Political Science Review,* Vol. XXXIX, No. 4, August, 1945, pp. 732–740.

of course, in the first case that there is no contest whatever in the primary; and in the second case that there is no contest either in the primary or in the general election which follows. In other words, the lone candidate gains office merely by filing nomination papers. It is the purpose of the present article to present the essential facts with respect to the Iowa primary of June 5, 1944, and to venture some comments as to their implications. Only county offices will be considered. . . .

AUDITOR. In 86 counties, there was only one Republican aspirant for nomination. In 3 counties, there were two. In 1 county, there were three. In 9 counties, there was none at all. In 32 counties, there was only one Democratic aspirant for nomination. In just 1 county there were two. In the remaining 66 counties, there was none at all. In each of these 66 counties, there was only one Republican candidate for nomination. Thus in exactly two thirds of the counties the Republican aspirant secured the office merely by filing nomination papers.

TREASURER. In 85 counties, there was only one Republican aspirant for nomination. In 8 counties, there were two. In 6 counties, there were none at all. In 29 counties, there was only one Democratic aspirant. In the remaining 70 counties, there was none at all.

CLERK OF COURT. In 85 counties, there was only one Republican aspirant for nomination. In 3 counties, there were two. In 2 counties, there were three. In 9 counties, there was none at all. In 28 counties, there was only one Democratic aspirant. In the remaining 71 counties, there was none at all.

SHERIFF. In 72 counties, there was only one Republican aspirant for nomination. In 17 counties, there were two. In 4 counties, there were three. In 1 county, there were four. In 5 counties, there was none at all. In 42 counties, there was only one Democratic aspirant for nomination. In 2 counties, there were two. In 55 counties, there was none at all.

RECORDER. In 81 counties, there was only one Republican aspirant for nomination. In 6 counties, there were two. In 1 county, there were three. In 11 counties, there was none at all. In 32 counties, there was only one Democratic aspirant for

nomination. In 1 county, there were two. In 66 counties, there was none at all.

ATTORNEY. In 74 counties, there was only one Republican aspirant for nomination. In 17 counties, there were two. In 2 counties, there were three. In 6 counties, there was none at all. In 27 counties, there was only one Democratic aspirant for nomination. In 1 county, there were three. In 71 counties, there was none at all.

CORONER. In 64 counties, there was only one Republican aspirant for nomination. In 11 counties, there were two. In 1 county, there were three. In 23 counties, there was none at all. In 20 counties, there was only one Democratic aspirant for nomination. In 1 county, there were two. In 78 counties, there was none at all. . . .

In 34 counties, there were no Democratic candidates for nomination for any county office; and in 19 of these the Republicans presented only one candidate for each office. In 54 counties, there was only one candidate for nomination for each office on either the Democratic or the Republican ticket. Thus in more than one third of the counties of the state there was no contest for any county office, either in the primary or in the general election. And in well over half of the counties there was no contest in the primary for any county office. In many of the remaining counties, there were contests for only one or two of the offices available. . . .

What is the explanation of this dearth of candidates? The war? Probably that is a partial explanation. However, insofar as this is true it means that war conditions merely accelerated a tendency already in full swing. For many years there have been relatively few candidates for county office. Probably the 1944 primary marks the lowest point.

Another explanation often advanced is that salaries are too low to attract many candidates. Salaries range from $2 thousand to $4 thousand a year, depending upon the population of the county. However, it is to be observed that in the most populous counties, where salaries are highest, there was the same dearth of candidates. Despite the rather widespread opinion

that low salaries account for the small number of candidates, there would seem to be no evidence of it. Indeed it may be suggested that small salaries by implication suggest such modest qualifications for office that many more people might well consider themselves qualified for the positions than if the salaries were higher.

The short term may be a partial explanation. It is quite understandable that people who are already employed in satisfactory positions would not be much interested in a political office for a two-year term. But the two-year term is not as bad as it sounds. A great many county officers hold their positions for a second term without having to face a contest. The alleged tradition associated with county offices expressed in the phrase "two terms and out," is balanced in some measure by the attitude, "one good term deserves another." Furthermore a considerable number of county officers hold their positions for many terms in succession. Thus a county officer may become so firmly entrenched in the confidence of the electorate that possible competitors feel it is useless to run. Insofar as this is true, it would account in part for the dearth of candidates.

The cost of running a campaign can hardly be a reason. Any qualified voter is eligible for any of the offices, except that of attorney; and one can get his name on the primary ballot simply by securing a number of signers to a petition. Sums spent in campaigns are negligible. One might suppose that nothing need be spent when there is no contest; but this is not quite so. Custom seems to dictate that even when a candidate has no opponent, he shall solemnly publish his picture and an appeal for votes in the local papers just as do those who happen to have opponents.

Do the county offices lack what is called "prestige value" to such an extent as to explain in part the lack of candidates? There would seem to be no reason to think so. To be sure, there is little public interest in these offices. It is certain that vast numbers of voters do not even know who the candidates are until they have a ballot in their hands. But there is no reason to believe that county officeholders are held in low esteem.

If "prestige value" is a factor at all, it may be supposed to have a positive rather than a negative effect.

It is possible that there is still another explanation, which may lie in the widespread effectiveness of the wholly informal preprimary caucus, the "parlor," or "private" caucus, or in similar activities not clearly enough organized to be described as caucuses. In other words, purposeful people behind the scenes may have the situation well in hand. This statement is not intended to suggest evil—corruption, bribery, crookedness, sharp practice, intimidation, or wrongdoing of any sort. It does suggest the possibility that relatively small numbers of people who are truly interested take advantage of public apathy to achieve the election of those whom they want to see in public office. This can be done through informal, inoffensive, and perfectly respectable exertion of influence. On the other hand, it must be admitted that these practices may come dangerously close to corruption and evil-doing, and the border line between what is respectable and what is evil may be very hard to draw. The opinion may be ventured that by and large there is very little wrongdoing or corruption but that there is a great deal of good-humored, decent persuasion.

Who are the people who exert this influence, and how do they do it? First in importance are those who themselves hold public office; and the length of time they have held office is a rough measure of their influence. The man who has been re-elected several times is likely to command the respect, if not the admiration, of the newcomer in politics. Those who aspire to other offices than his naturally want his support. A man who has been re-elected sheriff or treasurer several times by substantial margins can give great encouragement, or the opposite, to the hopeful neophyte who thinks he would like to be recorder, or clerk, or auditor. A friendly nod or a contemptuous word can turn the trick. It is not a question of outwardly "working" or "fighting"; it is merely a realization of tacit support, or of subtle and discouraging opposition, as the case may be. "John is for me, I think I can make it"; or "Bill is against me, I never can make the grade with him queering my chances all

the time." Thus popular incumbents of office can exert influence individually; and when several of them exert their influence in the same direction they can be very formidable. It is not a question of their influence being "good" or "bad," so far as the public interest is concerned. They merely express their personal preferences. There may be no slightest taint of evil purpose. Indeed, the judgment of these officeholders, thus casually expressed, may be a very wholesome check on the aspirations of utterly incompetent would-be candidates. Who knows how many such they may have discouraged from seeking office?

Obviously an incumbent of office seeking re-election would lend no encouragement to a rival. But such men may be keenly interested in the candidacies of people for other offices. Furthermore, the most successful and popular incumbents of county office may be planning to run for higher offices, state or district, or be anticipating appointment to some public position. Such aspirations do not cause them to lose interest in the county offices. On the contrary, their interest in those offices may be decidedly enhanced. The higher officeholder greatly values the support and friendship of county officials—hence their continued interest in the matter of who occupies them. Thus county officers, their relatives, and friends constitute a portion of the group who exert an influence on possible candidacies.

Very closely related to these officeholders are their deputies and the office employees. The reason for their interest is obvious. But let it not be supposed for a moment that their activities or influence are necessarily bad from a public point of view. It may be decidedly wholesome. There is a marked tendency for those who are concerned with civic virtue to condemn as evil, or corrupt in purpose, the political activities of those who can be shown to have any personal concern in the outcome of an election. A very large majority of those who are in elective office, or who hold appointments, are just as high minded and public spirited as are other people. It is no discredit for one who has been in public service, who has done good work, and who likes his job to want to stay there himself and to bring

others into public service whom he thinks are the right sort. The "courthouse crowd" is in a position to have the very best judgment as to who are the most desirable prospective candidates for office and who are not. Certainly their influence ought not to be a controlling factor; but just as surely their influence should not be looked upon as necessarily bad, even though affected in some degree by personal interest.

There is another group of people who have some influence in preprimary activities. They are that relatively small group who seem really to enjoy politics. They go to the regular party caucuses year after year. They are chosen as delegates to conventions. They do committee work and are selected to be official precinct committeemen. They will help the precinct chairman and the county chairman, and make some contribution to the party campaign fund. They will help in campaign activities, organize rallies, and do the drudgery that needs to be done if the party organization is to be alive. These people have influence on primary candidacies if they want to exert it. . . .

Respected and well-liked men, prominent in these groups—officeholders, their deputies, friends, relatives, and subordinates, those who aspire to higher office, those who go to caucus year after year and help maintain the county organization (most of them become well acquainted with each other)—are able to exert a great influence upon prospective candidacies for county office. Quite informally and in the most casual way, they can discourage would-be candidates, tacitly promise to support them at some future time, agree to support so-and-so for this office and so-and-so for that. No one is intimidated. Anyone qualified is quite free to get his name on the ballot if he is determined to do so. But he may well have a depressing sense of futility if he lacks the support of the right people. . . .

It would seem that the electorate has all but abandoned the business of selecting county officers, and is, moreover, reasonably content with the process by which the thing is actually done. Some will see in the deserted primary an argument for a return to the old caucus convention system of nominating

candidates. Others will see in it an argument for the short ballot and the appointment of county officers. It is probable that most Iowans would see in it nothing to be concerned about.

No. 9

The average citizen shows a far greater interest in national than in state politics. This should not obscure the fact, however, that our so-called "national parties" are really loose coalitions of state parties, hastily put together every four years for the purpose of choosing presidential candidates. Many important matters affecting our daily lives are still handled at the state level through party organizations. Aspirants to state and local office have practically no chance of election unless they can secure the endorsement of one of the two major parties. Nearly every state legislature is organized and controlled by the victorious party, and every state governor is a more or less stanch party man. Some degree of skepticism is permissible in judging state party platforms; nevertheless they *do* mean something even though the differences between them are sometimes hard to find. The two reprinted here are typical of recent appeals to the voters.

PARTY PLATFORMS IN KANSAS, 1946[2]

REPUBLICAN PARTY

PREAMBLE

A year ago this nation emerged victorious in the most cruel and costly war in human history. We thank Almighty God for our deliverance from the forces of world tyranny and oppression.

Kansas War Record. In this great struggle, Kansas sent forth her sons and her daughters to serve in the armed forces

[2] *Citizen's Pamphlet No.* 2, Bureau of Government Research, University of Kansas, Lawrence, Kansas.

throughout the world. The people of Kansas met every bond quota during this world crisis, and willingly performed every service requested.

Kansas factories turned out immense supplies of aircraft, guns, explosives, landing ships, and in fact practically all of the implements of modern warfare.

Kansas farmers and stockmen joined in producing food for the armed forces and civilian populations of ourselves and our allies in a volume never before equaled in the history of our state.

Credit for the great service and sacrifice belongs to the people. It does not belong to any political party or political leader.

National Issues. We are shocked and amazed that now our national administration still clamps rigid controls on all our people; still maintains thousands of federal pay rolls in positions created for the war emergency only; still regiments by countless directives and decrees the daily lives of all; still denies to our farmers and our stockmen the right to free and open markets.

More shocking and more amazing is the fact that while the people toiled and sacrificed to win a war in which multiplied thousands gave their lives there was unlimited graft and corruption in war contracts within the knowledge of officials high in the present national administration and actually aided and abetted by them.

We commend to the people of Kansas and to the nation as well the election this coming November of a Republican Congress in order that a full investigation and complete audit be made of our national administration. New Dealers do not make much headway investigating each other. The times call for immediate and direct action. The people of this state and of the nation are entitled to know the facts; to know the full amount contributed by them in the war effort that has been diverted into channels of graft and corruption; to demand immediate prosecution of all those guilty of such reprehensible and unpatriotic conduct.

STATE POLICY

During the war years, a Republican administration has directed our state government. It gave its pledges to the people of Kansas that it would be guided by honesty, efficiency, and economy. This pledge has been faithfully kept. Our house is in order. Our budgets are in balance. Our state is solvent.

Republican Accomplishments. Under honest and efficient Republican administration, no ad valorem property tax levy for state administrative purposes has been made for the past three consecutive years. This is a noteworthy accomplishment.

Under Republican leadership our state was given its budget, cash basis, and tax limitation laws. All these laws were passed in the interests of our citizens and our taxpayers. The Republican party has always believed and still believes that the citizen and taxpayer is entitled to know how and where his tax money is spent, and that full publicity be given to budgets of expense, financial conditions, and rates of tax. In the years immediately ahead it is most important that a party committed to that program remain in charge of the fiscal affairs of our great state.

Candidates. The nomination of Frank Carlson for the office of governor is in complete harmony with the high ideals, honesty, sincerity, and integrity that the people of Kansas have a right to expect in the office of its chief executive. His career in Congress was brilliant and won for him the esteem and confidence of the entire country. His long career in public life, where every duty was faithfully performed, speaks for itself. We have no doubt that the people of Kansas will avail themselves of the services of this sincere, honest, and able citizen and that he will, and by every consideration should, be the next governor of Kansas.

Kansas gained its statehood—its very right to exist as a free, independent and sovereign state—through the untiring efforts and grim determination of the Republican party.

The people of Kansas have throughout its entire history consistently, and almost continuously, supported the program of the Republican party.

Today both United States Senators, and each member of Congress, representing our great state in the nation's Capitol is a Republican. Each Republican nominee for Congress should be elected by large majorities this November.

Today every elective state office is filled by a Republican. Each of our nominees for state office is worthy of support and confidence. We urge the election of each and every one.

When the legislature meets next January, thirty-nine of the forty members of the state Senate will be Republican. The Republican party will have an overwhelming majority of the members of the House of Representatives; therefore we caution the voters of our state to beware of specious claims that are being made that certain candidates of the opposition party will control the fiscal or the legislative policies of our state during the next two years. Kansas now has, and for the next two years will continue to have, an overwhelming Republican legislature.

Our state is a part of the great Middle West. Its abundant natural resources will admit of larger population and of industrial expansion to an extent that defies imagination. The Republican party has long since dedicated itself to the cause of labor and industry and expansion under the American system of free enterprise. It has opposed centralized government and regimentation of our people. It will continue that opposition with renewed vigor.

We invite all citizens, regardless of party, creed, or color, to join with us until the last vestige of regimentation and bureaucracy has disappeared.

VETERANS

Kansas has every reason to take exceptional pride in the outstanding record spread upon the pages of its glorious history by those who answered the call for service in World War II. Over 200,000 of our youth were in the armed forces in America.

Benefits. The Republican party has, throughout its history, been notably ready to recognize at all times the obligation of the state of Kansas which it owes to veterans of every war and

has sponsored legislation covering practically the entire field of benefits accepted throughout the United States as desirable for the returning veteran.

In the past, the Republican party has been quick to respond to the suggestions and desires of its heroic sons and daughters and knowing, as we do, that these young men and women of World War II, who are now about to assume an equal responsibility as peacetime citizens and leaders of our state, will not be unreasonable in any program they may sponsor either individually, collectively, or in organized groups, we therefore unhesitatingly pledge ourselves as a party to sponsor in the future as in the past any and all legislation which may be deemed necessary or desirable for the benefit of our veterans and to give the utmost consideration to any program which the veterans themselves recommend.

Housing. The question of adequate housing facilities for veterans of World War II is one which deserves immediate attention. Suitable provision in the Office of Veterans' Affairs should be made for an agency to aid and facilitate local communities in arranging for the acquisition of all available facilities. By so doing, a distinct service can be rendered to those who are in need of a home, and we recommend that prompt action be taken to render all possible assistance.

LABOR

The Republican party is the traditional champion of free labor and free enterprise. Under this system, American workers have achieved the highest standards of living in the world. Kansas labor has always been sane, consistent, and loyal, making it desirable for industry to locate in this state. We fully recognize the permanency of and the necessity for trade unionism as an element of progress in the industrial, social, and economic life of Kansas and the nation.

Program. The progressive welfare of our industrial workers depends upon the increased production and elimination of exploitation. We therefore pledge:

1. To protect the rights of labor to organize and bargain collectively through representatives of its own choosing
2. To maintain an adequate force of competent industrial inspectors to minimize industrial hazards, and the resultant accidents to workers
3. To promote and encourage apprentice training in the skilled trades
4. To enlarge opportunities for regular full-time employment of labor, through industrial development
5. To increase the effectiveness of unemployment compensation
6. To support and further sane, helpful, and consistent labor legislation that will be beneficial to all Kansas labor.

SOCIAL WELFARE

We must give utmost recognition to the economic situation of our aged citizens who are in need and those of our people who are so unfortunate as to be disabled, physically or otherwise, so that they are unable to earn a sufficient living for themselves and those dependent upon them. It is not just our duty, it is our privilege, under the law, to assist our fellow citizens who, through no fault of their own, are in adversity. These folks are our neighbors and friends who have made their contribution to society. Certainly, there must be public realization that their problem is not charitable; it is social and shall be treated as such. The manner in which our friends who are in need are assisted should be on the same level of dignity as that attendant to the granting of pensions for war service; for these people who are old in years have devoted the major portion of their lives to good citizenship, and by that measure, they, too, deserve pensions.

The form of assistance to which we must subscribe under present federal laws is that of social welfare. Under that system, we must discharge our responsibility to the greatest degree possible, according to the resources our taxpayers make available for this purpose.

Increased Assistance Grants. Everyone knows there has been a tremendous increase in the cost of living. Food, clothing, housing, and every necessity of livelihood has been caught in the terrific updraft of this inflationary period. To meet these conditions we must see to it that assistance to our aged and other citizens in need is raised, and raised adequately so they may live in health and decency. To accomplish our purpose, we propose to use sales tax funds as the source from which increased state participation in the welfare financial program will raise the assistance grants. We will thereby provide for our aged and handicapped citizens, who are in need, the means for the decent livelihood they so richly deserve.

EDUCATION

The Republican party recognizes the all-important question of public education and the obligation of the state to insure every Kansas child the opportunity for an education in a public school system of uniformly high standards.

School district reorganization through local committees should be continued by judicious application of the school reorganization law enacted by the 1945 legislature. We favor such changes in this law as may be needed to correct any defects that have appeared in its application.

We recognize the increasing importance for the establishment of school transportation facilities to provide an adequate, safe, and economical system for our rural schools.

We are particularly conscious of the necessity of a general increase of teachers' salaries which are disproportionately low throughout the state and pledge ourselves to some definite means of correcting this situation.

We recognize the extreme need of accommodations for students attending our state educational institutions, and we recommend legislation designed to meet this emergency.

AGRICULTURE

Agriculture is our greatest industry and its prosperity is vital to all of the people of our state. In the years immediately ahead

serious and far-reaching adjustments must be made in converting agriculture from a war to a peacetime basis. We pledge that insofar as the state and its agencies can do so, they will render all possible assistance in maintaining agricultural prosperity.

We favor a policy of abundance, not scarcity. We pledge ourselves to work for an expansion of markets for Kansas farm products and for processing them within the state to the greatest possible extent. We advocate research along the lines of discovering new and improved crops and new uses for all farm products, with special consideration for those in surplus production.

Modern inventions and discoveries offer new possibilities in the way of improving living conditions in our rural communities. We pledge the full cooperation of the state in all programs for rural betterment as farm to market roads, expanded educational opportunities, extended rural electrification, and improved community facilities for health and well-being.

PROHIBITION

The Republican party has always recognized that the right to vote is a sacred and inalienable privilege of every citizen. If the constitution of Kansas is to remain in harmony with the thinking of our citizens, then it is fundamental that they should have the opportunity to express themselves on any and all important controversial issues.

We believe the propriety of the Kansas Prohibitory Amendment is being questioned by so many Kansas people that it has become a controversial issue of such importance that voters should have the right of self-expression. This question does not present a political issue. It presents a moral issue that should be determined by the citizens of Kansas on a nonpartisan basis, and we challenge the opposition party to so approach the question.

Therefore, we recommend that the 1947 legislature should submit a constitutional amendment for the approval or rejection of the voters at the November, 1948, general election.

HIGHWAYS

During the war years, Kansas highway building, of necessity, was curtailed. Now, in the postwar period, we are faced with the huge task of completing the gap caused by war and the building of a modern highway system adequate for the needs of the years ahead. We have undertaken a vast program of improving and extending our state system of highways and have started a long-range, secondary road program, state-wide in scope, to bring, as quickly as possible, improved highways to the farm, the home, the church, and the school. It is of paramount importance to our economic and social life that these programs be continued and expanded to achieve a highway system serving both present and future needs of all our people. To reach this goal, sufficient funds must be provided, commensurate with the financial ability of our citizens, to match all available federal aid and to carry on our highway program. If present sources for obtaining the required revenue prove inadequate, then we favor making such changes as may be necessary to secure the results desired.

INDUSTRIAL DEVELOPMENT

In 1939, a Republican administration created the Kansas Industrial Development Commission for the express purpose of fostering and promoting the industrial development and economic welfare of this state. This commission has done an outstanding job in making Kansas an industrial as well as an agricultural empire. Under its guidance, existing industries have been strengthened and new ones have been brought into the state. Industries will absorb our Kansas people and keep them in Kansas. These people appreciate the opportunity of having a good job, living at home—in Kansas—where they can work without interruption. The Republican party will cooperate to the limit in their behalf and will strive to strengthen the position of industries we now have and offer the finest of opportunity for those who come to Kansas. We have the finest of

prospects for industrial development, and it is the desire of the Republican party to make this state second to none.

LAW ENFORCEMENT

We recognize that law enforcement is a fundamental requirement of good government. Failure to enforce any of our laws tends to encourage disrespect for all law and order as well as disrespect for good government.

Therefore, we pledge to the people of Kansas a program of strict law enforcement.

TOLERANCE AND EQUALITY

The Republican party has a record of which its members may be proud, in teaching, encouraging, and fostering toleration, consideration, and equal opportunity for members of all racial, religious, and sectarian groups. We reiterate that stand, which has always been the policy of our party, and condemn the intolerance, bigotry, and persecution of certain groups becoming manifest throughout the nation.

The contribution of the colored citizens of Kansas toward the advancement of our state is appreciated by the Republican party. They are today holding more responsible positions than at any time during the history of Kansas.

We feel definitely that any member of a minority group regardless of race, religion, color, racial origin, or ancestry has the same inherent rights to employment and opportunity as any member of a majority group.

We pledge ourselves a continuation of the policy of our state since its birth, of offering a land of equal opportunity to any honest person, regardless of race, creed, or nationality.

SOCIAL PROBLEMS

While Kansas, in comparison with other states, is exceptionally fortunate insofar as its juvenile problems are concerned, nevertheless, we have not escaped entirely, and we are convinced that a suitable juvenile code would be of great benefit to all con-

cerned. We also feel that it is highly important for the 1947 legislature to establish a reasonable waiting period on the part of those securing marriage licenses. Such a law would prove most beneficial.

We further believe that the next legislature should vigorously pursue the rehabilitation program of the state charitable institutions in order that the several thousand unfortunate inmates may spend their remaining days in safety and comfort and that all may have proper and sufficient medical care and attention.

CONCLUSION

The Republican party in Kansas reiterates its faith in this nation and the ability of our people to prosper under the established American way of life. We urge the voters to join with us in maintaining the earnest, fearless, and intelligent leadership we have given Kansas in the past and will give in the future. The challenge now is crystal clear and eternal vigilance is yet the price of liberty. Let us march united in this battle for the preservation of the ideals so clear to us all. Victory is our goal.

DEMOCRATIC PARTY

PROHIBITION REPEAL AND LAW ENFORCEMENT

1. We demand the repeal of constitutional prohibition to end the present intolerable bootlegging situation in Kansas.

2. We insist that saloons be prohibited and "speakeasies" eliminated from our state.

3. We suggest state-owned and state-operated stores in which liquor will be sold only in unbroken packages under a permit system.

4. We recommend county option. Liquor must not be sold in any county against the will of the majority of the voters of that county.

5. We pledge that liquor will not be sold to minors.

6. We are unalterably committed to the strict enforcement at all times of laws governing or prohibiting the sale of liquor.

MACHINES AND BOSSISM

1. We favor eliminating all machines and bosses from the politics of Kansas. We urge all honest citizens to aid in the fight to re-establish political freedom in our state.

2. We condemn the practice of hand-picking candidates by political bosses and machines. We demand that the free primary be allowed to operate within the intent of the law and the desires of the people of Kansas.

VETERANS

1. We demand maximum state effort in solving the present critical housing shortage for veterans in their home and college towns.

2. We insist on a nonpolitical decentralized State Veterans Administration with representatives in every county.

3. We condemn the present Republican State Veterans Advisory Committee for its political administration of veterans affairs.

4. We pledge preference to veterans for all state appointments and employment.

5. We recommend examinations to be held for all state jobs filled during the war, to afford veterans an opportunity to compete for these positions.

VOTES FOR YOUTH

We advocate that the right to vote be given to all Kansans reaching the age of eighteen.

ONE-CENT GASOLINE TAX

1. We demand the repeal of the 1-cent gasoline tax.

2. We condemn the Republican legislation which levies a tax upon tractor and other fuels used off the highway.

EDUCATION

1. We demand general increases in pay for all teachers, elementary, high school, and college.

2. We pledge adequate retirement benefits for all teachers.

3. We recommend repeal of the mandatory provisions of the so-called "school reorganization law."

4. We will provide for balloting within the affected school districts on every proposed reorganization or consolidation.

5. We favor free school textbooks.

6. We believe in a constant effort to improve the education system of Kansas. To this end we promise a continuous school-building program. This program must include new classrooms, dormitories, and other structures for the institutions of higher learning.

7. We advocate an adequate system of farm-to-school roads. We favor modernization of the school transportation system.

8. We stand for adequate pay and a retirement plan for school bus drivers and other school employees.

SOCIAL SECURITY

1. We advocate a minimum pension under the Social Security Act of $60 monthly to every citizen sixty years of age or above.

2. We demand that the "responsible relatives" clause be eliminated from Kansas law.

3. We pledge to meet every federal increase in payments under the Social Security Act.

4. We favor representation of those receiving payments under the law in the membership of the Social Welfare Board charged with the administration of the law.

5. We favor legislation providing a retirement benefit program for employees of Kansas municipalities.

LABOR

1. We pledge the repeal of all legislation restricting the freedom of employees to organize and bargain collectively.

2. We believe in adequate payment to widows and dependents of deceased employees and increases in other benefits of the law. Present benefit payments of the Workmen's Compensation Act are shamefully inadequate.

3. We favor broadening the law to cover occupational diseases.

4. We advocate a minimum wage law for Kansas industries. Kansas will not tolerate the development of industry at the expense of labor through substandard working conditions or rates of pay.

5. We insist on legislation prohibiting the employment in industry of any child under the age of sixteen. We condemn the present practice of employment of children under "sweatshop" conditions.

FAIR EMPLOYMENT PRACTICES

1. We recommend legislation enforcing fair employment practices in Kansas.

2. We are opposed to all forms of discrimination based upon race, color, or religion.

JUVENILE DELINQUENCY

We favor improvement and recodification of the statutes covering juvenile delinquency to include the establishment of a children's bureau to handle cases of first child offenders rather than processing such cases through any court.

AGRICULTURE

1. We recommend state aid to Kansas farmers in the marketing of their products. This must include the development of a state marketing, distributing, and grading service. Farmer-managed cooperatives should be given every encouragement.

2. We advocate adequate aid to farmers to enable them to own the farms they operate. The recent trend which has reduced by 14,000 the number of farms in Kansas must be ended. Kansas youth must not be driven from the soil.

3. We favor the development of industries in the towns of Kansas to process our farm products.

HIGHWAYS

1. We condemn the present administration of the State Highway Department. This has resulted in no new construction and deplorable maintenance of existing highways.

2. We pledge a system of farm-to-market and farm-to-school roads, financed solely by taxes levied against the users of the highways.

3. We will re-establish a vigorous program to build and develop the arterial federal and state highway system of Kansas.

PUBLIC HEALTH

We advocate the reorganization and strengthening of the state public health system with emphasis upon research, prevention, and control of epidemics and diseases.

. . . . . .

No. 10

Ruling men will always be a "tough" business no matter what we call the apparatus by which it is done. It cannot be doubted, however, that our political manners have improved. "Organization" sounds better than "machine" as a term describing the apparatus of governing; and "leader" is a more respectable word than "boss." Some of the reasons for this change in terminology are discussed in this article which also makes some estimate of the extent to which the change is a fundamental one.

EXIT THE BOSS, ENTER THE "LEADER"[3]

In less than a year, Frank Hague of Jersey City and Ed Kelly of Chicago, both of whom doubled in brass as mayors and political bosses, have quit one or both of their jobs. In Kansas

[3] Warren Moscow, *The New York Times Magazine,* June 22, 1947, pp. 16–17, 47–48.

City, Jim Pendergast, son of the late Tom Pendergast, has pulled out by request and in Hoboken the McFeely brothers' edition of the Hague machine has crumpled like the only slightly older one-hoss shay.

Pendergast and McFeely got out because they had to. As to Kelly and Hague—two of the most powerful bosses of modern times—there is the well-grounded suspicion that they got out while the getting was good, before the electorate began kicking them around, too.

The luxury-loving Mr. Hague turned his Jersey City mayoralty over to his nephew in pretty much the way an eastern caliph would assign his household and perquisites to his favorite son; but it is still much too soon after the event to tell whether the old Hague machine will stand up long against a national trend which has been operating against the traditional big-city political machines.

In general, it is true, all around the country, that the city machines no longer control the vote the way they used to; and that they can no longer elect whom they please, when they please, and how they please.

But that the machines are crumbling, that the old-fashioned boss can no longer proclaim and get away with an "I am the law" attitude, does not mean that political parties have become anachronisms. Just as the pot-bellied alderman has been replaced by the paunchless councilman, so is the boss being replaced by the "leader" and the machine by the "organization."

Political organizations, whether known as machines or organizations, will be around as long as we have a two-party system, with nominations for public office to be made by the party members. And there is pretty sure to be some dominant member or group to run the show. It was so in the days of the party caucus, held in the back room of McGillicuddy's saloon, and it is so today as the "boys"—and nobody else—go through the motions of picking candidates in legalized primary elections.

But the difference between organization and machine, between leader and boss, is more than a purely semantic one. It

is a difference in methods—brought on by necessity—a difference in respectability, at least on the surface, demanded by changing times.

Because the boss was the product of the machine, even though he may have seemed both its progenitor and copyright owner, it is the changeover from machine to organization that has caused the mutation of boss to leader.

The old machine *controlled* the vote. It took immigrants, made them citizens, supplied them with jobs, bailed them out in night court, kissed their babies, and took their adolescents on picnics. It fixed traffic tickets for businessmen and winked at the violations of building and sanitary codes. It took various racial groups and saw to it that their most aggressive leaders were supplied with reasonably lucrative sinecures on the public payroll. Then, on election day, it took their votes in exchange, the citizenry knowing that their day-to-day destinies—if not their zoning laws and sanitation problems—were in good hands.

Of course, if the citizenry did not respond with a normal vote, just because of some extraneous issue like the tariff or the collapse of the foundations of the new jail, the organization took the votes anyhow. The organization did the counting—sometimes only the weighing—of the vote.

Gradually, over the years, the machine lost its power to do most of these things. The tide of immigration was dammed and the machines had no new crop of rapidly created citizens to help. Government welfare services replaced the clubhouse handout. Probation officers took over from the leader or his deputy in reviewing for the court the background of a youthful offender. Businessmen, during the depression, became more conscious of the organization "cut," as reflected in the tax rate, than grateful for the favors of the past. And, with the increased use of voting machines and federal supervision of any election in which a federal office was voted upon, it became tougher and tougher to steal votes. Those who did got caught, as witness the recent Kansas City vote scandal.

So the machine became obsolete and the "organization"

slipped quietly in to take its place. The organization does not control the vote, it *influences* the vote. When it goes after racial and religious blocs—and both parties do it—it does so by nominating a Negro to a higher office than ever before was offered to a member of his race, or an Italian for state-wide office, or a member of the Jewish faith for a post on the highest court of the state. It sees that its members in Congress vote "right"—for local rather than broad governmental reasons—on allocations of federal aid abroad or on antilynching legislation. Similarly, it sees that its local legislative members petition Congress for action in support of the Vatican or a free Palestine.

It can no longer win the vote by the beer party and the free handout, but it can woo the laboring man by jacking up wage scales or it can increase unemployment insurance payments and prolong their duration.

Naturally the "boss" who sat out on the sidewalk, presiding in tireless and vestless grandeur over a very informal receiving line, has been displaced by the leader—serge-clad, neat, and conscious of issues. His alliances may be with the community's entrenched respectability, rather than the underworld, but he is not necessarily more scrupulous—just more careful and much smoother. In most cases, the leader is personally "money honest." This, of course, is not necessarily a recent development. Many political bosses of the past refused to go along with George Washington Plunkett's contention that there was such a thing as "honest graft."

But look at the difference in type today between the old boss and the new leader. The background is different to start with. In the old days a good ward boss, possibly restricted in education to grammar school or less, rose, nevertheless, to be a good city or county boss, and, if hard-bitten, tough, practical, and ambitious enough, got to be a state boss whose name was known and whose word was law for miles around. Intrinsically, despite exceptions like Boies Penrose and Mark Hanna, the usual city or state boss was just the best of the ward bosses. He understood his colleagues and preserved most of their characteristics.

Today, the big bosses are not the men who came up as ward bosses or district leaders. They are businessmen, governors, United States Senators. Harry F. Byrd's Virginia organization has been called the tightest and best organization in the country today. And Byrd, a Senator and member of an old family, is its active leader. In New York and Indiana, to take two states at random, there are powerful Republican organizations of which the active as well as the titular head is the governor.

In Indiana, where they play politics for keeps, this writer saw Governor Gates run a recent state convention with an iron hand. The incumbent United States Senator was dropped as a party nominee because the governor wanted a state chairman in the job. A judge of a high state court was dropped, local reporters said, because he had dared cast a lone dissenting vote in that court in a case in which the organization was interested.

In New York, Tom Dewey had been elected district attorney of New York County and had made one unsuccessful though spectacular race for governor when the Republican leaders of the legislature—representing the party in the state as a whole —signed and published a solemn declaration that in matters of policy (state-wide politics) they would consult with Mr. Dewey and be guided by his judgment. That was in 1939, and in the intervening years he has consolidated his hold to the point where no one questions his one-man leadership of the party in the state today. Many a loyal Republican would be hard pressed to give the name and initials of the titular state chairman.

In near-by Nassau County, J. Russel Sprague, a popular, efficient county executive—the equivalent of mayor under Nassau's special charter—is as powerful as Frank Hague was in Jersey City in his heyday. He and his organization make the law but do not proclaim that they are the law.

How do they do it? In the old days there was a political axiom that a boss should not run for public office but should put his men in office, should be the power behind the throne, able at all times to dictate who should hold what job, either elective or appointive. As the machines went slowly into the

discard, the successful remaining bosses were those who paid no attention to the rule. Hague and Kelly, Crump in Memphis, held on longer than the others of their type because they began to dictate policy, too, from the administrative and policy-making public jobs they held.

The new leaders dictate policy and use the patronage whip to enforce their views. Many a balky legislator has given up his objections—founded on whim, prejudice, or principle—after a series of phone calls. The governor's office calls his home county chairman, tells him the legislator's vote is needed, and asks if the county chairman will please see that the legislator changes his mind. If the county chairman can't control the legislator, maybe the county chairman is not the proper person to dispense patronage in his county. The chairman gets the idea and the legislator is notified of the trouble he is causing. Of course, if he is just going to be a persistent troublemaker, interfering with the broad policies of the party in the state, maybe he'll have trouble in the next primary election. The legislator gets the idea.

In one case a legislator who declined to take persistent hints like that found that his past had been raked into and some disagreeable incidents disclosed, and the next hint was that those might be disclosed to his constituency. This time he saw the light.

Job patronage can't win an election any more, with the extension of civil service, the increase in the size of the electorate, and the general lack of interest on the part of the public in low-paying county, city, state, and federal jobs. But it remains extremely important for control of the party organization, indispensable for remaining in power.

So it is not surprising that a systematic, efficient, and comprehensive job-dispensing program exists wherever there is a strong organization in control. In one state, where the governor was "leader," he had one special secretary whose job was patronage dispensing. To this secretary were referred all requests by county chairmen and city leaders. He would weigh the possibilities, with an eye to present and future party policies, and

pass the recommendation up higher—to the governor, if the job was important enough either in salary or favor-dispensing potentialities. The recommendation also went to the state chairman. When both had approved, the applicant was appointed by the appropriate department head. And, to eliminate any possibility of error or later dispute, the governor and the state chairman both signed the card of recommendation.

For lesser jobs there are certain to be, and in this case there were, local patronage dispensers, for an area in the state, who did the preliminary sifting of possible appointees and forwarded what amounted to final recommendations to the capitol, even though there they went through an additional processing. The ramifications can best be realized when it is understood that appointees to staff an antiracial discrimination commission were so selected.

Job patronage can be, and is, defended on the ground that those in sympathy with a governmental policy should be the ones appointed to administer it. But job patronage in policy-making or administering posts is also important for the favors patronage carries with it.

Doing favors has been the way of making friends for political organizations ever since they were started—the old machines or their more modern replacements. Priority on the liquor license list, assignment of a building application to an inspector who will look on it with friendly tolerance, passage of a bill through the legislature which helps some particular group—such are reasonably frequent demonstrations of favor patronage; and if the man on top is to benefit, either through election support or party contributions, the deputy commissioners, the nonsalaried board members, even the legislative leaders, must be men who recognize the paramount importance of the organization and the man who heads it.

They must owe their positions to him, and usually do, or feel that their continuance in those jobs is a matter he can control.

So the new leaders find public office, high public office, a good place from which to run an organization. Many an old-time leader who did take office contented himself with a non-

policy-making sinecure which gave him a headquarters and a secretaryship in which he could place, at public expense, the most trusted of his aides.

Now it is the press secretaries and the ghost writers who, the leader makes sure, are in sufficient supply to do the job of influencing public opinion in order to influence votes and win elections.

Compare the photographs of Dewey, Gates, Byrd, and Sprague with those of Croker, Taggart, and Bill Barnes and you see the difference that a change in methods from machine to organization has made in the men who rule, the change from bosses to leaders.

Somehow the old-time, big-city machines were never able to achieve respectability, while the new organizations have it as a matter of course. Old Charles Francis Murphy, the Tammany leader who developed Al Smith, Jim Foley, and Bob Wagner, as well as others, came closer in his declining years to achieving it for Tammany, but he never actually got there.

And Charles Murphy, knowing that, used to complain that if the Democrats did anything wrong the public cried, "Stop thief," but that "the Republicans can get away with murder in this town."

The difference, of course, was that the Democrats at one time or another had been caught at thieving, while the Republicans had never been caught at murder, or even at lesser crimes. The old-time machines did steal blatantly and openly. They had the Robin Hood attitude that it was okay to take things from the rich to give to the poor, with a percentage of the take for operating expenses and a good time for the boys.

Those days are gone, possibly forever. Modern improvements have brought big business methods to the field of politics.

No. 11

The procedure by which the voters of a state may compel a popular vote on a legislative act, or place an act or a constitutional amendment on the ballot, without the intervention of the legisla-

ture, is clearly set forth in the following excerpts from the statutes of Nebraska.

INITIATIVE AND REFERENDUM[4]

Referendum; petition; form. The following shall be substantially the form of petition for ordering a referendum upon any act or any part of any act passed by the Legislature of the State of Nebraska:

Warning.

It is a felony for anyone to sign any initiative or referendum petition with any other name than his own, or knowingly to sign his name more than once for the same measure, or to sign such petition when he is not qualified to sign the same, or falsely to swear to the signature upon any such petition.

Referendum Petition.

The object of this petition is to .....

(Here shall be printed a concise statement in large type of the legal effect of the filing of the petition and the object sought to be secured by submitting the measure to the voters.)

To the Honorable ..... Secretary of State for the State of Nebraska:

We, the undersigned legal voters of the State of Nebraska and the county of ....., being severally qualified to sign this petition, respectfully order that Legislative Bill No. ..... entitled (title of act, and if the petition is against less than the whole act then set forth here the part or parts on which the referendum is sought), passed by the Legislature of the State of Nebraska at its ..... session, shall be referred to the voters of the state for their approval or rejection, at the regular election to be held on the ..... day of ...., A.D., 19..., and each for himself says: "I have personally signed this petition on the date opposite my name; I am

[4] *Election Laws of the State of Nebraska,* 1945–1946 ed., pp. 180–181.

a legal voter of the State of Nebraska and county of .....
..... , and am qualified to sign this petition; my city, village or post-office address, and my street and street number or voting precinct, are correctly written after my name."

Date	Name	City, Village or Post Office	Street and Number or Voting Precinct

[Here follow twenty numbered lines for signatures.]

. . . . . .

Initiative; constitutional amendment; petition. The following shall be substantially the form of petition for initiating any law or amendment to the Constitution of the State of Nebraska:

Warning.

It is a felony for anyone to sign any initiative or referendum petition with any name other than his own, or knowingly to sign his name more than once for the same measure, or to sign such petition when he is not qualified to sign the same, or falsely to swear to the signature upon any such petition.

Initiative Petition.

The object of this petition is to .....

[Here shall be printed a concise statement in large type of the objects sought to be secured by submitting the measure to the voters.]

To the Honorable ..... Secretary of State for the State of Nebraska:

We, the undersigned legal voters of the State of Nebraska and the county of ....., being severally qualified to sign this petition, respectfully demand that the following proposed law (or amendment to the constitution, as the case may be) shall be submitted to the voters of the State of Nebraska for their approval or rejection at the regular general

election, to be held on the ..... day of ....., A.D., 19.., and each for himself says: "I have personally signed this petition on the date opposite my name; I am a legal voter of the State of Nebraska, and of the county of ..... , and am qualified to sign this petition; my city, village or post-office address, and my street and street number or voting precinct, are correctly written after my name."

Date	Name	City, Village or Post Office	Street and Number or Voting Precinct

[Here follow twenty numbered lines for signatures.]

Chapter Four

LEGISLATURES AND LEGISLATION

No. 12

For many years the respective merits of the bicameral and unicameral principle of legislative organization were the subject of academic debate. The adoption of the single-chamber principle by Nebraska in 1934 made the matter one of practical observation. The article reprinted here was written, after four sessions of the new legislature, by a close and sympathetic observer.

UNICAMERALISM PASSES TEST[1]

Although the United States is engaged in an unprecedented world war and the end is not yet in sight, the thoughts of the people are turning to postwar planning. Near the close of World War I interest in state government was focused on budgetary reform and administrative reorganization; today it is centered upon the state legislature.

Many reputable citizens are pointing to the ineptitude of legislatures in their handling of the depression issues as an omen of their inability to cope with the many serious questions of social and economic policy that will plague them in postwar days. They feel that the mechanism of legislative procedure

[1] John P. Senning, *National Municipal Review*, Vol. XXXIII, No. 2, February, 1944, pp. 60–65.

must be reconstituted so that the lawmaking process will be adaptable to the nature and solution of those problems.

The nature and extent of that reform, whether it will follow the course of merely rejuvenating the bicameral setup or the example of Nebraska in adopting a unicameral structure, is unpredictable. Each plan has its stanch supporters and opponents. Unicameralism is a live issue in the Missouri constitutional convention now in session. The reasons advanced in opposition follow the traditional pattern of thought familiar to Nebraskans.

It is ten years ago this month that the campaign for a unicameral legislature was begun in Nebraska with the drafting of a constitutional amendment by a citizens committee. Again and again the question is asked as to why this amendment was successful at the polls. The reasons have been published too often to require repetition here, except for one very important factor—Nebraska had kept the idea of a one-house assembly alive and before the people since 1913. No matter how fiercely the fire of a campaign for governmental reform burns, there must be a backlog of education and information if the fire is to arouse the people to affirmative action.

Since the questions raised in opposition to the unicameral principle in Missouri and elsewhere are identical with those which were the center of debate in Nebraska, it may be appropriate to turn to actual experience of the operation of a unicameral assembly, through four sessions and one special session, and to see to what extent the prophets of gloom and pessimism failed in their predictions. The skeptic answers each of these questions with an emphatic "No." Is it possible for a small single-chamber assembly to be representative of the people? To be an effective deliberative body? To be a protection against hasty and ill-considered legislation? To be able to cope successfully with powerful pressure groups? Such an attitude reveals a misconception and a traditional view imposed upon the idea of a modernized legislature functioning in the present-day industrial and social environment.

In Nebraska the substitution of a nonpartisan, single-chamber assembly of 43 members for a partisan, bicameral body of

100 representatives and 33 senators reduced the total number of representatives without disturbing to any appreciable extent the ratio of farmers, business, or professional men and lawyers elected. Consequently the cross section of interests represented in the small assembly and in the bicameral body, subject to certain fluctuation, is the same. Multiplying men of the same occupational interest will not improve the representative character of the legislature.

IMPROVED PERSONNEL

Pursuing the subject of personnel we discover distinct gains in what may be termed a higher type of legislator. Considerably over 50 per cent of the unicameral legislators have either completed a college course or have attended an institution of higher learning one or more years. Furthermore a study of their place in the community shows that most of them have held public office or are influential members of civic and state social and economic organizations. They have therefore acquired a knowledge of the problems that are before the people and that are likely to need legislation for solution.

The most appealing argument used against representation in a small unicameral legislature was that, since Nebraska is predominantly agricultural in economic interest, the percentage of farmers elected would be too small for equable agricultural representation. One apparent fact was overlooked on the part of those who feared inequitable representation—that because of modern transportation, methods of production and distribution and industrialization of farming, urban and rural economic interests have become so intertwined that the differences of an earlier day have virtually disappeared.

A second fact emerged from an extended study of the occupations of the men elected to the one-house assembly and, for comparison, of the men who had served in the lower house of the bicameral legislature from 1921 to 1935. Of the bicameral representatives approximately 48 per cent were identified with two or more occupations while 52 per cent followed a single occupation. Of the unicameralists who served from 1937 to

1943, inclusive, approximately 69 per cent are identified with two or more occupational interests while 31 per cent have only a single occupational interest. Mr. Farmer, for example, also specializes in livestock raising, serves on a board of directors of a farmers' cooperative or of a rural telephone company or a local bank, and at the same time is identified with the associations representing those interests. Likewise Mr. Merchant, Mr. Lawyer, or Mr. Professional Man has a similar breadth of interests.

While the legislators do not lay claim to being experts, but just plain ordinary men, nevertheless by reason of their catholicity of interests, their wealth of experience, coupled with their demonstration of good judgment and common sense in their labors session after session, it follows that this small body of legislators is actually more representative of the state's interest than a body twice its size or one of 100 members.

Representatives of this quality are aware of their responsibility as the custodians of the great power vested in the single-chamber assembly. They gave evidence of that attitude during the first session in setting up the procedural framework within which the process of legislation has been carried on. The rules have been kept simple. A conscious effort was made to implement and supplement the safeguards set up in the constitution to prevent hasty and ill-considered legislation. Nor did the legislators rest on their oars after the rules of procedure were adopted. At each successive session alterations to facilitate work or to increase responsibility have been incorporated in the rules. This constant urge for improvement is in striking contrast to the old type of legislature in which rules were used for manipulation instead of for safeguarding the process of legislation.

The system of mandatory public hearings on all bills, inaugurated by the unicameral legislature, has steadily grown in importance. No legislator may serve on more than two of the eleven standing committees which deal with substantive legislation. Conflict of committee attendance is avoided by a carefully prepared schedule of time and place of meetings. This

schedule, published in leaflet form and widely distributed, becomes a highly important source of information as each committee announces what bills will be heard at each session. The latter notice must be published five days prior to the session at which the hearing is had and a like notice is issued if a second hearing on the same bill should be necessary.

NO SECRET SESSIONS

The public announcements of committee hearings and the full press reports of the discussions at the hearings have created a renewed interest in the legislature by the people of the state. Increasing citizen participation in the hearings from session to session has brought the legislature close to the people. Hearings are also a great aid to the committee in determining the attitude of the public toward the legislative proposals under consideration. The press reports hearings almost, if not quite, as fully as it does the deliberations on the floor of the House. Contrary to the practice in at least some bicameral legislatures, there are no secret executive sessions of committees. The public is excluded from executive sessions, but the press is present. In addition to its recommendation to the legislature as to disposition of a measure, the committee presents a statement giving reasons for its decision. This is mimeographed and placed on the desk of every member.

After a bill has been reported favorably by the committee to the parent body, it receives two thorough considerations by the legislature itself. The first, General File, is the more exhaustive of the two. It is here that the bill is amended and each section approved or disapproved. It is also at this stage that the greatest casualty of legislative proposals occurs, except, of course, in the standing committee.

LEGISLATIVE PROCEDURE

Because a bill is so thoroughly discussed on General File, the debate unchecked, the clash of opinions often sharp and sometimes lobbying tactics exposed, there is captious criticism that the legislature is too slow. It is recommended, chiefly by lob-

byists, that there be two or three leaders who would dictate to the rest of the House how to vote.

An interval of not less than three days must intervene between the first or General File consideration and the second or Select File consideration. Unless the measure is indefinitely postponed on General File it is sent to the Committee on Enrollment and Review for a thorough overhauling by the committee's legal expert for incorporation of amendments, attaining clarity of expression, and technical arrangement. All changes recommended by this committee are acted upon by the House. Following the second consideration on Select File, the Committee on Enrollment and Review prepares the bill for third reading and final passage. After the bill is printed in final form it must, by rule, lie on the members' desks for two legislative days before the final vote.

NEBRASKA UNICAMERAL LEGISLATURE. DISPOSITION OF BILLS

	1937	*1939*	*1941*	*1943*
Bills Introduced	581	523	515	446
Committee Action				
Recommended to General File	312	306	298	301
Indefinitely Postponed	205	124	177	136
Omnibus Motion	56	93	31	9
Withdrawn	8	0	9	0
House Action				
General File	312	306	298	301
Passed	239	155	209	250
Indefinitely Postponed	54	34	12	30
Omnibus Motion	19	117	75	21
Select File	239	155	209	250
Passed	235	148	204	249
Indefinitely Postponed	2	7	5	1
Omnibus Motion	2	0	0	0
Third Reading File	235	148	204	249
Passed	230	144	202	247
Defeated	5	4	2	2
Vetoed by Governor	16	6	7	7
Became Law	214	138	196	241

The full and open discussions, spacing of time between files, careful examination for errors after each consideration, machine and record votes, laying over of bills for additional information, all make for a satisfactory product. Moreover the orderly progress of work throughout the session prevents the piling up of a large number of bills to be disposed of during the closing days—another safeguard against hasty legislation. Not only does this make for a satisfactory product, but also the governor is not confronted by a large number of bills for his approval or veto after the legislature adjourns. After adjournment in 1937 the governor had in hand 26 measures, 24 in 1939, 11 in 1941, and 7 in 1943.

The relation of the governor to the unicameral legislature has been watched with interest especially since opponents of the unicameral plan predicted that the governor would exercise complete domination over the small legislative body. As a matter of fact the nonpartisan legislature and the chief executive have worked together more as two coordinate departments than did the governor and legislature under the bicameral system. A closer relationship exists at present between the governor and the Assembly since the governor acts as liaison officer between the federal government and the legislature in transmitting the interpretation of federal laws, rules, and regulations relating to federal-state legislation, to committees and to the House. He has been able to iron out differences much more effectively than if the legislature dealt directly with the federal agencies.

Both governors who have been in office since the inception of the unicameral body have objected strenuously to the constitutional prohibition that prevents the chief executive from vetoing items in the appropriations bill which have been raised above the figures set in the executive budget, after the bill has been passed by a three-fifths vote. This objection is not directed at the unicameral legislature but rather at a decision of the state supreme court in 1929, which said that veto of such items would constitute a second veto. In 1943 Governor Dwight Griswold asked the legislature to pass and submit to the people a

constitutional amendment which would give the governor the constitutional power to veto items raised above the executive budget, but the proposal did not get out of committee.

The veto power has never been exercised to any great extent in Nebraska and the same is true under the unicameral plan—see table, page 92. Furthermore there are frequent conferences between members of the legislature and the governor and understandings are effected while a proposal in which the governor is interested is under consideration. The position of influence which the one-house legislature has attained makes it stand on the same footing and coordinate with the executive department. Thereby the governor and the legislature act as a check upon each other.

WHAT OF THE LOBBY?

Is the one-house assembly able to cope with the lobby? Opponents of the unicameral legislature warned that the lobby would throw the legislature into confusion and assume control. They pictured the lobby as a few powerful special interest groups working under cover and attempting to corrupt the membership. Modern pressure groups are made up of a vast number of citizens whose manifold interests cover all the major fields of legislation. But the old-fashioned lobbyist is still on the scene using the objectionable tactics with which his name is associated. The unicameral legislature gives the representatives of the pressure groups opportunity to be heard at the public hearings where they perform a distinct function in expressing public opinion and in furnishing factual information.

A few persistent lobbyists pester the legislature in their insistence on attaining their objectives. The very nature of the one-house legislature, however, is a check upon their activities. The direct and open procedure soon exposes any member who is prone to succumb to lobby influence. It is not uncommon for a legislator on the floor of the House to call a lobbyist by name and to state in what underhanded practices he is engaged.

Each session has seen one outstanding struggle where powerful lobbies were pitted against each other—in 1937 the allot-

ment of 1 cent of the gasoline tax for relief, in 1939 and 1943 bills which brought private and public electric power forces into conflict, and in 1941 the regulation of small loan companies. The one-house legislature is much more successful in combatting lobbying influence than was the bicameral assembly, because its small membership is unhampered by party control, and because of the open procedure, the searching publicity, and the neutralizing influence of opposing pressure groups upon each other.

Why has the Nebraska unicameral legislature increased in popularity during the seven years of its operation and why are the requests for a return to the bicameral system few and far between? The product of legislation has been satisfactory and shows the result of exhaustive consideration and matured judgment. The process of deliberation is orderly and effective, conducted by a group of men who are representative of all interests in the state. The resistance to the lobby has inspired the confidence of thinking citizens in their lawmaking body. The development of research facilities through the legislative council assures accurate information to the legislature. The quarterly meetings of the council, held in different parts of the state where public hearings are conducted, induce citizen participation and lead the people to think of the legislature not as a discontinuous body but as a constantly functioning department of the state.

What of the future? There is a disposition on the part of members of the legislature to be alert for improvements in deliberation. Planning for and research upon important issues will be increased in scope. Forward-looking legislators are talking about a staggered four-year term to replace the present biennial term, of quarterly sessions to take the place of the long biennial session, and of salaries equal to those of judiciary and executive state officers.

The modernized structure of the Nebraska legislature is not a solution of legislative problems but only an instrument in their solution. It is a human instrument and as such can claim no infallibility, but it is a step toward coordination of the proc-

ess of lawmaking with the social and economic life of the people of the state.

No. 13

There is no good reason for doubting the accuracy either of the following description of legislative behavior or of the author's general judgment about legislatures. Before allowing oneself to grow too cynical about the matter, it is well to note that the legislature described contained a "typical slice of humanity." This is what a representative body is *supposed* to be; if we don't like it as it is, the remedy lies with ourselves.

I HOLD OFFICE[2]

I

Until I came there at the age of twenty-four to take up my residence as a legislator, I had never set foot in the State House. Entering, I found the marble corridors jammed with just such a good-natured rabble as one might encounter in the bleachers of any baseball park. The Democratic caucus was scheduled for that day and hour, but finding the doors of the House chamber locked and seeing as yet no familiar face, I began weaving aimlessly among the crowd. At length I collided with Slim, who was emerging rather feverishly from a smoke-hazed committee room. Slim was a veteran of our county delegation, a little butterball of a man with watery eyes and the voice of an auctioneer. He was beginning his twelfth term as legislator and living, I knew, in high hopes of being made Speaker of the House. I knew, too, that behind the door he had just closed was a conclave of bosses coming to compromise over the Democratic candidate, whose election—for there was only a handful of Republicans in the House—would be a simple matter of routine.

[2] Holmes Alexander, *Harper's Magazine*, Vol. 167, September, 1933, pp. 415–424.

"Any luck, Slim?"

He was more than twice my age, but the comradeship of an election campaign had bred familiarity.

"No," he said. "The Big Three want Gus."

The Big Three comprised a triumvirate of bosses who all but held a mortgage on the State House. If they wanted Gus, I surmised, then Gus it would be, though Slim, as senior member of the House, seemed the logical choice for the chair. It was my first close-up to the pettiness of politics. The Big Three had sidetracked Slim because Slim was a friend of Jim, and Jim had come out against the governor in the primaries.

"That's too bad, Slim."

He took me downstairs to the office of the state commissioner. The room was crowded tight, its walls lined with portraits of former commissioners, its furniture upholstered and polished. In one corner, making a triangle with the walls, was a long mahogany table on which doubtless many a momentous document had been signed. Now it was littered and stained with wet glassware. Two lovely creatures were standing behind it, rinsing glasses and pouring drinks. I didn't recognize anyone in the room; nobody looked particularly distinguished, but there were some handsome girls. Slim wandered off, leaving me without an introduction or any means of one. I eyed the liquor thirstily. Soon one of the handsome girls approached me.

"Like a drink?" she said.

I nodded vigorously and we went to the table together.

"I'm one of the secretaries here for the session," said the girl. "I suppose you're a new delegate."

I presented myself. "Are these all—secretaries?"

She winked. "Some of them. Come and meet Clarence."

Clarence was state commissioner, my host. Unlike most politicians—for as a rule they run to bulk—he had the appearance of being underfed, and his heavy spectacles gave him the owlish solemnity of a scholar. He pressed my hand moistly and declared with profusion that anybody from *my* county was a friend of his, that during the session I was to consider his office my home. I thanked him. His name, Clarence went on artlessly,

would come up before the legislature tomorrow for ratification —a mere formality of course.

"But every vote counts," he added pointedly. "Have another drink."

I had another, then several more. I met a number of Clarence's friends, recognized several because of the publicity of their names in state politics. Two hours later the telephone rang and Slim answered it. He banged on the table with his fist.

"The caucus is on," he shouted. "We'll have to go up and vote in Gus."

We who were delegates trooped upstairs to the House chamber. On the front row I found a seat marked with my name. I stood before it, regarding the prefix "Hon." with no little pride, though a cursory glance at the hundred-odd other "honorables" mitigated somewhat the intensity of that vanity. My seat was separated from Slim's by three other members of the delegation. He suggested that I move over next to him so that he could coach me during the session. I rather resented the implication that I might need or accept instruction in my voting. I knew right from wrong, I thought, and that would be sufficient.

We went briskly through the business of endorsing Gus. One of his own delegation put him in nomination, then Slim moved that it be made unanimous. I was mildly surprised at the supineness with which these lawgivers accepted their bosses' dictation. Besides Slim, there were at least a dozen other candidates for the job, all equally ambitious and certainly more entitled to the chair than the nominee, who had, I knew, served only one previous session and during that period had never once taken the floor to express an opinion. I had yet to learn that just such open-mindedness is the best promise a politician can show. Gus, people told me, would go a long way.

We stood up and gave him a strenuous round of applause as he ascended the rostrum to read off a typewritten speech he had prepared several days before. As soon as that was over I hurried back to the commissioner's office to rejoin the party.

II

I came to the State House with all the earnestness and credulity of a young man who had been told that here is a chance for him to "do something" about politics; and I left, three months later, forlorn of any loftiness save that of a tolerant and hilarious contempt for all things political. I record my service to the state mainly as a comic adventure, worth while, if at all, for the pleasantries of frequent debauch, for the opportunity of new and enduring friendships, and for the experience of the morals and modes of backstage politics which constantly amazed me.

"There are," wrote H. L. Mencken, in reference to legislatures in general, "always a number of really intelligent and public-spirited men, but the majority are simply low-grade political hacks . . . too stupid to know what the public interest is and too degraded to think of it even if they did. . . . The one aim of such professionals is to hang on to the public teat as long as possible."

I soon discovered that such an estimate of political personnel was by no means confined to Mr. Mencken, that, indeed, it expresses aptly enough the opinion of the very people who elected us. It is a strange fact that the profession of statecraft, which lives as no other on the good will of the people, should be in such universal disrepute. You are, if a politician, either a crook or a nincompoop. My elevation to public office, far from gaining me any esteem among my friends, served only as a tremendous joke; and I had not been in office a week before some of my constituents began to leer and to ask me confidentially how much I really expected to shake down during the session. Much of this was of course facetious; but those who assumed my own integrity doubted that of my colleagues. People, I came to conclude, rather expected us to skin them, and only asked in return a good show for their money.

The truth of the matter is that the group of men I met at the General Assembly represented as typical a slice of humanity as you are likely to find in any profession, taking rural and urban. There were naturally plenty of boobs and shysters, naturally

plenty of hypocrites and quacks, but there were also more than a few who were both honest and capable. And if this better element was one in constant flux; if, that is, the intelligent and public-spirited men rarely succeeded themselves in office, that was because intelligence so soon offends the voters and public spirit almost immediately offends the bosses. I met men at the legislature whose intentions were strictly honorable; I met others who were, true enough, wholly content to go along with their leaders and frugally to tighten their grip on the well-known udder.

A major percentage of the speeches I heard were intended solely for that latter purpose, were delivered with some grace and much gusto, though without the slightest hope of changing a single vote in the House. I listened embarrassedly to the splashing of crocodile tears while a delegate, defending the Woman Jury Service Bill, invoked the shade of "the finest woman in the world—my mother!" I heard a tidewaterman "prove," in attacking the Anti-Purse Net Bill, that Christ had used purse nets on the Lake of Galilee; I heard him liken his homefolk—a regiment of whom were sitting in the gallery—to the "blessed disciples." I was present when the wrath of Jehovah of Sinai was called down on all who should dare support the Blue Law Repealer; I was given to understand, while the spokesman rolled righteous eyes toward his parson standing in the doorway, that such support was high heresy. So confronted with such—and much—evidence I came to surmise that the most useful political utterance is the one most filled with sententious bombast and most innocent of any assumption of the hearers' intelligence. And if there were no other reason to think so, I might recall what was the most applauded speech of the session—the Speaker's on accepting the chair.

That gentleman—he had spent the past two months backslapping his way into the job—declared himself not only astonished but overcome with the honor, the responsibility just visited upon him; delivered himself of a windy eulogy concerning "this gr-r-r-reat state," its noble citizenry both quick and dead; and he ended chokingly:

I have taken as my motto:

Do what Conscience says is right,
Do what Duty says is best,
Do with all your mind and might,
Do your duty and be blest.

Coming into office as I did with a not unnatural assumption of self-importance, I found it hard to swallow the fact that though an "honorable" and a holder of the people's franchise, I was expected and destined to be little more than a "yes man." During the first week I was secretly incensed that Slim should pass me vocal instructions as to how I was to vote. It so happened that these early measures were innocuous and unimportant affairs, affording me little excuse to gainsay his advice, but I was determined at the first opportunity to exert the sovereignty of my own opinion.

I had not long to wait. In the middle of the second week there was listed for second reading a bill to do with judges' pensions. I made it a point to learn all I could about the measure, and the salient fact uncovered was this: that the judge to be most immediately benefited was the uncle of an influential delegate who had persuaded a sufficient number of colleagues, in return for favors promised and received, to lend their support to his bill.

There was a full gallery that day and a number of explanatory speeches from the floor. I listened carefully, jotting down fact and figure, half hoping all the time that my conscience would dovetail with Slim's, my declaration of independence be postponed. But when it came time for the roll call and Slim had passed down his customary instructions, I was confronted with the conviction that the bill was nothing short of an outrage. The clerk called my name and I responded with a resolute "No."

To my consternation I saw Slim leap to his feet, saw him level a stunted finger at my head, and heard him shout in a voice he might have used to hail a taxi, "I told you to vote aye!"

There was an agonizing hush throughout the room. I could

hear only the creaking of seats as delegates and spectators strained forward to see the object of Slim's wrath. The flustered clerk repeated my name, and in a voice husky with stage fright I answered once more in the negative. Slim flopped back with an audible and contemptuous "My God!" A flurry of laughter went over the room. I was hot and sweaty with mortification.

Nor was this public indignity the only unpleasantness that resulted from my first attempt at individualism. To have labeled myself a bolter so early in the session made me the object of much amusement, and no little scorn. Nobody, save himself and a few kindred cranks, ever takes a bolter seriously. It was a reputation I did not relish.

Then too my defiance cost me a temporary estrangement from the other members of my delegation. It was beyond them to understand why I should deliberately fly in the face of authority. I liked Slim, valued his friendship, and I certainly had not intended my gesture as a personal affront. But Slim could take it no other way. I had not only insulted him, he said, but I had jilted the party. He had already traded my vote away on another measure; I had made him an Indian giver. Vainly I argued that the vote was mine, not his or the party's, but Slim only shook his head. How did I expect him to get anywhere if he couldn't control his own delegation. Why did I suppose the boss had put me on the ticket if not to "go along"?

The immediate effect of Slim's displeasure was to fill me with a yet more potent charge of self-importance. I was still trailing some of those clouds of glory I had brought with me, still thought I was there to "do something." I began fancying myself a lone wolf, a Daniel come to judgment. I resolved to bolt as often as I had the moral persuasion.

Fortunately for my own peace of mind and general enjoyment of the session, this early zeal of conscience was short-lived and not robust enough to withstand either the dominance of Slim's leadership or the wear and tear of boredom that assails this business of lawmaking after the novelty of the first two weeks. It was not only that I lacked the moral stamina of a congenital reformer, but that I soon began to suspect that if I

were to accomplish anything at all it would have to be by playing the game according to its own rules.

One day soon afterward I was sitting as a member of the Committee on Corporations and was called upon to cast what amounted to the deciding vote on the recommendation of the Full Crew Bill. This measure, providing that the Transit Company should man its street cars with both motorman and conductor, seemed to me an aggressive move against the unemployment problem. I, therefore, voted that the bill be returned with a favorable report. Ten minutes later I encountered one of the party bosses on the floor of the chamber. He bore down upon me in a towering rage.

"What the hell's your idea on that Full Crew Bill?"

I began citing its virtues and my own reactions, but he cut me short.

"To hell with unemployment! Don't you know who's legal counsel for the Transit Company? Do you want to put *me* out of work?"

"No, but—"

"Now listen. I've told the chairman of the committee that you've changed your mind about that bill. It comes out with an unfavorable report. See?"

"Yes, but—"

He looked me up and down with a withering scorn I had never before faced.

"For God's sake," he said, "grow up."

If the gentleman meant by this that I should develop a more mature apathy toward the everyday atrocities of smalltime politics I think he had subsequently little reason for complaint. I knew by now that the way to amount to anything is not to revolt but to compromise. No man's single vote or his burning conviction is enough to transform his ideas, however good, into legislation. He has to accumulate enough support to get his majority, and often the only way to do it is to wink at, and even be party to, propositions not in themselves praiseworthy. Late in the session I managed to put over a pet bill of my own, a Blue Law Repealer, yet in the process of success I had to vote

for three bills I thought ridiculous and to walk out on another I knew to be scandalous.

But if I became, as time went on, less militant against the highhandedness of political methods I never ceased to wonder how their practitioners get away with it all. They shouted loudly for economy, but when it came to a showdown the only two bills designed to curtail patronage were summarily defeated. And the way we made swag of the taxpayers' money was little short of piracy. On the pay rolls of the House there were a little more than half as many jobholders as there were delegates. Or to turn the figures another way, I calculated that every member had 61 per cent of a jobholder to valet him. Most of the jobs were overpopulated and there were so many supernumeraries and alternates hanging round with nothing to do that we sent some of them home on full pay to get rid of them. There were more doorkeepers than there were doors; more cloakroom keepers than there were cloakrooms. And not only were there more jobs than we had any possible need for, but the persons chosen to fill them were, as often as not, incompetent to the point of travesty. The sergeant at arms, supposed to be a hard-boiled bouncer, was a cripple. He had, theoretically, two assistants, but once when the floor leader asked who and where they were, nobody could tell him. One of the so-called secretaries was, if I remember correctly, a plumber, three more were farm hands, and yet another was a professional referee. A census taken by an enterprising reporter proved that of the fifteen stenographers listed on the books only three knew how to typewrite. It was common gossip, though I cannot vouch for it, that the position of chaplain, a $5-a-day sinecure, had once been bestowed on a useful Democratic parson who, living some distance from the capital, thriftily sublet the holy office to a local brother, cleared a round sum on the deal, and never even came within praying distance of his charges.

All this as it gradually unfolded on me seemed bad enough but it was, after all, only petty larceny. There was worse and more of it. Six supervisors of election were receiving $48,000

when there were no elections to supervise. Three commissioners for opening streets were receiving $10,000 in a year when there were no streets to be opened.

But it would be foolish and grossly unfair to imply that there was not a considerable amount of competent and necessary work done at the legislature. There was a great deal, though most of it—all that mattered—was done and run by an exclusive oligarchy of leaders and bosses, and only indirectly by the rank and file of delegates, who, thus ignored, soon became chiefly concerned with making their residence as carefree as possible. Whenever an important bill hove in sight the oligarchy had the House thrown into recess, and retired itself into privy council. Sometimes when a bill came out of the council it was hard to tell just what was behind it, for we were simply given our voting orders and expected to act accordingly. Often when a bill came to the floor with a sheaf of amendments attached and was rushed through on suspended rules we had no idea, nor any chance to discover, what it was all about. Some of this was, of course, sound and disinterested legislation, but not all. Once during the banking crisis I voted, all unknowing, for a bill drawn by the director of a shaky bank, authorizing the county treasurer to turn over his public funds for bank stock! Another time I voted for what I thought was a Sunday Movie Bill, but which by an intricate set of amendments, turned out to be merely the setup of a censorship board to be created eventually for the benefit of a few more jobholders.

In this General Assembly, so dominantly Democratic, there were, properly speaking, no party fights. It was only when—and this was not seldom—the oligarchy divided against itself that there was friction. Before the session had aged many weeks there were half a dozen cliques, all overlapping in personnel, but seemingly incapable of compromise. One, for example, abetted by the Dairymen's Association, favored a subsidy for the cowmen; another, egged on by the Fishermen's Union, would have the oyster beds protected; and still another, coddled by big-town business, was all for changing the corporation and liability laws. It was city man against countryman;

farmer against fisherman against factory man; all out for themselves; all after a slice of the budget. And if they couldn't get it themselves, it was a case of dog in the manger. Nobody else should have it either.

Political battles, like martial ones, are won, to quote a Confederate General, by getting "the mostest men thar fustest." That is ever the clique leader's problem, to get his votes lined up before his bill comes to the floor. His power and his prestige depend on the strength he can muster. Generally this garnering is done off stage, but I recall at least one instance when it took place on the open floor. His bill having failed of a majority by four votes, a delegate called for a revision of roll call, and in the interim between the recount and the official announcement he scurried about and managed by a series of whisperings to persuade three colleagues, who had presumably just voiced the dictates of their conscience, to see things differently and to change their vote. Such maneuvers seemed to me at first outrageous and I would have no part in them, but before long I came to understand that politics, even sincerely played, is mainly a game of bargain and barter, where matters of right and wrong are not always distinguishable. Here, for instance, was I, accepting a salary to represent my county—that is to grab everything I could for its benefit. If I had to swap votes and compromise with my conscience in doing so, that was then part of my duty. I was damned if I did or if I didn't.

III

Soon after my arrival at the State House the lobbyists aroused my curiosity. From what I had read and heard of the species, I expected to find them skulking banditti that lurked behind the white pillars of the corridors and, like so many serpents of Eden, whispered temptations into innocent ears. As a matter of fact, they turned out to be, on the whole, no less intelligent and certainly more industrious than we legislators. And far from being shamefaced about their profession, they rather patronized the less influential delegates. Often I

would arrive at the House chamber to find one of them complacently occupying my seat, leaving me, lawgiver that I was, to stand or to shift for myself.

Most of them were there, of course, because of their interest in some particular cause; but there was a sizable group of free lances, who, having no bill to work on, hung round like third-rate jockeys at the race track, hoping to pick up a ride.

By far the most colorful and prosperous of all the lobbyists was one known about the House as Boojum, the fat and fiery apostle of the Lord's Day Alliance. He was an old man, a broken-down evangelist, employed by an organization of Old Testament die-hards to block legislation against the Blue Laws. Boojum used to waddle about with his pockets full of pamphlets compiled to prove that Paris with open Sunday required ten gendarmes to every bobby of London, where the Sabbath was still kept holy; that the fall of Rome, Nineveh, Tyre, and Berlin were the results of their godless ways; that any number of biblical references point unmistakably to the ruin of America unless we should forthwith turn from our iniquity. He was your old-fashioned psalm shouter who relied on lurid allusions to hell-fire and brimstone to press home his points; never once did I hear him mention Heaven.

Boojum and I were bitter adversaries in our official roles. He rode me unmercifully in his campaign against my Blue Law Repealer, called me every kind of an evil-minded, besotted upstart; and I retaliated as best I might. But off stage we became pretty good friends. We sat round together, talked religion and politics by the hour. I used to tease him by offering him drinks of liquor and tickets to burlesque shows, and he entertained me at length with anecdotes of all the famous statesmen he said he had known. Above all else he was proud of the Phi Beta Kappa key he had won at college forty years ago and of the three broken fingers he had acquired playing baseball. But in all our intimacy Boojum never allowed himself to drop out of character. Always he remained the prophet of righteousness-or-woe. A lovable old cuss was Boojum, and for the life of me I can't say whether or not he was a hypocrite.

Professional lobbying, I learned, is based on the assumption that every man has his price or his weakness; and I have never found reason to doubt it. Even if a man be not moved by the clink of gold or the shouting of psalms, he is not, therefore, immovable. I give myself in proof. No one at the State House ever offered me money, no one ever stirred me by psalmistry, but I was, nevertheless, victimized by a lobbyist.

My corruption came about so pleasantly that not until it was all over did I realize how easily I had been undone. The proponents of the Woman Jury Service Bill had created one day a spectacular commotion by marching—sixty singing women—up and down the corridors, flaunting banners that proclaimed feminist rights. They had serenaded the governor, had buttonholed delegates, and in general stirred up a great deal of merriment at their own expense. We legislators, though we openly jeered at the bill, were rather grateful to them for diluting the boredom of an otherwise dull week. I was among the loudest laughers. I thought the bill was a totally absurd proposition, and I showed no reticence in saying so. Yet a few days later I not only voted for it but made my first speech of any length in its defense.

The explanation is that there was among these zealots a lady young, charming, and persistent, and mine was not the only mind she changed. She was a lobbyist only pro tem, being an ex-debutante who, tiring of social frivolity, had teamed up with the feminists for "something to do." I found her mastery of facts rather uncertain, but that shakiness never curtailed her persuasive powers. Once I asked her:

"What's the sense peddling a bill like this? You wouldn't want to serve on juries, would you?"

"Oh, that's different," she said.

"Well, do you know what states, if any, use woman jurors, and how successfully the system works?"

"No," she confessed, "but that's not the point."

What the point was she never bothered to explain. I only know that I was enchantingly hoodwinked into supporting her

bill and that, on the day it failed, she took herself out of our lives—until, I suppose, the next session.

The parade of the woman jury servicists was not the only one staged for our benefit. Far superior to it in clamor and thrills was that of the hunger marchers. One day late in the session we were lolling through the routine, passing laws and ladling out money, when suddenly the door at the rear of the chamber burst open and fifty hoodlums, black and white, male and female, filed up the aisle, pushing the lame sergeant at arms before them.

A more ragged, woebegone, and obviously harmless crew I never saw. Fully thirty of them were Negroes, not your stout insolent bucks but undersized, shivering black trash that huddled together at the sight of so many white scowls and would doubtless have broken and fled at the first crack of the gavel had not someone shut the in-swinging door behind them. The leaders, a pair of Italian agitators, advanced boldly to the rostrum and, without preface, one of them began reading a printed petition.

The Speaker flailed on the desk with his mallet, informed them sternly that they were out of order, and requested that they hand over their petition to the reading clerk. This insistence on formality the swarthy spokesman either mistrusted or misunderstood, for he simply raised his voice and continued to recite. Up to this point the delegates had sat in silent curiosity, but now there rose a buzz of indignation which culminated in a lusty, "Throw 'em out!" I vaulted over my desk into the aisle and found myself engulfed in a free-for-all.

It was no stand-up-and-slug affair, rather a melee of push-and-shove. The two leaders, though outnumbered twenty to one in the first rush, valiantly attempted to hold their ground; but their cohorts at the rear stampeded frantically for the door, which, because it hinged toward them, only hindered their retreat. My body, propelled from behind by the weight of reenforcements, became an unwilling projectile, and I pierced the enemy phalanx, sprawling on my knees at its core. For a

few uneasy moments I had visions of serving as a vicarious sacrifice for the sins of capitalism, but fortunately the marchers were more intent on escape than on vengeance. Nobody attempted to kick or pommel me, and I struggled up in time to issue with them (the door having finally been opened) into the lobby.

Here the trouble should certainly have ended, for the congestion was relieved and cooler heads soon prevailed upon the agitators to conduct their hearing in an orthodox manner. But some panicky individual had already turned in a riot call. Fully fifteen minutes after the exodus, and when affairs were in a state of pacific anticlimax, the local police, re-enforced by state troopers and a posse of deputies, charged into the corridor wielding blackjacks and firearms. With the fury of confident numbers, and to what purpose I do not know, they fell upon these disheveled starvelings.

Heads were broken, blood was shed. I followed the course of the fracas out of the building. I saw a woman pitched headlong down the stone steps into the street. I saw a Negro boy, struggling only to escape, being held by two burly cossacks and clubbed into insensibility by a third. I saw a white man lying face down on the curb. It was raining, and the gutter of State Circle literally ran red with his blood. I started to lift him, but a reporter delayed me while he snapped a picture. A bluecoat shooed me away, and, clipping a handcuff on the limp wrist, posed grandly over his captive.

Then outside some shooting began. No one, I understand, was hit. The idea was simply to round up the fugitives, to keep them herded until the patrol wagon in several relays had carted them off to jail. I saw three Negroes running down an alley, their hands on their trouser seats, leapfrogging at the sound of every shot. They were headed off and came back under guard, their hands raised, their eyes rolling. A cop struck one of them across the mouth with a handcuff. The Negro lowered a hand to the slashed lips and the cop hit him again.

The whole fiasco was a sickening and inexcusable exhibition of selfrighteous authority, and for the first time during the ses-

sion I was really aroused. Hardly knowing why, I followed the last wagon to the jail.

"Better get outa here before we lock you up," advised the keeper.

I blustered. "I'm a member of the state legislature. I'll get out when I'm good and ready."

Visibly impressed he turned away. I was confronted by a state trooper, a veritable titan of a fellow with a blackjack in one hand and a pistol at his thigh.

"Beat it," he said.

"I'm a member—"

"Listen, buddy, you ain't a member of this jail. Get out."

"What about those people? They didn't do anything."

"Say, are you gettin' out?"

I looked him over and decided to move on. Back at the State House I found the attorney general in the lobby conferring with the county sheriff and the two Italians. I heard the attorney promise the agitators that if they could get their gang out of town in half an hour all should go free.

One of the Italians threw up his hands. "Get 'em out with what—ambulances?"

"Take it or leave it," shrugged the sheriff.

I went back to the jail to watch the marchers depart—those who could walk. They were sullen and cowed. Someone had collected a hundred dollars to feed them, but this gift the leaders scornfully rejected.

That afternoon the clerk read their petition. It demanded in part: state unemployment insurance, a donation of the militia funds to the poor and needy, a repeal of the Jim Crow laws.

"Refer to the Ways and Means Committee," chanted the Speaker. And that was the last we ever heard of it.

IV

Until I went into residence at the state capitol I had no idea of my capacity for dissipation. At college I had weathered periodic sprees, but at the legislature they were almost a mat-

ter of daily routine. Somehow we were rarely sober after sunset.

As soon as a session adjourned those of us who felt the urge would retire to any one of a dozen office rooms in or about the State House. I had fitted up one under the delusion that I might get some work done in spare moments. Here was a table, plenty of chairs, a wash basin, and several filing cabinets. The bottom drawer of each cabinet was our larder; we kept our liquor there. In case we ran short there was replenishment near at hand. One of the "secretaries" had turned bootlegger. Every day he drove down from the city in a car with a tricky back seat that was stocked with three-dollar bottles of rye and two-dollar bottles of gin.

On a good night we'd have as many as twenty-five or thirty there—delegates, lobbyists, reporters, jobholders of both sexes, and not infrequently two or three young wives. One evening I came late to the party and, finding the door locked, banged indiscriminately upon it. The purr of voices ceased, and though I continued to rap impatiently, the door remained shut. Finally I called out and at length a friend's face appeared in the crevice. Recognizing me, he opened up. The usual crowd was there.

"Why didn't you give the signal?" said my friend. "We thought you were a Republican."

Our celebrations usually carried us deep into the night and we seldom got back to the hotel before two or three o'clock. At eleven the next morning we'd rise from beds of pain, pour down an eye opener, and limp off to the State House for committee meetings that had probably been scheduled for two hours before. Nothing at the legislature ever came off anywhere near the appointed time, and the chances were that no matter how late we arrived there wouldn't be a quorum present. It's a wonder to me we ever got any laws made.

The final day of the session was one of uproar, revelry, and last-minute sallies. We convened at noon and sat, with a few minutes out for supper, until daybreak the next morning. The oligarchy was in full command. Rules were suspended to rush through measures that in more leisurely times would have been smothered. The Speaker, exercising his prerogative of temporal

omnipotence, recognized whom he chose and willed himself deaf and blind to others. Once on a raw decision he was forced to yield the chair till a vote of confidence restored him. A trusty stood by the reading clerk, judicially arranging the order in which bills were brought up, consigning the undesirables to the bottom of the pile.

Nothing in my life—not even class reunions or ushers' dinners—ever surpassed for sheer carousal those last five hours. From midnight on it fairly snowed paper. The bill files were torn and scattered like confetti. Some of the more exuberant members lighted the files before tossing them. Desks were overturned; glassware thrown. An ink bottle bounced at my feet, spattering my socks and trousers. A telephone book, hurtling through the air, caught me on the ear. Slim leaned over and shouted, "This is nothing. You should have been here last session."

And oblivious to it all the Speaker, the floor leader, and the reading clerk went solemnly through the formalities of parliamentary procedure. Even on the front row it was utterly impossible to hear the bills read or your name called, much less make yourself heard in voting. After each inaudible roll call you might read the Speaker's lips "House Bill um-um-um having received a constitutional majority is declared passed."

And finally when these three ringmasters adjudged the affairs of state in order, the floor leader stood at his desk and shouted, "Mr. Speaker, I move the House adjourn sine die."

There was a wail of protest from delegates whose bills were thus sidetracked, but the motion to adjourn is not debatable. The Speaker made his final decision, "The ayes have it."

I rose to sing "Auld Lang Syne" with the mixed emotions of a schoolboy who hears his last bell ring, and who, for all his hours of boredom and disgust, all his wishings for the moment, finds himself suddenly and unaccountably smitten with sentiment.

I was glad it was over, not sorry I had come. I despised some of the political methods I had seen without despising the game itself or even its practitioners. I had no illusions about my serv-

ice to the state or any particular desire to prolong or repeat it. Slim and I, both veterans now, teetered silently back to the hotel through the dawn.

No. 14

Many years ago a distinguished legal student, after studying the sources of law, came to the conclusion that the real rulers of society are "undiscoverable." If the search for the origins of the ideas which finally appear as the laws is not quite so hopeless, it is certainly true that the history of these ideas is an obscure and tangled one. Much of our law is found, of course, in the reported decisions of our judges; but an increasing proportion of it is "made" by our state legislatures. Contrary to the general opinion that legislators are busybodies, they in fact originate very few statutes even though they do attach their names to bills. Most legislators have reached the age when they are convinced that little that is good can be accomplished by legislation. Their tendency is not to act until some pressure of a felt need compels them to do so. Such needs are forced on the attention of numerous individuals and organizations outside the legislature, and it is by these that ideas for laws are conceived and elaborated before they are presented to the legislature for formal enactment. How varied are these sources and how difficult the process of converting an idea into a statute is made clear by the following able study of the situation in a single state.

STATE AGENCIES AND LAWMAKING[3]

Students of politics and government officials have long realized that administrative agencies have exerted great influence in statute lawmaking in addition to formulating administrative law through their rule-making powers. From our earliest history, few seriously believed that the theory of checks and balances excluded the direct and often decisive influence of the

[3] Elizabeth McK. Scott and Belle Zeller, *Public Administration Review*, Vol. II, No. 3, Summer, 1942, pp. 205–220.

administrative agency in the legislative process. And yet research in this important field has been meager indeed.

In the Spring, 1942, issue of *Public Administration Review,* however, Edwin E. Witte's article, "Administrative Agencies and Statute Lawmaking," described the initiation of bills within the federal administrative departments and the influence which these departments exercise upon the action of the Congress. Mr. Witte concluded that "the natural result of all of the activities of administrative agencies devoted to legislation is that they very greatly influence the action of Congress." The legislative influence of administrative agencies of the states in general, he said, is much smaller than that of the federal agencies. He added, however, that "in some states, for instance New York, administrative departments seem to play quite as important a role in statute lawmaking as in the national government."

A study of the sources of New York state legislation in 1941 confirms the opinion of the role of the New York state administration in statute lawmaking. State and local administrative agencies and officers proposed and sponsored more than half of all the statutes enacted in 1941, and the eighteen state administrative departments proposed more than a quarter of them.

WHOSE BILLS WERE ENACTED?

During the 1941 legislative session 4,381 bills, of which 1,541 were duplicates, were introduced in the New York Senate and Assembly. Of the 2,840 bills which were separate proposals, 955 were finally enacted into law. These bills sprang from the soil of our whole society. The most important ones were the product of much interchange of thought and cannot be attributed to the initiative of any one type of agency. Yet by careful study it is possible to describe the ways in which these proposals were brought to legislative fruition.

The bills, all of which, of course, were formally introduced by members of the legislature, came from five main sources: administrative agencies, the judiciary, legislative members and

agencies, governmental employee associations, and private organizations and persons.

Administrative agencies and officials, as Table 1 shows, were the source of 769 of the 1,641 bills introduced and of 502 of the 884 statutes enacted on which information is available.

Only those bills were credited to federal agencies which state departments indicated had come from such sources. Such

TABLE 1. SOURCES OF NEW YORK STATE LEGISLATION, 1941

Sources	*Number of Proposals Introduced*		*Number of Proposals Enacted*	
Administrative				
Federal Agencies	14		4	
State Departments	376		240	
Independent Commissions	8		6	
Local Government Agencies	348		241	
State and Local Officials	23	769	11	502
Judicial				
Courts and Court Officials	56		28	
State Judicial Council	32	88	19	47
Legislative				
Law Revision Commission	51		44	
Temporary Legislative Committees and Commissions	87		47	
Legislators	31	169	28	119
Governmental Employee Associations		97		28
Nongovernmental				
Organizations	395		110	
Individuals or Unorganized Groups	123	518	78	188
Total		1,641		884
Proposals on Which Source Information Is Lacking		1,199		71
Grand Total		2,840		955

federal proposals customarily are sent to the corresponding state departments to become part of the legislative program, and they are then submitted to the chairmen of the appropriate legislative committees. An exception in 1941 was the United States Housing Authority bill, introduced by Assemblyman Robert F. Wagner, Jr., son of the author of the federal act, instead of by the chairman of the legislative committee.

Approximately half of all proposals enacted came from state administrative agencies and from agencies of local governments. The permanent independent commissions, such as the Flood Control Commission and the Commission on Pensions, have been listed separately from the regular state departments although their programs and sometimes their personnel may be closely identified with the departments. For example, the state superintendent of insurance is also chairman of the Commission on Pensions. Proposals coming from state and local administrative officials, most of whom are policy-determining officers, have been included with those attributed to administrative sources. It would be difficult to separate the recommendations of such organizations as the New York State Association of Public Welfare Officials, the Municipal Electric Utilities Association, and the Surrogates' Association of New York State from the recommendations of the governmental units which they serve. Because of the legal fiction which prevents two of the strongest groups of local officials influencing legislation in the state, the New York State Conference of Mayors and the Association of Towns of the State of New York, from officially recommending proposals, the total of their recommendations has been added to that of local government agencies.

Another principal source of legislation is the judiciary. The courts' interest in legislation affecting court practice and procedure is much the same as the administrative departments' interest in their fields of action. . . .

The 169 proposals and the 119 enactments springing from "legislative" sources were by no means unaffected by administrative influence and consideration since representatives of the

state administrative departments frequently serve in important advisory capacities on the temporary interim legislative committees and commissions. For example, the state superintendent of insurance sits with the Committee on Recodification of the Insurance Law, which was created by the legislature in 1937 and has been renewed annually.

Governmental employee organizations, which are generally concerned more with the conditions of work than with the formulation of governmental policies, have been listed as a separate category apart from the administrative and judicial officials. Examples of such groups are the Association of State Civil Service Employees of the State of New York, the Civil Service Forum, and the associations of teachers, police, and firemen.

TABLE 2. LEGISLATION PROPOSED BY STATE DEPARTMENTS

Department	*Number of Proposals Introduced*	*Number of Proposals Enacted*
Agriculture and Markets	24	14
Audit and Control	14	12
Banking	11	9
Civil Service	1	1
Conservation	38	34
Correction	18	9
Education	21	9
Executive	54	20
Health	7	4
Insurance	28	24
Labor	43	31
Law	9	4
Mental Hygiene	0	0
Public Service	9	0
Public Works	21	21
Social Welfare	6	5
State	29	13
Taxation and Finance	43	30
Total	376	240

Thus the figures given in Table 1 cannot be taken to mean that administrative agencies and officials had nothing to do with the proposals springing from other than administrative sources. In doubtful cases proposals were classified under judicial, legislative, or nongovernmental sources. The over-all record of state departments shown in Table 1 is given in greater detail in Table 2.

What was the relative importance of the bills springing from nongovernmental sources? Of the 884 new laws on which sources were known, 188 were the recommendations of nongovernmental agencies, private pressure groups, private firms, or individuals. An examination of these 188 laws justifies the conclusion that not only was this group of laws quantitatively far less important than the group of governmental measures, but, more significantly, they were qualitatively less important. Although this group contained a few bills of major consequence, it contained a considerable number of bills of much less importance than those introduced from government sources. The three main bills were the installment sales regulation bill of the Legal Aid Society, the automobile financial responsibility bill of the insurance companies, and the urban redevelopment bill of the Merchants Association. The first two measures had been originally proposed in more drastic forms by state departments. The third, although not originating in any governmental agency, was fully discussed and agreed upon with the Division of Housing and other governmental agencies and approved by them before it became law.

Several of the 1941 bills of nongovernmental agencies were actually drafted by administrative agencies, though sponsored and introduced by private groups. In such cases the government agency giving drafting assistance took the attitude that if a law were to be passed over which it would have jurisdiction, a measure carefully and correctly drafted was to be preferred.

Unless a nongovernmental agency can stage a spectacular campaign for its legislative proposal or win the approval of the affected administrative agency, there is slim chance of success for its bill. Although the number of privately sponsored

bills enacted is small, the number of such bills introduced is very large. Most of them lie dormant in the legislative committees to which they are referred.

RELATIONS WITH PRIVATE GROUPS

The participation of the administrative departments in the legislative process is much broader than the total number of their own bills implies. Many of the nongovernmental pressure groups have come to realize that the legislative battle is at least half won if they can get the state administration on their side. For this reason, many of the bills sponsored by private agencies were drafted by them with an eye toward the administrative point of view or in active collaboration with administrative agencies. On the other hand, the reverse is true: many of the bills sponsored by administrative agencies were proposed to those agencies by private groups which, instead of going directly to a member of the state legislature, preferred to ask the state departments to initiate their measures.

Of the fourteen bills of the Department of Agriculture and Markets which were enacted in 1941, four were requested by the following five nongovernmental groups: the New York State Association of Refrigerated Warehouses, the New York State Farm Bureau Federation, the New York State Vegetable Growers' Association, the Empire State Potato Club, and the Lower Hudson Market. Two bills were supported by the seed potato growers, farm groups, and biologic manufacturers, and one bill was prepared after consultation over a period of several years with farm and trucking interests. Furthermore, private persons and groups play a part within the departments themselves. For example, in the Department of Labor in New York, representatives of employers, employees, and the public serve on such departmental agencies as the Industrial Council, the Advisory Committee for Self Insurers, and the Unemployment Insurance State Advisory Council; they are appointed either by the governor himself or by the commissioner of labor. Many of the bills in the programs of the various departments are the result of years of work in negotiating and adjusting the conflicting interests of all those affected by the proposals.

The extent of cooperation between a department and the private groups and individuals with which it deals will vary from department to department. Some merely advise or attempt to reconcile divergent views, or they agree not to oppose a bill although unwilling actually to recommend it. The Department of Labor may draft a bill to be introduced at the request of the New York Federation of Labor. The Department of Social Welfare writes: "We have close contact with many bills affecting public welfare and may even go so far as to help in either originally drafting or later on redrafting such measures in consultation with the original sponsors."

Of the twelve agriculture bills enacted which were not part of the department's legislative program, all were either "approved" or "not objected to" by the Department of Agriculture and Markets. Some of these were actually drafted by the department; on others the department gave advice and assistance. Thirteen bills in this field were vetoed, of which two were actively disapproved by the department.

The Department of Civil Service sponsored only one bill of its own, which was enacted. However, many civil service bills are put in at the request of civil service reform organizations and civil service employee groups. Because a good deal of this legislation provides for special advantages, the department's chief role has been the negative one of doing what it can to block such legislation. In this function the Department of Civil Service is often assisted by the New York State Conference of Mayors and the Association of Towns of the State of New York.

The Department of Health, which initiated only seven of its own bills in 1941, sent out some 243 letters on forty-one different bills not sponsored by it. Many of these bills were opposed by the department. Such letters went to the governor, the director of the budget, the chairmen of the legislative committees, and the majority and minority leaders of the Senate and Assembly. In this particular department there were in addition a number of interdepartmental memoranda. These help in crystallizing the views of the administrative agency. One such interdepartmental memorandum read as follows:

"Idea laudable. Believe it can be handled by welfare officers if they would assume responsibility. I recognize this as a specialized bill and don't particularly like it. . . ." And so the strength of any department of the state government can be measured not only by its actual program of bills but also by its influence on the programs of others.

The administrative departments recognize their own limitations and seldom introduce bills which they know have no chance of passing. The departments have certain sponsoring advantages over other initiating groups in that their own bills are almost invariably introduced by the chairmen of the Senate and Assembly committees to which the bills are referred. These legislative chairmen and the departmental representatives, usually the departmental counsels, are in constant communication with each other. The departments take the political climate in the legislature into consideration before asking that their bills be introduced.

Many of the departments, on the other hand, have recommendations buried in annual reports which are not introduced until favorable reception is promised them. For example, in 1941 two of the most important bills of the session were recommended by nondepartmental sources. Both of these bills, if their history is traced to their beginnings, were recommended in earlier sessions by departments. One of these, the automobile financial responsibility act, was recommended jointly by a group of business and insurance company representatives after consultation with members of the New York State Bar Association, the Division of Motor Vehicles, and the Department of Insurance. The department had recommended compulsory automobile insurance and introduced bills embodying its recommendations repeatedly since 1936. The department agreed to accept the proposal enacted in 1941 as a compromise measure and as an experiment. The series of bills in 1941 regulating installment selling can be related similarly to earlier departmental recommendations although the 1941 bills were drafted by a conference on installment selling which included

representatives of the Legal Aid Society, the Russell Sage Foundation, various trade associations, and related business units.

As a matter of fact, as demonstrated in both of these cases, when special groups see reform is inevitable, they prefer to write the reform themselves. The department, too, prefers to let the groups affected take the initiative at this time rather than to dictate to them, even if it could. For all administrative agencies know that it is not enough to put legislative enactments on the books, but that these laws must be enforced. Enforcement by the department is made much easier by such procedure. In the case of the regulation of installment selling, the trade associations affected are now actively cooperating in enforcement by holding meetings to help their own memberships understand and observe these laws and to prevent competitive groups, not members of the trade associations, from violating the law. One can be sure that such cooperation is welcomed by the department since it lightens its task of enforcement, particularly in a field newly regulated.

Much pioneering is done by private civic and social organizations which put in bills year after year knowing full well that neither the public nor the legislature has been sufficiently educated to grasp the immediate necessity for the reforms. A good example of this is the health insurance bill sponsored in the New York State Legislature for many years by the American Association for Social Security. The administrative departments concerned with their immediate tasks may have felt that the time was not yet ripe for this legislation. It is probable that when that time comes the appropriate administrative agencies will play a more prominent and active role in the formulation of health insurance legislation.

No. 15

Although local and private legislation is prohibited by the constitutions of most states, it is still permitted by a few. Some idea of

the extent and character of such legislation is given by the brief extracts reprinted here.

THE LEGISLATIVE PROCESS IN ALABAMA—LOCAL AND PRIVATE LEGISLATION[4]

SUBJECT MATTER OF LOCAL LEGISLATION

A study of the subject matter of local legislation, whether it be by forthright action, by general act local in application, or by constitutional amendment, shows that the major problem dealt with is local finance. The Constitution fixes a tax limit and a debt limit for counties and municipalities. These limits have been found generally so low as to hamper the necessary activities of local governments, which therefore find it necessary to appeal to the legislature continually for constitutional amendments relaxing these limitations. It is an interesting fact that general amendments to alter the tax limit or the debt limit seem never to have been considered. Each case is handled separately. Hence we get such amendments to the Constitution as the Mobile County School Tax Amendment, the amendment permitting Limestone County to levy a tax for malaria control, and the amendment permitting Morgan County to erect a new jail. Of the fifty-five constitutional amendments local in purpose which have received the approval of the legislature, sixteen have been concerned with the tax and debt problems of the counties and municipalities.

The second major purpose of local legislation by amendment is regulation of the fees and salaries of county officials. The fee system has long been a point of controversy in Alabama. Some counties wish to abolish fees and put officials on salary. To do this requires a constitutional amendment. No general amendment permitting abolition of fees has ever been added

[4] Hallie Farmer, *Local and Private Legislation*, Bureau of Public Administration, University of Alabama, 1944, pp. 28–31, 38–39.

to the Constitution. However, an amendment has been added permitting the legislature to make this change for Jefferson County, another for Montgomery County, a third for Mobile County, a fourth for Calhoun and Tuscaloosa Counties, a fifth for Morgan County, a sixth for the sheriff of Mobile County (who was omitted from the original Mobile salary amendment), a seventh for Dallas County, and an eighth for Etowah and Cherokee Counties. Two amendments permitting the legislature to regulate fees and salaries were passed in the 1943 session but have not yet been ratified by the people. One of these applies to Houston County and the other to Walker County. Ten amendments (assuming that the people ratify the amendments passed by the 1943 session) will have made it possible for the legislature to regulate fees and salaries in eleven counties. These amendments have resulted in a flood of local acts. The 1943 legislature, for example, passed thirty-two local acts to fix compensation or to regulate salaries. These acts affected approximately 115 county employees paid from county funds.

By local legislation, or by general acts local in application, the legislature regulates the government of the counties in the most minute detail. Three separate local acts were passed by the 1943 legislature permitting three different counties (Colbert, Cullman, Dallas) to close county offices one afternoon each week. Calhoun County won the right to close its county offices through a general act applying to all counties having a population of not less than 54,000 nor more than 64,000. It took an act of the legislature to give the Board of Revenue of Colbert County the right to provide an office for the county solicitor. Local legislation authorizes janitors for Montgomery County's courthouse, and a stenographer, or "secretarial assistant," for the circuit clerk of Covington County. Fourteen different acts were passed in the 1943 session alone permitting the sheriffs of as many different counties to employ deputies.

Titles for county officials cause a great deal of work for the legislature. Acts of this kind usually go much deeper than mere titles, however. They frequently involve a move to dispossess

a county official by abolishing his office and re-establishing it under a new name. In 1932 the legislature by local act abolished the office of county solicitor in Coosa County and created the office of county attorney. In 1943 the legislature reversed the process, abolishing the office of county attorney and creating the office of county solicitor. Boards of revenue become boards of courts of county commissioners and then boards of revenue again, with bewildering frequency. Before the legislature met in 1943, Escambia County and Jackson County had courts of county commissioners. Now they have boards of revenue.

. . . . . .

Since 1911 approximately one fourth of all private acts passed have provided for refunding money erroneously paid to the state treasury through overpayment of taxes, licenses, or fees. Persons making tax payments in error must, under the Alabama law, seek a refund within two years. When such an error is not discovered within the two-year period, relief is available only at the hands of the legislature. Prior to 1943, money erroneously paid for a license could be recovered only if the probate judge certified that the mistake had been made in his office. For any other errors the legislature was the only source of relief. An act of the 1943 legislature makes it possible for such errors to be corrected after investigation by the state department of revenue.

Another large block of private legislation is that involving compensation for injuries—those received by employees in the discharge of their duties or by citizens at the hands of state or county employees. Since the state (and the county as a division of the state) cannot be sued without its consent, and since Alabama has provided no judicial procedure for settling claims against the state and the counties, the legislature is the only recourse of any citizen having such claims. The fact that cities may be sued probably explains why relief legislation drawing money from city treasuries is never presented to the legislature.

The number of claims satisfied by private legislation is not

large, nor is the amount of money involved in any one of them. The largest amount ever appropriated for private claims by any legislature was that authorized by the legislature of 1931, which passed forty-seven laws providing for total payments of $79,522.06. The problem does not arise primarily from the number of claims or the amount of money involved. It concerns rather the wisdom of attempting to settle by legislative action claims which should properly be resolved by judicial process. The dangers of such legislative action are too obvious to require comment.

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No. 16

VALIDATION OF MARRIAGE

(State of Connecticut, January Session, 1927, p. 4460)

Sec. 31. The marriage of Albert Batterson and Alice Dorothy which took place at Ridgefield, February 28, 1927, is validated notwithstanding the fact that the license therefor was issued by the registrar of vital statistics of the town of Redding. A copy of this section, certified by the Secretary of the State, shall be filed for record by the officiating clergyman with the registrar of vital statistics of the town of Redding.

No. 17

In a simpler age legislatures were supposed to be able to generate their own ideas out of the observation and experience of their members, and to put these in proper statutory form without much expert help. As the subject matter of statutes grew more technical and complicated, the idea took root that the membership would profit from more preliminary research and planning. In many states these are now supplied by the legislative council. In 1945 such councils were active in twelve states, and the device seems now to be firmly established in our state governmental machinery.

THE DEVELOPMENT OF THE LEGISLATIVE COUNCIL IDEA[5]

The legislative council has now been in existence long enough to permit a partial test of its value, although there has not yet been sufficient time for full development of its possibilities. Of the three councils which have been in operation through more than one regular legislative session, two have been relatively inactive. The present report, in consequence, must necessarily be limited to the Kansas council, which has had nearly 4½ years of continuous active experience.

SPREAD OF THE COUNCIL IDEA

Beginning with the creation of an executive council by Wisconsin in 1931, the council experiment has spread until there are now in existence seven legislative councils and the Wisconsin Executive Council. Kansas and Michigan, in 1933, established councils which were distinctly legislative. In Virginia an Advisory Legislative Council established by executive order in 1935 was given legal status in 1936. The Kentucky council of 1936 is primarily a commission on interstate cooperation, with the additional duty of serving as a legislative council to prepare a legislative program. In 1937, Nebraska, Connecticut, and Illinois also adopted the council idea.

The Wisconsin council has been relatively inoperative since 1933, as has that of Michigan since 1935. Both were active during their first biennium. The council in Virginia presented five excellent reports to the 1936 session, and the one in Kentucky was successful in preparing a legislative program of eleven bills for the special session of 1937.

The fundamental purpose in the creation of a legislative council is the preparation of a program for the next legisla-

[5] Frederic H. Guild, *The Annals of the American Academy of Political and Social Science*, "Our State Legislators," Vol. 195, pp. 144–150 (1938).

tive session. The reasons for the creation of such an agency have been variously stated but are fairly well summarized in the preamble to the Illinois law of 1937 which concludes:

> Such legislative planning and formulation as actually obtains would, by being recognized and made properly antecedent to regular sessions, conserve legislative time, save unnecessary expense, improve ensuing debate, and restore legislative activity to the high place in government and public esteem which it merits.

ESSENTIALS OF THE KANSAS IDEA

The methods and accomplishments of the council cannot be understood unless there is thorough comprehension of several important features of the Kansas idea which are frequently misconstrued by the observer. The first is that the Kansas council is *legislative* and not executive, in actual operation as well as in name. The legislators have been working out the council idea in their own way, as something indigenous to legislative soil. The institution as it evolves may differ somewhat from a priori ideals but will be more genuinely a legislative product and may prove better fitted to legislative ends. The real question, to which the Kansas council gives some promise of being the answer, is: Can the legislature work out its own salvation?

The Kansas idea of formulating a program has been that the selection of the solution must be reserved for final decision in full legislature, newly elected. The program has not been a positive recommendation of specified solutions, but rather explanation of alternatives, finding as to facts; and as such, it has been adapted to legislative behavior more readily than any conclusions of a few council members could have been. Except in a few instances, even the bills recommended were tentative. The council expected them to be subject to amendment and compromise, and the accompanying factual material was as important as the bill itself. In other words, what the council has usually done has been to present comprehensive analysis of each situation.

Such a program clears the ground of much of the lost motion

and confusion of the past. It economizes legislative time by freeing it from the burden of innumerable, ill-considered, freak, and surprise attempts at solution of major problems with inadequate information and without impartial analysis. Certainly the 1935 and 1937 sessions were more clear-sighted, less confused, because of the existence of the council. The council selects the important topics and provides the factual basis for clarifying issues, permitting the major worth-while alternatives to rise to the surface. The legislature, however, must assume responsibility for the final choice.

The council's program is of such a nature, in consequence, that neither the legislature nor the governor has ignored it or can ignore it. Not in the slightest is this because of any remarkable potency of the council's official recommendations. It is due, instead, solely to the fact that there has been provided a genuinely new bit of legislative machinery by means of which a legislative program is developed over a period of many months. When the council concludes its last meeting, the program is actually there, an established fact, written across the whole state, and by that time no fiat of council, governor, or legislature can make or unmake it.

Herein lies the peculiar contribution of the Kansas experiment—and its chief contrast to the small, executive-type council. The Kansas council evaluates the relative importance of public demand for action in various fields, and responds to that demand by analyzing those subjects which it considers most likely to be important before the session, regardless of whether or not it believes affirmative action desirable; and this the council has done well. The legislature and the governor may determine the emphasis to be given one part of the program as against another; they may disapprove or disagree on solutions or fail to take action; but the subjects sifted out by the council have proved to be the ones which did require consideration and decision in the legislative session.

The final essential is a well-staffed research department as indispensable for council success. Since the council's findings

in its program are primarily factual, it is imperative that the legislators have an impartial staff, under their own control, upon which they can fully rely. While it required nearly fourteen months for this to become evident, and several months more before the research work was accepted as sound and unprejudiced, few Kansas legislators, administrators, or observers would now believe it possible for the council to continue successfully without this staff.

THE LEGISLATOR AS COUNCIL MEMBER

The council idea is based on using legislators without any attempt to metamorphose them overnight into a brain trust or guiding angels free from behavior normal to legislators. Two factors enable them to function as they could not during regular session. The first is the quarterly meeting, with freedom from rush and pressure; no necessity for immediate decision, concentration on fundamentals instead of upon detailed language of bills; opportunity to talk all subjects over for three months at home before returning; and time for further consideration spread over two years. There are no special local bills to push through. Logrolling is gone. Nothing remains but major state problems. Second, there is the research staff, to do most of the detailed work for committees and members, to supplement with additional information at the next meeting, and ultimately to report to the legislature such additional information as the council may direct.

The council member nevertheless remains strictly a legislator. Many members will probably run for re-election or for another office. They are naturally contemplating the next campaign. They must also think in terms of their membership on regular committees, of the give-and-take which will normally result in the regular session. In consequence, legislators have definite limitations in planning a program to extend beyond two years. They are particularly fitted, however, to gauge accurately the program which will best meet the needs of the next session. In so doing they do not sit down to plan such a

program deliberately. A few items are selected as the result of conscious effort. Many others are chosen in response to the very same stimuli to which legislators have always reacted.

THE COUNCIL IN OPERATION

Introduction of new subject matter before the council normally takes the form of a proposal, which is referred to a standing or special committee, although it may receive preliminary consideration immediately upon introduction. These proposals consist of a very brief title indicating the general objective, and may be accompanied by further explanatory material. The proposal may be reported unfavorably at the same meeting, but usually all which seem to have any merit are referred to the research staff for preliminary statement or analysis of the facts. Some of these require extensive research. A progress report is usually presented at the next quarterly meeting and the preliminary and supplementary research reports are made available to all members, to all other legislators, and to a mailing list of over 1,000 citizens throughout the state.

Between council meetings, the committees may function more or less actively. Some have designated a member to cooperate with the research staff, who may appear for conference with the staff from time to time. Others may maintain contact primarily through correspondence. While committees have held special meetings, their formal work is usually done during the council session. The rules provide that on final report the committee shall present a bill covering the subject, but as a matter of fact this is rarely done until the last two meetings immediately preceding the regular session.

Proposals come not only from members but also from recommendations from the governor, from other legislators, and as a result of petitions or correspondence from citizens. In consequence, the gross result of council endeavor is somewhat akin to the regular legislative situation. Proposals are thrown in from all quarters. Attention is focused and information is provided by the committee reports and by the discussion thereon. General council interest in any one of the proposals as a part

of the final program is a development from this procedure rather than the result of conscious planning. Committees and the council itself act as sifting agencies, first to eliminate various proposals and second to analyze the remainder. The program which finally evolves is the net result of the combined efforts of all members of the council.

COUNCIL ACTIVITY BETWEEN MEETINGS

General council activity is not much in evidence between meetings, aside from the work which the research staff may be doing under committee instruction. The individual member, however, serves a very definite function, which even he frequently fails to realize. He has heard the proposals, received the factual material, and listened to committee reports and to discussion in the debate following. On returning home there is ready at hand material to which he can easily turn for speeches over his district or for day-by-day discussion with constituents. That is, the council member spreads over his district, more intimately and in more detail than the press reports, what has been picked up at the council meeting. The essentials of the program thus begin to take preliminary shape. In addition, the legislator who is not a member, but who receives all the reports submitted, is similarly able to use the material as questions arise.

This almost invisible function, this dissemination of preliminary reports and factual material at the outset of popular consideration of the general problem, is perhaps one of the most valuable contributions which the council makes toward a legislative program. A gradual assimilation of such information and discussion goes on from one meeting to another. By this process the council is finally confirmed in its decision to proceed further, or is satisfied that as much has been done as is needed for the moment. It is in this manner that there is laid the foundation for a sound legislative program in the regular session. An important part of the work is accomplished long before the council submits a formal report to the legislature.

RELATION OF COUNCIL TO THE LEGISLATURE

The council is in fact, and in improved form, a perpetual interim committee for the legislature, always available to institute a study of a new subject, with full power to secure the necessary information, directing its attention at once to matters of immediate public interest. This timeliness of consideration is no small factor in bringing the council's work before the people over the state while their interest and attention are focused on a particular problem.

Dumping of reports upon the busy first days of the regular session, the usual practice of interim commissions, imposes a task of assimilation which the ordinary legislator usually refuses to assume, or which delays the session if he must give time to it. The ability of the council to make reports more than a year in advance of the session, or preliminary statements indicating the scope of final reports, prepares the legislature for their reception. In consequence, these reports (not the formal summary report in December, but those issued over the two years) have been used immediately. In advancing legislative and popular understanding of the problem and the probability of immediate constructive steps in the next session, the council has been much more successful than most interim commissions of the past.

This new agency is not a group of specialists or experts, nor do its members pretend to be wiser than other legislators. It is as much a regular committee of the legislature as any other standing committee. Nevertheless, it is difficult as yet to avoid some feeling of natural jealousy which arises when a small part of the legislature is set apart as a "council." Many important members of the legislature cannot be appointed thereon if geographic, party, and other representative groupings are to be given proper weight. It must be borne in mind that there is much leadership in the new blood in the legislature. Also, new members coming fresh from the election feel that they have as much a mandate from their constituents as any other member

of the legislature. They want to make a showing, to have equal voice in committee and on the floor. They would not willingly tolerate such a legislative organization if it undermined their own legislative standing.

By making its work immediately available and distinctly helpful to other legislators, old and new, the Kansas council has adjusted its relationship to the legislature to accord with this situation and with the psychological factors behind it.

While the individual member who returns to the regular session (eighteen in number in 1935 and twelve in 1937) lays no claim to greater authority because of council membership, nevertheless the fact that he may have participated in six or seven quarterly sessions, with a mass of factual material before him and careful discussion of the various problems over this period, does enable him to be better informed than many other members of the legislature. He is in the strategic position, though frequently unwittingly, of requiring others to meet him upon the same factual basis. He serves as an interpreter of the work of the council to other members of his committee and to the general legislative body, and is partly responsible, in consequence, for the prestige of the research reports. In this he is not alone, for other legislators, not on the council, have also had access to material, and many of them may be as well informed. If chairmen of council committees return, they frequently play a very important part in developing the final program in standing committees, on the floor, and in the corridors.

REACTION TO RESEARCH REPORTS

The combination of council and research staff has brought about immediate, easy acceptance of research reports. The explanation seems to be threefold. First, the reaction of council members as legislators governs the research department in its selection and presentation of material in its reports over a two-year period, which makes them of immediate value to the legislators.

Second, the council members become sponsors for the re-

search and for the research staff. Familiarity in this case has not bred contempt, for the continuous association has developed mutual understanding. In addition, other legislators who have received the reports of the quarterly meetings at a time when there was leisure to consider them have themselves been able to make use of part of the material. The approbation of council members, combined with their own practical use of the material, brings such legislators to the session with an appreciation of research results.

A third significant fact is that the legislator who knows that research has been completed on a certain subject is most reluctant to enter legislative debate on that topic without being informed. In the 1935 session, when incorrect statements were immediately challenged by council members or by other legislators who had in their hands the research report giving the exact facts, the uninformed legislators found themselves in an embarrassing situation. One major result was the rather continuous use of council reports throughout the session. Such use of factual material and the extent to which legislative committees came to the research staff during the session for additional facts indicate clearly the value of the research function of the council and its staff.

THE COUNCIL AND THE GOVERNOR

In Connecticut the governor is a member of the council; in Virginia he appoints all the members, although five must be from the legislature; in Wisconsin and Kentucky he appoints part of the membership from outside the legislature. Only in Kansas, Michigan, Nebraska, and Illinois are the councils entirely under legislative control. The two types of experiment, while allied in purpose, may work rather differently in actual operation.

Both Kansas governors have been skeptical of the quarterly appearance at the State House of the representatives of the legislature, with full power to open any subject for discussion. However, the council thus far has kept its feet securely on the

ground, and its treatment of inquiries into administration, for the most part, has been expertly handled. Although the Michigan governor in 1935 was antagonistic to the council and recommended the repeal of the Michigan law, there has been no reason in Kansas why a governor should oppose the council and its program.

The formal relation is maintained solely by messages from the governor, one at the opening of each new council and others recommending special topics as occasion arises. These have been few in number. Close contact is maintained precisely as it is during a regular session, through conferences with chairmen of committees or individual members, and the governor never loses touch with the council from meeting to meeting. In addition, there is another contact through the research staff, which is under instructions to work for the governor on his legislative program.

The presence of the council enables the governor to keep in closer touch with the possible legislative program than he could if such an agency did not exist. The governor may ignore or take a definite stand on some of the alternatives presented in the program, or even add other topics to the list. He can rely upon the factual presentation of alternatives and use that material in reaching his choice for a specific recommendation. In consequence, the council's work may be as beneficial to the governor as to the legislature.

PRESENT STATUS OF THE KANSAS COUNCIL

Those informed will probably agree that the Kansas council has been genuinely helpful to the legislature; that it prepared ample material for the presentation of programs to the 1935 and 1937 regular sessions; and that it has grown steadily in prestige with the legislature and with the general public. It seems clear to the writer, although others may not agree, that actually, in its brief four years, the council has already become an integral part of legislative machinery.

Certainly the net result of the council's labors has been a

distinct gain. A comprehensive program was available for the special session of 1933, and 60 per cent of the bills recommended were passed. No interim committee reports in Kansas had ever before been of such immediate assistance or played so direct a part in the passage of legislation as did the council reports to the 1935 and 1937 sessions. In both sessions, the legislature actually placed major emphasis upon those items which the council had considered. The council even anticipated most of the major items in the governor's program, despite the unforeseen political overturn which occurred in the 1936 election.

Experienced legislators believed reduction in legislative time was a direct result of council activity. Many believe the evidence shows that the new institution made positive accomplishments in its first two terms sufficient to warrant optimism for its future. The chief test at this time is a simple one—merely whether the council is meeting a genuine need and whether the end result, by and large, is a substantial gain. Despite misunderstandings and misconceptions, the answer to this in Kansas has been affirmative.

No. 18

Legislatures of all sorts have from the very beginning of representative government been subjected to constant criticism. Much of this has been uninformed and extreme. The suggestions made in the article below, by a state officer, have the great merits of balance and common sense, and all are within the limits of what is practicable.

PRACTICAL SUGGESTIONS AND PROSPECTS FOR LEGISLATIVE REFORM[6]

Any legislator, or ex-legislator, writing on a subject such as this, inevitably has his thought shaded by his own experience. Problems that seem to him important because of his experience in his own state may not be problems at all in other states, and he may completely ignore urgent needs in those other states.

The subject presupposes faulty functioning by the state legislatures at present. It assumes the need for reform and that the legislatures at present are not doing what they are supposed to do.

Before embarking upon any suggestions, practical or otherwise, for the correction of this assumed situation it may make for accuracy if we take a look at just what a legislature is supposed to do. What is its job?

The job of the legislature is certainly not just to enact statutory law. Any legislature serves quite as much, perhaps more, in what it refuses to do as in what it does. In these days of pressure group government "no" is at least as important a word in a legislator's vocabulary as "yes." But the legislator's job is something more than passing good statutes and refusing to pass bad ones. As the most democratic branch of our government, the branch closest to the people and generally most responsive to their thinking, and to their needs, the really fundamental job that the legislators have is that of preserving self-government and protecting the rights and liberties of the individuals who make up our nation. . . .

The chief yardstick to be applied in measuring the success of

[6] D. Hale Brake, *State Government*, Vol. 20, No. 6, June, 1947, pp. 161–164 and 178–179. By permission of the Council of State Governments.

our legislative bodies is that of whether they have so acted as to preserve self-government and thereby protect personal rights and liberties. Of course, this is not the yardstick generally applied in the press, nor even in college halls, where the criterion is generally that of efficiency or lack of it. Efficiency is important; it is highly desirable in the legislatures, but for many it is a false god. It is not, and never has been in America, the thing of greatest or first importance. The foundation upon which the framers of our Constitution built our governmental structure was that of safety for individual rights and liberties, not efficiency, and they were everlastingly right in their choice. Probably no one would contend that our state legislatures are as efficient as they conceivably might be. Perhaps at times they are a little less efficient than other branches of government. A part of that is the price of democracy—a part of the price of keeping government close to the people. We can overlook some inefficiency if our legislative branch is so holding its position as to make and keep personal rights and liberties secure. . . .

DIFFICULTIES OF LEGISLATORS

No one without legislative experience can fully appreciate the difficulties that lie in the path of a legislator who is really trying to do his job. He is led into many of his mistakes by segments of the public so intent upon the satisfaction of their own needs or wishes that they overlook the general public good, and then he is condemned by other segments of the public as if the ideas originated with him. If he is a member whose experience and ability draw to him many assignments of responsibility time is inadequate for all that he has to do during the session, yet if he fails to foresee even remote contingencies in connection with legislation he is promptly condemned for his lack of attention—and very few indeed are the people who realize how tremendously difficult it is to foresee all that may happen in connection with a statute after it is passed. Constant demands are made upon his time that are not directly connected with his work. He is asked to obtain jobs for his con-

stituents; to secure action by administrative departments of government and to do a thousand and one other things not directly connected with legislation. He is under constant surveillance of a press that does not always have as its chief objective finding something commendable in his motives or in his work. He is underpaid. In many legislatures he is without adequate research facilities.

Naturally, and properly, our legislators are drawn from all walks of life. The labor unionist finds himself mixed with farmers, perhaps a banker, a doctor or two, several lawyers, a few businessmen, perhaps a housewife; a few who have retired from their respective businesses or professions and perhaps a few who have no business but politics. To many in each session the experience is new. While in Michigan generally the turnover is about 20 per cent, in the present new House of Representatives it is 40 per cent. I am informed that in many legislatures as large a turnover as that is common. The members are confronted with new problems, subjected to new pressures, work under new conditions, and perhaps to a greater extent than anytime before in their lives they have the problem of trying to pick the truth out of a mass of conflicting evidence. It is natural they should make some mistakes; that some shall not be able to adjust their viewpoints to the larger problems now before them; that some shall yield to improper pressures, but this is representative government working in its essential form and the results are better, not worse, than a disinterested student might expect. In Michigan, for instance, the most serious results in recent years in the way of lawmaking that have taken place have been when the people tried to legislate for themselves, instead of through their legislature, by way of constitutional amendments upon complicated propositions, and it has been many a year since the legislature made as serious a mistake in our state as did we, the people, in a complicated tax diversion proposition that we wrote into our Constitution on November 5 last. . . .

One definite handicap under which every legislature works is a lack of public confidence. In part, that lack of confidence is

due, without doubt, to the mistakes and failures of the legislatures, but only in part. No one can question the continued tremendous influence of the press in molding public opinion. A legislature may pass a hundred good bills, or at least bills that are not harmful, with scarcely a mention of the fact in the press, but let it make one mistake and that is news. Members of the press who represent their respective papers at the state capitols are not to be blamed. They are expected to write only what is news, but a more sympathetic understanding on the part of the editors of the big papers would be very helpful. Commendation by an editor of a city paper of the work of the legislature is so rare as to be almost salable like a rare stamp. Adverse criticism is common and all too frequently is based upon an entirely insufficient amount of information on the part of the editor of the newspaper.

THE LEGISLATURE SHOULD HAVE PUBLIC CONFIDENCE

In many college classrooms the state legislature is mentioned with a smile or a shrug of the shoulders rather than with a sympathetic understanding of its difficulties and its problems. The same is true in our secondary schools, and all too frequently there is the additional factor that the teacher has no sufficient background for teaching the subject at all. We also have direct reactions on the part of high school students. Every legislature is visited by classes in government. Frequently, their impression is extremely disappointing—they may strike a day when little takes place in the general assembly. They see the members sitting in their seats joking with each other. Perhaps they hear the roll call taken on a few issues which they do not understand. They had expected to see a Daniel Webster deliver an oration on the floor and that doesn't materialize. It may be that that very day highly important work was done by the legislators in committee. The measures voted upon in general meeting may have been important, even without oratory. Those things the students do not understand, and they go home disappointed. The legislature could function

much more satisfactorily if the public had more confidence in it. Of course, a greater part of that confidence must be won by the legislature itself, but there are others who could help, if they would.

TREND AWAY FROM GRAFT

You would expect me, coming from Michigan, to have something to say in the matter of graft and corruption in a legislature. Certainly the exposure that has been made concerning our legislature in the last two or three years has had no tendency to create public confidence, but it is easy to get out of balance in that connection. I call your attention to the fact that no one to date has pointed out a single bad bill that was passed because of bribery, nor a single instance in which a good bill was defeated because of bribery. As this indicates and with but very few exceptions, bribery involved weak and ineffectual members of the legislature who were able to deliver to their criminal employers nothing in the way of results. A great majority of the 1939 and 1941 legislators, who were the ones chiefly involved, were honest and sound, and both legislatures made good records as to legislation actually passed and defeated. The greatest allegations of bribery, and they have not yet been established in court, were in connection with bank legislation which in our state requires a two-thirds vote of both houses, and that legislation was passed even with the two-thirds vote, in spite of the alleged bribery against it. There is nothing new about bribery and corruption in government. The public is, however, becoming more and more impatient with such practices in government, and while one cannot produce figures in support of his belief, there seems to be little doubt that the trend has been definitely away from practices of that kind, toward cleaner government, and that that trend will continue.

CONSTITUTIONAL RESTRICTIONS

One very definite legislative problem lies in the field of constitutional restrictions. That a state constitution shall define

the powers of the legislature with sufficient particularity to keep the legislature within its own field is proper without question, but the tendency is to go far beyond that. Such restrictions as those limiting the number of days the legislature may be in session, requiring that all bills must be reported, giving detailed procedure as to hearings on bills, forbidding anything that would prevent the discharge of a committee from consideration of a bill as does the Michigan constitution, are all restrictions upon legislative procedure that frequently hinder the legislature in meeting ever-changing conditions. In practically every election in Michigan we have on the ballot three or four proposed amendments to the Constitution, most of them aimed to add restrictions. Most of them fail, but a few have passed such an amendment prohibiting the use of any gasoline or automobile weight tax money for anything except highways and a 15-mill property tax limitation and our Constitutional Civil Service. And now, as a result of action on November 5 last we have in the Constitution an allocation of more than 78 per cent of the state's chief source of income, the sales tax, to the public schools and the cities, villages, and townships of the state. Some states are more fortunate in that they cannot so easily legislate by way of constitutional amendments, but even some of those states have constitutional restrictions which seriously interfere with the work of the legislature.

There is no quick remedy for this situation—it means a long process of education of the public and a gaining of more confidence in the legislatures.

HIGHER SALARIES NEEDED

No state in the Union pays its legislators a sufficient salary. With some states paying as little as $200 or $300 for a two-year term and with a top salary of $2,500 a year, and that I believe in but two states, here is a field where something can be done.

In Michigan there are two stock replies to any suggestion of higher salaries for members of the legislature—one is that the $3 a day through the term, which we pay, is all that they are worth, which may or may not be true, but generally is not

true, and the other is that the members knew before they ran what the salary would be and did not need to run if they didn't like the salary, which is true, but, true or false, neither reply is an answer to the question. Those making those replies are looking at the matter purely from the viewpoint of the legislator individually, whereas the viewpoint should be that of the public. The question is not whether that salary is all the legislator is worth or whether he needed to run or not. The question is whether the public would get better service if members of the legislature were adequately paid. The answer to that is definitely "yes." While legislative salaries ought not to be so high that the office would be sought as a money-making scheme, they ought not to be so low that every competent person must make a financial sacrifice in order to serve in the legislature. At present salaries in Michigan and in most other states, every competent member of the legislature, even a farmer, so far as salary is concerned, serves at a distinct financial loss to himself. This does not make for good service. It is a distinct honor to serve one's state in the legislature, but the state will receive better service if it gives reasonable compensation to the men and women who are spending their time in its interest. When I was in the Senate of Michigan I figured that it took my first year's salary to pay my expenses during the regular session and my second year's salary to get myself re-elected. That is undoubtedly the experience of the vast majority of the members of the legislatures of all our states. . . .

LOBBYING

No discussion of the legislative problems can well pass without mention, at least, of the subject of lobbying. Legislators soon learn that the lobbyist is not the monster that sometimes seems to exist in popular imagination. Generally, he is not only decent and honorable but he is useful to the members of the legislature. He has information they need—his viewpoint is one they should have in mind, and if his thinking is right he knows that his greatest stock in trade is the confidence that the

members have in him and that he will not have that confidence unless he plays on the level with the members. Unfortunately, there are sometimes lobbyists, and they are usually those who do not expect to be back session after session, who are not too ethical in their approach and not averse to using methods that will not stand the light of day in order to accomplish their purpose.

Some states require that all lobbyists be registered and that the registration include definite information as to employers and interests represented, and some states prohibit contingent compensation for lobbyists. These are good provisions. So would be provisions requiring filing of expense accounts if there were any way of compelling accurate performance. Actually most of the difficulty incident to the lobbyist, however, will have to be remedied by what we do with the legislator rather than what we do with the lobbyist. What the legislator needs more than anything else between the time of his election and the time of taking office is a course in sales resistance. Here again there is no quick remedy. Corrections lie in selecting legislators who cannot be bribed or unduly influenced. Unfortunately, in order to change our legislators we must change those who elect them—a slow process—but one to which we may well bend our backs.

LEGISLATIVE COUNCILS

There is a very definite need in most of our legislatures for more work between sessions—a problem that has some connection with the matter of salaries too. Many states are reaching toward the solution of this matter through legislative councils—a trend that ought to be encouraged. There are many problems involving intricate legislation that simply cannot receive sufficient study during the legislative session. In Michigan we have made in recent years extensive use of study commissions made up in whole or in part of nonlegislative members. Our feeling is that that definitely is not the answer. No matter how painstaking such a commission may be in its work, the job of selling the result to the legislature is always difficult,

and much better results could be obtained certainly if those studies were made by legislators themselves or by a staff under direct control of the legislature, working either for a legislative council or legislative reference bureau, or legislative committee.

COMMITTEES

The greater part of the actual work in any legislature is done in committee. If the committees are doing their jobs the legislature is likely to turn out pretty satisfactory work. Perhaps there is no phase of legislative activity more in need of attention than are certain aspects of committee work.

A great deal has been written about the number of committees in the state legislatures. The average in the legislature is 71.1, with a Senate average of 32.6 and a House average of 40.8. The Wisconsin Senate has but 9, as I am informed, whereas the South Dakota Senate has 56. Kentucky has 75 House committees and our own state has 69. The Michigan Senate of 32 members has just reduced the number of members on each of its 3 principal committees, Finance, Judiciary, and State Affairs to 7 and permits no member to be on more than 1 of these committees, in order that these 3 committees can meet at the same time. Its total number of committees is now 18 and no member may be on more than 3. . . .

A given number may mean much or little. I can't get excited about a lot of committees that never are expected to meet or that meet perhaps once in a session. The difficulty lies in a large number of committees that actually try to function. If the number of those is too large it becomes impossible to arrange meeting schedules to avoid conflicts with the result that members neglect their work on some committees. In other words, the problem is one of ability to schedule meetings more than anything else, and if the actual working committees are brought down to such number that meetings can be arranged for all of them without conflict, the results will be satisfactory. Probably any system will result in a heavy load for some members and a comparatively light load for others—that lies en-

trenched in human nature. "To him that hath shall be added" is an idea that did not originate in American legislatures. Experienced and competent people will draw more than their share of work in legislative committees, the same as they do everywhere else. It may be hard on those members, but it is well for the public that this is so.

Again, some committees draw too much work; others too little. Subcommittees have been tried to lessen the load, as has a device of a reference committee that first passes on the bills. There probably is no entirely satisfactory answer. Certainly I have none to the problem of getting committee members to attend committee meetings, and on time! Solution of the latter would largely answer the former. With a committee schedule avoiding overlapping and the members ready to work on time at each meeting any load likely to come to a committee of the state legislature could be handled.

It appears to me that the answer to many legislative abuses that have drawn sharp criticism upon state legislatures lies in full publicity as to all committee meetings. The practice in Michigan is largely to the contrary. Many of the committee decisions are made behind closed doors and the records, such as they are, are kept only until the end of the session. Those states that require a complete record of what goes on in committee and the permanent preservation of that record and require open doors on the committee rooms have a much better system. Secret action may be convenient for the committee members in that they can avoid public responsibility for their acts, but it does not result in good service to the public.

A phase of committee work in which there is an almost infinite variety among the states is that of how much power a committee shall have over a bill. On the one hand are some states in which the committee has no real control. It is either required to report every bill, or one member or three members or some other small number can compel the placing of the bill on the calendar, the wishes of the committee to the contrary notwithstanding. At the other extreme again is Michigan where the committee's control over a bill is practically com-

plete, as a matter of practice although not as a matter of law. The great majority of bills introduced in Michigan die in committee. Personally, I have no quarrel with that practice except that they should not die in a committee which meets in secret session. In any busy legislature no one has time to give adequate study to every bill that is introduced. The members of the committee are, however, presumed to give particular study to the bills referred to their committee. They should have adequate power to deal with those bills after such study. Again neither house has sufficient time for adequate debate on every bill that is introduced. Committee elimination avoids that necessity. That there are dangers attendant to this practice is obvious, but it appears to me to be the lesser of the two evils. Perhaps under our practice the committee has too much power, but we believe that in many states it has far too little power.

Much reason for hope of continued progress toward better legislative service lies in the increased activity and growing prestige of the Council of State Governments. In its meetings, legislators from various states meet and discuss their mutual problems and methods. Legislators from a given state seem to take suggestions for improvements much more readily from legislators of other states than they do from, shall we say, even better authority within their own state. This organization is doing a great job in a field where there is a definite need.

Personally, when I wish to feel pessimistic about the government under which I live, I can find many spots that worry me much more than do the state legislatures. With all their faults, with all their inefficiency, with all their mistakes, they are still fundamentally sound; they are still democratic; they are still thoroughly American. Improvement we should and can have, but we must be careful that we lose nothing of the splendid values they already have.

Chapter Five

STATE EXECUTIVES AND STATE ADMINISTRATION

No. 19

The following extracts from the 1947 message of the governor of Michigan to the legislature illustrate the form of such communications, the nature of the problems encountered in that state, and one executive's suggestions as to their solution.

MESSAGE TO THE LEGISLATURE[1]

LABOR

We should be guided by two basic fundamentals: (1) management and labor must solve the problems of relations between themselves; (2) the level of government closest to a social problem should have the most direct responsibility for facilitating its solution.

The government's only responsibility is to assist labor and management in solving their mutual problems under rules that will protect all parties concerned. The interest of the general public must always be supreme. Action should be taken, if possible, by local communities; and if local action is not feasible, then action by the state government is required. Government must be close to the people. Problems relating to labor and

[1] Kim Sigler, *State Government*, Vol. 20, No. 2, February, 1947, pp. 46–47. By permission of the Council of State Governments.

management, which can be solved at home should not be left to Washington officials who are unfamiliar with local conditions.

I am not interested in establishing elaborate and complicated governmental machinery in the field of labor relations. We already have too much government. I am interested in the establishment of effective governmental programs designed to provide practical assistance in the cause of industrial peace, in line with the two principles I have just expressed.

Duplication and confusion exist in our state government concerning labor problems because of an overlapping of agencies. I am therefore recommending to you that legislation be passed consolidating these agencies into a single, coordinated Department of Labor and Industry. Such coordination will make governmental labor services more useful. It can mean that in each community of any size throughout the state, there will be one place to which workers and their representatives, and employers and their representatives, may go for assistanse in matters relating to labor. . . .

LOBBYING

Thirty-four states of the Union, and the federal government, have provided, by statute or resolution, methods of regulating lobbying. I am convinced that we of Michigan should not be backward in this important field. The disclosures in Michigan during the last three years have demonstrated the need for such legislation in our state.

Our neighboring state of Wisconsin has gone a long way in this direction. The federal act passed by Congress is worthy of consideration and study.

The honorable lobbyist performs an important and legitimate function. The unethical and dishonorable lobbyist is a menace to society and to the very structure of good government. By his conduct he brings disgrace upon legislative business and disrespect for law. Let us meet this problem frankly and courageously. . . .

INSURANCE

The Supreme Court of the United States, in a recent case, held that when insurance business was transacted across state lines it became interstate commerce. Under the Constitution of the United States, Congress is the regulatory body for commerce between the states. Congress has acted upon this matter, and by the McCarran Act, so-called, has authorized the states to continue to regulate and tax the insurance business. However, after January 1, 1948, the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission Act will apply to the insurance business to the extent that it is not then regulated by state law.

It therefore becomes necessary that this legislature enact laws applying to the insurance business, affording the public the same protection as is provided by the federal antitrust laws. To fail to do so will actually mean federal regulation instead of state regulation. We can all agree that we already have too much federal regulation.

I understand that the National Association of Insurance Commissioners has worked upon this problem for almost two years, and after much study has prepared bills for consideration by the several legislatures of the Union, which, if adopted, will preserve state regulation. I therefore urge your earnest consideration of the adoption of such appropriate legislation as will bring the regulation of that business as far as possible within the jurisdiction of our own state. . . .

FINANCE

I believe that we will all agree that one of our most important, if not the most important problem before us, concerns the subject of finances. It is unnecessary to recount the causes leading to the recent adoption of the sales tax amendment to the Constitution, which is principally responsible for our current dilemma.

During recent years, because of the high level of consumer spending and price inflation, the state government has enjoyed

a period of lush revenues. The retail sales tax, the chief source of state revenue, has mounted annually. This will not necessarily continue.

Many people believed we had accumulated huge surpluses; we did have certain surpluses, but not to the extent commonly supposed. But, as a result of the recent constitutional amendments, the state's fiscal outlook has suddenly changed from one of surpluses to one of prospective deficits.

The amendment relative to state and municipal participation in the construction of airports is a forward-looking step, which will make possible the development of facilities necessary to meet the future growth and progress of our state.

The amendment authorizing the payment of a bonus to the sons and daughters of Michigan, whose efforts contributed so definitely in the winning of the recent war, has imposed an annual cost upon the state estimated at a minimum of $18 million.

The approval of the so-called sales tax diversion has taken away a major share of the state's chief revenue and placed it in the hands of the schools and local units of government. Under this amendment the schools may receive upwards of a total of $116 million a year—a sum far in excess of the wildest dreams of the most enthusiastic school supporter but a few weeks ago. Many townships, villages, and cities will receive moneys without any relationship to their needs.

This condition presents a lopsided financial picture, and we find ourselves faced with this question— Can we continue the present state services and operate the government at its present level without the adoption of new taxes?

No. 20

What may be called a "case study" will usually do more than the most accurate generalization to show how a governmental device actually works. A "power" such as the governor's veto can best be understood as a practical matter by a careful examination of its use in a single state. Since vetoes are matters of record, the method

followed in the article below may without difficulty be followed in the student's own state. The veto power is illustrated by the brief message by the governor of Maine.

THE GOVERNOR'S VETO IN PENNSYLVANIA[2]

The veto power is well known as one of the primary sources of the strength of a governor. Especially in the thirty-eight states which give their chief executives the right to reject items in appropriation bills, the governors have been able to mold legislation to their liking. In a few states, including Pennsylvania, the power to veto items has been expanded to include the authority to reduce any item. Probably in no state in the Union has the veto been a more effective club in the hands of the governor than in Pennsylvania. A study of the veto record in Pennsylvania over the past eight years reveals the extent to which the governor's will has prevailed.

The constitutional provisions concerning the veto in Pennsylvania are not unlike those in a number of other states. The governor may, within ten days after the passage of a bill by the General Assembly, disapprove it. If he fails to act within that period, the bill, unless approved by the legislature just before adjournment, becomes law without his signature. In addition, he is given the power to veto individual items in appropriation bills. The legislature may override any veto by a two-thirds vote of all the elected members of each house. A bill which is passed during the ten days before the close of the session becomes law unless vetoed by the governor within thirty days after the adjournment.

During the period from 1939 to 1946, inclusive, the General Assembly passed a total of 2,174 bills. Arthur James, who served as governor from 1939 through 1942, vetoed 144 bills in their entirety, and also sliced off all or a part of 304 items in the appropriation bills. Governor Edward Martin (1943–1946),

[2] M. Nelson McGeary, *The American Political Science Review*, Vol. XLI, No. 5, October, 1947, pp. 941–946.

a less ardent pruner, rejected 85 complete bills and reduced or struck out 49 appropriation items.

. . . . . .

For over twenty years, Pennsylvania has had an executive budget. A governor, armed with the Pennsylvania type of item veto, has full power to hold appropriations down to his budget figures. As a practical matter, of course, a chief executive may find it politically desirable to acquiesce in some of the legislature's suggestions for larger expenditures. Generally speaking, however, the governor's budget is enacted into law in much the same form as originally drafted. In 1939, for example, Governor James presented to the legislature a budget for the biennium totaling $377,171,000. The General Assembly, more generously inclined, added 2½ per cent, bringing the total to $386,290,000. But the governor cut it back to $376,065,000, which was slightly under his originally suggested figure. Although Governor Martin did not enforce as rigid a budget on the legislature as did his predecessor, he nevertheless used the item veto effectively; in the 1945 session, for example, he slashed appropriations by $21,808,000, or approximately 4 per cent of the amount passed by the legislature. It is interesting to note that, of the total amount of apropriations vetoed during the eight-year period of this study, about 78 per cent resulted from the reduction, not the complete rejection, of appropriation items.

Such reductions discourage the acceptance of responsibility by the legislature. When a legislator, even though opposed in principle to an appropriation, is reasonably certain that the governor will slice it down to more moderate size, he is tempted to bolster himself politically by voting large sums of money to a popular cause. Indeed, one may wonder that larger appropriation bills are not presented to the governor for his whittling.

. . . . . .

When vetoing items in appropriation bills, the governors customarily did not give detailed reasons but often merely stated that their action was necessary "because of insufficient

state revenue." When vetoing complete bills, however, the governors usually gave detailed explanations. The principal reasons for full vetoes can be classified under four headings: bill defective because of bad drafting, bill of doubtful constitutionality, bill unnecessary or similar to another bill already signed, and bill generally undesirable in the opinion of the governor. Not infrequently, two of these reasons were listed in a single veto message. An analysis of the messages of Governors James and Martin shows that a major factor in 62 per cent of the full vetoes was the governor's judgment that the bill was undesirable. Only 8 per cent of the vetoes were at least partially occasioned by the governor's doubts as to the constitutionality of bills. The number of defectively drafted bills appears rather high and may point to some carelessness on the part of the General Assembly. It should be noted, however, that bad drafting was given as the sole reason for veto in only relatively few instances; in 21 of the 36 vetoes in which the governor declared bills defectively drawn, other grounds for rejection were stated.

GOVERNORS' REASONS FOR THE 229 VETOES OF COMPLETE BILLS

Session	*Bill poorly drafted*	*Bill unconstitutional*	*Bill unnecessary*	*Bill undesirable*	*Miscellaneous*
1939	12	9	13	42	4
1940					
1941	9	5	9	53	5
1942	1	4			
1943	7		1	24	8
1944					
1945	7	1	6	24	13
Total (257)*	36	19	29	143	30
Percentage of the 229 vetoes	16	8	13	62	13

* This total is higher than the 229 bills vetoed because of the inclusion of two principal reasons in some veto messages.

The full significance of the veto authority of the governor of Pennsylvania is not apparent until it is understood that in practice the power is almost absolute. Only once in the present century has the legislature overridden a veto. A combination of circumstances has accounted for this record. The constitutional requirement of a two-thirds vote of all elected members of both houses is in itself difficult to meet. Only occasionally is any attempt made to meet it. A house of the legislature, when it receives a bill and accompanying veto message from the governor, usually lays it, rather perfunctorily, on the table, from which it never rises. Even though a bill may originally have passed both houses by unanimous vote—as not infrequently happens—rarely is any effort made to resurrect it. Only once in the period of this study was a motion offered to override a veto. The bill, which would have amended the milk control law, had passed the House by a vote of 200 to 0 and the Senate by 46 to 2. The governor's veto was sustained in the house, however, by a vote, on the motion to override, of 115 yeas to 75 nays.

Because it passes most bills in the last few days of a session, the General Assembly completely precludes any legislative review of most vetoes. Such legislative procrastination is traditional. It was reported in 1924, for example, that "of the total number of appropriation bills and items which the (Pennsylvania) governors disapproved or reduced, 98 per cent were disapproved or reduced in the thirty-day period" following the adjournment of the legislature.

This last-minute activity on the part of lawmaking bodies is, of course, not unique to Pennsylvania. The mountain of unfinished business faced by most state legislatures at the end of a session has been one of the most pressing arguments for the establishment of legislative councils. . . . The record of the 1945 legislature is typical—of 537 laws enacted that year, only 183 were presented to the governor in time to receive his approval before the adjournment of the legislature; moreover, 42 of the governor's 45 full vetoes and all of his item vetoes were given after the close of the session. The total figures for the four reg-

ular sessions of the General Assembly during the period of this study show that only 14 of the 224 vetoes of complete bills and only 17 of the 337 vetoes of items in appropriation bills reached the legislature before adjournment. The legislature, in other words, is to a large extent responsible for conferring on the governor an absolute veto power.

. . . . . .

The predominant role of the governor in the legislative process was further highlighted by the General Assembly's handling of the general appropriation bill of 1941. When this measure produced a conflict between the Republican Senate and the Democratic House, the argument was tossed into the governor's lap for settlement. The Senate, rather than send the bill to a conference committee and a probable deadlock, voted 32 to 0 to send it to the governor, who explained that "the Senate has passed the bill, objectionable as some of its provisions are, in the same form as it was received from the House, and has left it to the governor's constitutional power to correct such conditions as it can."

Realization of the potential power of the governor's veto weapon appears unduly to have tamed the legislators. The General Assembly must not allow itself to drift into a position of impotence. The lawmakers, at the very least, should better spread their work over an entire legislative session and thereby reclaim their right to consider executive vetoes.

No. 21

VETO MESSAGE[3]

State of Maine
Executive Department
Augusta

April 9, 1943.

To the Honorable Senate and House of Representatives:

I am returning, unsigned, Legislative Document 881, Bill, AN ACT Relieving Towns from Board and Care of Neglected Children.

I gladly recognize that the objectives of this bill are desirable and just.

Figures I have received from the Committee on Appropriations and Financial Affairs show, however, that the passage of this bill will result in an operating deficit at the end of each year of the coming biennium after allowing for the current costs of civilian defense from current revenues.

I believe that Civilian Defense and current emergency war costs have prior right to current revenues. In my opinion, as expressed in the budget message, it is neither sound nor prudent to enact a law requiring a known annual expenditure without providing a definite means of financing such a law.

I, therefore, cannot approve this act at this time.

Respectfully submitted,
(Signed) Sumner Sewall

No. 22

The following provisions of the New Jersey Constitution of 1948 are, with some qualifications, illustrative of much current thinking about administrative organization. Note that the number of depart-

[3] *Legislative Record*, Maine, 1943, p. 1216.

ments is limited to twenty and that the heads are to be single executives, though the way is left open for the use of boards. The concluding paragraph, providing for the filing and publication of executive rules and orders, points up the growing importance of "subordinate" legislation in state government.

CONSTITUTION OF THE STATE OF NEW JERSEY

ARTICLE V, SECTION 4

1. All executive and administrative offices, departments, and instrumentalities of the State government, including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments, in such manner as to group the same according to major purposes so far as practicable. Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department.

2. Each principal department shall be under the supervision of the Governor. The head of each principal department shall be a single executive unless otherwise provided by law. Such single executives shall be nominated and appointed by the Governor, with the advice and consent of the Senate, to serve at the pleasure of the Governor during his term of office and until the appointment and qualifications of their successors, except as herein otherwise provided with respect to the Secretary of State and the Attorney General.

3. The Secretary of State and the Attorney General shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor.

4. Whenever a board, commission or other body shall be the head of a principal department, the members thereof shall be nominated and appointed by the Governor with the advice and

consent of the Senate, and may be removed in the manner provided by law. Such a board, commission or other body may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the Governor. Any principal executive officer so appointed shall be removable by the Governor, upon notice and an opportunity to be heard.

5. The Governor may cause an investigation to be made of the conduct in office of any officer or employee who receives his compensation from the State of New Jersey, except a member, officer or employee of the Legislature or an officer elected by the Senate and General Assembly in joint meeting, or a judicial officer. He may require such officers or employees to submit to him a written statement or statements, under oath, of such information as he may call for relating to the conduct of their respective offices or employments. After notice, the service of charges and an opportunity to be heard at public hearing the Governor may remove any such officer or employee for cause. Such officer or employee shall have the right of judicial review, on both the law and the facts, in such manner as shall be provided by law.

6. No rule or regulation made by any department, officer, agency or authority of this State, except such as relates to the organization or internal management of the State government or a part thereof, shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law. The Legislature shall provide for the prompt publication of such rules and regulations.

No. 23

It is a commonplace in the study of government to note the increasing influence of the executive upon the "making" of laws. A more vigorous role in this field has been played not only by the President of the United States but also by governors and by such local executives as the "strong" mayor and the city manager. The discussion by Dr. Spicer of this development is all the more con-

crete because it is confined to a single state. It will be noted that the governor has influence in the field of policy not only by virtue of being an elective officer but also because his position as chief of *administration* is one which endows him with great influence in suggesting and promoting new departures in *legislation.*

GUBERNATORIAL LEADERSHIP IN VIRGINIA[4]

He who seeks only originality will not be interested in this paper. It attempts to deal with a very old problem in the light of the relatively recent experience of the oldest American state. The problem in its broad and essential nature is that of the proper relationship of the executive and the legislature in democratic government. It is essentially a problem of reconciling efficiency of governmental service with effective responsibility and popular control. Or, in more technical phraseology, it involves the proper balancing and adjustment of politics and administration. The problem is new only in the sense that it faces new difficulties and calls for new applications and adjustments. It has not been solved by the formal, unctuous phrases of written constitutions. It involves the realities of life and tasks to be accomplished; and these realities and these tasks are not static but vital and dynamic. Nowhere is this more clearly demonstrated than in the history of American state governments.

The aspect of the problem considered here is the governor's relationship to legislation and administration. Strong and effective leadership is essential in both legislation and administration. It is vital to the successful functioning and even to the existence of democracy in modern circumstances. The problems of the war and postwar reconstruction will demand an ample supply of able and courageous leadership. It is important that the several states be prepared to play a significant role in this struggle for the preservation of democracy.

[4] George W. Spicer, *Public Administration Review,* 1940–1941, Vol. I, No. 5, Autumn, 1941, pp. 441–457.

Long-standing legislative jealousy of executive leadership, aided by emotional accretions to the phrases, "separation of powers" and "checks and balances," has operated against the development of such leadership. The American people have feared to trust leadership. Yet it must be trusted if democracy is to be effective and survive. The traditional relationship between the legislature and the executive has made it difficult to afford ample power for action and to fix responsibility for action in both the legislative and administrative fields. With our legislatures constituted as they are, it is next to impossible for legislative leadership to be developed within the legislative body. At the same time in the states, as in the national government, we have developed new administrative authorities with an almost complete disregard of the necessity or the desirability of general supervision and coordination. We have acted largely without consideration of plans or principles. Here, too, we have been suspicious and distrustful of strong and effective leadership.

But whence should come leadership in legislation or administration? In which field should the governor take the leadership? Or should he lead in both? The trend has been toward the latter alternative in Virginia, as in the majority of states. Through the vicissitudes of more than a century and a half the chief executive of the Old Dominion has emerged as the leader both of legislation and of administration. At least there is little positive leadership in either field that does not emanate from the governor's office. . . .

LEGISLATIVE LEADERSHIP

The framers of the first state Constitution were chiefly concerned with making the legislature supreme. The previous unhappy experience with irresponsible and tyrannical colonial governors appointed by the Crown was too fresh in their memories to permit more than a mere formal declaration of the doctrine of separation of powers. Although Section 3 of the Constitution of 1776 provided that the three "departments shall be separate and distinct, so that neither exercise the powers

properly belonging to the other," other sections of this same Constitution made the governor completely subservient to the legislature. Indeed he remained virtually in this relationship to the legislature until 1852. . . .

The Constitution of 1850 wrought the first really important change in the political position of the governor by (1) abolishing the Council of State and (2) providing for the election of the governor by the voters for a term of four years. By these changes he was rendered politically independent of the legislature and was enabled to exert a political leadership which was destined to have a significant effect not only upon legislation but upon administration as well.

The Constitution of 1869 granted the veto power to the governor for the first time and thereby rendered more effective his recommending power. From this time on and to some extent from 1852 the governor's influence over legislation is indicated by certain acts conferring administrative powers upon him.

The Constitution of 1902 further augmented the legislative powers of the governor by granting him the power to veto specific items in appropriation bills and the power to recommend amendments to any bills presented to him.

Another significant addition to the legislative, as well as to the administrative, power of the governor came by the way of statutory legislation with the enactment of the Budget Act of 1918, authorizing and requiring the governor to prepare and submit to the General Assembly a biennial budget. Under the act the governor is further required to submit with his budget a bill carrying in legal form his recommendations.

Through these and other constitutional and statutory grants of power, and through his position in the party organization of the state and as leader and exponent of public opinion for the state as a whole, the governor by the beginning of the third decade of the present century had become able to play the role of leadership in the conduct of the political functions of the state government. He had emerged from his evolutionary process as the representative of the people of the whole state, and as such he was expected by them to assume the leadership in

formulating and steering to enactment a constructive program of legislation. For this they had come to hold him responsible, the separation of powers to the contrary notwithstanding.

This popular attitude toward the governor was due in part to the change in his political position enabling him to become the voice of the entire people of the state, but more largely perhaps to the decline in the prestige of the legislature, which began in the country as a whole before the middle of the last century. . . .

The extraordinary growth in the legislative leadership of the governor in the early part of this century was undoubtedly stimulated by the forceful, dynamic, and courageous leadership of such governors as Hiram Johnson, Charles E. Hughes, Robert M. La Follette, and Woodrow Wilson. They were all vigorous and popular leaders and did not hesitate to make their appeal directly to the people when their proposals were sidetracked by hostile legislatures. In Virginia, constitutional and statutory changes have perhaps been more favorable to the development of the governor's legislative leadership than in any other state, but extralegal forces have played their part here as elsewhere. . . .

In considering briefly the nature and effectiveness of the governor's legislative powers, the discussion may be confined to the *recommending power* and the *veto power.* In the broadest sense these cover nearly the whole range of the governor's legislative influence—legal and extralegal. Likewise they are closely interrelated in that the possibility of a veto by the governor tends to increase the effectiveness of his recommendation to the legislature and the effectiveness of the recommending power decreases the necessity for the employment of the veto power.

THE RECOMMENDING POWER

The power to recommend to the General Assembly at each session thereof such measures as he deems expedient was first granted to the governor in the Constitution of 1830, but it could not at that time have been intended to be used as a positive

force in securing the enactment of legislation. Since the governor owed his very office to the legislature, he had no means of implementing the recommending power as a positive and constructive force in legislation. It could not have been more than a mere suggestion.

Today it is a much more important factor. Of course, the General Assembly may still reject all of the governor's recommendations, but it is not in a political position wisely to follow such a course if the proposed program has the support of public opinion. The fact that the governor is elected from the state as a whole and is consequently responsible to the whole electorate rather than to some small segment thereof gives him, and him alone, the voice to speak for the whole people. This has given him a prestige and influence which no member, nor even a group of members, of the legislature can hope to match. He is the only spokesman for the state as a whole.

Whatever may have been the original intention of the constitutional provision concerning the recommendation of measures to the legislature, it is now regarded by governors and apparently by legislators alike as imposing a joint responsibility upon the governor and the legislature with respect to legislation. This interpretation found expression, for example, in the general message of Governor James H. Price to the 1940 General Assembly thus: "Under the terms of the Constitution, the chief executive and the General Assembly have a joint responsibility in the field of legislation."

The Constitution of Virginia, like those of other states, does not expressly indicate whether the power to recommend legislation carries with it the further power to formulate the recommended objectives into specific bills ready for introduction, but there would seem to be no objection to such procedure. . . .

Recent governors of Virginia have not hesitated to embody their recommendations in the form of drafted bills, and the legislature apparently welcomes, if it does not actually expect, this procedure. Governor Price stated with obvious satisfaction to the 1940 session of the General Assembly that, "All the legislation which has been proposed . . . has already been pre-

pared and is in my hands ready for introduction and consideration by the General Assembly."

EFFECTIVENESS OF RECOMMENDING POWER

The most outstanding legislative record of recent governors in Virginia, and perhaps in the entire history of the Commonwealth, is that of former Governor Harry F. Byrd. He combined all of his legislative powers—legal and extralegal—to effective advantage. Of approximately seventy-five recommendations made to two regular sessions and one special session of the legislature in his administration only seven, it appears, failed of enactment into law.

Mr. Byrd's successor, the late John Garland Pollard, also had a high proportion of his legislative recommendations enacted. Of fifty recommendations submitted to two regular sessions of the General Assembly only eight failed to secure legislative approval, and one of the latter was approved in a later session. Governor George C. Peery, who succeeded Governor Pollard, was only slightly less successful than his predecessor in securing enactment of his legislative proposals. Of approximately a dozen recommendations for new legislation made in his inaugural address, only one or two failed to receive approval by the legislature. In this case a governor lacking the usual characteristics of a popular leader was nevertheless successful in securing the approval of his first legislative program. It is true that at the next regular session in January, 1936, the governor's recommendations for social legislation were received less favorably. Nearly all social security and labor legislation which came before this session was defeated by a reactionary legislature, but two facts should be noted in this connection: (1) that the governor exerted no vigorous or crusading leadership in behalf of such legislation at this time; and (2) that he called an extra session later in the same year which passed with little opposition an unemployment compensation act recommended earlier.

The legislative record of the present governor, James H. Price, marks an exception to the preceding record, especially in his mid-term session of the legislature. In the first session

he was far from unsuccessful in legislative leadership, if his unsatisfactory political relations with the legislative majority are taken into consideration. While abortive attempts were made to embarrass him the legislators of the opposing faction were impressed with his personal popularity and political strength, and he suffered no serious reversal in the 1938 session. . . .

The constitutional power of the governor to convene the legislature in special session is in Virginia, as elsewhere, a factor of importance in augmenting the effectiveness of his recommending power. Although Virginia is not one of those states (numbering about half of the total) in which legislation at such sessions is limited to the subjects named by the governor in his call, nevertheless public attention is concentrated on a definite program initiated by the governor, and the legislature finds it more difficult to dodge the issues involved. For example, in the administration of Governor Trinkle (1922–1926), of eighteen proposals made to the regular session of 1922 eight failed to pass; whereas in the special session of 1923 only three of thirty-two proposed measures failed of passage. Other special sessions show similar results.

NEW MACHINERY FOR LEADERSHIP

Beginning in 1926 the political power considered in the foregoing paragraphs was employed by Governor Byrd to effect an increase in the administrative powers of the office, which in turn had the indirect effect of further strengthening the legislative leadership of the governor. Through constitutional and statutory changes enacted under the leadership of Mr. Byrd and collectively known as administrative reorganization, the governor became the administrative head, or general manager, of the state government.

The reorganization of the administrative agencies of the state government, coupled with the executive budget which had been in operation since 1918, greatly strengthened the governor's influence in that large body of legislation relating to the organization and functions of administrative departments and other agencies. Through the executive budget the governor

controls the budget estimates and expenditures of administrative agencies and thereby may exert strong influence on any new legislation desired by them. Consolidation of administrative agencies under the control of the governor has further strengthened his power over administrative legislation. The type of bills formerly prepared and submitted independently of the governor by administrative agencies not under his control now usually clears through the governor or emanates from his office. This change has greatly reduced the practice of departmental and institutional lobbying before the legislature and has brought about a considerable increase in the number of administration bills. Most departmental legislation is now recommended in the governor's message, and he rightly resents any attempt on the part of heads of departments or divisions to by-pass him in their requests for new legislation. It was almost inevitable when the governor became the head of the administration that he would be even better prepared to play the role of legislative chief. Thus the cycle ran: first, the political leadership of the governor developed; second, the political power was used to effect an increase in the administrative power of the office; and, third, this in turn had the indirect effect of further strengthening the legislative leadership of the governor.

Since the reorganization, which will be later considered in connection with administrative leadership, the governor's recommending power has been further implemented by the creation of agencies which aid him in the preparation of his legislative program, and which have tended to promote a more satisfactory and effective working relationship between him and the legislature. The more important of these devices are the Division of Statutory Research and Drafting, the Virginia Advisory Legislative Council, and the Virginia State Planning Board. . . .

THE VETO AND LEGISLATIVE LEADERSHIP

The veto is constitutionally the chief source of the governor's legislative power. It was not conferred upon the governor of

Virginia until 1869, it will be recalled; but it has been enlarged by subsequent constitutional revision to become, in the positive sense, one of the most effective among the veto powers of state governors. In this connection it should be noted that the governor may recommend amendments to bills presented to him by the General Assembly, if he approves of the general purpose of the bill but disapproves of any part or parts thereof. In this case he returns the bill to the house in which it originated, indicating precisely the changes in language which he desires; and if the two houses, after reconsideration, agree to the governor's recommendations by a majority of those present in each, the bill is again sent to the governor and he may act upon it as if it were then before him for the first time. Only two other governors, those of Alabama and Massachusetts, have this power, which brings to bear the governor's influence at an early stage and thus frequently makes it unnecessary for him to veto a single bill during the session of the legislature.

During the last sixteen years four governors have returned a total of 150 bills to the General Assembly with recommendations for amendment and only two of these recommendations have failed to receive approval. The positive effect of this power may be further indicated by the fact that during this same period the four governors vetoed only twenty bills while the legislature was in session and only two of these vetoes were overridden.

The so-called pocket veto affects bills presented to the governor less than five days before final adjournment of the legislature and is, of course, absolute in character. Bills presented at this time must have the positive approval of the governor within ten days after final adjournment in order to become law.

The provision of the Constitution of 1902 authorizing the governor to return bills to the General Assembly with recommendations for amendment was regarded by its framers in the convention of 1901–1902 merely as "a step in the direction of increasing the friendly relations and facilitating conferences between the legislature and executive." It would not affect, they thought, the balance of power between the governor and

the General Assembly, but would rather obviate friction between the two departments and bring about more harmonious relations between them.

Both the power to recommend amendments to bills and the pocket veto are confined largely to bills with technical defects or bills inconsistent with, or duplicates of, other bills. So closely does the governor ordinarily follow his legislative program and so effective is his influence, thanks to the foregoing powers and devices, that it is rarely necessary for him to exercise his veto on grounds of constitutionality or of public policy while the legislature is in session. The veto is employed primarily as a method of correcting the deficiencies in legislative organization and procedure.

In addition, the item veto may, of course, be employed by the governor to protect his budgetary estimates. This power, however, has been rarely exercised. In approximately forty years only three governors have attempted it; and in the case of seven provisions of the Appropriation Act of 1940 vetoed by Governor Price, the supreme court of appeals held that none of these provisions was an item of appropriation and the disapproved provisions were, therefore, restored to the Appropriation Act. . . .

ADMINISTRATIVE LEADERSHIP

As already pointed out the political power and influence of the governor in 1926 and 1927 were directed by Governor Byrd toward making the governor the administrative chief of the state. By the Reorganization Act of 1927 and the constitutional revision approved by the electorate in June, 1928, the governor became the head of the administration. Prior to that time he had gained relatively little power in the field of administration.

The object of the reorganization was in the broadest sense twofold: One purpose was to make the state administration more efficient and more economical by concentrating power in the hands of the governor, and the other was to make government more responsible to the people by simplifying it so that they might more effectively control it. The phrase "unity of

management" perhaps best expresses the major principle by which these purposes were to be achieved. This means, first, that all persons in the administration are under the general direction of the governor; second, that all units in the administrative organization are integrated into a system which leads up to the chief executive. The practical basis of this principle of integration is that the chief executive cannot be expected to secure completely satisfactory results in service unless all units of the administration are under his direction and control. The governor, as the responsible leader of the administration and of the people, is in this way afforded effective means of coordinating and controlling those activities for which he is responsible.

As corollaries or supplements to the principle of concentrating administrative leadership and control in the governor, functional departmentalization was to be observed by setting up a small number of departments each comprehending one major function under the direction of a single director appointed by and responsible to the governor; boards were to be eliminated as purely administrative agencies; a governor's cabinet was to be recognized; staff agencies were to be strengthened and coordinated under the governor, and provision made for an independent audit. Through the application of these principles the governor was to be placed in a position effectively to coordinate, supervise, and control the administrative activities of the state. Thus the identification of responsibility for success or failure in each department was to be rendered less difficult.

If these principles are applied in their full integrity, there will be no headless departments, no plural-headed departments, no department heads elected by popular vote or by the legislature, no boards or commissions as administrative agencies; and each department will comprehend, as nearly as possible, some one major function. Now even a casual examination of the administrative structure of the state will make it apparent that there were many departures from, or violations of, the

declared principles of the reorganization; and that in many important respects the reorganization was merely piecemeal.

Only the briefest summary of these conditions can be given here. First, it may be observed that only three of the thirteen so-called departments have single heads and that only two of these latter are appointed by the governor. The other, the head of the Department of Law, is a constitutional elective officer over whom the governor has no control. Some departments have no heads as, for example, the Department of Conservation and Development and the Department of Finance; and others, such as the Department of Public Welfare, are plural-headed. The Department of Corporations is "headed" by a commission chosen by the legislature, thus involving a double violation of reorganization principles. The principle of functional integration is violated in that related functions are in some cases scattered among a number of departments; and, conversely, unrelated functions are assigned to the same department, as, for example, police functions of the Department of Finance. In five line departments there are both a board and an executive director, each separately appointed by the governor. In each case the board theoretically formulates administrative policy but cannot direct or compel the executive officer. This difficulty, however, has been averted in several cases; the board has informally delegated administrative authority to the executive director, generally known as commissioner.

The number of separate agencies now responsible and reporting to the governor is approximately as great as before reorganization. The difference is that most of these agencies are now at least potentially under the control of the governor. Their number, however, is so large as to stretch his span of control far beyond the point of effectiveness. With so many points of managerial contact, the governor finds it impossible to give adequate attention to all of them.

In spite of the foregoing conditions the administrative organization is probably more nearly integrated than that of the majority of reorganized states, and the governor may properly

be called the head of the administration. Usage has obviated some of the above-mentioned obstacles to his administrative leadership, and the establishment of fairly adequate staff agencies, especially the fiscal agencies, has offset many others. For example, the Department of Highways, which is in theory "headed" by the state highway commission of which the highway commissioner is only the executive officer, is actually operated as a single-headed department. The commissioner has long been the chief influence on the commission and the latter has informally delegated its administrative authority to him. Most of the governor's contacts with the highway department are through the commissioner.

Again the "headship" of the Department of Education is shared by the state Board of Education and the state superintendent of public instruction. However, in actual operation this department is not very different from an integrated department. A *modus vivendi* seems to have been worked out between the superintendent and the board whereby conflict is avoided and the governor is afforded a more effective means of coordination.

Likewise in connection with the Department of Health, although full administrative responsibility is legally vested in a board of seven members appointed by the governor, this body apparently delegates the major part of its administrative authority to the commissioner of health and relies upon his judgment in determining administrative policy. The board meets approximately once a year upon call of the commissioner. A similar situation prevails in the Department of Agriculture.

In addition to the governor's control over administration through the power of appointment and removal, and the power to require reports from, and to make investigation of the heads of departments and institutions, he maintains a continuous control over the financial affairs of the state through the various divisions of the so-called Department of Finance and the Division of the Budget. Through the control devices made available within these agencies an energetic governor can go a long way

toward offsetting the handicaps flowing from the complicated structure of the operating agencies.

Whatever defects of organization and procedure may remain in the financial system of Virginia, the most distinctive mark of the system is the leadership of the governor. From the administrative side, all instruments of financial direction and control are in his hands. Every step in the process of acquiring, using, and accounting for public funds, save the voting of appropriations and the independent legislative audit, is under his supervision and control. When the governor controls both the budget estimates and the use of funds after appropriations are made, his authority is greatly extended.

But this control is in no sense a usurped control. It has been granted to the governor by the legislature and it can be withdrawn by the same authority. In setting up the accounting control system and the other instruments of current expenditure control under the governor's direction, the legislature has recognized that current control of expenditures is essentially an executive function. This means, within prescribed limits, administrative finality in the use of appropriations, once they are made, but it in no sense impairs the ultimate legislative control of the purse, which is properly regarded as essential to the maintenance of representative democracy. In the exercise of these fiscal functions the governor and his subordinates are acting essentially as agents of the General Assembly and of the people of the state; and the more ample their granted powers and the better integrated their activities, the more effective is their accountability likely to be.

In the field of personnel management the governor is still without adequate staff assistance, although a partial personnel system has been developed in the Division of the Budget, and individual departments and other agencies have developed their own limited personnel programs. The Virginia Advisory Legislative Council sought to fill the void by a personnel management bill presented to the 1940 session of the General Assembly, but the effort was defeated. It seems not unlikely that

this or a similar program will be adopted in the reasonably near future. The demand for it is growing and the legislature will not always be unmindful of this fact.

CRITICISM AND CONCLUSION

The preceding pages have sketched the development of the governor from a position of impotence in both legislation and administration to one of leadership in both fields. The inevitable question now arises, "Is such leadership desirable?" Just as there was strong criticism of the governor's legislative leadership, so there is strong criticism of his position as general manager of the administration in the reorganized states. For example, Professor T. V. Smith of the University of Chicago, former member of Congress from Illinois, regards the governor as logically and constitutionally subordinate to the legislature and contends that he has usurped a function for the performance of which he is neither authorized nor qualified, and that in attempting this function he is neglecting almost completely the one job which he is authorized to do, namely, administrative leadership. "In reaching for the forbidden fruit beyond his fence, he lets go to waste the rich fruits of his own orchard," he says in *The Promise of American Politics.* To meet this situation Mr. Smith makes two suggestions, supplemented by a third. "The first suggestion is to get the governor off the backs of the legislatures and set him on his own feet. The second is to get the legislature organized to do well their deliberate job, which the governor now usurps poorly." The supplementary suggestion is to make the lieutenant governor an expert in legislative-executive relations.

To these suggestions of Representative Smith, the answer of Professor Harvey Walker, of Ohio State University, would seem to be an emphatic "No!" He insists that on the basis of both theory and experience the governor is unfitted for the job of chief administrator. A chief administrator, chosen by the legislative body from nominations by the governor, should therefore conduct the administrative business of the state "along scientifically sound lines" (as he said in an article in the

National Municipal Review in April, 1930), and the governor should be left free to perform the task for which he is competent, namely, legislative leadership. It is not improbable that each of these able critics is half right. It may be that the governor is potentially competent for leadership in both fields and that such a combination is desirable.

With regard to the governor's relation to administration in the reorganized states, it appears that either too great results or wrong results are expected of reorganization by adverse critics. This is particularly true of those who oppose reorganization on the ground that it vests so great a power in the governor that he cannot be held responsible. The truth is that if the governor is to be truly responsible to the legislature and to the people for efficient administration, he must have power commensurate with that responsibility. Where there is no power, there can be no real responsibility; and where power is scattered and disintegrated, responsibility will be divided and ineffective. As Woodrow Wilson pointed out more than a half century ago, "There is no danger in power, if only it be not irresponsible. If it be divided, dealt out in shares to many, it is obscured; and if it be obscured, it is made irresponsible. But if it be centered in heads of the service and in heads of branches of the service, it is easily watched and brought to book."

The chief objection of some of these critics is that the more powerful executive is not responsible to the legislature. They sometimes assert or intimate that they would not object to increasing the governor's power if he were responsible to the legislature, as in the cabinet system. Actually the situation seems to be that American governmental administration is under greater potential control by the legislature than is the cabinet in England. True it cannot turn the executive out of office for a disagreement over policy (the British Parliament seldom does), but it can defeat the measures of the executive with no fear of dissolution. Among the legislative controls over the administration are (1) the power to determine the activities to be undertaken, (2) the power to provide the organization

through which such activities are performed, (3) the provision of funds for their support, (4) the independent legislative audit and review, (5) the sole power to provide taxes and to make appropriations for the operation of the administration, (6) the power to secure adequate information concerning the work of the administration through the requirement of records and accounts, regular reports, etc., (7) special investigations of a more intensive character when deemed necessary, (8) the power of impeachment and removal, and (9) the confirmation of appointments. These devices can be made effective if the legislature has the will to make them so.

No responsible advocate of integrated adminstrative organization regards it as a cure-all or a self-executing system. Indeed there are many important problems of modern democracy which administrative organization touches only indirectly or not at all. Political jobbery and personal aggrandizement may prevail in reorganized states as they have in unreorganized states, so long as the voting population condones these practices. We know, of course, that an administrative code is no absolute guarantee against a Len Small; but we know also that a loosely organized disintegrated type of administration is no safeguard against the incredible reign of a Huey Long.

No type of administrative structure can render these political monstrosities impossible. But the possibility at least of securing responsible administration is attained by concentrating administrative authority in the governor. All that responsible advocates can claim for the integrated type of administration is that it affords the people a relatively simple government under which greater efficiency and responsibility can be had, if the officials and the people so will it. It is primarily a technique of democracy in a complicated industrial society.

The fact that reorganization has not always and everywhere accomplished the results claimed for it is no proof that it is based upon unsound principles. Everywhere its declared principles have been to a greater or less degree only partially applied, and the results have not unreasonably fallen short of what was claimed for a complete application of principles—or

if the critics prefer, hypotheses. The simple truth is that there can be no completely reliable appraisal of administrative reorganization until we have a fairly complete and consistent application of reorganization principles.

As to legislative leadership, the significance of the increased influence of the governor lies in the fact that through him the people have discovered a more effective means of controlling the formulation of public policy. The only way that public opinion is likely to find expression for the state as a whole is through leadership of the governor. He must of necessity formally originate most public policy. The legislatures with their infrequent sessions and their lack of knowledge of the intricate business of government are finding it increasingly difficult to perform the legislative function in the traditional manner. . . .

No. 24

The "spoils system" as a method of keeping the political "machine" alive and in good health dies hard. Not only is it difficult to draw a "merit system" law so as to exclude "machine" influence; even a well-drawn statute has to be administered, and, if the administrators are unfriendly to the merit idea, many ways will be found to evade the spirit of such laws. Many times neither the legislature nor the executive is sympathetic to the merit system, with such results as are described in the article reproduced here.

METHODS OF EVASION OF CIVIL SERVICE LAWS[5]

Any systematization of the techniques of political machine formation must include an analysis of the methods of evasion and avoidance of merit system legislation. The electoral power of the "machine" depends in large measure upon the efforts of disciplined and loyal party workers who may be recruited most

[5] V. O. Key, Jr., *The Southwestern Social Science Quarterly*, Vol. XV, No. 4, March, 1935, pp. 337–347.

readily through the distribution of patronage. Almost uniformly legislators and practical politicians have opposed, at least privately, the enactment of laws providing for the recruitment of public employees upon the basis of merit. Militant reform movements compelled the enactment of such legislation and ways and means came to be devised to mitigate the requirements of the law. Without attempting an extensive survey of the present status of the merit system, examples of evasion in various jurisdictions may be brought together to indicate the more frequently recurring general types.

LIMITING THE SCOPE OF MERIT LAWS

By framing legislation to exclude certain classes of employees from the application of merit requirements and procedures, many positions have been saved to be dispensed at the discretion of the organization. Practically every proposal in Congress for the creation of a new administrative agency is marked by a fight to exclude its employees from the provisions of the civil service regulations, and often the effort meets with success. The disastrous effects of such a step on prohibition enforcement are too well known to require comment.

Although there are some exemptions of specific administrative agencies in states and cities having merit laws, more positions are affected by the exemption of classes cutting horizontally through all the administrative departments. Heads of departments and their immediate subordinates, such as deputy commissioners, are generally open to selection upon the basis of political considerations. These jobs are extremely valuable from the patronage standpoint, for it may be said that the value of a job for this purpose increases with its altitude in the administrative hierarchy. The place which their holders occupy in the public eye serves as a constant reminder to the Italians, the Brotherhood of Locomotive Engineers, the Poles, the Catholics, the Negroes, the American Legion, or other pressure group that the administration has recognized them by placing one of their number in a post of power and honor. Furthermore, the possession of a large number of such positions greatly

simplifies the matter of discipline within the organization. The leader is constantly being challenged by men who are almost his equal, and the astute distribution of positions of this type among the more dangerous contenders for power helps mightily in checking insubordination.

Every important official must have his confidential assistants, personal investigators, private secretaries, or other attachés possessed of a title of relatively high prestige value. Due to the intimate relationship and the delicate matters handled by these persons, it is argued that they should be selected by their superior completely free of any requirement for competitive examination. This contention is often groundless, but after the places are created and exempted from examination requirements they may be used as rewards for deserving members of the organization.

Some positions which for other reasons are thought not to be susceptible of being filled by competitive examination are governed by pass or noncompetitive examination provisions. This type of examination gives much greater discretion to the appointing authority than the ordinary open competitive test. In effect, complete freedom may be given to the appointing officer. At the other extreme, laborers are usually exempt from the operation of the competitive procedure. There are loafers and workers, able and disabled persons, whose characteristics could be determined by a personnel officer, but the merit system was introduced with emphasis upon the academic type of exmination which precluded the inclusion of this type of employee. This leaves a large number of jobs for unskilled workers which can be used with extraordinary effectiveness in building up organization support. The possible effect of all these exemptions may be seen from the fact that in 1929, of the 86,509 employees of the city of New York, 246 belonged to the unclassified service, which number included heads and deputy heads of departments; 1,024 to the exempt class; 11,694 to the noncompetitive class; and 24,200 to the labor class. Over 40 per cent of the employees of the city were thus exempt from merit procedures.

Slightly different from permanent exemptions from the merit laws is provision for the appointment of temporary employees to fill positions otherwise subject to examination. Legislation usually provides that vacancies in such positions may be filled for thirty or sixty days by temporary employees pending the holding of an examination. By filling competitive positions with temporary employees and repeatedly renewing these appointments merit laws may be practically nullified. As an example of what may be done by this method the West Parks system of Chicago may be cited. Table 1 shows the progressive increase in the number and proportion of temporary appointees over a period of years. About 1,900 of the 4,500 Cook County (Chicago), Illinois, jobs are subject to the merit laws. During 1928 at least 40 per cent of these positions were filled by temporary appointees. In 1923 approximately 5,000 of the 22,000 positions in the Chicago classified service were filled by temporaries. During the Cermak administration in Chicago the general trend in the number of temporaries was upward with aperiodic fluctuations nicely synchronized with the occurrence of elections. The total number of temporary employees was reliably estimated at between 5,000 and 6,000. In Cleveland in 1922 it was found that more than 2,000 of the 5,000 positions subject to examination were occupied by "thirty-day" appointees. The practice was carried to its logical conclusion in Kansas City, where at one time all positions in the city service were held by temporary appointees. In Cuyahoga County (Cleveland), Ohio, in 1929, 58 per cent of the county's 1,466 positions were either exempt, unclassified, or filled by temporaries. By renewals these positions become in effect permanent, at least for the duration of the party's power. Such appointees, however, may be removed at will, thus greatly simplifying the problem of maintaining organizational discipline.

Under certain circumstances the Civil Service Commission usually has the authority to exempt positions from examination and this is often done, sometimes for the benefit of the organization and at other times for legitimate reasons. Without the complicity of the commission, positions in the classified service

may be left unfilled by the appointing authority and the duties performed by persons appointed under some title not subject to examination. In the federal service it was found at one time that a large number of persons appointed as laborers without examination at the request of various politicans had been assigned to classified duties.

TABLE 1. TEMPORARY APPOINTEES OF WEST CHICAGO PARKS SYSTEM*

Year	*Number of Positions*	*Salary Paid to "Temporaries"*	*Percentage of Total Pay Roll Paid to "Temporaries"*
1915	79	$ 5,021.86	0.0071
1920	234	35,132.93	3.3
1925	636	473,350.33	26.3
1928	1,725	1,202,616.90	42.5
1929	1,305	984,867.82	39.9
1930	1,798	872,777.00	27.4
1931	2,212	1,748,501.65	61.2
1932	2,122	1,142,163.90	46.7

* *Report Dealing with the Physical Condition, Business and Administrative Practices, Personnel Management and Financial Situation in the West Chicago Parks System*, June 10, 1933, p. 31.

Under the civil service laws of some jurisdictions it is possible to evade the requirement of competitive examination prior to appointment by contracting for services. This exception, designed to provide for the employment of attorneys, accountants, architects, and experts of various kinds on a contractual basis, was used in New York City to furnish a berth for Dr. William H. Walker, brother of the former mayor. The Board of Education contracted for his services as a "medical consultant" to render the same service as a "medical examiner" in the competitive class. When the court of appeals nullified this evasion, about 250 employees hired under the contract system in New York City were affected. In Boston contracts were made for the services of laborers. The contractor made a profit in furnishing these men who could have been employed directly by the city. In Chicago it was alleged in a legal proceeding that political

employees of the West Parks board were not on the personnel pay roll but were paid with vouchers for materials.

Clerical employees and other attachés of the courts on all levels of government and in practically all jurisdictions remain subject to the patronage system. Due to the insistence upon the independence of the judiciary as a coordinate branch of government, its employees are more often excluded from the operation of civil service laws than not. This action has not been unconnected with the fact that court functionaries are often in a position to render services of peculiar value to the organization, particularly in the lower courts handling minor criminal cases. Similarly employees of legislative bodies—clerks, pages, stenographers, and the like—are in most cases selected on a patronage basis. In some instances the committees making the selections are frankly named the "patronage committee."

"RIGHT GUYS"

The early advocates of civil service reform—affectionately referred to by the "pols" as the "goo-goos"—envisaged civil service commissions as agencies independent of the administrative departments applying the merit laws stringently and without fear or favor. This conception was readily demolished by appointing "right guys," i.e., loyal organization men, to the commissions. "If the mayoralty of the city falls into the hands of the spoilsman who appoints the Civil Service Commission, it is an easy thing to take all the starch out of the civil service requirements. The manifold ways in which this was done under the Walker administration (in New York City) revealed the abuses incident to the commission being appointed by the mayor and owing allegiance solely to him." (Samuel Seabury, *Final Report, In the Matter of the Investigation of the Departments of the Government of the City of New York,* 1932, p. 40.) In Illinois during the regime of Governor Len Small the chief examiner of the Civil Service Commission quoted one of its members as saying that "there will be just examinations enough to keep up appearances." Even when the commission is constituted of men firmly committed to the policies of the

merit law and is assisted by a staff of technically proficient personnel officers, it can accomplish little without the voluntary cooperation of the chief executive and the heads of the administrative departments.

An excellent example of what can be done by appointing the "right" men to a commission occurred during Mayor "Big Bill" Thompson's first two terms in Chicago. The two Republican positions on the commission were held by three individuals at various times during his administration. Charles E. Frazier, a prominent member of the thirty-third ward Republican organization, was appointed, he said, with the understanding that he should "do nothing unjustified." Alex J. Johnson, vice-president of the William Hale Thompson Republican Club, replied to a query as to the relationship between his political activities and his appointment to the commission: "What of it? You don't think the mayor would appoint an enemy, do you?" Percy B. Coffin, the third Republican holding membership on the commission during this period, served as a handy man for the mayor in various capacities, including a stint as unofficial patronage dispenser.

The appointment of loyal organization men to the commission is undoubtedly the most effective means for bringing the civil service under the control of the organization. This can be done, of course, only when there is no effective opposition to such a policy. To placate opposition to spoils practices frequently a minority of the commission consists of effective but harmless "window dressing." Or appointments of weak men without malodorous records, easily subject to manipulation, may be made for the same purpose.

LEGISLATIVE SABOTAGE

Control of appropriations for the work of the personnel agency may serve as a means for mitigating the severity of the enforcement of merit laws. However disposed the commission may be, without ample staff to carry on the voluminous and complex work of testing, classification, etc., it can accomplish little. By reducing the appropriations for the personnel agency

the legislative body may effectively draw its fangs. The Chicago Civil Service Commission may be cited as an example. When Mayor Thompson first took office in 1915 the commission had an average staff of 75 employees and an annual appropriation of about $100,000. It was recognized as one of the best personnel agencies in the country. Table 2 shows what happened to its staff and appropriations. Other factors contributed, but by 1923 the commission had sunk to a position

TABLE 2. STAFF AND APPROPRIATIONS FOR CHICAGO CIVIL SERVICE COMMISSION, 1915–1922*

Year	*Staff*	*Appropriation*
1915	74	$101,000
1916	63	74,520
1917	37	65,640
1918	37	61,930
1919	39	74,420
1920	31	82,070
1921	31	87,580
1922	33	104,820

* Kingsbury, "The Merit System in Chicago from 1915 to 1923," *Public Personnel Studies*, Vol. IV, 1926, p. 310. Increased appropriations from 1919 reflect increases in salaries following postwar price rise.

of very low repute. The financial strangulation of the personnel agency has been carried to the logical conclusion in Kansas, where no appropriations are made and the state civil service law remains dormant. Short of actually cutting appropriations pressure may be brought to bear upon civil service agencies by members of the legislative body. One cannot very well deny a legislator a favor one day and ask him to vote for an appropriation the next.

THE PROCESS OF SELECTION

In the process of examination there is opportunity for maladministration. Although safeguards are usually employed to prevent the identity of the examinee from being known to the

rater, they may be evaded. Furthermore, a considerable latitude of discretion in the evaluation of papers is possible due to the type of questions often used in civil service examinations. A Cook County, Illinois, grand jury in 1922 compared the markings of papers by the Civil Service Commission examiners and by the persons who had been brought in by the commission to prepare the questions. Although no proof of abuse of discretion was presented except by inference, the range of variation as indicated by Table 3 indicates the possibilities.

TABLE 3. COMPARISON OF RATING PAPERS BY EXAMINERS AND BY PERSONS PREPARING CERTAIN EXAMINATION QUESTIONS*

Paper	*Mark by Civil Service Examiners*	*Mark by Persons Preparing Questions*
A	90	70
B	60	80
C	40	85

* *Good Government*, Vol. XXXIX, 1922, p. 19.

Numerous instances of unfair grading of examination papers are available from a study of the Cuyahoga County, Ohio, Civil Service Commission. An examinee, who had not had the experience required to enter the examination, was asked: "When would you permit the addition of sand above the amount called for in the specifications in a batch of concrete?" The answer was: "When the weather is wet, before the engineer has been able to make a test." He went to the head of the eligible list. In an examination for dirt street foreman the following question was put: "Describe in detail and illustrate with a diagram a case where a drain across a street is needed." The reply was: "A drain should be placed under roadway." No drawing was furnished. Although the applicant had not had the required experience for entrance to the examination, he passed and was appointed to the service. In another examination for the same position a man who had been a barber most

of his life said in his application: "I did not have any practical experience of this position, but I have a number of barber shops." He was given 70 per cent for experience. Two years' experience in dirt highway construction work was required. In an examination for sewer maintenance foreman answers totaling fourteen lines to five questions earned a mark of 98.4 per cent. A close check of 1,175 names on the eligible lists resulting from 73 examinations by the Cleveland city commission showed that 22 per cent of them had actually failed in the tests.

Members of the organization may take the examination and be appointed with or without chicanery in the ratings. Being appointed, they may do their political work "on the side," assuming as is customary, a weak enforcement of the rules prohibiting political activity by permanent employees. In some cases positions requiring technical training and practical experience are filled by inexperienced political temporaries who acquire experience at the expense of the public and then secure permanent appointment after examination.

In case of necessity, when the examining authorities are careless, a substitute may take the examination for the applicant. Occasional instances of this have been uncovered. "James M. Curley and Thomas F. Curley were convicted," according to Foulke, "of impersonating two candidates at a civil service examination in Boston and were sentenced to two months in jail." (W. D. Foulke, *Fighting the Spoilsman*, 1919, p. 185.) In some cases little publicity is given to coming examinations. This may leave the organization practically free to appoint its candidates through the forms of competition.

Members of the Civil Service Commission or its employees may be bribed to give an applicant a favorable rating. When the examinations are fairly conducted but an atmosphere of suspicion exists, persons with "inside" information can pick up a little pin money. A municipal civil service commissioner once said that "someone would accidentally or in some improper manner" discover the results of the examination "and would go and obtain money" in return for an assurance that

the examinee "would get the rating which he had already earned by his own ability." In other cases persons claiming the power to influence the selection from among the three highest in an examination have collected money from as many as possible of those likely to be appointed, keeping the amounts paid by the successful ones and repaying "those not selected, with the explanation that counter influence was too strong." (Chicago Civil Service Commission, *Final Report, Police Investigation,* 1912, pp. 49–50.)

MOVEMENT OF PERSONNEL

The control of promotion, discipline, and assignment may be employed to persuade recalcitrant members of the administrative personnel, recruited into the service by an open and aboveboard system of examinations, to serve the purposes of the organization in the same way as those appointed by an out-and-out spoils procedure. Criteria of achievement or failure of achievement in the political organization may be substituted for similar criteria within the administrative hierarchy in the management of personnel. A man may be promoted within the administrative service for gloriously carrying his precinct or he may be made to "go along" with the organization by actual or threatened disciplinary measures.

Because of the difficulty of developing an objective measure of relative merit for promotion in the administrative service, promotion is peculiarly susceptible to manipulation for political purposes. In some cases no effort is made to promote as the result of examinations. Discretion in selecting persons to be promoted is left to the head of the department or some other administrative superior. This discretion may be exercised upon the suggestion of party officials. By its power to determine the classes of employees eligible to take promotional examinations, the Chicago commission was able to favor particular individuals.

Persons entitled to promotion on the results of an examination under some laws may waive their right to someone lower down the promotional list. Pressure may be brought upon them

to compel them to do so. In 1915, one Weideling, a sergeant in the Chicago police department, took the examination for police lieutenant ranking forty-fifth on the examination results. Forty-three men waived and Weideling, then becoming one of the three highest, was promoted to a lieutenancy. "It was directly charged in the press that these forty-three men were compelled to waive their rights by pressure and influence brought to bear by the head of the police department in order that Weideling's name might be reached." (*Good Government*, Vol. XXIII, 1916, p. 4.) Control of assignments is a method often used in police departments to defeat the purpose of the merit laws among other things. Police who persist in political indifference may be sent to the "prairies" or to the "sticks." Assignment to a post far away from home is a powerful persuasive. Continual application of such measures will usually bring the most obstinate person into line.

Positions in the classified service may be abolished as an "economy" measure or on some other basis. New positions with different titles but similar duties may then be created and filled by temporary political appointees. In Chicago the license bureau which had charge of the collection of business and occupational license fees was abolished by council action. A short time later fifty clerks, selected in fact by the fifty Democratic ward committees, were stationed in police station houses to perform similar duties at a much higher cost and a reduction of license revenue. The chief function of these clerks appeared to be to sound the alarm when the police brought in persons charged with crime to call to their rescue the ward committeemen or other party functionaries. Similarly in Columbus jobs held by classified employees were abolished and later recreated under new titles and filled by political appointees. In Troy, New York, competitive positions were abolished and new jobs exempt from examination, "executive secretaries," were created to handle the work.

It would be a grave error to say that the movement for civil service laws beginning with the passage of the Pendleton Act by Congress in 1883 has not limited to a considerable extent

the patronage available to political organizations in many jurisdictions. Nevertheless, ways and means have been found to weaken in varying degrees the efficacy of the administration of these laws. The explanation is simply that the groups of citizens interested in combating the patronage system have not been powerful enough to compel the enforcement of these rules.

No. 25

In the enacting of many statutes involving the regulation of economic and social matters, state legislatures find it impossible to foresee all the detailed and technical difficulties which may be encountered in the actual administration of the law. It has been found necessary because of this to confer upon various executive authorities of the state, power to issue rules and regulations to carry out the law. These rules and regulations, although having the force of law, do not ordinarily enjoy the same amount of publicity as does the statute under which they are issued. Several states have in recent years passed statutes requiring that they be filed in the office of the secretary of state or other state official so that they may be known more readily by those who are expected to obey them. Statutes similar to the one presented here are in force in South Carolina, New York, Oregon, Kansas, Massachusetts, Wisconsin, Tennessee, Ohio, North Dakota, California, Kentucky, Michigan, and others.

ADMINISTRATIVE RULES AND ORDERS[6]

84–901. For the purposes of this act: (1) "Agency" means each board, commission, department, officer, division or other administrative office or unit of the state government authorized by law to make rules, except the courts and the Legislature; (2) "rule" means the written statement of any rule, regulation, standard or policy of general application issued by an agency,

[6] *Revised Statutes of Nebraska*, 1943, Supplement.

including the amendment or repeal thereof, and designed to implement, interpret or make specific the law enforced or administered by it, or governing its organization or procedure, but not including regulations concerning the internal management of the agency not affecting private rights or interests; *Provided,* that for the purpose of this act every rule which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

84–902. Each agency shall file forthwith in the office of the Secretary of State a certified copy of the rules in force and effect in such agency on the effective date of this act. A certified copy of any rule adopted after the effective date of this act shall likewise be so filed. Such copy or copies shall be printed, typed or mimeographed on legal size paper, properly indexed and bear the effective date. The Secretary of State shall keep a permanent file of all such rules, which shall be open to public inspection during regular business hours of his office. The Secretary of State, in order to maintain and keep such files current, shall be empowered to require new and amended rules to be filed as complete file pages and to remove all superseded pages to a separate file. The Secretary of State shall prescribe regulations for carrying out the provisions of this act to include: (1) Manner of certification of rules filed under this act; (2) form of indexing the file of each agency; (3) method of filing amendments to the rules; (4) manner in which copies shall be made available to the public from the office of Secretary of State; and (5) the price per copy, unless otherwise specifically provided by statute.

84–904. Each agency shall file with the Clerk of the Legislature, not more than thirty nor less than ten days prior to the commencement of each regular legislative session, a certified copy of the rules of the agency in force and effect at the time of filing, properly indexed in the manner prescribed for filing with the Secretary of State, for the consideration of the Legislature.

84–905. Each agency shall prepare, compile and print, type or mimeograph a complete certified compilation of all rules duly

adopted and in force and effect on the thirtieth day prior to the commencement of the next regular legislative session, and on the same date prior to each regular legislative session thereafter, and shall file same in the office of the Secretary of State, as provided by section 84–902. Such certified compilation, when duly filed, shall supersede all rules previously filed. This shall not be construed as precluding any such agency from making additional compilations as often as it deems it necessary or advisable. Copies shall be made available to all interested persons on request, at a price fixed to cover costs of publication and mailing; *Provided,* any such agency may furnish the same without charge, in the discretion of the agency, if funds are available.

Sec. 5. The certified copy of each amendment or rule adopted under this act, subsequent to the effective date thereof, shall be submitted to the Attorney General for his consideration, and his approval or disapproval thereof shall be attached to and filed with such amendment or rule in the office of the Secretary of State. Thirty days prior to the next regular legislative session, the Attorney General shall have examined the file of each agency as it appears in the office of the Secretary of State, and shall approve same or file a report with the Clerk of the Legislature in the form of an opinion on each rule which in his opinion fails to meet the requirements of the Constitution and laws of the United States and the State of Nebraska.

84–906. No rule required under this act to be filed with the Secretary of State shall be valid as against any person until the certified copy of the rule shall have been so filed; and, unless otherwise specifically provided by law, such filing of any rule shall, except where notice by publication is insufficient in law, be sufficient to give notice of the contents of such rule to any person subject thereto or affected thereby. The filing of any rule as herein provided shall give rise to a rebuttable presumption that it was duly and legally adopted.

Approved June 9, 1947.

Chapter Six

THE COURTS AND LAW ENFORCEMENT

No. 26

Approximately three fourths of the states have created judicial councils for the purpose of improving judicial organization and administration. Although the powers and duties of these councils vary from state to state, they usually include powers of general administrative supervision, rule making, research, and investigation. The New York statute reprinted here is the legal basis for the judicial council in that state.

JUDICIAL COUNCIL IN NEW YORK[1]

SEC. 40. JUDICIAL COUNCIL OF THE STATE OF NEW YORK CREATED; MEMBERSHIP

There is hereby created and established the judicial council of the state of New York. The judicial council of the state of New York shall consist of a member of the bar from each judicial department and two citizens of the state at large to be appointed by the governor by and with the advice and consent of the senate. The chief judge of the court of appeals, the presiding justices of each appellate division of the supreme court, the chairman and ranking minority member of the committee on the judiciary of the senate and the chairman and ranking minority member of the committee on judiciary of the assembly, the chairman of the committee on codes of the senate and the chairman of the committee on codes in the assembly, shall

[1] Laws of the State of New York, 1934, Chapter 128, as amended.

by virtue of their respective offices or designations be members of such judicial council. Any judge or justice who shall have retired at the expiration of his term or by reason of the constitutional age limit at the close of any calendar year during which he has been a member of the judicial council shall thereupon become and thereafter be an advisory member of the judicial council.

SEC. 41. QUALIFICATIONS; TERMS OF OFFICE; VACANCIES

Ex-office membership in the judicial council shall not constitute holding a public office. Membership in the council by any judge or justice shall be deemed to be one of the judicial functions of such judge or justice. The chief judge of the court of appeals shall be a member during his term of office, each presiding justice of an appellate division shall be a member during the term of his designation as such presiding justice, the chairman and ranking minority member of the committee on judiciary of the senate and the chairman and ranking minority member of the committee on judiciary of the assembly shall be members during their respective designations as such chairmen or ranking minority members; the remaining members shall be appointed for a term of two years. Vacancies occurring during the terms of office of an appointive member shall be filled in the same manner as the original appointment and for the unexpired term.

SEC. 42. TEMPORARY DESIGNATIONS

The chief judge of the court of appeals may from time to time designate in writing a judge of said court to act in his stead as a member of the council for a stated time, or until said chief judge revokes such designation; the presiding justice of each appellate division may from time to time designate in writing an associate justice of said court or a justice of the supreme court within the judicial department to act in his stead as a member of the council for a stated time or until said presiding

justice revokes such designation. The judge or justice so designated shall have all the powers and duties of a member of the council during the period of his designation.

SEC. 43. ORGANIZATION

The chief judge of the court of appeals shall be the chairman of the council, and any judge of said court designated as provided in section forty-two to act in his stead as a member of the council shall, during the period of his designation, act as such chairman. The council shall appoint from its members a vice-chairman who in the absence or disability of the chairman or in case of vacancy shall act as chairman. The council, on the nomination of the chairman, shall appoint and may at pleasure remove such employees, including persons qualified for legal research, investigating and statistical work, as may be deemed necessary to enable the council to perform its duties and administer its affairs, and from time to time fix their salaries or compensation within the appropriation therefor made by the legislature. The council may make and modify from time to time rules and regulations for the conduct of its proceedings and the exercise of its powers, including provisions (a) for regular meeting and for the method of calling special meetings of the council, (b) defining the number of members of the council which shall be necessary to constitute a quorum for the transaction of its business, (c) prescribing the duties of its executive secretary and other employees of the council, and (d) for the conduct of hearings and investigations authorized to be conducted by the council or any committee of the council. The council may appoint regular and special committees of its members to investigate and report upon any matters relating to the duties imposed upon the council.

SEC. 44. EXPENSES OF MEMBERS

Each member and advisory member of the council shall serve without compensation but shall be allowed and paid his actual and necessary expenses incurred in the performance of his duties.

SEC. 45. POWERS AND DUTIES

The council shall have the powers and shall be charged with the following duties:

(a) To make a continuous survey and study of the organization, jurisdiction, procedure, practice, rules and methods of administration and operation of each and all the courts of the state, including both courts of record and courts not of record, the volume and condition of business in said courts, the work accomplished and the results obtained.

(b) To collect, compile, analyze and publish the judicial statistics of the state in compliance with article six, section twenty-two of the constitution.

(c) To receive, consider and in its discretion investigate criticisms and suggestions from any source pertaining to the administration of justice and to make recommendations in reference thereto.

(d) To keep advised concerning the decisions of the courts relating to the procedure and practice therein and concerning pending legislation affecting the organization, jurisdiction, operation, procedure and practice of the courts.

(e) To recommend from time to time to the legislature any changes in the organization, jurisdiction, operation, procedure and methods of conducting the business in the courts which can be put into effect only by legislative action and to recommend to any court or to any body vested with the rule making power for any court any changes in the rules and practice of said courts or the methods of administering judicial business therein which, in the judgment of the council would simplify and expedite or otherwise improve the administration of justice therein.

(f) To adopt and from time to time to amend and promulgate with the force and effect of law rules and regula-

tions not inconsistent with any statute with respect to the manner of keeping records of the business of any court.

SEC. 46. REPORTS TO COUNCIL

The clerk of each court of the state and each judge or justice of a court not of record which has no clerk and each official referee, and the district attorney of each county shall make to the council periodically or from time to time as the council shall prescribe, such reports on such matters and in such detail and form as the council directs, and a failure to observe a requirement of the council shall be deemed a neglect of duty constituting grounds for removal from office.

SEC. 47. PUBLIC HEARINGS

The council and any committee of the council empowered by it are authorized to make an investigation and to hold public hearings with respect to any matters relating to the powers and duties imposed upon it, and in connection therewith the council, or any such committee thereof, shall have power to subpoena and compel the attendance of witnesses, and to require the production of any or all books, records and documents, and to take and hear proofs and testimony. Such subpoenas shall be issued and signed by the chairman or vice-chairman of the council or of any such committee of the council.

SEC. 48. REPORTS OF COUNCIL TO LEGISLATURE

The council shall on or before February fifteenth each year make a report to the legislature of its proceedings of the work of the various courts of the state during the past judicial year, the condition of business therein, and any recommendations which require action by the legislature to improve the administration of justice. It may during legislative session make such further and supplemental reports as it may deem proper. The judicial year is defined as the year beginning July first, and ending June thirtieth of the succeeding year.

No. 27

In all but ten of our states most judges are elected by the people. Many lawyers and intelligent laymen have long been dissatisfied with popular election. On the other hand, it has not been feasible to introduce the appointive system in those states where popular election has long been established. Plans combining the advantages of both the elective and the appointive systems have for some years been operating in California and Missouri. The merits of the Missouri plan are set forth in the article which follows.

IMPROVEMENTS IN THE MISSOURI JUDICIAL SYSTEM[2]

I have been asked to discuss with you today the improvements in the Missouri judicial system brought about in recent years, some of which improvements have attracted nation-wide attention. However, time will only permit me to list certain of these improvements and to tell you, in limited detail, how the most important one has functioned. We feel that we have made great strides in the gradual overhaul and streamlining of our judicial system by providing for the following:

1. Power in the supreme court to make temporary transfer of judicial personnel from one court to another as the administration of justice may require
2. Compulsory retirement at age seventy of judges of certain courts
3. Power in the supreme court to establish rules of practice and procedure for all courts
4. Provision for direct review by the courts of decisions and rulings of administrative bodies
5. Provision for retirement of disabled judges after a fair hearing

[2] William W. Crowdus, Address before The Ohio State Bar Association Convention, May 15, 1947.

6. The establishment of a state-wide judicial conference to study, improve, and expedite judicial functions
7. Removal of constitutional bar preventing women from serving on juries
8. Establishment of magistrate courts in lieu of the old justice-of-the-peace courts
9. Various changes in the requisite qualifications of judges
10. Last but not least, the establishment of the Missouri Nonpartisan Court Plan, which I shall hereafter refer to as the Missouri plan.

Because of its great publicity, I believe most of you would like to hear from me today a first-hand, impartial report on how the Missouri plan has functioned in the more than six years it has been in operation.

I am not so naïve as to claim that the Missouri plan is perfect, as no plan of judicial selection and tenure is perfect. Nor do I contend that the evils of our old elective system were any different under Republicans than under Democrats. Before telling you how the Missouri plan has worked, let me refresh your memory with a brief summary of its pertinent provisions. Our plan carries out the spirit of the resolution adopted in 1937 by the House of Delegates of the American Bar Association, which called for a method of "judicial selection that will be conducive to the maintenance of a thoroughly qualified judiciary and that will take the state judges out of politics *as nearly as may be.*"

EXPLANATION OF THE PLAN

The plan is mandatory to the supreme court, the three courts of appeals, and the circuit and probate courts of Jackson County (which includes Kansas City) and the city of St. Louis —it was left optional as to the circuit and probate courts of all other circuits in the state.

The plan provides for three distinct steps in the selection of the judges affected thereby, to wit: *nominating, appointing, and electing.*

The plan establishes two types of nonpartisan nominating

commissions: the Appellate Judicial Commission and the Circuit Judicial Commissions.

The Appellate Judicial Commission consists of seven members: three laymen, one from each court of appeals district, who are appointed by the governor; three lawyers, one from each court of appeals district, who are elected by the lawyers of the respective districts; and the chief justice of the Missouri Supreme Court, who acts as chairman of such commission. The Appellate Nominating Commission nominates candidates only for positions on the appellate courts.

Each Circuit Judicial Commission consists of five members and one is established for each circuit affected by the plan. It consists of two laymen, residents of the circuit, appointed by the governor; two lawyers residing in the circuit who are elected by the lawyers residing therein; and the presiding judge of the court of appeals of the district in which the circuit is located acts as chairman of such commission. A Circuit Nominating Commission nominates candidates only for circuit judge and probate judges in its circuit.

Under rule of the supreme court, as provided for in the plan, the terms of office of all members of the nominating commissions are for six years and are staggered, thus making it impossible to claim that any one governor of the state could control any of these commissions, as our governor holds office for a term of only four years and cannot succeed himself. In addition, no member of any nominating commission, excepting when serving out the term of another, shall be elected as his own successor, and no member of any such commission, other than the chairman, may hold public office, and no member may hold any official position in any political party.

Whenever a vacancy occurs in the office of any judge affected by the plan, the following three steps for nomination, appointment, and election are then taken:

1. The appropriate nominating commission nominates three persons possessing the qualifications of the office, and the names of these three candidates are then submitted to the governor.

2. The governor then must appoint one of such three candidates to fill the vacancy.
3. After the judge so appointed has served for a trial period of at least a year, he must then be voted on and elected by the people at the next general election, in order to remain in office for a regular or full term. At such election, his name will appear on a separate judicial ballot, without party or political designation, reading:

"Shall Judge ——— of the ——— Court be retained in office? Yes. No."

If such judge is elected, he then remains in office for the same term as he would under the former system, such as six years for a circuit judge, twelve years for a supreme court judge, etc.; but if he is defeated, then the nominating and appointing process is again invoked.

Any judge elected under the plan can at the end of his term run again solely on his record in the same manner just outlined, and his name will appear on the same type of separate judicial ballot; all he is required to do to get his name on such ballot is to file in the office of the secretary of state, not less than sixty days prior to such election, a declaration of candidacy for election to succeed himself. Of course, if no such declaration of candidacy is so filed, the vacancy resulting from the expiration of his term of office is filled by the same nominating and appointing process.

No judge selected under the new plan is allowed directly or indirectly to make any contribution to, or hold office in, a political party or organization, or to take part in any political campaign.

The plan is not, as some people have assumed, an outright appointive system. In fact, the appointive feature is merely incidental and simply sets the machinery of the plan in operation. The governor can appoint only one of the three nominees submitted to him by the nominating commissions; thus he cannot appoint anyone he might choose. As one writer put it, the plan is really a compromise between the outright appointive system

and the old popular elective system, yet it retains the best features of both. So, the plan enables careful selection in the first instance and leaves in the people, where it belongs, the final determination. In fine, our plan was designed to take our courts out of politics and to attract more better-qualified men to the bench.

OPERATION OF THE PLAN TO DATE

The first indirect test of the plan came a great deal sooner than most people anticipated. In 1940, at the same election at which the court plan was adopted, Forrest C. Donnell, a Republican, was on the face of official returns elected governor of Missouri by a majority of around 3,000 votes. His Democratic opponent contested the election, and the legislature (which was dominated by Democrats), in apparent violation of the Missouri Constitution, refused first to seat Governor Donnell, and then conduct the contest. Thereupon, the attorneys for Donnell filed in the Missouri Supreme Court a mandamus suit against the Speaker of the House of Representatives, seeking to compel him to publish the election returns seating Donnell. It so happened that all of the seven members of the supreme court had previously been elected as Democrats long prior to the adoption of the Missouri plan. Nevertheless, the decision of the court was unanimous in issuing the writ of mandamus in favor of Donnell, the Republican, against McDaniel, the Democrat. Under the old popular elective system, all of these seven members of the court, if they sought re-election would have first had to face the vicissitudes of a primary election and, if successful therein, then be the Democratic candidates at the ensuing general election. Under the provisions of the court plan, however, these judges would not have to face a primary election; and would not run as Democrats, but would, in a general election, run solely on their respective records, with no opponents, on a separate judicial ballot without party or political label, the sole issue being whether they should or should not be retained in office. Hence, when the aforesaid honest and courageous decision was rendered, these seven judges did not have to worry about party politics; at least none of them had to

make any apologies to any political leaders or committeemen.

I state, without fear of contradiction, that thus far only lawyers and laymen of the highest type have been selected for the various nominating commissions, and both the public and the bar are completely satisfied with the personnel thereof. The first lay members of these commissions were appointed by Governor Stark, a Democrat, but there was no occasion for any of the commissions to make any nominations until vacancies occurred in the several courts during the tenure of Governor Donnell, a Republican. While on the subject of the nominating commissions, I also want to state, without fear of contradiction, that in each instance where the appropriate nominating commission has submitted three nominees to the governor, those nominees have all been amply qualified lawyers of the caliber which would reflect credit to the judiciary. Hence, under our experience to date, no governor could have made a bad appointment had he been inclined to do so. Apropos of this point is the following excerpt from an editorial which appeared in the *St. Louis Star-Times,* which, incidentally is a Democratic newspaper, at the time of the first appointment under the plan:

> One important fact is that under the new system Mr. Donnell was required to choose one of the three nominees suggested to him by the advisory panel, and every one of these nominees—Mr. Killoren, James V. Frank, and Vincent L. Boisaubin—was a citizen and a lawyer of proper standing for a judgeship. . . . Sometimes Missouri governors have made bad (interim) judicial appointments, but Mr. Donnell could not have made a bad selection even if he had wished to do so.

To date, the nominative and appointive features of the plan have been invoked on nine occasions, two respecting vacancies on the supreme court, one respecting a vacancy for each of the Springfield and Kansas City courts of appeals, two respecting vacancies in the circuit court of Jackson County, two respecting vacancies in the circuit court of the city of St. Louis, and, one respecting a vacancy in the probate court of Jackson County. Both the bar and the public have highly commended these nine judicial appointments, each appointee being thoroughly quali-

fied for the judiciary. Some of the opponents of the plan have complained, however, that the two governors, who made the appointments to date, followed party lines in their appointments. Moreover, as I said before, in every instance, all of the nominees have been *lawyers of outstanding character and ability and every judge appointed thus far has met our objective, which is to place high-type, conscientious, able and eminently qualified lawyers on the bench.* We did not always get such good results, particularly in St. Louis, under the old system. Take the case of one of our circuit judges who went literally from his employ as a hospital pharmacist to the bench. After his admission to the bar in 1927, he retained his job at the hospital and while there employed as a pharmacist, he worked almost nine hours a day, six days a week, and did some work at nights. He had been at the hospital ten years when he decided to run for circuit judge. The records of the circuit clerk's office show that in the eight years from his admission to the bar, until January 1, 1935, when he took office as a judge, he was listed as being the filing attorney in only nine suits—eight for divorce and one for annulment. He became a judge, despite his lack of qualifications and despite his almost complete rejection in the bar association judicial poll, simply because he was slated by the then local political boss of his party who put him over in the primary, and in the ensuing election, where most people voted a straight ticket on account of national issues, he was easily elected. *The record* of this judge on the bench is a story in itself and was in keeping with his lack of qualifications.

Digressing a bit further, let me give you one example of the intrusion on our courts by the politicians under our old system and what a judge, in the honest performance of his duty, had to face if he dared to offend the political bosses. In 1938, Judge James M. Douglas of the Missouri Supreme Court, who had previously been appointed by Governor Stark for an unexpired term, was a candidate for nomination in the Democratic primary. Judge Douglas, a thoroughly qualified jurist, had made an excellent record in office but had deeply offended Boss Tom Pendergast by voting against the latter's wishes in the famous fire-insurance rate case. Pendergast in his determination to pun-

ish Judge Douglas picked his own candidate, a man with few judicial qualifications, to run against Douglas in the primary. Then, the people witnessed the spectacle of a knock-down, a drag-out political fight (for an office which should be completely divorced from politics) with both candidates literally stumping each of the 114 counties of the state, and with Judge Douglas devoting months of his time away from his judicial duties at a great loss to the taxpayers. The cost of Judge Douglas's successful fight was estimated at various figures between $10,000 and $25,000. Is there any wonder, therefore, that our people became disgusted with our political system of selecting judges and that many eminently well-qualified lawyers would not, and could not afford to, seek judicial office under such conditions.

The answer to the complaint about our governors following party lines in their appointments is first that only well-qualified men have been appointed, and second that under our plan it makes no difference what a man's politics are before he goes on the bench—the point is that once he attains the bench he is independent of politics; he is under no obligations to his party committeeman or to the politicians *because they did not put him there in the first instance* and he is not dependent upon them, nor is it necessary for him to incur political obligations in order to remain in office. If a judge has a good record, he is assured of a long tenure in office, but if his record is bad, a simple and direct method is provided for removing him. Thus, more better-qualified men are and will be attracted to a judicial career, and the public is unquestionably the beneficiary of such a system.

There have been three tests of the elective feature of the plan. The first one on November 3, 1942, produced some very interesting results. Although at that election the state went Republican, the voters retained two supreme court judges who had previously been elected as Democrats before the plan was established. The city of St. Louis likewise went Republican, but the voters retained seven judges on the circuit court, six of whom had been elected as Democrats before the plan was adopted, and the seventh, Judge Killoren, a Republican, who

had previously been appointed by Governor Donnell and who was up for retention in office following the serving of his trial term. Jackson County went Democratic, but the voters there *removed* one circuit court judge who had previously been elected as a Democrat before the plan became effective, and retained one judge who had previously been elected as a Democrat and who had made an outstanding record on the bench.

The second test of the elective feature of the plan occurred at the November 7, 1944, election. At said election there were fourteen judicial candidates for retention in office, four of whom were Republicans and the remainder Democrats. *All of these candidates had the endorsement of the bar, and all of them were retained in office.* The striking fact about this election was, as was the case of the first test of the elective feature of the plan, that the party affiliations of the judicial candidates made no difference to the voters; otherwise the four Republicans would have probably gone out of office, in view of the general victory in Missouri for the Democratic party. Before the adoption of the plan, many an excellent judge, with a fine record, was swept out of office on some question of policy which had no bearing whatsoever on the judiciary, and frequently an inferior judge was elected in his place. This point can best be illustrated by the following editorial which appeared in the *St. Louis Globe-Democrat* on November 10, 1944.

FRUITS OF NONPARTISAN JUDGE BALLOT

Tuesday's election offers further proof of the nonpartisan value in Missouri's new judicial system.

Two supreme court judges, each with an excellent record, sought election on the nonpolitical ballot. One is a Democrat, James M. Douglas. The other is a Republican, Laurance M. Hyde. Both were returned to the bench by heavy majorities.

If this election had been according to the old method, with Democratic and Republican nominees running against each other for the two places on the court, probably Judge Hyde would have been defeated in the general state victory of Democrats.

The judicial ballot ignores party ties and eliminates opposition.

Candidates seek terms only on their records. As a result Missouri retains Judge Hyde and is assured continued service of a justice well reputed in legal circles and qualified by experience for the office.

Incidentally Judge Hyde was the first man to be appointed by a governor to the supreme bench under the court plan adopted in 1940.

The third test of the elective feature of the plan occurred at the November 5, 1946, election, at which all of the judicial candidates for retention in office were retained. Here again, party affiliations of the judicial candidates made little or no impression on the voters. For example, the city of St. Louis on the vote for senator and other offices outside of the judiciary, went overwhelmingly Republican, but at the election Judge Mayfield, Democrat, appointed to the St. Louis circuit bench under the plan, received the third highest vote among the ten circuit judges who were retained in office.

It is only fair that I bring up another criticism of the plan which has been made chiefly by lawyers, and that is that the plan freezes the incumbents in office, and that it is difficult or virtually impossible to defeat a judge running for retention in office. It cannot be denied that every advantage is with the incumbent seeking retention in office. However, unless the incumbent has fallen down on the job or proved himself unfit, he should be retained in office under the spirit of the plan. Thus far, as I have already told you, *one judge has been defeated for retention in office.* The story of his defeat is contained in the 1943 report of the Special Committee on Judicial Selection and Tenure of the American Bar Association, which points out that this particular judge was retired through the work of a small committee of laymen and lawyers, which focused attention upon the issues, and at an expenditure not exceeding $300. *Consequently, it has been proved that it is possible, under our plan, to defeat a judge running for retention in office.* However, the complaints I mentioned concern chiefly certain of the judges in St. Louis who were incumbents at the time of the plan's adoption and who were retained in office at elections

since the adoption of the plan, despite the fact they were not endorsed by our bar association. As to this criticism, I want to say two things. First, that from a practical standpoint, in order to put over the plan originally, it was deemed expedient to provide that those judges then in office should be permitted to run on their records in the same manner as any judges thereafter appointed. Assuming that certain of those judges who were then in office were not of the best type, nevertheless, this is not a matter of great importance *when you consider that a long-range view must be taken of the plan, and particularly of its objective to fill future vacancies on the bench with men of higher qualifications than those possessed by many of the judges who were selected under our old political system.* Apropos of this point is the comment of Dean Roscoe Pound who said, "Too much talk has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on." As I have heretofore pointed out, every single appointee under the plan to date has been eminently well qualified. Further, no judge appointed under the plan has been rejected or repudiated in any Bar Association poll. In fact, in most every instance where a Bar poll has been taken prior to the several elections, the appointed judges have led the poll.

Second, assuming that certain of the incumbent judges elected under the old political system should have been removed from office, the fact that they were not is the fault of the Bar itself. The public, which as a whole has little knowledge concerning the qualifications and working records of our judges, must look to the Bar for information and advice on the subject. The Bar, therefore, has a positive duty to furnish to the public its specific reasons for wanting a judge retained in office or rejected by the voters; and the responsibility of seeing that the plan works properly is largely on the Bar itself. Nevertheless, there has been a tendency on the part of the Bar Associations merely to advise the public of the results of the several judicial polls, without more. Just prior to the last election the Bar Association of St. Louis ran one small newspaper advertisement (its only ad in the campaign) giving merely the results of its judicial poll; in which poll it did not endorse two incum-

bent circuit judges in St. Louis, who were holdovers from the old system. Nevertheless, the two judges not endorsed were retained in office, but this one small ad did make a substantial difference in the amount of "Yes" and "No" votes received by these two judges at the election. In a field of ten circuit judges, all of whom were elected, the highest man received "Yes" votes of 143,028 and "No" votes of 30,061, whereas one of the unendorsed judges received "Yes" votes of 128,747 and "No" votes of 44,444, while the other unendorsed judge received "Yes" votes of only 110,254 and "No" votes of 66,657. Thus, it is apparent that a more vigorous attitude on the part of our Bar Association would in all probability have resulted in the defeat of at least one of these unendorsed candidates. *The Bar obviously has the duty to get a bad judge out of office and it certainly has a corresponding duty to keep a good judge in office. A bad judge is often imputed to the negligence or indifference of the Bar.*

Continuing with the elective feature of the plan, and reiterating the fact that the Bar has the responsibility of making the plan operate successfully, there is another point which is worthy of our consideration. In the 1946 election in the rural areas of several districts where two respective judges of the courts of appeals were seeking retention in office, the vote on the judicial ballot was very small in comparison with that for United States senator. Even in the larger cities the vote on the judicial ballot was much less than that on the other offices. Here I should point out that the Association of the Missouri Bar did not conduct a judicial poll prior to the 1946 election on the two appellate judges seeking retention in office. As a result, even though these two appellate judges, who had made fine records on the bench, were retained in office, they failed to carry certain counties in their respective districts. It is apparent, therefore, that the voters in those counties which those judges failed to carry had little knowledge of the records of the judges running for retention, and perhaps their loss of certain counties in their districts may have been the result of the inclination of people to vote "No" on matters which they do not understand. The

experience of these two appellate judges presents a challenge to the Bar and reiterates my contention that the Bar should be ever on the alert and should always conduct a judicial poll and should always take a firm and aggressive stand in widely publicizing to the voters those judges whom it has endorsed and those whom it has not endorsed. In addition, the Bar by a studied publicity campaign should seek to educate the voters on the elective features of the court plan. A special committee of the Missouri Bar is making a thorough study of this whole question, including the best type of judicial poll to be taken, and its report should be forthcoming in the near future.

Unquestionably, the prohibition in the plan against a judge engaging in politics has had a tendency toward the making for a more independent judiciary and nonpolitical courts and has enabled our judges to devote their entire attention to the business of their courts. The action of Hon. Leslie A. Welch, a Republican, when he was appointed Judge of the Probate Court of Jackson County in 1942, is a practical demonstration of the wisdom of this provision. In the probate office at that time there were twenty-one employees, seventeen of whom owed their appointments to the Democratic machine; six had been Pendergast or Shannon precinct captains. Judge Welch read the constitutional provision to these employees and told them that the probate court should be completely divorced from party politics; that no person would be discharged or employed by his court because he or she was a Democrat or a Republican, but that no one could retain his position if he or she held office or was an active worker in any political organization or party. On unsigned slips, all of the employees supported Judge Welch's view and agreed to cease their political activities.

By way of further proof that our plan is working well and that the people of Missouri approve our plan, it was retained in its original form in the new Constitution adopted in 1945, despite the frantic attempts of the opponents of the plan to remove it therefrom—the court plan was by far the most controversial issue in the constitutional convention and the ensuing

campaign. The new Constitution, by the way, extends the plan's applicability to the courts of criminal correction in St. Louis.

Our judges themselves like the plan. They no longer need fear the dangers of the primary, as the primary is abolished under the plan, they are prohibited from making contributions to political groups, and the only cost to a judge seeking retention in office is a 3-cent stamp to cover the sending of a notice to the Secretary of State announcing that he desires to be a candidate for retention in office. Under our old system, the cost of being elected a circuit judge in St. Louis ran as high as $5,000, while the salary at the time was only $8,000 per annum.

Now, a judge can devote his entire attention to the business of his court and does not have to fear the so-called political lawyer. I regret to state that in many instances such was not the case under the old elective system. In addition, our judges have unquestionably asserted greater independence since the plan became effective. This is manifested by the fact that formerly our judges in appointing receivers, etc., usually followed party lines from lists furnished them by their party committeemen. Now it is not at all unusual for a lawyer or layman of opposite political faith to that of the judge to receive such an appointment. Under our former system, in many cases, lawyers would be selected by litigants for their supposed, if not real, influence with a certain judge, whereas there is no longer any necessity for litigants selecting attorneys with such a thought in mind.

Under our old system no man aspiring to the bench could be at all sure of his tenure in office. He gave up his practice and even if he made a good judge, he could not control national or state landslides, and if he happened to run for re-election on the wrong party ticket, out he would go, irrespective of his ability or fine record; or perhaps, *and worst of all, if he displeased the political bosses, he would be "knifed" in the primary by his own political party—the primary was the most vicious and political part of our old system.* This happened to several of our outstanding judges under the old system. Upon

being defeated, a judge would then have to start rebuilding his law practice, usually entailing financial loss. Could you blame many of our well-qualified lawyers for refusing to run for a judgeship under *such* conditions? *To date, under our plan, no appointed judge, nor any judge whom the Bar has endorsed, has been rejected by the voters.*

The independence of the judiciary, under our plan, is unquestionably the crux of the whole matter. Judge Henry T. Lummus (Chairman of Judicial Administration Section of the A.B.A. 1938–1939) once pointed out: "A politician may make a good judge if he can stop being a politician after going on the bench; but it is a great handicap to good judicial work to have a system which tends to compel every judge to be a politician to remain a judge."

Summarizing the experience under our plan to date, and despite the claims of its critics, it has accomplished the following results.

1. It has taken our courts out of politics as far as that is possible to do.
2. Our litigants have actually been getting better justice and our people have increased confidence in our courts, or to put it another way, the confidence of the people has been restored in our courts.
3. We now have more better-qualified men on the bench than we had under the old system, and this includes most of the incumbent judges at the time of the plan's adoption, inasmuch as they no longer have to be politicians in order to remain on the bench.
4. It has encouraged men to serve on the bench who would not submit themselves to the ordeal of campaigning for office under the old political system, or who lacked the means to finance such a campaign.
5. It has given security of tenure in office to capable and conscientious judges with a good record.
6. It has promoted efficiency in our courts, and has speeded up the administration of justice.

7. Finally, it is a decided improvement over the old political elective system, and we now have a system of judicial selection and tenure in Missouri which ensures a thoroughly qualified and independent judiciary and which has the confidence of the people.

. . . . . .

No. 28

Persons suspected of crime may be accused in either one of two ways. A grand jury composed of whatever number of citizens the statutes may provide may "bring in" an indictment after hearing such evidence *against* the suspect as may be presented by the prosecuting attorney. A "true bill" by the grand jury is sufficient to bring the accused to trial. An alternative method is the filing of an "information" by the prosecuting officer of the jurisdiction—usually the county. An information is substantially the same as indictment except that it is presented by a single officer on his official oath. Samples of these methods of accusation are presented here so that students may see processes often discussed but seldom reproduced in a textbook.

PROSECUTOR'S INFORMATION

EXHIBIT "A"
IN THE DISTRICT COURT OF CHASE COUNTY, NEBRASKA

STATE OF NEBRASKA, PLAINTIFF, VS. JOHN DOE, ALIAS J. H. DOE DEFENDANT.	*INFORMATION* For Making, Drawing, Uttering and Delivering No-Fund Check. Sec. 28–1212 Revised Statutes of Nebraska, 1943, Violation of Habitual Criminal Act. Sec. 29–2221 Revised Statutes Nebraska 1943

BE IT REMEMBERED, that Richard Roe, County Attorney in and for Chase County, Nebraska, in the 14th Judicial Dis-

trict of the State of Nebraska, comes now on the 23rd day of October, A.D. 1945, and for the State of Nebraska, gives the Court to understand and be Informed that heretofore, to-wit: on or about the 30th day of January, A.D. 1945, John Doe, alias J. H. Doe, under the name and style of J. H. Doe in the County of Chase, and State of Nebraska, then and there being, did then and there with intent to defraud, unlawfully, wilfully, falsely, purposely and feloniously make, utter, draw and deliver a certain check drawn for the payment of money and delivered to the ABC Pharmacy, drawn upon the Wauneta Falls Bank of Wauneta, Nebraska, said bank then and there being a bank duly organized and existing under and by virtue of the laws of the State of Nebraska, and which said check is in words and figures as follows, to-wit: [Here follows reproduction of the check]; he, the said John Doe, alias J. H. Doe, well knowing at the time of making, drawing, uttering and delivering said check, that he, the said John Doe, alias J. H. Doe, had no account or deposit in said Wauneta Falls Bank, in either the name of J. H. Doe or in the name of John Doe, or in any name whatsoever, with the intent of him, the said John Doe, alias J. H. Doe, unlawfully, knowingly, fraudulently and purposely to defraud by obtaining money and merchandise of the value of $8.58, he, the said John Doe then and there and thereby did obtain money and merchandise from the said ABC Pharmacy of the value of $8.58.

For further complaint against the said John Doe, alias J. H. Doe, the said Richard Roe, County Attorney of Chase County, Nebraska, being further sworn on oath as aforesaid, further deposes and says that the said John Doe being the same person named defendant in the foregoing complaint, on or about the 12th day of April, 1943, was convicted by the District Court of Phelps County, Nebraska, of the crime of making, uttering and delivering no-fund checks with intent to defraud, and was thereupon by said district court sentenced and committed to prison in the Nebraska State Penitentiary at Lincoln, Nebraska, for a period of One Year and Six Months from said date of April 12, 1943.

For further complaint against the said John Doe, alias J. H.

Doe, the said Richard Roe, County Attorney of Chase County, Nebraska, being further sworn on oath as aforesaid, further deposes and says that the said John Doe, being the same person named in the foregoing complaint, on or about September 26, 1938, was convicted by the Circuit Court of Atchison County, Missouri, of obtaining Money by Means of a False and Bogus Check, the same being a felony under the laws of the State of Missouri, and that the said John Doe was thereupon sentenced and committed to prison in the State Penitentiary of the State of Missouri for a period of Two Years from the date of September 26, 1938.

The said Richard Roe, County Attorney for Chase County, Nebraska, being further sworn on his oath as aforesaid, further deposes and says that on or about the 18th day of November, 1941, the said John Doe, being the same person charged in the foregoing complaint, was convicted by the Circuit Court of Malheur County, State of Oregon, of the crime of obtaining Money by False Pretenses and that the said John Doe was thereupon by said Circuit Court of Malheur County, Oregon, sentenced and committed to the penitentiary at Salem, Oregon, for a period of not to exceed one year.

The said Richard Roe, as County Attorney of Chase County, Nebraska, alleges that by virtue of the foregoing facts, the said John Doe, alias J. H. Doe, is an habitual criminal as defined by Section 29–2221 of the Revised Statutes of the State of Nebraska for the Year, 1943.

Contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

s/ Richard Roe

STATE OF NEBRASKA }
COUNTY OF CHASE, } *ss.*

Richard Roe, being first duly sworn, on his oath says that he is the County Attorney of Chase County, Nebraska, in the 14th Judicial District of said State of Nebraska, and the allega-

tions and charges against John Doe, alias J. H. Doe, in the foregoing information are true as he verily believes.

s/ Richard Roe

Subscribed in my presence and sworn to before me this 23rd day of October, 1945.

s/ Cornelius Gardner
Clerk of the District Court
of Chase County, Nebraska.

Witnesses for State of Nebraska:
Russell Bodeman
Glenn E. Case
Tom Fredrickson
W. G. Adams
John W. Green
Roy Cocklin
G. Royal Hanson

No. 29

GRAND JURY INDICTMENT

STATE OF NEBRASKA }
LANCASTER COUNTY } ss

At the September term of the district court of the third judicial district of the state of Nebraska, within and for Lancaster County in said state, in the year of our Lord 1947, the grand jurors, chosen, selected and sworn in and for the county of Lancaster, upon their oaths, present:

That John Doe, late of the county aforesaid, on the _____ day of _____, 1947 in the county of Lancaster and State of Nebraska aforesaid, did [charging the particular offense in appropriate language], contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska.

_____
County Attorney

(ENDORSEMENT ON INDICTMENT)

Offense:
Arson [or other offense]

Indictment:
A True Bill

_____
Foreman

No. 30

Over most of the rural portion of the United States the sheriff continues to be the principal "peace officer." His office has for many years been the target of adverse criticism, but so far it has successfully resisted serious reform. The analysis here reprinted indicates most of the shortcomings of the office.

GOOD-BYE TO THE SHERIFF[3]

We Americans are now examining the structure of our government and the men running it, as we have not done for decades. This tendency, few will deny, is a healthy one, and should bring fruitful results in local government, as well as in state and national administration. Within a few miles of your home and my home are governmental agencies and agents, whose duties are duplicated elsewhere and done more efficiently. Might the office of sheriff be included in this category? Under present circumstances, wisdom lies in repairing our own back fences, as well as in venturing to bring reforms further from home. James T. Young, in the new edition of his book *American Government,* points out that the county "is the least efficient of all our governmental units." Many of us do not object to paying heavy taxes, if we can get something for them. But it is worse than a crime, it is a blunder, to permit waste and inefficiency in

[3] R. E. Heiges, *Social Science,* Vol. XI, No. 2., April, 1936, pp. 137–141.

government, when that waste and inefficiency can be remedied. Consider the time-honored office of sheriff.

The antiquity of this office is unquestioned. Few positions can claim such a long history in the operation of government, which is all the more reason for investigating it. From the time of King Canute, famed because the ocean refused to obey his words, references may be found to the sheriff. Originally, he represented the local lord, the earl, and served the king in fiscal matters at the same time.

William the Conqueror was quick to avail himself of this governmental agency, appointing to it members of the baronial class. It was at the end of the eleventh century that the sheriff reached the greatest height of power that he ever attained. So, for the last 850 years, his influence has been steadily diminishing, both in England and in America, after his transfer here. Other officers have slowly but certainly removed function after function from his authority. As the needs of a changing civilization have varied, the sheriff has not been able to retain his power and prestige.

Maitland, the English historian, described his duties at the close of the nineteenth century. "He receives the judges on their circuits, he acts as a returning officer in parliamentary elections for his county, he executes civil judgments, and has to see the hanging of those who are appointed to die." The functions of the American sheriff today, briefly stated, are: first, he has criminal duties; second, he exercises civil functions; third, he acts as administrator of the county jail.

Does he meet these obligations satisfactorily and adequately? Are there alternate ways of performing these duties? The consideration of these questions is the purpose of this article.

THE SHERIFF'S CRIMINAL DUTIES

The sheriff never was constrained by law to ferret out crime and criminals, but was ordered to arrest any persons for unlawful acts committed within his view. It is much in this spirit

that the sheriff now considers his criminal duties. Testimony to this effect might be cited from many sources.

A survey of sheriffs in some Ohio counties showed that only one fourth to one half of the time of the sheriff and his deputies was devoted to criminal activities. The proportion of time usually depended upon what amount remained after other obligations were met. As one sheriff put it, "You know, we must do the civil work, and then we do what we can at the criminal. We really need another man so we could cover the criminal work."

As criminal investigators, twenty-eight out of fifty-one sheriffs in Ohio had experience as deputies. The other twenty-three men assumed office prepared (?) by the occupations of farmer, salesman, contractor, mechanic, railroader, hay buyer, dairyman, or fireman. The deputy sheriffs were even less prepared for the performance of highly skilled work—the repression and detection of crime. Thirty seven out of fifty-four were found to have had no police experience or training for their duties.

Sheriffs generally do not have the means for cooperation with fellow officers; in many instances it is doubtful if cooperation would follow were the physical facilities available. Information or other assistance sought by one sheriff must be requested individually from each other officer. Knowing his own lack of training the requesting officer is frequently very suspicious of the ability and thoroughness of his fellow sheriff.

A robbery was committed in the rural section of a certain county in one of our more "enlightened states," and yet the police of the county seat were not notified. That day a similar act was committed there. Later it developed that the city police would and could have held the men on suspicion for the county if they had known of the previous robbery. At the same time the offense within the city limits would have been prevented.

Requests for information from other officers or calls for aid from individuals are usually subject to haphazard treatment. If there are no clues in criminal cases it is likely nothing will be done or at most that the place or person involved in the wrongdoing is visited. Even if there is a suspicion, investiga-

tion may wait until some civil process is to be taken in that direction. A notation of the complaint may or may not be made. If it is made, it will be held for several weeks, after which it will be discarded. If no notation is made, the investigation lies dormant unless some relevant object happens to cross the path of the sheriff or his deputies.

Thus briefly, we have stated some of the characteristics of the sheriff's office: slightly trained men, lack of cooperation among themselves, and little if any system in investigating crime. In several states a system covering the same territory as the sheriff's is, in operation, a state police system. These forces are composed of men rigidly chosen, adequately trained, and strictly disciplined. Pennsylvania has a school troop to which each recruit is sent for a period of five months. He is then assigned to a regular troop and works closely with an experienced member of the force for a time before working by himself.

State police compare favorably with sheriffs in the matter of cooperation. Pennsylvania, New York, and New Jersey state forces are linked by an interstate teletypewriter system. Working agreements also exist with the Massachusetts and Connecticut forces. Cases involving stolen automobiles, bank robberies, and crimes where high-speed transportation is used are particularly aided in their solution by such a system of state-wide communication.

Cases are handled efficiently by state police and no case is closed until "finis" is written across the record. The reports are full enough to know the development in any case from day to day and allow a new man to take up the work of investigation when a change is necessary or desirable.

From the foregoing discussion it can be seen that the sheriff's office as now constituted and with the duties placed on it does not adequately cover criminal cases. In order to alleviate this situation, it is suggested that the criminal work be transferred to some other police force. A mere transfusion of new men may give the office of sheriff an appearance of revived life, but many of the old difficulties such as elective head, limited ten-

ure, and untrained personnel would remain. A county constabulary might be considered as a change toward improvement. The limitation of this type of organization is suggested, however, by the great number of counties. The small size of these units, made necessary hundreds of years ago by lack of proper transportation facilities, precludes the maintenance of a force of sufficient size to operate staff agencies. Consolidation of counties into districts may be the answer to this difficulty. One fact seems certain: the sheriff suffers by comparison with other police forces.

The sheriff's office in most counties contains too few men to permit specialization; on the other hand, the number of opportunities to exercise any specialized knowledge within the limits of one county are few. The state police, a larger force which is internally specialized, has opportunity to exercise its special knowledge and equipment with the whole state as its field.

Some might contend that taking the criminal work from the sheriff's office would be too "radical" (whatever evil connotation that much-abused word may have). Others might say that states which have state police forces maintain them merely as supplementary law-enforcing agencies. Opposing those views, we find that New York sheriffs depend upon state police to cover approximately 50 per cent of the criminal cases; and that West Virginia sheriffs rely on their state police in 75 to 100 per cent of the cases. Many Pennsylvania sheriffs indicated, when asked, that two or three cases were given consideration by them each year, others being cared for by the state police force of only 395 men.

THE SHERIFF'S CIVIL DUTIES

Although the popular conception of the sheriff is that he is ever on the lookout as the criminal's worst enemy, yet it is the civil activities which engage the major portion of the time of his office. As an officer of the courts, the sheriff attends sessions of the various county courts, makes attachments, serves summons and subpoenas, and disposes of executions of judgments.

Practically all civil work originates or at least passes through

the office of the clerk of the county courts. Under this regime duplication, resulting in waste of time and man power, is frequent as a typical instance shows.

An order issued by the clerk of the court directs the sheriff to serve a summons. The indorsements to be attached are indicated. The sheriff makes an exact copy of this order, serves the summons, and files the return with the clerk. The clerk then copies the return into the docket. This sequence involves several operations which could be eliminated if the sheriff's office were abandoned as a separate entity, and the civil duties conferred on the clerk's office. Moreover, the training of the sheriff and his deputies, as indicated before, argues conclusively that they are not trained for clerical work, and it is a sheer waste of time to expect it. The work of the clerk's office consists of record-keeping and hence better adapts it to make returns than the typical "hunt and miss" system under which the sheriff's office operates typewriters.

The sheriff's inability or disinclination to keep records and make reports is notorious. These are burdens to many, as the usual work includes returns to be made on summons and subpoenas, publication in connection with sales and other civil work, maintenance of a cashbook indicating the funds received in the performance of his functions and the distribution thereof, annual statements of various types, and reports on phases of jail administration. With such an array of routine matter, neglect and inability usually prevent proper records, as investigation has shown.

Not all the blame for poor records falls on the men acting as sheriffs. The system is at fault. An example of this exists in one state where an annual report on jail administration is prescribed by statute to be forwarded to the secretary of state. The superfluity of this report is demonstrated by the fact that from the time of the passage of the statute, which was in 1857, until the summer of 1931 no report was sent to the secretary of state and none asked for. As a result of my inquiry to see the annual reports, the secretary of state, in question, for the first time became acquainted with the statute and sent out a form

to all sheriffs in 1931. The returns were slow in being received and incomplete. No use was made of the returns beyond filing them with the clerk of the House. A renovation of the law-enforcing machinery suggests itself.

The practicability of a radical change is further supported by the fact that municipal courts have avoided much duplication by joining the bailiff to the office of clerk. The clerk of one city explained the improved arrangements. "The bailiff's office does not make copies of orders and processes issued by the clerk. They do make notations on one copy of what action they have taken in the particular case." Whether the bailiff is appointed by the clerk or by the judge, it is observed that he feels directly responsible to the court or the clerk, and does not consider himself an independent officer responsible to the voters alone. This means closer coordination of work and consequent savings.

PROBLEMS OF THE SHERIFF AND THE JAIL

Jail administration is the third phase of the sheriff's work. County jails rightly are receiving a great deal of criticism from many sides. The buildings are generally old, insanitary, and used far beyond reasonable capacity. The wealth and size of the county are frequently insufficient to warrant better structures. As custodian of the jail, the sheriff has the power to administer it much as he sees fit, often inefficiently. The county judge, or county commissioners, or some state officers are supposed to oversee the sheriff's jail administration. Such a provision guarantees little, however, as the supervisors in Ohio, for example, exercise little of the influence that they possess.

By training, the sheriff or his appointee is rarely competent as a jailer; through inexpert handling of prisoners, the county jail is frequently the breeding place of crime and disease; and by reason of overhead and inefficiency the expense of incarceration is exorbitant. Large rake-offs have been made and are being made by sheriffs on the feeding of prisoners. The actual amount of profit cannot be determined. Many variations in profit exist in different counties that do not appear in official

records. A perusal of costs from actual records in eighteen Ohio counties, however, showed nine of them gave contracts for the feeding of prisoners at a daily rate; the other nine fed the prisoners at actual cost by paying the bills for food. The difference in the costs under these systems averaged 13.1 cents per day per prisoner as shown below.

COMPARISON OF FOOD COSTS IN SOME OHIO COUNTIES FEEDING PRISONERS BY CONTRACTS AND SOME FEEDING PRISONERS BY PAYMENT OF THE ACTUAL COST

Contract Counties	*Daily Rate*	*Actual Cost Counties*	*Daily Average for Four Months*
Coshocton	$0.75	Athens	$0.568
Fayette	0.75	Clinton	0.775
Hancock	0.75	Darke	0.497
Jackson	0.70	Holmes	0.726
Noble	0.75	Pickaway	0.576
Perry	0.75	Pike	0.611
Seneca	0.75	Ross	0.452
Tuscarawas	0.75	Union	0.666
Wayne	0.75	Wood	0.651
Average	0.744	Average	0.613

The sheriff is not without profit in the county paying the actual cost of the food since the cook's services are exceedingly well paid. Also, the ability of the sheriff to distribute the business where "it would do the most good" is not to be disregarded. On several occasions the sheriff's wife was heard to inquire as to the proper source for securing potatoes, or the store from which to purchase baked goods. The sums thus controlled are undoubtedly advantageously dispersed.

A somewhat extreme solution of the jail problem seems inevitable. It lies in the establishment of district jails under state control, a step probably as certain as state care of unfortunates has become. A district jail would be sufficiently proximate to the county courthouse, considering improved

methods of transportation. Trained administration, segregation of prisoners, and reduction in costs of operation would be the result.

TOTAL VIEW OF THE PROBLEM

The foregoing recommendations, although applicable largely to rural counties, apply in urban counties with modifications. The sheriff's criminal activities in the latter counties are largely conducted outside the city areas under conditions similar to those of counties predominantly rural. In civil work the recommendation of unifying the sheriff's office with that of the clerk's is even more convincing, since the municipal courts have actually accomplished an analogous union by attaching the bailiff to the clerk of the municipal courts. With regard to jail administration the arguments for amalgamation are not so convincing, because the case against the small jail with high overhead is not applicable here. Nevertheless, rural communities adjacent to urban counties should have freer access to larger jails than that at present.

. . . . . .

No public office ever recommended its own abolition or the reduction of its work and scope; the sheriff's office proves no exception. A realistic and effective reallocation of functions that remain in the hands of the sheriff appears to involve the elimination of this office—a case of getting rid of a bothersome thistle by pulling out the roots. As a carry-over of days previous to the horse-and-buggy age, the sheriff's office continues its decline. Its criminal activities, civil duties, and responsibilities for jail administration can be more efficiently placed in other hands.

Chapter Seven

INDIVIDUAL RIGHTS

No. 31

The whole notion of "rights" has a very long history in the thought of the Western world. The assertion that men somehow by nature have certain "rights," while not susceptible of logical proof, has been made in every contest with despotism since the breakup of the feudal system. Even though absolutism of the old sort may have disappeared, the danger of arbitrary action by the holders of office is never absent, as a philosophical examination of the idea of rights makes clear. Men who have power may use it for evil, as well as for good, ends. The following selection is designed to show the perennial nature of the ideas embodied in formal bills of rights.

LEGAL-HISTORICAL AND PHILOSOPHICAL BACKGROUND OF THE BILL OF RIGHTS[1]

LEGAL-HISTORICAL POINT OF VIEW

An analysis of a bill of rights should include two approaches: first, the legal-historical viewpoint; secondly, the philosophical. These viewpoints are not mutually exclusive, since one dove-

[1] Harry B. Kies, *Manual on the Bill of Rights and Suffrage and Elections for the Missouri Constitutional Convention of 1943*, September, 1943, pp. 9–13.

tails into the other. If a distinction in the mechanics of analysis is made between them, it is purely as an aid to clarity and succinctness.

Historically, we find that at various times men have affirmed and protested that certain rights are inalienable and natural to man, and are not to be denied him by the state. The present survey will be limited to the historical precedents among English-speaking peoples which substantiate the thesis that, due to certain exigencies, men have been forced to call the state (political government) to task, and to delineate by emphatic insistence certain areas into which political authority had no right to transgress.

In 1627, in the Five Knights case, counsel for the prisoners sought to use the writ of habeas corpus, but to no avail. In the following year, Parliament being in session, it was decided that attention must be called to the improvisations which existed in the field of fundamental rights. The Petition of Right of 1628 resulted; it was based upon the principle that the King should not govern arbitrarily. This petition specifically sought to prohibit:

1. The use of martial law in time of peace
2. The billeting of soldiers in private houses
3. Arbitrary imprisonment
4. Arbitrary taxation

Here are four easily recognized landmarks in any modern bill of rights. If men are to act as free men, such abuses of their rights to act as free men cannot be tolerated. It is immaterial to inquire into the validity of motives or even the idealism behind these specific requests. Imbued as we are with our own modern democratic attachment for self-government, we would look in vain, perhaps, for a similar, clearly recognizable democratic ideal in the Englishmen who first gropingly set down a sort of negative bill of rights. At all events, knowingly or unknowingly, they rendered a great service to the cause of democratic self-government even though that early Petition of

Right did not immediately eventuate in definite redress. It took a civil war, much confusion of issues, idealism and self-seeking, to crystallize the yearning of liberty-loving men into a definite Bill of Rights. That happened in 1689. It was out of a welter of conflict over political and economic power among groups seeking their own ends that seventeenth-century England gave birth to these basic concepts of principles of self-government.

In the Bill of Rights of 1689, we find that time had further refined and affirmed the more or less negative demands of 1628. Thus it

1. Condemned the use of the court of high commission; in short, due process of law was demanded
2. Condemned excessive bail
3. Condemned irregular treatment of jurors
4. Recognized the right of petition
5. Recognized the right of protestants to carry arms for their defense
6. Demanded free elections
7. Demanded freedom of speech
8. Insisted that this enumeration did not deny or disparage other rights retained by the people.

The next major historical step in the development of a bill of rights was the Declaration of Independence. Here, again, was a historical exigency which brought forth masterful phraseology, as it echoed the cries of the inner wellsprings of human dignity in measured and meditated power.

An analysis of the Declaration into its three component parts reveals: a declaration of rights, a declaration of grievances, a declaration of independence. While the major emphasis here will be upon the historical side, we must not lose sight of the fact that the practical necessity of the period was not isolated from the philosophical concept of the dignity of man and the true concept of government. This following section, "He has refused his assent to laws the most wholesome and necessary

for the public," clearly indicates the conception of the principles that government is not merely a negative protecting agent, but also a positive, constructive agent. But to return to our main line of analysis, we find that the framers of the Declaration took issue with the British government in its dissolution of representative houses, violation of the independence of the judiciary, the sanctity of the home, the imposition of taxes without consent, and deprivation of trial by jury. Thus, as one goes through the grievances, it is seen there is a protest against extant conditions which called to the forefront mechanisms and principles recognized in the historical tradition of the people.

The same tendency to follow past historical precedents is seen in the transition from colonial charters to state constitutions. In turn, the very human tendency to rely and build upon the past accounts for the great similarity of all our state constitutions. At the same time, identical or nearly identical conditions worked similar responses in the matter of delineation of fundamental rights. In other words, the majority of our state constitutions reflect the social, political, cultural, and economic ideas of the period.

A rough analysis of the original thirteen state constitutions reveals that only six states had separate bills of rights, although all did embody in their constitutions the fundamental rights. In the period of the Revolution, the first business at hand was that of getting a government under way, and the perils of war precluded too much time being spent upon a subject that all felt and knew could historically be taken for granted. Four states simply enumerated the rights they felt had been infringed upon and the rights which they deemed theirs as men but which had not been specifically stated in the Declaration of Independence. Three states being so grounded in the fact that they had inalienable rights continued their charters as constitutions, while six states definitely stated that the grievances enumerated in the Declaration of Independence were attacks upon their inalienable rights.

While we consider, therefore, the first bills of rights, these

conclusions follow: it was an era in which the people recognized the natural law as the source of rights; rights enumerated were, for the most part, those which the extant conditions had placed in jeopardy; colonial traditions had impressed upon the people the fact that without religious freedom, other freedoms and rights were without a firm foundation; all the states save South Carolina had the right of the freedom of religion in their respective constitutions.

In brief, the first bills of rights showed a unique consciousness of historical tradition, and the first constitutions were specific in giving protection to those basic rights upon which government is apt to encroach, and without which the people have a peculiarly difficult task in keeping their officials under control.

THE PHILOSOPHICAL POINT OF VIEW

We turn now to a more positive approach. It is an approach which is vital in our day, and is often undertaken in the form of the question: "Is it necessary to have a bill of rights?"

This question would be answered in the negative if the people at large and, more specifically, the officials of government understood, appreciated, and were conscious of the indisputable dictum of the Declaration of Independence. The fact is, however, that the body politic generally speaking does not understand the three principles of the Declaration, which are:

1. There is a Creator.
2. Men are created equal.
3. The state exists for man.

There is a Creator. The founding fathers were aware that man is dependent upon some Being since he owes his existence to that fact. Since man's existence is predicated upon such a fact, it logically follows that man has certain obligations. These obligations can only be fulfilled when man is free, and it is inconsistent with the idea of God to suppose that He would lay

down certain obligations without giving man the necessary freedom. Government, therefore, is limited in what it can do, and it must never infringe upon this natural freedom of man.

Men are created equal. Since all men have the same common Creator of life, it follows that while there are accidental differences of physical and mental characteristics, they all have the same common end and, therefore, have the same fundamental nature and rights. Each man, while having the same rights, must be given the opportunity by the state to exercise those rights, and the state cannot morally deny the existence of the right. (Note the distinction between the denial of the right and the denial of the exercise of the right.)

The state exists for man. This is another way of saying that man has certain inalienable rights. At the moment, this is the most important for us to consider. In view of the fact that men are created equal and that man existed before the state, there results the indisputable truth that the state must not be considered all powerful. That the state is an important mechanism to aid men to reach their natural end cannot be denied, nor can it be denied that the state per se has certain rights. However, the important fact is, man has rights which the state does not give to him. The political power resting in the people is self-evident. But the use of the right of suffrage does not appear so self-evident, in view of the manner in which the state rightly sets down rules governing its exercise. Yet, upon analysis, it is clear that unless the political power which is an inherent, natural right has a mode of expression (right to vote), it is of little or no value. In brief, the right to vote can be traced back to a more fundamental right.

In the following table, "a" denotes rights that are basic and self-evident; "b" denotes rights that are not self-evident or are doubtful.

The question undoubtedly comes to mind whether or not the foregoing emphasis upon natural rights is of any valid importance today. Do we accept the natural law? Is there any necessity for restating today the fact that man has rights upon which the state may not encroach? Is such a recognition of natural rights simply a pious historical sentiment?

If we answer the foregoing with a denial of the existence of natural law and natural rights, then let us once and for all be honest and come to the logical conclusion that we cannot fight a Hitler upon moral grounds. If there be no reasoned basis for our rights, then, given the proper conditions of changing sentiment, loss of historical traditions, the state can act with impunity with unlimited power. If there be no natural law that tells us what man is, what man's rights are, what man's duties

BILL OF RIGHTS: ARTICLE II, MISSOURI CONSTITUTION

Sec. 1.	Political power, source	a
Sec. 2.	Internal affairs, regulation	a
Sec. 3.	Local self-government not to be impaired	b
Sec. 4.	Purpose of government; natural rights	a
Sec. 5.	Religious freedom	a
Sec. 6.	Religion, individual support	a
Sec. 7.	Religion, state must not aid	a & b
Sec. 8.	Religious corporation, purpose	b
Sec. 9.	Elections free and open	b
Sec. 10.	Courts of justice	b
Sec. 11.	Security from search and seizure	b
Sec. 12.	Criminal prosecutions	b
Sec. 13.	Treason defined	b
Sec. 14.	Freedom of speech, press	a
Sec. 15.	Ex post facto law	b
Sec. 16.	No imprisonment for debt	b
Sec. 17.	Right to bear arms	a
Sec. 18.	Officers to attend personally to duties	b
Sec. 19.	Collectors in default, ineligible	b
Sec. 20.	Private property for private use	a
Sec. 21.	Private property for public use	a
Sec. 22.	Rights of accused	b
Sec. 23.	Accused not compelled to testify; double jeopardy	b
Sec. 24.	Bail	b
Sec. 25.	Excessive bail, fines	b
Sec. 26.	Habeas corpus	b
Sec. 27.	Military subordinate	b
Sec. 28.	Trial by jury	b
Sec. 29.	Right to assemble and petition	a
Sec. 30.	Due process of law	a
Sec. 31.	Slavery prohibited	a
Sec. 32.	Rights reserved	b

are, then a Hitler need have no scruples in ordering the physically weak to be exterminated. If man be nothing but an animal, if he be without a soul, then most certainly the state cannot be condemned for trying to breed a healthier type of human animal. If that thought is burned deep into the consciousness of man, need we ask if a bill of rights is necessary?

There is no middle course; either man is something higher than the brute animal, or he is not. Upon the premise depends the kind of bill of rights to be written.

Is it not, however, carrying coals to Newcastle, to spend energies and time on a subject which all or, at least, the majority recognize as valid? Let us see if the people today really grasp this principle, or whether, perhaps, we have been living upon the accumulated political wisdom of our ancestors with respect to fundamental principles of man and government.

There appeared in the University of Pennsylvania Law Review, Vol. 91, No. 4, December, 1942, the following:

> While it is still customary to talk of a bill of rights, actually this terminology is definitely out of date. In the eighteenth century, rights were thought of as "immutable," "inalienable," "natural." . . . Amendments to the American and other constitutions were really civil liberties—a constitutionally guaranteed and reserved sphere of the individual.

This statement is clearly indicative of the long road of forgetting which we have traversed. The statement presses heavily the dictum that the rights enumerated in bills of rights are really something not of the very essence of man but are mere accretions born of changing conditions. Their birth comes very near being the stillborn birth of the positive rights doctrine. It is a doctrine that seems to imply that the state, acting for society, confers these rights upon the individual.

The point in fact is that the rights enumerated, for the most part, are immutable, inalienable, and natural since they inhere in the essence of man. The exercise of those rights is, however, something different—the delineation between the right and its

exercise must, at all times, be borne clearly in mind. Today, therefore, in many respects, a consideration of a bill of rights mirrors two antagonistic philosophical concepts.

We have, on the one hand, the "positive" rights approach which is best detected in the statements that rights are the product of society, or the state, and, that these rights may be taken away by the state. This concept is primarily a mechanistic one and reflects the materialistic trend in political thought. The rights it would have the individual use are born of the material facts of group life, and when the material facts of that group life change, then there are no longer any rights. The aspect of change thus becomes the criterion of whether or not the individual possesses certain rights. Such a viewpoint related to government inexorably means that there is no norm or measure by which the actions and the ends of the state can be tested. It reduces itself to the absurdity that the government of the state will create its own hierarchical judgeship to measure its own actions, the fruit of which is statism. That such is the irreconciliable outcome is best seen by quoting the words of John Dewey:

> With the founders of American democracy, the claims of democracy were inherently one with the demands of a just and equal morality. We cannot now well use their vocabulary. . . . We have advanced far enough to say that democracy is a way of life. We have yet to realize that it is a way of personal life and one which provides a moral standard for personal conduct. (Chandler, *The Clash of Political Ideals*, pp. 156–157.)

The other concept is founded in the natural law. This predicates that a right is a moral capacity, a moral power, which is inviolable and comes to man because of the significant fact that man is a human being. The natural law states specifically that there are rights which no man owes to the state or society; that government is morally bound to recognize and respect these rights; that there is outside of the government a measure for its actions, a measure which is found in the natural law.

Has it ever occurred to the protagonists of the positive rights doctrine that the idea of judicial review would be hollow mockery if there was no measure beyond positive law that the courts could use? In brief, while the founders of the American system knew that government is concerned, rightfully so, with positive rights, they, nevertheless, in their constitutions, specifically in the bills of rights, realized that there was something behind this façade and gave public recognition to the fact that the purpose of government rested in the natural law.

Under the natural rights philosophy, the Bill of Rights is an insurance policy against the power of the state. The value of this insurance with respect to state constitutions is of even greater importance than in the federal Constitution, for under our legal theory the latter is a government of delegated powers, whereas the former has all power except that specifically denied. Thus, in using the analogy of a constitution being a watchdog, the Bill of Rights is the necessary chain anchoring the watchdog. "The chain may destroy some of his efficiency and part of his effectiveness, but it is safer. Without the chain, even a good dog may become overzealous, and when this happens he may even bite his own master." (Manion, *Lessons in Liberty*, p. 151.)

Nos. 32, 34, 35, 36

The selections numbered 31, 33, 34, and 35 are illustrations of a renewed interest in the practical application in admittedly difficult cases of the idea of rights long embodied in formal constitutional guarantees. Feeling against racial discrimination has grown markedly since the war waged against the Axis powers. This feeling finds expression not only in the report of the President's Committee on Civil Rights, but in a more concrete way in the two recent decisions of the Supreme Court of the United States.

No. 32

IRENE MORGAN, APPELLANT, v. COMMONWEALTH OF VIRGINIA[2]

Mr. Justice Reed delivered the opinion of the Court.

This appeal brings to this Court the question of the constitutionality of an act of Virginia, which requires all passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination the white and colored passengers in their motor buses so that contiguous seats will not be occupied by persons of different races at the same time. A violation of the requirement of separation by the carrier is a misdemeanor. The driver or other person in charge is directed and required to increase or decrease the space allotted to the respective races as may be necessary or proper and may require passengers to change their seats to comply with the allocation. The operator's failure to enforce the provisions is made a misdemeanor.

These regulations were applied to an interstate passenger, this appellant, on a motor vehicle then making an interstate run or trip. According to the statement of fact by the Supreme Court of Appeals of Virginia, appellant, who is a Negro, was traveling on a motor common carrier, operating under the above-mentioned statute, from Gloucester County, Virginia, through the District of Columbia, to Baltimore, Maryland, the destination of the bus. There were other passengers, both white and colored. On her refusal to accede to a request of the driver to move to a back seat, which was partly occupied by other colored passengers, so as to permit the seat that she vacated to be used by white passengers, a warrant was obtained and appellant was arrested, tried, and convicted of a violation of Section 4097dd of the Virginia Code. On a writ of error the conviction was affirmed by the Supreme Court of

[2] *L. Ed. Advisory Opinions,* Vol. 90, No. 16, 1945 Term, pp. 982–989.

Appeals of Virginia. The Court of Appeals interpreted the Virginia statute as applicable to appellant since the statute "embraces all motor vehicles and all passengers, both interstate and intrastate." The Court of Appeals refused to accept appellant's contention that the statute applied was invalid as a delegation of legislative power to the carrier by a concurrent holding "that no power is delegated to the carrier to legislate. . . . The statute itself condemns the defendant's conduct as a violation of law and not the rule of the carrier." No complaint is made as to these interpretations of the Virginia statute by the Virginia court.

The errors of the Court of Appeals that are assigned and relied upon by appellant are in form only two. The first is that the decision is repugnant to Clause 3, Section 8, Article I of the Constitution of the United States, and the second the holding that powers reserved to the states by the Tenth Amendment include the power to require an interstate motor passenger to occupy a seat restricted for the use of his race. Actually, the first question alone needs consideration for if the statute unlawfully burdens interstate commerce, the reserved powers of the state will not validate it.

We think, as the Court of Appeals apparently did, that the appellant is a proper person to challenge the validity of this statute as a burden on commerce. If it is an invalid burden, the conviction under it would fail. The statute affects appellant as well as the transportation company. Constitutional protection against burdens on commerce is for her benefit on a criminal trial for violation of the challenged statute.

This Court frequently must determine the validity of state statutes that are attacked as unconstitutional interferences with the national power over interstate commerce. This appeal presents that question as to a statute that compels racial segregation of interstate passengers in vehicles moving interstate.

The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as

a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts.

In the field of transportation, there have been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce.

Because the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional. The courts could not invalidate federal legislation for the same reason because Congress, within the limits of the Fifth Amendment, has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end.

This statute is attacked on the ground that it imposes undue burdens on interstate commerce. It is said by the Court of Appeals to have been passed in the exercise of the state's police power to avoid friction between the races. But this Court pointed out years ago "that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of

the police power." Burdens upon commerce are those actions of a state which directly "impair the usefulness of its facilities for such traffic." That impairment, we think, may arise from other causes than costs or long delays. A burden may arise from a state statute which requires interstate passengers to order their movements on the vehicle in accordance with local rather than national requirements.

On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made "at any time" during the journey when "necessary or proper for the comfort and convenience of passengers." This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, "any passenger to change his or her seat as it may be necessary or proper." An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey.

Interstate passengers traveling via motors between the North and South or the East and West may pass through Virginia on through lines in the day or in the night. The large buses approach the comfort of Pullmans and have seats convenient for rest. On such interstate journeys the enforcement of the requirements for reseating would be disturbing.

Appellant's argument, properly we think, includes facts bearing on interstate motor transportation beyond those immediately involved in this journey under the Virginia statutory regulations. To appraise the weight of the burden of the Virginia statute on interstate commerce, related statutes of other states are important to show whether there are cumulative effects which may make local regulation impracticable. Eighteen states, it appears, prohibit racial separation on public carriers. Ten require separation on motor carriers. Of these Alabama applies specifically to interstate passengers with an exception for interstate passengers with through tickets from states without laws on separation of passengers. The language

of the other acts, like this Virginia statute before the Court of Appeals' decision in this case, may be said to be susceptible to an interpretation that they do or do not apply to interstate passengers.

In states where separation of races is required in motor vehicles, a method of identification as white or colored must be employed. This may be done by definition. Any ascertainable Negro blood identifies a person as colored for purposes of separation in some states. In the other states which require the separation of the races in motor carriers, apparently no definition generally applicable or made for the purposes of the statute is given. Court definition or further legislative enactments would be required to clarify the line between the races. Obviously there may be changes by legislation in the definition.

The interferences to interstate commerce which arise from state regulation of racial association on interstate vehicles has long been recognized. Such regulation hampers freedom of choice in selecting accommodations. The recent changes in transportation brought about by the coming of automobiles does not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. The factual situation set out in preceding paragraphs emphasizes the soundness of this Court's early conclusion in Hall v. De Cuir, 95 U.S. 485.

The De Cuir case arose under a statute of Louisiana interpreted by the courts of that state and this Court to require public carriers "to give all persons traveling in that state, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color." Damages were awarded against Hall, the representative of the operator of a Mississippi river steamboat that traversed that river interstate from New Orleans to Vicksburg, for excluding in Louisiana the defendant in error, a colored person, from a cabin reserved for whites. This Court reversed for reasons well stated in the words of Mr. Chief Justice Waite. As our previous discussion demonstrates, the transportation difficulties

arising from a statute that requires commingling of the races, as in the De Cuir case, are increased by one that requires separation, as here. Other federal courts have looked upon racial separation statutes as applied to interstate passengers as burdens upon commerce.

In weighing the factors that enter into our conclusion as to whether this statute so burdens interstate commerce or so infringes the requirements of national uniformity as to be invalid, we are mindful of the fact that conditions vary between Northern or Western states such as Maine or Montana, with practically no colored population; industrial states such as Illinois, Ohio, New Jersey, and Pennsylvania with a small, although appreciable, percentage of colored citizens; and the states of the deep South with percentages of from 25 to nearly 50 per cent colored, all with varying densities of the white and colored race in certain localities. Local efforts to promote amicable relations in difficult areas by legislative segregation in interstate transportation emerge from the latter racial distribution. As no state law can reach beyond its own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel. It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid.

Reversed.

No. 33

The writ of *habeas corpus* is one of those procedures which is always discussed in the classroom but which few students have ac-

tually seen. The writ does *not* guarantee either an immediate trial or immediate release of the person in whose behalf it is issued. What it *does* guarantee is that the person being held in custody shall be presented before a judge who will then inquire into the sufficiency of the reasons for which he is being held. If there are good prima facie reasons for holding him he will be returned to the custody of the official having him in charge; if the evidence shows that he is being held without adequate cause the judge may order his release. In any case, it is a way of preventing arbitrary imprisonment. The judge has no discretion with respect to issuing the writ but must do so upon demand of the person being held or his attorney. Statutes of the individual states prescribe the details of the procedure. The writ is also available in the federal jurisdiction and in all English-speaking countries. It is very ancient but was not regularized by the British Parliament until 1679.

WRIT OF HABEAS CORPUS

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

In the Matter of the application of Karl N. Snow, Relator, for a Writ of Habeas Corpus -vs- F. L. Johnson, as Superintendent of The State Hospital for the Insane at Lincoln, Nebraska, Respondent.	WRIT OF HABEAS CORPUS

STATE OF NEBRASKA }
LANCASTER COUNTY } *ss.*

To: Dr. F. L. Johnson, as Superintendent of The State Hospital for the Insane, at Lincoln, Nebraska:

You are hereby commanded to have the body of Karl N. Snow by you unlawfully deprived of his liberty, as is alleged, together with the cause of his detention, before Harry Brown, Judge of the District Court, at the court house in Lincoln, Nebraska, on the 9th day of August, 1947, at the hour of 10 o'clock A.M., then and there to be dealt with according to law, and have you then and there this Writ.

Witness, Harry Brown, Judge of the District Court of Lancaster County, and the seal of said court, affixed hereto this 1st day of August, 1947.

s/ Albert Jensen
Clerk of District Court

By s/ John S. Richards
Deputy

No. 34

TO SECURE THESE RIGHTS[3]

THE RIGHT TO VOTE

The right of all qualified citizens to vote is today considered axiomatic by most Americans. To achieve universal adult suffrage we have carried on vigorous political crusades since the earliest days of the Republic. In theory the aim has been achieved, but in fact there are many backwaters in our political life where the right to vote is not assured to every qualified citizen. The franchise is barred to some citizens because of race; to others by institutions or procedures which impede free access to the polls. Still other Americans are in substance disfranchised whenever electoral irregularities or corrupt practices dissipate their votes or distort their intended purpose. Some citizens—permanent residents of the District of

[3] *The Report of the President's Committee on Civil Rights,* Washington, 1947, pp. 35–40.

Columbia—are excluded from political representation and the right to vote as a result of outmoded national traditions. As a result of such restrictions, all of these citizens are limited, in varying degrees, in their opportunities to seek office and to influence the conduct of government on an equal plane with other American citizens.

The denial of the suffrage on account of race is the most serious present interference with the right to vote. Until very recently, American Negro citizens in most Southern states found it difficult to vote. Some Negroes have voted in parts of the upper South for the last twenty years. In recent years the situation in the deep South has changed to the point where it can be said that Negroes are beginning to exercise the political rights of free Americans. In the light of history, this represents progress, limited and precarious, but nevertheless progress.

This report cannot adequately describe the history of Negro disfranchisement. At different times, different methods have been employed. As legal devices for disfranchising the Negro have been held unconstitutional, new methods have been improvised to take their places. Intimidation and the threat of intimidation have always loomed behind these legal devices to make sure that the desired result is achieved.

Until 1944, the white primary, by which participation in the Democratic primary is limited to white citizens, was used in Texas, Alabama, Arkansas, Georgia, Louisiana, and Mississippi as the most effective modern "legal" device for disfranchising Negroes. While some Southern Negroes succeeded in spite of various obstacles in voting in general elections, almost none voted in the Democratic primaries. Since the Democratic primary is the only election of any significance, the device of the white primary resulted in exclusion of Negroes from government in these states. Over a period of time, advocates of white supremacy had refined this device to the point where it seemed to be constitutionally foolproof. The command of the Fifteenth Amendment, prohibiting states from abridging suf-

frage because of race or color, was circumvented by purporting to vest the power to exclude Negroes in the political party rather than in the state.

But in 1944, the United States Supreme Court in the case of *Smith v. Allwright* overruled an earlier decision and held the Texas white primary illegal. It declared that the exclusion rules of the Texas Democratic party were in effect the rules of the state and were therefore forbidden by the Fifteenth Amendment.

Some states adapted their primary laws to the Supreme Court ruling; others resisted, first, by refusing to open white primaries to Negroes until further litigation made the Texas ruling applicable to them, then by devising other methods of depriving Negroes of the ballot. Today the effort to preserve the pure white electoral system in these states is continuing.

Two states, Louisiana and Texas, repealed white primary provisions immediately after the Supreme Court decision; Florida, Alabama, and Georgia were forced to do so by further court rulings. South Carolina called a special session of the state legislature at which all state laws in any way regulating primaries were repealed. The theory governing this action was that by placing the primaries entirely outside the law and the structure of government the ruling in *Smith v. Allwright* would be rendered inapplicable. In a message to the special session of the general assembly, the governor of the state said:

> After these statutes are repealed, in my opinion, we will have done everything within our power to guarantee white supremacy in our primaries of our state insofar as legislation is concerned. Should this prove inadequate, we South Carolinians will use the necessary methods to retain white supremacy in our primaries and to safeguard the homes and happiness of our people.
>
> White supremacy will be maintained in our primaries; let the chips fall where they may.

In 1947 the white primary in South Carolina, resting on its new foundation, was held invalid by the United States District

Court for the Eastern District of South Carolina in the case of *Elmore v. Harris.* In its opinion the Court said:

> Racial distinctions cannot exist in the machinery that selects the officers and lawmakers of the United States; and all citizens of this state and country are entitled to cast a free and untrammeled ballot in our elections, and if the only material and realistic elections are clothed with the name "primary," they are equally entitled to vote there.

The case will undoubtedly be carried to the Supreme Court for a final decision.

Alabama took a different course from South Carolina. Instead of repealing the primary laws it sought to continue disfranchisement by establishing "qualifications" standards under which Negroes could be barred by administrative action. The "Boswell amendment" adopted by this state in November, 1946, set up a provision under which voters would be required "to understand and explain" provisions of the state Constitution. Exclusion by this kind of device is a familiar Southern phenomenon. The tradition is to ignore such tests with respect to white voters but to apply them to Negroes—literally, where there is any possibility of eliminating them under the test; fraudulently, where they meet the test.

In a recent case in the Department of Justice files, a Negro schoolteacher was disqualified under a North Carolina provision requiring an ability to read and interpret the Constitution. The registrar refused to register him on the ground that he had not read the federal Constitution in a satisfactory manner. However, in a statement to the FBI the registrar declared, "my decision not to register him was based solely on the disfranchisement of the colored people in this county rather than on his ability to read, to write, and to explain the Constitution." This case was subsequently prosecuted by the Department of Justice and resulted in the conviction of the registrar.

The poll tax—another important legal obstacle to full suffrage in some Southern states—limits white as well as Negro

suffrage. The poll tax has frequently had an unequal racial effect, since, like the "understand and explain" clauses, it has been administered in a discriminatory manner. It has been very effective as an anti-Negro device. A poll tax simply places the payment of a fee between the voter and the ballot box. In some states it is cumulative; taxes not paid in years when the voter does not go to the polls pile up and he must pay more than one year's tax before he can vote. The poll tax has curtailed the size of the entire electorate, white and Negro. Seven states—Alabama, Arkansas, Mississippi, South Carolina, Tennessee, Texas, and Virginia—still maintain this tax as a prerequisite to voting. Since 1921 four other states have abandoned the poll tax. These are North Carolina, Louisiana, Florida, and Georgia.

It was estimated on the floor of the House of Representatives on July 21, 1947, that: In the presidential elections of 1944, 10 per cent of the potential voters voted in the seven poll-tax states, as against 49 per cent in the free-vote states. In the Congressional elections of 1946, the figures are 5 per cent for the poll-tax states as compared with 33 per cent for the free-voting states.

It has frequently been pointed out that the congressional representation of poll-tax states is based on proportionately fewer voters than the representation of other jurisdictions. It has also been urged that the poll tax is in reality a tax levied by the state upon the citizen's federal right to vote for members of Congress. In recent years there has been a strong drive for federal legislation forbidding the requirement of a poll tax as a prerequisite to voting in federal elections. The House of Representatives passed an antipoll-tax bill for the fourth time in July of 1947. The three previous bills passed by the House were killed in the Senate.

In addition to formal, legal methods of disfranchisement, there are the long-standing techniques of terror and intimidation, in the face of which great courage is required of the Negro who tries to vote. In the regions most characterized by generalized violence against Negroes, little more than "advice"

is often necessary to frighten them away from the polls. They have learned, through the years, to discover threats in mood and atmosphere. In one case in a deep Southern state, a middle-class Negro who had courageously attempted to vote and to complain to the Department of Justice when he was refused access to the polls, subsequently became so afraid of reprisal that he indicated uncertainty whether he would be willing to testify in court. He asked, if he should decide to testify, to be given ample notice of the date so that he could first move his family out of the region.

In past years, American Indians have also been denied the right to vote and other political rights in a number of states. Most of these restrictions have been abandoned, but in two states, New Mexico and Arizona, Indians continue to be disfranchised. The Constitution of New Mexico withholds suffrage from "Indians not taxed." In Arizona the state Constitution has been interpreted to deny the vote to Indians as being "persons under guardianship." Protests against these legal bans on Indian suffrage in the Southwest have gained force with the return of Indian veterans to those states.

The constitutionality of these laws is presently being tested. It has been pointed out that the concept of "Indians not taxed" is no longer meaningful; it is a vestige of the days when most Indians were not citizens and had not become part of the community of people of the United States. Indians are now citizens and subject to federal taxation. They are also subject to state taxes, except for lands held in trust for them by the United States government. There is therefore little justification for denying them the franchise on the assumption that they are excused from the burdens of other citizens.

No. 35

SIPUEL v. BOARD OF REGENTS, UNIVERSITY OF OKLAHOMA[4]

On January 4, 1946, the petitioner, a Negro, concededly qualified to receive the professional legal education offered by the state, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the state of Oklahoma. Petitioner's application for admission was denied, solely because of her color.

Petitioner then made application for a writ of mandamus in the district court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the supreme court of the state of Oklahoma affirmed the judgment of the district court. We brought the case here for review.

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the state. The state must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. [Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).]

The judgment of the supreme court of Oklahoma is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion.

The mandate shall issue forthwith.

Reversed.

[4] *Law. Ed. Adv. Opinions,* Vol. 92, No. 7, p. 256. Decided January 12, 1948.

No. 36

FISHER v. HURST[5]

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate issued in Sipuel v. University of Oklahoma, January 12, 1948 (—U.S.—, ante, 256, 68 Sup. Ct. 299). We there said:

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the state. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. [Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 83 L. ed. 208, 59 Sup. Ct. 232 (1938).]

Petitioner states that on January 17, 1948, the supreme court of Oklahoma rendered an opinion in which it was said:

Said Board of Regents is hereby directed, under the authority conferred upon it by the provisions of Article 13–A, Constitution of the state of Oklahoma, and Title 70 OS 1941, Sections 1976, 1979, to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with the equal protection clause of the Fourteenth Amendment of the federal Constitution and with the provisions of the Constitution and statutes of this state requiring segregation of the races in the schools of this state. Article 13, Section 3, Constitution of Oklahoma; 70 OS 1941, Sections 451–457.

Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith.

[5] *Law. Ed. Adv. Opinions,* Vol. 92, No. 10, pp. 420–423.

It is further stated by petitioner that the district court of Cleveland County of Oklahoma entered an order on January 22, 1948, as follows:

It is, therefore, ordered, adjudged, and decreed by this court that unless and until the separate school of law for Negroes, which the supreme court of Oklahoma in effect directed the Oklahoma State Regents for Higher Education to establish "with advantages for education substantially equal to the advantages afforded to white students," is established and ready to function at the designated time applicants of any other group may hereafter apply for admission to the first-year class of the School of Law of the University of Oklahoma, and if the plaintiff herein makes timely and proper application to enroll in said class, the defendants, Board of Regents of the University of Oklahoma, et al., be, and the same are hereby ordered and directed to either:

1. Enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for Negroes is established and ready to function, or
2. Not enroll any applicant of any group in said class until said separate school is established and ready to function.

It is further ordered, adjudged, and decreed that if such a separate law school is so established and ready to function, the defendants, Board of Regents of the University of Oklahoma, et al., be, and the same are hereby ordered and directed to not enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma.

The cost of this case is taxed to defendants.

This court retains jurisdiction of this cause to hear and determine any question which may arise concerning the application of and performance of the duties prescribed by this order.

The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed. It is clear that the district court of Cleveland County did not depart from our mandate.

The petition for certiorari in *Sipuel v. University of Oklahoma* did not present the issue whether a state might not sat-

isfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear it was not an issue here. The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense.

Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were. The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order. Whether or not the order is followed or disobeyed should be determined by it in the first instance. The manner in which, or the method by which, Oklahoma may have satisfied, or could satisfy the requirements of the mandate of this Court, as applied by the district court of Cleveland County in its order of January 22, 1948, is not before us.

Motion for leave to file petition for writ of mandamus is denied.

Chapter Eight

STATE FINANCE

No. 37

The ways in which state and national policies and finances are interrelated as a result of the system of grants-in-aid, and some of the practical problems created by these grants are made clear by the two articles which follow. A careful reading of these ought to make clear that these problems will not be solved by shouting such phrases as "centralization," "states' rights," and "usurpation" in heated arguments. As long as the states exist as separate political units, the practical issue is how they can best get certain things done which are neither "state" nor "national" in character but a baffling mixture.

FEDERAL GRANTS-IN-AID [1]

Federal grants and subsidies to the states are not a new development in this country. In one form or another they have existed since the initial formation of our federal government. But the present system of grants-in-aid for continuing activities of government really dates from the Smith-Lever Act of 1914. Beginning in that year, we inaugurated a system of federal grants to the states, which has grown by leaps and bounds during the past thirty years.

Total federal grants for the fiscal year 1915 amounted to only $5.5 million. By 1925 this figure had increased to approxi-

[1] *State Government*, Vol. 20, No. 11, November, 1947, pp. 297–298. By permission of the Council of State Governments.

mately $115 million. The high-water mark was reached in 1935 when over $2 billion was allotted to the states in the form of emergency relief grants. During the fiscal year of 1947 federal grants-in-aid exceeded $1 billion. Most of this sum was expended for regular, continuing grants. The following table shows the trend of federal grants since 1915, as well as the percentage of emergency grants to total grants.

Fiscal Year	*Total Grants*	*Per Cent Emergency Grants to Total Grants*
1915	$ 5,488,000	0
1920	77,115,000	0
1925	114,478,000	0
1931	183,484,000	11
1935	2,161,054,000	98
1939	904,474,000	40
1943	986,188,000	37
1945	865,418,000	32
1947*	1,208,200,000	5

* Preliminary figures.

The major continuing federal grants-in-aid are agricultural aid, mainly the county agent system, established in 1914; highway construction, established in 1916; vocational education, established in 1917; public health, established in 1918; employment security, established in 1933; public welfare and assistance, established in 1935. In addition, the seventy-ninth Congress established three new grant-in-aid programs in 1946: airport construction, hospital construction, and the school lunch program. The following table indicates the amount of federal funds expended for regular and emergency grants during the fiscal year ending June 30, 1947.

Even the huge sum of $1.2 billion does not represent the total of federal aids to other levels of government. For example, the figures in the table do not include payments in the nature of shared revenues, payments in lieu of taxes, payments for the performance of services for which the federal govern-

ment is responsible, loans which may or may not be repaid, and expenditures for the National Guard. These payments will add at least another $150 million to the total.

Program	*Amount in Millions*
Regular grants:	
Highways	$ 180.9
Agriculture and forestry	47.6
Vocational education	20.5
Vocational rehabilitation	14.6
Public health	33.4
Old-age assistance	515.7
Aid to dependent children	113.4
Aid to the blind	14.9
Unemployment compensation administration	59.8
Employment service	42.5
Welfare services	20.2
School lunch	78.0
Airports	2.0
Hospitals	0.6
Other regular grants	9.1
Total regular	$1,153.2
Emergency grants:	
Highways	23.0
Maternity and infant care	11.0
Other emergency grants	21.0
Total emergency	$ 55.0
Total grants	$1,208.2

It is estimated that regular federal grants-in-aid will exceed $1.5 million for the current (1948) fiscal year, based on existing legislation and appropriations. In addition, numerous proposals are pending in Congress to extend grants—grants for elementary and secondary education, grants for general relief, grants for expanded health services, and grants for water pollution control. This list is by no means exhaustive.

The expansion of federal grants-in-aid for continuing functions of government gives pause to those who believe that, to the greatest possible extent, each level of government should be responsible for raising its necessary revenues and for maintaining its necessary services. In reviewing this broad problem the Joint Conference of Representatives of the Congress and the Governors' Conference had the following to say:

> To achieve a higher degree of efficiency, reduce duplication, and to achieve economy and stability in our coordinated system of federal, state, and local governments, our states must cease relying upon the federal government to do things for them and their citizens which they can do for themselves as well as, or better than, the federal government. In order that the state and local governments may be enabled to assume those functions, the federal government should reduce those taxes which can be administered best by state and local governments.

It is becoming more and more apparent that federal grants-in-aid must be considered not as a separate problem but as an important factor in the complex intergovernmental tax and fiscal structure that has developed willy-nilly in this country. To discard the grant-in-aid device without readjusting federal, state, and local taxes is neither desirable nor practicable. On the other hand, it would seem to be feasible to reduce the volume of grants-in-aid by readjusting the tax structure so that each level of government may collect to a greater extent the revenues necessary to maintain the governmental services which it performs.

The allocation of adequate sources of revenue among its component members is an essential condition for the maintenance of a strong federal system of government. Experience indicates that when a unit of government loses power to raise a substantial portion of its own revenue, it loses power to function effectively on its own initiative. Accordingly, when consideration is being given to the distribution and utilization of revenue sources among the federal, state, and local govern-

ments, the importance of fiscal independence and responsibility in each area should be emphasized.

Most people who believe in our system of government will agree that the closer the administration and financing of governmental activities are to the people, the more effective will be the appraisal and control of them by the people. If a coordinate system of federal-state government is to be maintained, therefore, the allocation of services, and of financial resources with which to undertake them, must be based on principles which will strengthen, not weaken, the federal structure. The following general observations are set forth as guideposts which it is believed will be of assistance in determining definite allocations of services and the proper scope for intergovernmental fiscal relationship:

1. Services that are completely federal, or state, or local, should be administered and financed directly by the respective level of government.
2. Where it can be demonstrated that a state lacks the resources necessary to maintain basic minimum standards of public service in the national interest, it is appropriate for the federal government to supplement the resources of the state government with grants-in-aid. A similar principle is well established in the field of state aids to localities.
3. The level of government making grants-in-aid should require minimum standards of performance of the aided service but should not attempt to control the methods or details of operations under the program. Grant-in-aid programs should be devised in such a manner that the fullest measure of local administration will be maintained.
4. Where the full allotment to a state or locality under a grant-in-aid program cannot be used prudently in a given period, the amount not allotted should be made available during a subsequent period or it should lapse; but under no circumstances should this amount become available for transfer to another state or locality.

These general principles, while not all-inclusive, are pertinent to any consideration of federal-state-local fiscal and administrative relations. The failure to observe them will lead, as it has in numerous instances led in the past, to confused and uneconomical results, compatible neither with good public service nor with responsible, cooperative government. Consequently, reconsideration of the entire grant-in-aid program and a reappraisal of allocation of services with a view to correcting existing weaknesses are necessary steps toward the strengthening of our federal system.

No. 38

The power of the national government to tap the most lucrative sources of revenue in modern society is incomparably greater than that of either the state or the local governments. In recognition of this fact there has been a growing willingness of the latter governments to accept financial aid from the national Treasury. The same forces are at work as between the states and their local units. This aid normally takes the form of grants-in-aid or the sharing of taxes. The administration of such devices invariably raises some intricate problems having to do with the equalizing of both benefits and local effort. How these devices work from this point of view is explained in the selection which follows.

THE PRINCIPLE OF EQUALIZATION APPLIED TO THE ALLOCATION OF GRANTS-IN-AID[2]

ADMINISTRATION AND CONSTITUTIONAL CONSIDERATIONS

Having decided to support a function, Congress has at least two important reasons for often choosing to use grants rather than provide for federal operation of the service. The first may be the administrative reason it desires to leave the operation of the particular service to local and state control, which

[2] *Bureau Memorandum No. 66*, September 1947, pp. 18–25, Federal Security Agency, Social Security Administration.

is closer to the people. Each state must enact legislation to accept the federal aid offered, but it maintains a large share of control over the way in which the funds are spent in that state. This procedure is in keeping with national traditions of local enterprise, initiative, and democratic controls.

The second reason is a constitutional one. Congress has certain delegated powers and the inherent powers necessary and proper to their exercise. Many of the functions that Congress has chosen to aid are clearly within the scope of its general powers, and the choice between direct administration and aid was one of policy only. But many other functions that Congress has chosen to aid seemed, at least until recently, to be open to constitutional assault in the courts if administered directly, but less vulnerable if grants-in-aid are the vehicle of Congressional action.

The question of federal power to aid a function in absence of specific power to administer the same function directly was brought before the United States Supreme Court in *Massachusetts v. Mellon,* and its companion case, *Frothingham v. Mellon.*

These two cases involved a challenge of the constitutionality of the Sheppard-Towner Maternity Act of November 23, 1921, which provided grants to states for a period of six years for cooperative work in reducing maternal and infant mortality and in protecting the health of mothers and infants. The former case was an original suit brought by the Commonwealth of Massachusetts for herself and as the representative of her taxpaying citizens. The latter, an appeal from a decree of a lower court, was a taxpayer's suit brought on the ground that the allegedly unconstitutional statute in effect took Mrs. Frothingham's property, through taxation, without due process of law.

The decision considered whether Congress, in passing this statute, had invaded a field reserved to the states. The Court suggested that it had not: "Probably it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject."

Regardless of this question, the major issue in these cases revolved about the right of a state, on its own and its citizens' behalf—as well as the right of a private taxpayer—to have a remedy at law in such a situation. The Court ruled that the "cases must be disposed of for want of jurisdiction without considering the merits of the constitutional question," adding that the question of usurpation of the reserved powers of the several states "is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power." The state has no power to sue on behalf of its citizens because the burden of taxation falls upon the inhabitants of the states who are properly within the realm of the federal taxing power as well as of that of the states in which they reside. Moreover, in Mrs. Frothingham's case, the Court held that the interest of a taxpayer of the United States "is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation of any payment out of the (federal) funds, so remote, fluctuating, and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."

These cases clearly established that neither the disaffected state nor the unwilling taxpayer can successfully challenge grants-in-aid as a method of spending for the general welfare. Thus these cases encouraged the use of grants-in-aid, at least until the Court held, in 1936, that the power to spend for the general welfare "is not limited by the direct grants of legislative power found in the Constitution." More significant decisions on this point were given a year later, on May 24, 1937, when the Court sustained the use of the tax credit device and, inferentially, the conditional grant-in-aid, in disposing of complaints against the federal-state unemployment insurance program of the Social Security Act, as not being constitutional coercion of the state or taxpayer. In a companion case upholding the old-age titles of the Social Security Act, Justice Cardozo affirmed that *United States v. Butler* settled that "Congress may spend money in aid of the general welfare." The subsequent cases tending to protect the use of such power

against assault in the courts by aggrieved states, taxpayers, or injured corporations further "immunize" this power and thus also tend to permit its greater use. These cases may thus have narrowed the constitutional margin between grants-in-aid and direct federal administration.

The geographic, economic, fiscal, and administrative considerations each reinforce the other in support of aids from central to local units, and especially federal aids to states. They represent some of the basic reasons behind the making of grants—it may be well at this point to examine the specific purposes served by grants-in-aid.

PURPOSES OF FEDERAL GRANTS

Several different purposes may be served by grants-in-aid, although each grant need not serve all purposes. Certain of these purposes can also be served by devices other than grants, but grants are most adaptable to the achievement of all. The objects for which grants may be adopted are as follows.

1. To encourage or stimulate the states to develop or expand certain services. The narrowness with which the functions to be aided have been defined from time to time attests that the federal government has often wished to develop or expand particular public services, frequently without regard to the state of development of related public services in the several states.
2. To assist the states to finance some kind of "national minimum" in certain public services. The frequent use of minimum allotments to each state in various grants and the ceilings on the amounts of aid under public assistance and other of the matching grants illustrate the intent to finance a minimum and no more.
3. To secure for the federal government a measure of leadership with respect to certain state and locally administered functions of national interest and to assure adequate performance of functions involving vital national interest. The public health grants might be cited as evidence of

the federal purpose to assume a measure of leadership with respect to this function, and assure adequate protection to the entire nation against certain health hazards, many of which can only be fully attacked by cooperative federal, state, and local action.

4. To combine within a federal system the virtues of local control over administration of many functions with the superior money-raising powers of the federal government. Public assistance grants are an excellent example of this purpose, because they are the largest single grant-in-aid. During the depression, many state and local units were unable adequately to meet the relief demands that conditions placed upon them. Neither their taxing nor their borrowing powers were adequate to carry the burden of economic dependency of millions of persons. By the use of grants-in-aid, the federal government was able to help the states and their local units continue to carry their assistance loads and yet permit them to retain virtually complete control over the administration of the assistance payments.
5. To equalize to a greater or lesser extent service levels and relative tax burdens among the states and among persons in different income classes and different local jurisdictions, thus in effect, also to reduce disparities in incomes, among persons and among areas. To the extent that any federal aid is allocated with reasonable regard to the need for the function aided, it is likely to equalize in some measure the level at which the aided service is performed in the several states. To the extent that the amount of state-local expenditures required to match federal aid is related directly to the ability of these governmental units to finance the services themselves, it is likely to equalize as among communities the size of the tax burden necessitated by the expenditures for these services.
6. To improve the over-all federal-state-local tax system so that it becomes more progressive and more uniform, by placing more of the cost of government on federal and

state income taxes, less on local property taxes. While federal aids do not necessarily result in abandonment of local financial support of the aided service, they often serve to minimize the extent of local financial participation, because both the federal and state governments tend to assume a greater share of the financial responsibility. Local tax revenues largely arise from the property tax, commonly considered a regressive tax. Today the bulk of federal revenues comes from income taxes, and an increasing amount of state revenues also comes from such taxes. Therefore, most federal aids tend to make the total federal-state-local tax system more progressive and more equitable. Moreover, the fact that such taxes are national or state-wide in inclusiveness tends to make for greater uniformity in the incidence of the tax burden.

7. To aid in approaching full employment, or to counter the business cycle. The depression aids for public works construction helped to counter the business cycle. Recent advances for planning postwar public works were justified at least in part on the theory that public construction might be necessary to forestall a "recession" during the period of reconversion. That these fears have not yet materialized does not detract from the fact that the grants may be used to counter the business cycle. Conversely, it is generally agreed that grants and expenditures for public works by all levels of government should be sharply curtailed in periods of impending inflation. This requires that public works be planned in advance so that they can be readily undertaken or shelved as fiscal considerations require. In line with this, it has been suggested that the federal share for federally aided public works vary with the need for increased (or decreased) purchasing power.

The postwar highway, airport, and hospital construction grants now being made were recommended by the President despite the timing. In his budget message for the fiscal year 1948, he said, "The postponement of public works in good

times and their expansion in hard times will make their contribution even greater. All postponable public works should be deferred at the present time. But the need to protect and improve our natural resources has become acute as a result of the war, and we must carry out the works included in this budget if we are to avoid waste."

ALTERNATIVE INTERGOVERNMENTAL FISCAL DEVICES

The purposes listed may occasionally be served by fiscal devices other than conditional grants-in-aid—grants earmarked for a specific function. For example, the central government can: (1) perform the function itself, if within its constitutional powers; (2) strengthen the tax resources position of local units in the hope that increased funds will be used for the function the central unit desires to see performed; (3) offer loans or loan guarantees to the local unit to help it finance the function; or (4) make unconditional grants-in-aid—"block" grants. Each of these will be discussed below.

SHIFT OF FUNCTIONS. It has been decided from time to time that the national interest in certain functions amply justifies having the federal government take over full responsibility for support and administration of certain functions. Some functions have been assumed by the federal government when the interest of state and local governments is negligible and national interest is strong. The federal government, for example, administers a leprosarium and an institution for narcotics addicts, while local and state health officers cooperate with federal officials in finding and referring cases to the national institutions.

Some functions are federally operated, but federal expenditures for them virtually constitute direct aid to state and local governments, as, for example, the National Guard, defense housing and community facilities, and the depression-born programs for youth (NYA and CCC) and work relief (WPA). Military security in time of war has led to making a National Guard of what were once state militias, but, except in times of

war, the states have considerable latitude with respect to use of the National Guard. The public employment offices, recently returned to state control by act of Congress, were under direct federal operation during World War II.

Within states, the state government has often taken over full administration and/or financial support of particular local services, including highway construction and maintenance, school systems, highway police patrol, and even metropolitan police forces. In addition, certain welfare institutions have tended to become state rather than local responsibilities. The constitutional inhibitions against transfer from state to federal administration do not normally exist between local and state governments, apart from "home-rule" clauses in state constitutions.

Apart from the constitutional barriers to centralization of functions in the federal government, there are also political inhibitions impeding such changes. Although the broadening interpretation of the interstate commerce power has meant a substantial shift of regulatory power from the state to the federal government, this shift does not tend to affect materially the programs now drawing grants-in-aid. There may be some continuation of the trend of shifting certain local functions to the states, and additional state functions may eventually be transferred to the federal government, but one cannot expect such shifts to be immediately important as a device to solve problems of intergovernmental finance.

Another alternative to the shift of state functions to the federal level is the creation of regional authorities. "The TVA is a concrete demonstration that ways and means can be devised to decentralize the administration of many of the functions of the central government." However, despite TVA's notable successes in strengthening state and local governments, such a solution gives no assurance that minimum levels of service for functions for which a national interest exists will be achieved or that the burden of paying for these levels will be equalized.

SHIFT OF TAX SOURCES. Instead of shifting functions to a larger unit of government having greater financial resources, additional tax powers or resources might be made available to the

state and local governments. This proposal has been made with increasing frequency in recent years, when tax duplication and overlapping have become more significant. The Council of State Governments has suggested from time to time that the federal government withdraw from certain state and local tax fields (for example, motor vehicle, amusement, and certain sales taxes), but no significant steps have been taken in this direction beyond more intensive study of the problem. Progress along these lines is unlikely since the causes of duplication will also operate to hinder the relinquishing of tax sources; also, tax competition may prevent effective use of the new powers. A major weakness of the device is that it generally would benefit the wealthier states and localities more than the poorer ones; it cannot achieve equalization among them all.

SHARED TAXES AND THE TAX-CREDIT DEVICE. Many states collect taxes from sources that cannot be reached effectively by local units and share the proceeds with their local units. This device works for greater uniformity of taxation within the state than if local units attempted to raise equivalent funds directly, and it promotes equity among taxpayers within the limits that it operates (assuming, of course, that the basis of sharing does not cause greater inequities than it corrects).

Similarly, the federal government shares certain receipts, such as those derived from public lands and lands on which forests and other natural resources are located, with the governmental unit in which the property is located. Closely related to these shared revenues are payments made in lieu of taxes which might otherwise be collected by the state and local units. The chief examples of these are payments made by the Tennessee Valley Authority to states and localities for loss of taxes on property and by the Federal Public Housing Authority to local governments to recompense them for the waiving of property and special assessment taxes on federally aided slum-clearance and low-rent housing developments.

Shared taxes have the merit from the local point of view that they are not always earmarked for a specific purpose, as are grants-in-aid; thus they permit wide local latitude in the choice

of purposes to which they may be devoted. From the standpoint of home rule, shared taxes aid the local treasury without requiring additional drains on it and tend to stabilize local revenues.

There is, on the other hand, the disadvantage that they tend to put the receiving unit in a financial strait jacket. Expansion into the occupied tax field is more difficult, and local revenues become more rigid, for the amounts received are more responsive to economic conditions than to local revenue needs. Finally, the problem arises as to the method of distribution. Allocation according to collection districts is easy, but allocation according to area of incidence may raise administrative difficulties; in either case, this type of allocation does nothing to allay inequities in income and ability. Use of some other measure in the allocation of a specific tax meets with considerable local resistance.

The tax-credit device allows a taxpayer to meet part of his tax liability to the national government by receipts for a similar tax paid a constituent state. It is simply a tax "umbrella" put up by the central government, which "encourages" every state to adopt that specific tax. It is especially effective in overcoming fear of the use of the tax in the constituent units; its notable successes to date are in the fields of estate and unemployment insurance taxes. State fears of emigration of tax sources if these two taxes were levied have largely disappeared, and both taxes are now general.

The inheritance tax credit added to state resources, in effect, by encouraging state occupancy of this tax field, but did nothing to encourage any specific uses of the added funds. The unemployment insurance tax credit was for an earmarked tax and was combined with a grant-in-aid; together they helped secure adoption of unemployment insurance laws in every state and territory subject to the federal tax.

Both measures—the shared tax and the tax credit—have merit as a means to a more coordinated and equitable tax structure. Unless the proceeds are earmarked, however, it cannot be certain that they will be used to develop, expand, or main-

tain a particular governmental service; furthermore, they normally are cyclical in their yield to state-local treasuries. Whereas grants-in-aid can be used to strengthen the financial position of the constituent units in time of economic adversity, the tax credit and the shared tax are more likely to yield decreasing amounts at such times.

LOANS FROM CENTRAL TO LOCAL UNITS. An alternative open to a central government seeking to help its member units or to encourage them to perform specific functions is the use of loans either from the central treasury or guaranteed by the central government. This device has been used a number of times and has certain advantages.

When, for whatever reason, the credit standing of constituent units is poor, the central government can aid such units without great expense to itself by transferring to the local unit its better credit position. The federal government can practically create its own credit instruments because of its banking and currency powers.

Loans have been useful in promoting the building of self-liquidating or reproductive public works, such as highways, housing, and rural electrification, but as a device to meet relief and public assistance needs in periods of widespread unemployment they have not proved fully equitable or very successful. Loans can help cover temporary weaknesses in specific localities but are not adapted to the regular financing of continuing public programs on a uniform, equitable basis. Their inadequacy was clearly indicated during the depression of the 1930's.

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While federal grants-in-aid to the states have been extremely important in helping the states, it is not to be denied that they create serious problems for state officers. Some of these problems, with suggestions for handling them, are discussed in the following article by a thoughtful governor.

FISCAL RELATIONS IN A WORKING FEDERALISM[3]

The whole subject of federal-state relations may well need a "new look." Much of our thinking has long been clothed in the economic and political styles of pre-Civil War days. Neither the national federalism style of the past fifteen years nor the older states' rights fashion does very much for the federal structure today.

If we are to face and solve issues of state, whether domestic or international, it will not do to follow fashion trends, to dust off old arguments, and to lengthen them. The growth of world interdependence, of complex domestic relationships, are facts of the life we must live. They call for a reappraisal of the basic economic and social forces to which our political institutions ought to be adapted. They demand that we reconcile the economic unity of our nation with the political and cultural diversity of our States.

The task is not easy; and in some areas it is not even politically feasible at this time. As Alexis de Tocqueville has so well said, "A democratic people tends toward centralization, as it were by instinct. It arrives at provincial institutions only by reflection." This same penetrating observer of the American scene was well aware of the vital necessity of "reflection" toward "provincial institutions." In words which are as pertinent today as a century ago, he pointed out:

> Certain interests are common to all parts of a nation, such as the enactment of its general laws and the maintenance of its foreign relations. Other interests are peculiar to certain parts of the nation, such, for instance, as the business of the several townships. When the power that directs the former or general interests is concentrated in one place or in the same persons, it constitutes a centralized government. To concentrate in like manner in one place the

[3] Alfred E. Driscoll, *The Tax Review*, December, 1947, pp. 53–56.

direction of the latter or local interests, constitutes what may be termed a centralized administration.

. . . I cannot conceive that a nation can live and prosper without a powerful centralization of government. But I am of the opinion that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may ensure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation.

These timeless precepts for a thriving democracy may be applied today if we will but recognize the conditions that have since emerged as the keys to a working federalism. Since de Tocqueville wrote, we have learned much in the process of working out the apparent spheres of power of national and state governments. While the sweep of events has caused the center of power, politically and legally speaking, to shift from the federal government to the states and back again, over the course of years, it was not until the full effect of the industrial revolution that problems of federalism began to take their present scope and character.

Industrialization of society brought with it problems of urbanization, of intense economic interdependence, of severe economic readjustments and forces of social and political upheaval. Some increase in "centralized government" was a more or less natural outgrowth of the realization that government could no longer remain simply an "umpire" and at the same time protect the citizen against bigness and neglect. This changed environment which required a broader role for government cannot be attributed to any political party. It had been simmering from the days of President Theodore Roosevelt and was, perhaps, first authoritatively recognized in the work of President Hoover's Commission on Social Trends. The economic crisis of the 1930's was seized upon by the party in power, however, to exploit the influences of centralization so

as to build a great bureaucracy and to subordinate state governments which were a threat to that bureaucracy.

We are faced today with the opportunity not to retrace our steps but rather to redirect our planning and our thinking toward the goal of a revitalized working federalism. This would mean an environment in which the states can serve to maintain the values of democracy and local self-government. It would encourage the states to assume responsibility for those governmental policies and administration which they have always been better able to adapt to local needs than any central government. But the states obviously require adequate fiscal capacity to meet their responsibilities.

This old relationship between services and finance is the root of a working federalism today. Out of it grow the two key conditions without which we may well have to resign ourselves to the evils of "centralized administration." These conditions are:

1. Control of the grant-in-aid so as to limit it to areas of demonstrated need; this would preclude its use to stimulate huge spending programs without regard to the capacities or the desires of the states.
2. An integration of federal and state tax structures which will free for state use those sources of revenue which are best adapted for state administration; this would immediately relieve mounting local pressures for increased central financing, and in turn permit a rational approach to grants-in-aid.

These key points of federalism are fiscal, but they do not relate to the unique power of the federal government to engage in deficit financing. The fallacy of the notion that the federal government can go on indefinitely promising the moon to our local governments has been demonstrated elsewhere. The point here is that the abuse of the grant-in-aid device and the preemption of sources of revenue which traditionally and economically belong to the states has placed the federal government in a position to undermine the whole character of the

state and local government. It is for the citizens of the respective states to insist that their state and local governments learn to do more and more for themselves and to depend upon the national government for less and less.

The grant-in-aid has become an accepted device of the "political contrivance" that we know as federalism. This much we must admit. It is its abuse rather than its use which is causing trouble. Used as an instrument to foster and develop a governmental service vested with a national interest it is important to national unity. Used as a "handout" to include local expenditure programs it is an expensive and wasteful method of finance.

There are three rules which ought to govern the use of the grant-in-aid:

1. Where a service is in *national* need of development (*highways*), grants can properly be shared proportionately by each state, but only where needed to sustain a uniform minimum standard of service.
2. Where a service is in an uneven need of development (*schools*), grants should be given only to those jurisdictions with a demonstrated need of financial help.
3. Where a service can best be left to the diversity of state initiative (*airports*), no grant should properly be considered.

In the period from 1915 to 1947, the amount of federal grants-in-aid to the states has increased from $5 million to $1 billion. This is roughly 10 per cent of total expenditures by state and local governments. If some of the pending federal spending programs are enacted, the latter figure will be greatly increased. The states neither want nor need this kind of wasteful and inefficient use of the taxpayer's money. This is not to say that there should be no federal aid; it is, of course, apparent that just as local governments within a state require aid to equalize their fiscal capacity with their governmental needs, there are states which likewise need support if they are to

carry on programs vested with a national interest. But this admitted need for some federal aid cannot in any way justify the abuse of the device in such a way as to transfer responsibility and authority from the states to federal bureaucracies.

The federal aid highway program is a good example. This program, begun in 1916, with an initial appropriation of $5 million has been expanded over the years until the Federal Aid Highway Act of 1944, which authorized grants of $500 million a year for a three-year period. The federal aid program has thus been expanded from its original purpose of encouraging a nation-wide network to facilitate commerce, defense, and the carrying of the mails into a program by and through which the federal government threatens to dominate the entire road improvement program and a large segment of the fiscal policy of the respective states.

Two features of the federal program directly invade the discretionary area of state legislatures. The first of these penalizes any state which diverts so-called highway user revenues to purposes other than the construction, maintenance, policing, and safety of highways; and the second denies federal aid for any highways upon which tolls may be charged regardless of how small the federal contribution may be toward the entire cost of the improvements. The questions of "diversion" and of "toll roads" are admittedly controversial, and there is much that may be said for and against each of them as a policy. The fact remains, however, that the federal statute has sought to use the dispensing power to shift the responsibility for decision of these two matters from the states to the national administration.

As a matter of regular state policy, I am opposed to the diversion of highway revenues for nonhighway uses. But where, as in New Jersey and other states during depression periods, it has been possible to avoid new taxes by some diversion of highway revenues, the states ought to be free to decide this matter of policy uncoerced by any federal penalty. In the whole matter of diversion, present federal legislation not only deprives states of full freedom to determine their own fiscal policies, but it also has the ridiculous effect of requiring the national admin-

istration to penalize a state for diversion, at the very same time that the national government is itself guilty of very substantial diversion of its highway revenues to general treasury purposes.

The federal gasoline tax was originally adopted as an emergency measure at the rate of 0.5 cent a gallon and its emergency character quietly forgotten. The federal Treasury received $406 million from this tax last year.

The continuation of the tax can be justified only upon the presumed national interest in aiding states to carry out the national highway program which could not otherwise do so. The whole argument collapses when it is recognized that the entire needs of *all* the states have at no time in the past ten years exceeded annual grants of $140 million. The principal part of the $500 million per year which is to pass through the federal Treasury and be in part returned to the states represents a wasteful, inefficient, and extravagant process of taking money out of the states, sending it to Washington, apportioning it back among the states, and returning it to the states for expenditures upon highways by the respective state highway administrations.

We have two sets of records and audits to be maintained by the taxpayers. We have two sets of collectors and inspectors and examiners covering the same ground in the administration of the motor fuel tax. We have two separate administrative agencies engaged in administering, collecting, and disbursing the very same tax. In New Jersey, and I am sure in other states, the state administrations would be delighted to collect the federal gasoline tax and remit it to the federal Treasury at much less cost than the federal government is doing it for itself.

The main point is that there is absolutely no justification for the continued levy of a federal gasoline tax for the principal purpose of turning it right back to the states. If the federal government would get out of the gasoline tax entirely, the various states would be well able to meet their highway development needs without federal aid, except for the relatively few states which have inadequate taxable resources. As for them, the federal government would be justified in using general treasury

funds to sustain a national highway transportation policy. In brief, it merely builds bureaucracy to impose a federal aid program upon states which neither need nor desire federal aid just to provide the machinery of financial assistance for a few states that ought to have it.

The old-age assistance program, which by far comprises the largest single object of federal aid other than highways, is another example of the inflation of a reasonable idea into a program far exceeding the proper scope of any federal responsibility. This program is essentially built upon a matching grant basis, which means that those states which have greater ability will provide a more generous program for their dependent old-aged. But here again, duplicate administrative hierarchy is created and sustained by the need to give "aid" to states which neither want nor need it.

If the federal government would give up the inheritance and estate taxes by allowing a credit against the full federal tax of up to 80 per cent for state taxes paid, many of the states would be well able to pay their own way entirely in this field. But once more the national government has pre-empted a field of revenue which historically and economically belongs primarily to the states. It has repeated the process of duplicate administration and collection, of sending funds to Washington and back again, of pre-empting sources of revenue with which the states could meet their own needs without federal aid.

The alcoholic beverage tax, and the federal policy relating to it, is a good example of the fiscal distortions which weaken state administration. While the tax has policing as well as revenue aspects, the extent to which there is duplication and inefficiency in its administration by both the states and federal government at the same time is immeasurable. You may be familiar with stories of how state inspectors have trailed a suspicious-looking character for weeks only to discover that the "character" was himself a federal inspector also working on a case. This ridiculous situation, serious as it is, is overshadowed by the very pre-emption of this tax by the heavy wartime increases in the federal levy. Here, again, a supposedly emer-

gency tax, which Congressional leaders professed an intention to reduce immediately upon the cessation of hostilities, has been retained by the federal government despite the urgent need of the states for this revenue source.

The conclusion is clear. Any state of average wealth and average taxable resources neither needs nor wants federal aid as a "handout" device. If the federal government will turn back to the states the gasoline tax, the inheritance tax, the alcoholic beverage tax, they will be well able to finance needed services and activities themselves. This will do much to eliminate the inefficiency, waste, and irresponsibility of central financing of local services. If the Congress is genuinely interested in economy, it can well begin by terminating grants to states where there is no demonstrated need.

Any realistic view of the future of state and local government underscores the importance of developing some rational basis of federal aids and of integrating the tax structures of federal and state governments. Governments everywhere are faced with the rising demands for new services and with increased costs of existing services. We must make every effort to economize—and if our New Jersey problem is any indication of the situation of states generally, I might say from personal experience that it is not any easier to cut a state pay roll than it is to reduce an industrial pay roll under current conditions.

States should not and cannot engage in deficit financing, but they and their local subdivisions are obliged to maintain governmental services which are essential to their citizens and to industrial activity and commerce, regardless of general economic conditions. While there are some who would readily seek to impose new taxes for the use of state and local government, there are few states indeed which are not already scraping the bottom of the barrel tax-wise. Many states, and New Jersey is not among them, have already exhausted the possibilities of sales and income taxes, luxury taxes, and excises of all kinds. They are faced with the alternative of curtailing essential government services or seeking to impose rate increases on

already overburdened tax bases. What is the taxpayer to do in the face of this sorry situation?

In the already well-developed programs of effective citizen research agencies I would particularly emphasize:

1. An insistence that the Congress recognize its obligation in a federal system not only to accept but to support vigorous and responsible state government
2. Provision for every possible citizen encouragement to a joint federal-state program designed to integrate the present confused, overlapping, and wasteful duplication in federal and state structures
3. The coordination of the efforts of taxpayer groups toward the reduction of not only federal expenditures but also state and local expenditures with a view toward reducing unnecessary costs whenever and wherever they may occur
4. The development of adequate standards of service responsibility to the end that governmental services may be allocated to and provided by that level of government which can most effectively recognize and meet local needs, and maintain local values in providing the services of government
5. A willingness to support adjustments in our tax structures designed to assure a fair and equal application of existing taxes to all taxpayers, as well as a fair apportionment of the total tax burden among all those who either pay or should be paying a share of the cost of government.

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The press stories reprinted here need little explanation. It is clear that, if a state wishes to support a social security program of any sort, the last word may be spoken by the national government. So far as the issue of "state rights" is concerned, the states have a "right" to their own independent programs if they are willing to meet the entire cost. If such a program does not please the voter recipients, there seems no alternative but to accept federal aid—on federal conditions.

WITHHOLDING FEDERAL GRANTS[8]

STATE GETS U.S. FUNDS FOR AUGUST AID PAYMENTS

JEFFERSON CITY, MISSOURI, JULY 29. Federal funds for Missouri's social security payments for August were made available today after government officials had been informed that the House of Representatives will reconvene August 9 to consider additional appropriations for administrative expense.

Parke N. Banta, State Social Security Administrator, said that with the receipt of federal money, telegraphed here through a local bank, there would be no delay in sending out August checks for old-age pensions and aid to dependent children, which he expected to have in the mails by Sunday.

A total of $1,161,912 for old-age pension payments and $207,663 for aid to dependent children was received from the Federal Social Security Board. This will be matched by state funds, making the average pension check about $20.40 and the average ADC check about $31.75. The July old-age pension rolls hit a low total of 107,688 recipients, and the August rolls are expected to be about the same.

The federal government, through warnings to Governor Donnell, had threatened to cut off funds if appropriations for administration, made by the General Assembly, were not enough. The legislature appropriated a total of $2,750,000 out of state funds, which was described as being inadequate.

In the face of this threat and because of other matters pending, Speaker Howard Elliott yesterday issued a call for the reconvening of the House, which will consider a request of Governor Donnell for an additional $750,000 administrative appropriations.

Senator Frank P. Briggs of Macon, president pro tem of the

[8] Hume Duval, *St. Louis Globe-Democrat*, July 30, 1943.

Senate, said he would wait to see what action the House takes before calling the Senate back to work. . . .

MISSOURI PENSION CASE LESSON IN STATE RIGHTS

LEGISLATURES FIND THEY HAVE SOLD OUT FOR FEDERAL AID DOLLAR GRANTS [4]

JEFFERSON CITY, MISSOURI, AUGUST 7. The fact that the House of Representatives is forced to return here Monday to consider additional appropriations for the administration of the Social Security Act is a striking illustration of the encroachment of the federal government on the powers of the states and a forceful reminder that the ancient and honored doctrine of states' rights has gone the route of slavery, national prohibition, and other dead policies.

No provision of the federal Constitution or an act of Congress compels the Missouri General Assembly to take this step. The federal authorities cannot put the legislature in jail if it fails to return. Legally, the Assembly is still a free agent to do as it pleases, but Washington has a powerful weapon to whip the state into line, and so far no legislature has seen fit to risk the consequences of the lash of that whip.

Federal domination over the state lies in the power of federal agencies to withhold funds for various activities unless the state complies with rules, regulations, and standards laid down in Washington. This is the sword of Damocles that has been dangling over the heads of state legislatures since the federal policy of handing out money to help finance certain activities became firmly established.

The social security program is not the only activity that is financed partly out of federal funds, but it will serve as an example of the system that has grown up, and here is how it works:

The state appropriates a certain amount of its funds for old-

[4] Hume Duval, *St. Louis Globe-Democrat*, August 8, 1943.

age pensions and aid to dependent children. The federal government matches this allotment, provided certain standards are maintained by the state in administering the law. The standards are dictated by Washington bureaucrats and the state must comply, else federal funds will be withheld.

The General Assembly is well aware of the consequences of withdrawal of federal aid. Old-age pension payments in Missouri now average in the neighborhood of $20 a month, one half paid by the state, and one half by the Federal Social Security Board. Aid to dependent children checks average somewhat higher, but there are not so many of them. If federal aid were withdrawn, these checks would be cut in half, and the recipients would share only in the state-appropriated funds. It would bankrupt the state treasury to finance the payments in full on their present level.

The Assembly, therefore, has no choice except to bow to the dictates of the federal government and follow whatever instructions are sent out from Washington bureaus.

In the case at issue now, the administration of the Social Security Act is involved. The present General Assembly, after much wrangling and controversy, appropriated $2,750,000 of state funds for administrative expenses. The State Social Security Commission took the position this was not adequate for proper and efficient enforcement of the law, and threats to cut out federal funds came from the representatives of the Federal Social Security Board.

Governor Donnell requested the General Assembly, which had adjourned until August 23, when it was scheduled to adjourn sine die, to return and consider an additional appropriation of $750,000 for social security administration. Under the circumstances, Speaker Howard Elliott has called the House back, and return of the Senate is anticipated as soon as the House gets under way and turns out some legislation for the upper chamber to consider. . . .

WITNESSES HEDGE ON WITHDRAWAL OF FEDERAL FUNDS [5]

JEFFERSON CITY, MISSOURI, AUGUST 9. Representatives of the Federal Social Security Administration, appearing this afternoon before the House Appropriations Committee, refused to make a definite commitment as to whether federal funds for social security purposes would be withheld from Missouri if additional funds for administration are not made available, but indicated that such action might be anticipated.

J. E. Wrenn, regional director for the federal board, and Miss Phyllis Osborn, regional representative of the Bureau of Public Assistance, underwent a rather severe cross-examination for 2½ hours before the committee, which is considering the State Social Security Commission's request for an additional administrative appropriation of $750,000.

Wrenn referred technical questions of policy to Miss Osborn who told the committee she could not state categorically whether the federal government would withdraw its allotments if additional administrative funds are not made available.

Miss Osborn said the federal authorities had closely scanned the reports and recommendations of the State Social Security Commission, which has informed Governor Donnell and the Assembly that the present appropriation of $2,750,000 out of state funds is not sufficient.

"We have no reason to doubt the statement of the state agency," Miss Osborn said.

She added, however, that in her opinion as an individual, the present appropriation would not be sufficient to administer the $70 million social security program efficiently in compliance with minimum federal requirements.

That was the nearest the committee was able to get to a definite commitment.

Both Miss Osborn and Wrenn said that any action taken by the federal board would be "after the fact" and would be based

[5] Hume Duval, *St. Louis Globe-Democrat*, August 10, 1943.

on whatever showing was made by the state agency with whatever funds the General Assembly appropriates. She said there is danger of an immediate withdrawal by the federal board and that the state would be given reasonable notice if such action were contemplated.

"We are not trying to dictate to the Missouri Legislature," Miss Osborn said. "We are interested only in an efficient administration of your program. Your commission says it does not have enough money and we see no reason to doubt its statement. We would first observe how well you administered your program with whatever funds you have, and then the federal board would take whatever action it deemed necessary."

Members of the committee and Speaker Howard Elliott attempted to force Wrenn and Miss Osborn into an admission that warnings sent to the Assembly as to the possible withdrawal of federal aid were inspired by Parke M. Banta, State Social Security Administrator, and members of the state commission.

Miss Osborn replied that those warnings were sent purely as a result of a study that had been made of the requests the state commission had made to the legislature and the legislature's treatment of these requests. She denied emphatically that Banta or anyone else connected with the commission had inspired the warnings.

Miss Osborn further pointed out that in her opinion, Missouri had never had sufficient administrative funds to carry out an efficient social security program. She said the state is now some 12,000 cases behind on reinvestigation and that it had been the experience that closer supervision of the work reduced the old-age pension rolls and offset the additional costs of administration. . . .

HOUSE KILLS SOCIAL FUND INCREASE IN DEFY OF U.S.[6]

JEFFERSON CITY, MISSOURI, AUGUST 11. The House late today hurled a defiant challenge to the federal government to carry outs its threat to withhold social security matching funds and refused to vote an additional appropriation for the administration of Missouri's $70 million program.

In a revolt against federal domination of state agencies, the House, by the vote of 64 to 62, defeated the bill to allot an additional $340,000 for administrative costs.

This action, taken in the face of warnings by federal agency representatives that federal aid may be cut off if more money is not made available, leaves the administrative appropriation at $4,460,000, which the State Social Security Commission has said is not sufficient to ensure an efficient and economic administration. Regional officials of the Federal Social Security Board, which hold the purse strings on the government's participation in the Missouri program, told the House earlier this week they saw no reason to doubt the conclusions of the state agency.

Although there was bitter denunciation of the "dominating policy" of the federal agency, sponsors of the appropriation were quick to point out that if federal funds were withdrawn, the members would rush back to Jefferson City to approve any request Washington officials made. Some House leaders predicted the defeat of the bill would make a special session of the General Assembly a virtual necessity. . . .

SHREWD SENATE MOVE KILLS SECURITY FUNDS[7]

JEFFERSON CITY, MISSOURI, AUGUST 18. A shrewd, well-organized maneuver which recessed the Senate until five minutes before sine die adjournment at noon Monday, this afternoon

[6] Hume Duval, *St. Louis Globe-Democrat*, August 12, 1943.
[7] Hume Duval, *St. Louis Globe-Democrat*, August 19, 1943.

killed the $2,078,000 supplementary social security appropriation recommended by Governor Donnell almost immediately after it had been surprisingly revived and approved by the Senate Committee on Appropriations.

Shortly after the Senate acted, the House transacted the last of its business and adjourned until 11 o'clock Monday morning with the announcement by Speaker Elliott that the session would be technical to satisfy the record and that the members need not be present.

For all intents and purposes, today's action winds up the sixty-second General Assembly, which passed a total of nine bills, and all that remains now is to record the formal sine die adjournment Monday as fixed by resolution previously adopted. . . .

No. 41

Twenty years ago the "separation" of the sources of state and local revenue was a very live issue not only among students of the theory of revenue administration but also with practical revenue officials. The administrative difficulties involved in assessing and collecting such a tax as that on general property over an area as large as a state were so great that its use had even then become impracticable. The story of its rapid disappearance in *state* finances is given in the following article. In reading this it is necessary to keep in mind that the discussion has to do solely with the use of the general property tax for *state* purposes. As is pointed out, it is still the most important revenue producer in units of local government. The productivity of the sales tax—one of the "replacement" taxes—is indicated in the table following the article.

THE DECLINE OF A TAX[8]

Legislatures of two states took action in 1947 toward abolishing general property taxes. Arkansas' general property tax will be discontinued after January 1. The Texas legislature voted

[8] Francis B. Elwell, *Tax Outlook*, October, 1947, pp. 10–13.

to put up for popular referendum in November, 1948, a constitutional amendment to forbid state ad valorem taxes for general purposes, beginning in 1951.

If its voters approve this amendment, Texas will become the twenty-first state to discontinue use of the general property tax. This action would mark another stage in the decline of this one-time giant of state revenue producers.

The general property tax is not, of course, administered uniformly in all the states, for there is variation in the definition of general property. It is always a tax on land and buildings; in many states it is a tax also on other tangible property; and in many others it is a tax on intangibles. Because the tax is fixed as a percentage of the assessed value of the property, it is also known as the ad valorem (i.e., to the value of) tax.

In the nation's early days, the general property tax was practically the only source of state revenue. And, as late as 1902, the ad valorem tax raised 44 per cent of all tax receipts of all the states. Last year this tax brought in only 4 per cent of all the forty-eight states' revenues. In 1935 the general property tax led all others as a producer of state revenue. Last year it ran a poor seventh to the taxes on general sales, motor fuel, corporation income, motor vehicle licenses, personal income, and alcoholic beverages.

The story of the decline of the state ad valorem tax is the story of a tax incapable of maintaining its major productive role in an era of greatly expanding government expenditures. Between 1932 and 1947 the yield of state property taxes dropped 19 per cent, from $323 million to $262 million. During this same period, property taxes (as a percentage of state revenues) fell from 20 per cent of the total to only 4 per cent. The states were turning to more lucrative new taxes, leaving general property levies as the principal source of revenue for local governments.

The ad valorem tax had never been completely satisfactory for states. Conviction had long been mounting that this levy was more suitable for local governments. Among the shortcomings of the state property tax were:

1. Lack of flexibility to meet changing economic conditions
2. Difficulty of assessment and collection
3. Lack of uniformity in assessments between local units of government.

Its lack of flexibility was forcefully demonstrated during the 1920's. Expenditures expanded greatly as states added new responsibilities—among them, state-wide modern highways. Legislatures felt that property levies could not be upped to meet the new revenue needs. So new taxes were sought.

The development of the automobile, as well as increasing the expenditures of state governments for highways, presented an important new source of revenue: the gasoline tax. The great expenditures necessary for highway construction brought the almost universal adoption of state gasoline taxes. This newcomer quickly put the property tax in a secondary position. Today the motor fuel tax is almost as big a revenue producer as general sales tax, for it brought in some $900 million to the forty-eight states last year. The fuel tax and general sales tax each produce about 15 per cent of state revenues.

Prior to the 1920's only three states—California, Pennsylvania, and Virginia—had discontinued the ad valorem tax. During the 1920's four more states abandoned the levy: North Carolina, Delaware, Ohio, and New York. It is not safe to assume that these four states dropped the ad valorem tax because of the adoption of the gasoline tax or any other single factor.

Another demonstration of the inelasticity of the property tax came with World War II. War-inflated state revenues from other sources doubled and tripled. But the property tax—much less sensitive to change—remained fairly stable. During this period (but not necessarily because of this factor) Oregon, Florida, and South Carolina abandoned the property tax. New Jersey repealed its general property tax in 1946.

Even though its collections generally remain stable, the ad-valorem tax presents many difficulties. Assessing property valuations fairly and uniformly through elected officials—many of

them untrained for this work—is an involved and difficult procedure.

Collection of the taxes may also offer many problems, delays, and sometimes expensive litigation. Collecting taxes during a period of economic distress is particularly difficult. This was a major difficulty during the 1930's. Countless homeowners simply could not pay their taxes, and delinquencies reached record heights, a rate of 20 per cent over the nation in 1932–1933. This presented state governments with a twofold problem:

1. To relieve the burden on property
2. To find new taxes to finance growing relief expenditures.

Some states relieved the burden on property by eliminating the tax completely: Illinois, Michigan, New Hampshire, Oklahoma, Rhode Island, and South Dakota.

Another method was found in the homestead exemption movement, designed to give relief to homeowners. These exemptions were voted in fourteen states—one fourth of all states using the property tax—and ranged from $500 exemption (on assessed valuation) in Wyoming to a $5,000 exemption in Florida and Mississippi. South Dakota allowed an exemption on 160 acres. Other states granting homestead exemptions were Alabama, Arkansas, Georgia, Iowa, Louisiana, Minnesota, North Carolina, Oklahoma, Texas, and Utah. These exemptions were of considerable importance to the revenues of these states. For example, homestead exemptions in Georgia totaled $240 million in 1944 (30 per cent of the total of assessed valuation in the state).

Other states lowered assessments or dropped property tax rates as a relief measure during the 1930's.

To replace revenues thus lost, the states looked for new types of taxes. The result was the most active period of expansion of revenue sources in United States history. The answer was found chiefly in general sales taxes or in levies on sales of special commodities. Forty-six states placed a tax on the newly relegalized alcoholic beverages. General sales taxes were

adopted in twenty-one states. Personal or corporate income taxes were added by twenty-two states. Special chain store taxes were adopted by twenty states, and new tobacco imposts were levied by nine.

Result: Property taxes accounted for 38 per cent of state revenues in 1925, only 7 per cent by 1939.

A few states, however, still rely heavily on the general property tax. Nevada's property tax accounted for 27 per cent of its collections last year; 22 per cent of Nebraska's tax receipts and 20 per cent of Maine's came from the property tax.

In contrast to the decline of the state general property tax has been the increased use of special, or selective, property taxes. This type of tax has been levied on properties not suitable for local taxation—public utilities and intangibles, for example. Very often, all or a part of these revenues are allocated among local units of government, to compensate them for losing these properties as tax sources.

The general property tax seems likely to continue as the principal source of revenue for counties, townships, and municipalities, which got 92 per cent of their tax revenues from it in 1945.

AD VALOREM TAX'S CHIEF USERS

State	*Return from Ad Valorem Tax (in Millions)*	*Per Cent of Total Tax Revenues*
Nevada	$ 1.5	27
Nebraska	6.8	22
Maine	5.3	20
Arizona	4.7	15
Kentucky	8.2	13
North Dakota	2.6	12
Utah	3.1	12
Wisconsin	13.9	11
New Mexico	2.6	10
Texas	18.0	10

Figures above are for 1946 in the ten states which derive 10 per cent or more of their total tax revenues from the ad valorem tax. Figures are rounded.

DECLINE OF THE GENERAL PROPERTY TAX

Year	*Total Tax Collections (in Millions)*	*General Property Tax Collections (in Millions)*	*The Falling Percentage*
1902	$ 155	$ 82	53.0
1917	410	183	45.0
1922	858	348	41.0
1927	1,355	370	27.0
1932	1,642	323	20.0
1937	2,759	206	7.5
1942	3,935	175	4.4
1944	4,106	152	3.7
1946	4,980	158	3.2
1947	5,798	167	2.9

Percentages above show the general property tax collections as a percentage of the total tax collections in all the forty-eight states. Total taxes do not include unemployment compensation taxes. The 1944, 1946, and 1947 figures for general property tax collections are necessarily estimates, because official figures are not yet available.

No. 42

THE SALES TAX BOOM[9]

THE INCOME FROM THE SALES TAX IN 1946 IN TWENTY-THREE SALES TAX STATES

State	*General Sales Tax Revenue (in Millions)*	*Sales Tax as Percentage of Total Revenues*	*Per Capita Sales Tax Revenue*
Alabama	$ 18	27	$ 6.50
Arizona	10	31	15.10
Arkansas	13	24	7.50
California	179	37	20.40
Colorado	16	31	13.50
Illinois	107	42	13.90
Indiana	46	43	13.50
Iowa	30	34	13.20
Kansas	22	38	12.30
Louisiana	13	11	5.10
Michigan	119	51	21.80
Mississippi	17	28	7.80
Missouri	47	42	13.00
New Mexico	10	35	18.00
North Carolina	27	19	7.50
North Dakota	6	30	12.00
Ohio	75	30	11.00
Oklahoma	24	23	11.60
South Dakota	6	30	10.50
Utah	8	32	13.80
Washington	67	50	32.50
West Virginia	38	62	22.20
Wyoming	31	35	11.90

NOTE: All figures are rounded. Figures represent revenues from general sales taxes, gross receipt taxes, and use taxes. Source: U.S. Bureau of the Census, *State Tax Collections in 1946 (Preliminary) and State Government Finances in 1945.*

[9] *Tax Outlook*, September, 1947, p. 5.

No. 43

If studied carefully the following census bureau materials on state finances will be self-explanatory. Comparison of these figures with the normal peacetime costs of the national government and the revenues and expenditures of local units will show the importance of the states in our governmental system.

SUMMARY OF STATE GOVERNMENT FINANCES IN 1947[10]

State government expenditure during the fiscal year 1947 was up $1.7 billion, or more than one fourth, from the 1946 level. Total state general expenditure of $8.1 billion in 1947 was equal to $59 per capita, which compares with $49 in 1946 and $41 in 1940. The record increase in 1947 reflects postwar resumption of capital improvements, more normal maintenance of facilities, and higher price levels and pay rates.

State revenue in 1947 was up 17.8 per cent from the 1946 figure; and gross debt, reversing its wartime downward trend, rose 24.9 per cent.

REVENUE AND EXPENDITURE COMPARED

A comparison of 1947 totals of certain major categories of state income and outgo shows that:

General revenue exceeded general expenditure by $388 million.

General revenue exceeded general expenditure less provision for debt retirement by $532 million.

General revenue and new borrowings totaled more than general expenditure by $1,106 million.

Data for both 1947 and 1946 are as follows:

[10] Bureau of the Census, Washington, D.C., May, 1948.

Classification	*1947 (in Millions)*	*1946 (in Millions)*
Total general revenue and new borrowings	$9,252	$7,305
New borrowings	717	58
Total general revenue	8,534	7,247
Total general expenditure	8,146	6,455
Provision for debt retirement	144	188
General expenditure less provision for debt retirement	8,002	6,267

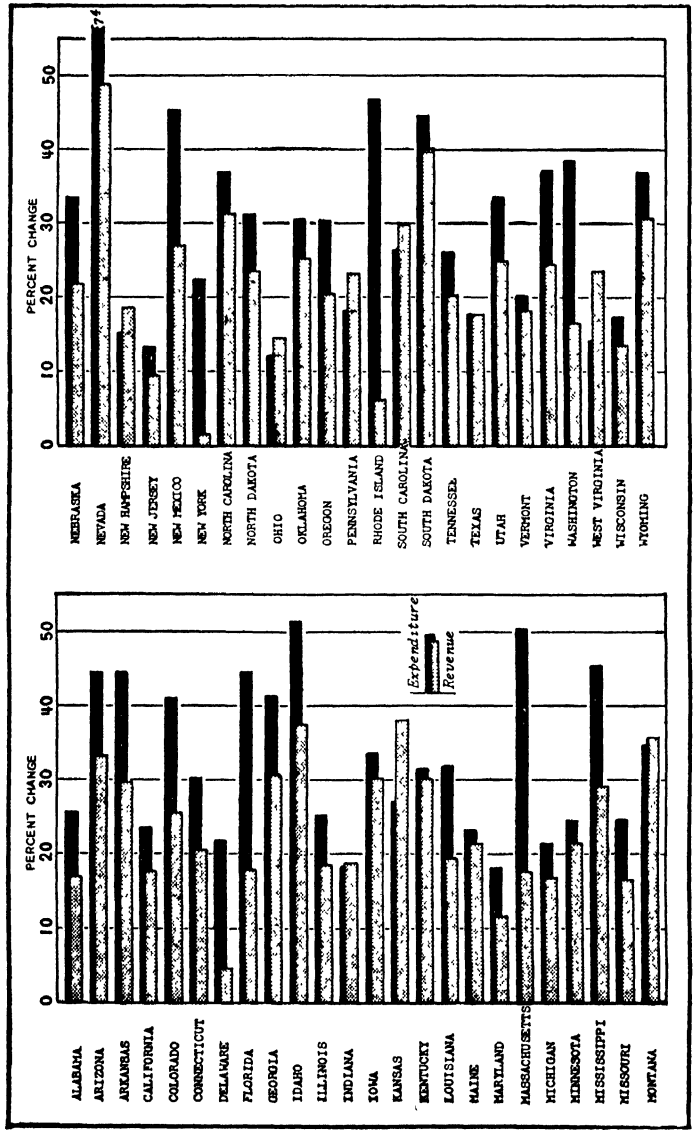
From the foregoing tabulation it may also be seen that the total of new borrowings for general government purposes rose strikingly in 1947 from the 1946 level and was, in fact, five times the amount provided for general debt retirement. New borrowings, of course, had been at an unusually low level throughout all of the war years.

CHANGES IN GENERAL REVENUE

General revenue in 1947 was $8,534 million, 17.8 per cent higher than the $7,247 million received by the state governments in 1946. The bulk of this revenue increase resulted from higher tax yields.

In 1947, taxes produced $6,745 million, or 12.2 per cent more than in the previous year. This total includes $969 million from unemployment compensation taxes held in trust for the payment of benefits and hence not available for general state purposes. Excluding these pay roll taxes, 1947 tax collections were 16.0 per cent over those for 1946. There was considerable tax legislation at the 1947 sessions of the state legislatures, but the effect of this legislation is almost exclusively upon the revenue of the succeeding fiscal year.

Of the $1,154 million received by states as aid from other governments in 1947—up 50.3 per cent from 1946—$1,121 million came from the federal government. Substantial increases in programs of federal aid were reflected in state receipts—



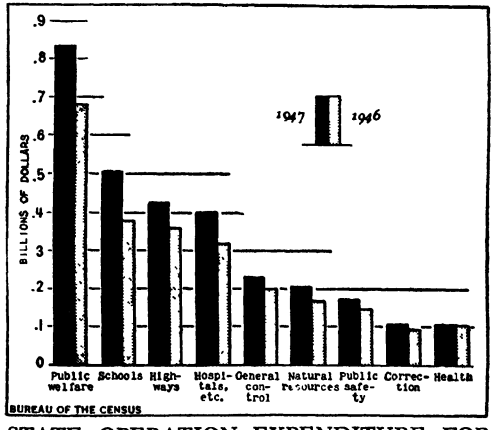
PER CENT CHANGE, 1946 TO 1947 IN STATE GENERAL REVENUE AND GENERAL EXPENDITURE

particularly aid for highways, in accordance with the three-year postwar program authorized by the Federal-Aid Highway Act of 1944.

Income from charges and miscellaneous sources totaled $636 million, an increase of 36.4 per cent from the amount received in 1946. The largest single cause of this rise was the increased revenue derived from charges made to students at state colleges and universities, where enrollments have been at unprecedented levels. Contributions received from alcoholic-beverage monopoly systems in the 16 states that operate such enterprises were up 14.2 per cent.

CHANGES IN GENERAL EXPENDITURES

State general expenditure of $8,146 million in 1947 reflects a rise of 26.2 per cent from the 1946 total of $6,455 million. For several years prior to 1946 the corresponding figure was approximately $6 billion. The sharp rise between 1946 and 1947 resulted from substantial increases in operation expense, capi-



STATE OPERATION EXPENDITURE FOR SELECTED FUNCTIONS 1947 AND 1946

tal outlay, and aid paid to local governments, which together comprised in 1947 over five sixths of all state general expenditure.

For operation and maintenance of their general governmental services, the states expended $3,314 million, or 28.4 per cent more than in 1946. Increases occurred in operation expense for all functions. The greatest rise in absolute amount was for public welfare. The largest percentage increase was for schools (mostly state colleges and universities). State bonus payments to veterans of World War II totaled $159 million in 1947, as compared with $47 million in 1946. Six states made bonus payments during 1947—Massachusetts, New Hampshire, Vermont, Illinois, Michigan, and Rhode Island; the first three of these initiated such payments in 1946, and the other three made their first payments in 1947.

Capital outlay in 1947 was almost three times as great as that of 1946, chiefly reflecting the fact that the 1946 amount of $356 million was abnormally small because of war-induced shortages. The 1947 amount of $945 million included $666 million for highways.

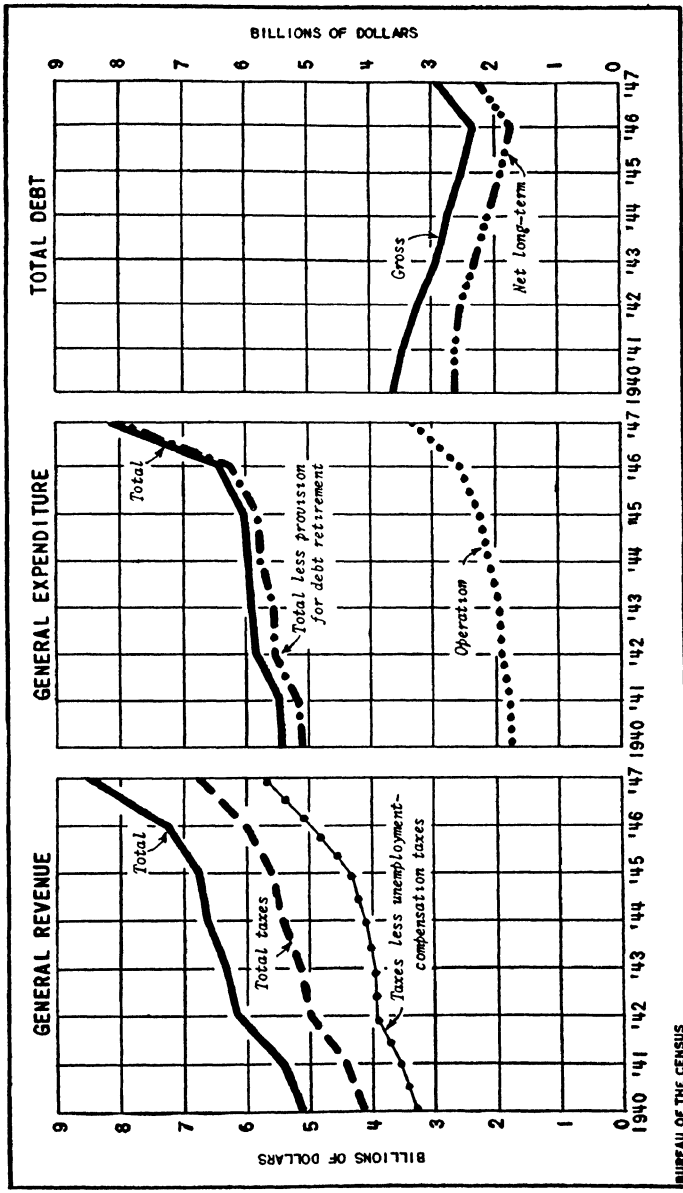
The states paid $2,605 million in aid to their local governments during 1947, 24.5 per cent more than in the previous year. State aid, which includes both grants and also local shares of state-imposed taxes, comprised almost one third of total general expenditure, and was distributed largely for schools, public welfare, and roads and streets.

ALCOHOLIC BEVERAGE MONOPOLIES

Net income of the sixteen state-operated systems for the sale of alcoholic beverages amounted in 1947 to $147 million. Contributions of these enterprises to the general government of the states totaled $136 million in 1947, as compared with $119 million in 1946.

GENERAL AND ENTERPRISE DEBT

During the war years states were able to retire much of their indebtedness and had little occasion to borrow. In 1947, however, the states issued bonds totaling $718 million, which contrasts with the 1946 figure of only $56 million and the wartime



STATE GENERAL REVENUE, GENERAL EXPENDITURE, AND TOTAL DEBT 1940–1947

low of $14 million in 1945. The heavy borrowing in 1947 was chiefly in connection with financing veterans' bonus payments and services by three States—Illinois, Massachusetts, and Michigan.

This substantial issuance of bonds resulted in an interruption in the downward trend of state debt outstanding. Gross debt (general and enterprise) rose from $2,367 million to $2,956 million during the states' 1947 fiscal years, or 24.9 per cent; net long-term debt rose from $1,734 million to $2,270 million, or 30.9 per cent.

Chapter Nine

THE STATE AND LOCAL GOVERNMENT

No. 44

One of the factors which complicates the business of local government is the large number of units. The extent and variety of these units, together with some of the problems which their existence creates, are set forth in the study here reprinted—the latest and most complete which we have on the subject. The student would do well to examine carefully the tables on pages 315–318 and the maps (prepared by the Bureau of the Census) which appear on pages 310–311.

THE UNITS OF AMERICAN GOVERNMENT, 1941 [1]

WHAT IS A UNIT OF GOVERNMENT?

. . . The concept of a "unit of government" has nowhere been legally or officially defined. Court decisions, statutes, and legal treatises dealing with local government have used a great variety of terms; municipality, municipal corporation, public corporation, quasi corporation, taxing district, civil division, political subdivision, and others. Many distinctions have been attempted where no real differences existed, such as the suggested distinction between a "taxing district" and a "political

[1] William Anderson, "The Units of Government in the United States," *Public Administration Service*, No. 83, 1945, pp. 7–16.

subdivision of the state" in the reports, statutes, and decisions on the national "municipal bankruptcy act."

. . . . . .

ESSENTIAL CHARACTERISTICS

Since a short one-sentence definition without explanation seemed to be insufficient for the purposes of accurate identification, the various elements necessary to a unit of government have been listed and amplified below. Each element must be present in some degree in any entity that is to qualify as a distinct unit of government. Since the unity and the separate identity of the nation as a governmental unit, and of each of the states, is so generally recognized, the following discussion refers mostly to local governments.

1. TERRITORY. Each unit of government as herein defined operates over a definite land or land-and-water area which is in most cases set forth in its constitution, charter, or documents of organization. It may have incidental powers and possessions beyond these territorial limits, yet it remains identified with a particular area. In this respect it is unlike a business corporation or a "government-owned corporation," which usually has a principal place or center of business such as a central office, but ranges outward from that center without very fixed territorial limits.

Because each unit of government has a definite area and powers of government therein, as noted below, it has authority over all persons within its territory with certain known exceptions. In short it is not a thing of voluntary membership like a cooperative society, but a thing of compulsory authority within the limits of its powers over all things and persons within its area.

2. POPULATION. Since a unit of government is a human institution, it requires a population, and without population there is no unit of government. How large the minimum population need be it is impossible to say. According to the laws of certain states, townships may become organized units of govern-

ment with as few as twenty-five inhabitants, and common school districts may be organized where there are twelve or more children of school age. In either case this amounts to only a few families. Once organized, most units may legally continue to operate even if the population later falls below the minimum required for original organization. Especially where there is taxable property in the unit belonging to nonresidents, a very few inhabitants may carry on the government of the place, filling the offices themselves but collecting revenue from all property owners.

. . . . . .

3. ORGANIZATION. Essential to the existence of a governmental unit is a continuing governmental organization. This usually consists of a legislative body, council, or board, with officers and employees to carry out its decisions, but in the case of certain small local units a single elective or appointive officer is a sufficient organization. The town or district meeting of the legal voters is an organizational feature of many thousands of local governmental units but is not an essential.

. . . . . .

4. SEPARATE LEGAL IDENTITY. Most units of government have certain characteristics of corporations—a separate legal identity, a legal personality which can sue and be sued in its own name, and "continuous succession" or continuity of legal existence whatever changes occur in the population. Place and area are more important as preservers of identity than inhabitants. Unfortunately, there is so much confusion in statutes and judicial decisions concerning the corporateness of local governments that corporateness as such is not set forth here as an essential of a unit of government. In the case of some operating local units the courts have even denied that they are corporations, although to a layman they seem to have all the necessary characteristics.

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5. AUTONOMY, OR DEGREE OF INDEPENDENCE. In many cases there are within the same area two or more local agencies exercising governmental authority. A city, a school district, and a housing authority may occupy the same area. When this is the case it is not always easy to determine whether there are several separate units of government, or a single one operating through several agencies or departments. It is most important in these cases to determine the degree of independence possessed by each of the operating agencies. Any one that has its own powers and functions conferred on it by law and a reasonable measure of power in determining its own policies and raising and spending money deserves classification as a separate unit of government. Where consolidation has taken place, however, as, for example, where a city and county occupy the same area but are really governed as one by a single board or council, only a single unit of government may be said to exist.

Absolute independence is, of course, out of the question for any local unit. The nation itself can hardly claim it, in view of its international obligations and its dependence on the states in many internal matters. Certainly the states or commonwealths cannot claim independence or autonomy in an absolute sense. For local units, autonomy exists only in a relative sense and to a small extent vis-à-vis the state, but as against other local authorities the degree of independence is usually much greater.

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6. GOVERNMENTAL POWERS AND FUNCTIONS. Each entity that is to be classed as a unit of government should be one that is entrusted and empowered by law to perform some governmental service or services. The range of these is already very wide and is ever broadening. Public utilities like water and electricity supply are certainly to be included, and so are public housing, irrigation and drainage projects, and many more. Many units of government are entrusted with only a single important function, such as education. These units may be called "unifunc-

tional." Others have several or many services to perform, and these are in varying degrees "multifunctional."

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7. FISCAL INDEPENDENCE. The power to raise a revenue by taxation, or by special assessment, or by fixing and collecting rates, charges, or rents for services rendered, must be considered one of the most important criteria for distinguishing units from nonunits. A certain amount of fiscal independence seems indispensable to genuine autonomy in the performance of service functions. It is recognized, of course, that all states and most local units of government today get some funds from grants-in-aid, and that none has absolute independence in financial matters. Nevertheless, mere spending agencies that have no power to raise even a part of their own revenue are not considered to be separate units of government in this study.

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DEFINITION

Summarizing the foregoing characteristics, a unit of government may be defined as a resident population occupying a defined area that has a legally authorized organization and governing body, a separate legal identity, the power to provide certain public or governmental services, and a substantial degree of autonomy including legal and actual power to raise at least a part of its own revenue.

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LAYERS OF GOVERNMENTAL UNITS

It is only as a concept of the mind, and certainly not as a physical reality, that we can speak of the several "layers" or "levels" of governmental units. Nevertheless, there is a certain hierarchy or order of priority among such entities that is recognized by everyone. At the upper levels, the rank of each type of unit corresponds roughly with its constitutional or legal

status. At the lower levels, i.e., in the field of local government, where one type of unit is not as a rule legally superior to another, there are other tests of priority to apply, such as the importance or breadth of the functions performed.

In the United States we generally recognize the following tiers or levels of units of government:

1. Units of central government
   a. The nation
   b. The states
2. Units of local government
   a. The counties (and parishes)
   b. Cities, villages, boroughs, incorporated towns, towns and townships
   c. School districts
   d. Other special districts.

There are, of course, a number of units that do not fit neatly into this classification. These exceptional or irregular entities include such units as the District of Columbia, interstate bodies like the Port of New York Authority, and metropolitan authorities such as that which handles water supply, sewage disposal, and other functions for the Boston area.

In any state, the citizen is subject to the national and state governments, and to a varying number of local units. At the simplest there will be one local government, as in those cities of Virginia that are independent of the surrounding counties. Generally in the South, in certain western states, and in New England, the number of levels of local government directly affecting the average person is relatively small. In the states from New York to North Dakota and south to Kansas, Missouri, and the Ohio River, the situation is more complex. The average citizen in those states is in direct contact with three levels of local government: the county, the city or village (urban) or township (rural), and the school district. There may also be special districts in addition to these. In certain large

cities, notably in Chicago, the number of layers of governmental units is considerably larger.

The units enumerated in the table on pages 314–318 fall naturally into two main groups—central and local. The distinctions between these classes are not based upon differences in size of area or population. There are many counties in the West with areas larger than some eastern states, and there are a number of cities and counties with populations larger than those of some states, both east and west. The essential differences between central and local units of government arise from their constitutional status and purposes.

The nation itself, with certainty, and the forty-eight states, though more doubtfully, may be classed as units of *central government.* Together these units, their governments, and their respective relations to each other (national-state and interstate) constitute what may properly be called the "federal system."

All other units may be designated as units of *local government.* The "system of local government" consists, then, of these various local units, their governments, and their respective relations to each other and to the central governments which control them.

THE UNITED STATES AS A UNIT

The first unit of government is the United States taken as a whole, with its government for the entire nation centered in Washington, D.C. Since there is no other comparable unit within the country, and since its adequacy for the purposes of national self-government in the modern world is hardly open to question, it does not seem necessary to discuss it at length in a study devoted largely to local government.

The significant things about the United States as a single unit of national government seem to be: (1) the tremendous and rapid increase in national area, population, and wealth since 1789; (2) the stabilization of the continental land area after the Gadsden Purchase in 1853; (3) the marked recession

in the rate of population growth in recent decades; (4) the rapid exploitation of natural resources; (5) the movement of population out of great rural areas after the resources were used up or were found inadequate for an American standard of living; (6) the corresponding concentration of population in urban centers; and (7) the tremendous increase of governmental services in recent decades. Some of these factors have had more effect upon the local units of government than upon the central government, but their influence is felt all along the line.

THE STATES AS UNITS OF GOVERNMENT

The number of the federated American states or commonwealths increased from thirteen to forty-eight between 1790 and 1912. Of the original thirteen the largest was Virginia, then 64,284 square miles, and the smallest was Rhode Island, 1,067 square miles. Delaware had the smallest population (59,096), and Virginia the largest (747,610). The average area of these states was less than 26,000 square miles, and the average population was 279,683.

To reveal the tremendous increase in scale down to the present day it is only necessary to give the corresponding figures from the 1940 census. Rhode Island is still the smallest state in area, but the largest now is Texas, with 263,644 square miles of land area. The state with the smallest population today is Nevada (110,247), and New York has the largest (13,479,142). The present average state area is 62,022 square miles in land area, or about the same as that of the largest state in 1790, and the present average population (2,729,295) is nearly ten times the average population in 1790. In fact the average state population today is two thirds of the 1790 population of all the original thirteen; and nine different states have today more population each than all had at the first census.

These great increases in the numbers of states, in the average areas of states, and in the populations to be served have been accompanied also by great increases in wealth, in public services, and in public revenues and expenditures. The in-

creases have not resulted in making all states more nearly uniform in population and wealth, or in raising them all up to a desirable minimum of capacity for the performance of normal state functions. On the contrary the spread has become ever greater.

The largest state in land area in 1790 was only about sixty times as large as the smallest. Today the difference is about 250 to 1. In population the largest original state was only about twelve times as large as the smallest. The spread in 1940 between New York and Nevada was 122 to 1. In wealth and in taxpaying ability the difference between New York and the poorest states is today almost equally great. It must be evident, therefore, that while states may be equal before the law and in Senate representation, they are markedly unequal in their capacities to perform the services expected of a modern commonwealth. It is partly because so many states are quite unequal to their tasks that we find so general a tendency in the less populous states to seek the aid and intervention of the national government.

There is another reason why today so many states fall short of expectations. The boundary lines set for them in bygone centuries, and fixed either for the purpose of royal land grants or for some other purpose unrelated to the problems of modern administration, have become noticeably unsuited to present-day needs. It is not only because industry and commerce have become national in scope but also because great metropolitan communities have grown up that straddle the boundaries of several states. To solve the local administrative problems of the Chicago region alone, three or four states must cooperate. The New York metropolitan community has a similar problem, and others have a like situation.

Such conditions seem to call either for changes in the boundaries of existing state units, or for the creation of a new type of metropolitan district in which state lines can be ignored. To bring about changes in state boundaries is, of course, a very difficult matter under the federal Constitution (Article IV, Section 3, Paragraph 1). A fair exchange of territory of about

equal taxpaying ability might obtain the needed consent of the legislatures of the states concerned, but any change of boundaries that might result in the loss by any state of large taxable wealth would be strongly resisted.

NEW INTERSTATE UNITS NEEDED

On a limited scale, without state boundary changes, it may be possible to set up various new interstate units of government to solve some of the problems of metropolitan areas that cut across the boundaries of several states. The New York–New Jersey Port of New York Authority may be the forerunner of other units of this kind. The states in the Tennessee valley, those in the Colorado River basin, and other groups may find reasons for uniting in common administrative organizations for limited purposes.

The establishment of large new regional governments to take the place of the state units for many purposes has been frequently discussed, but the suggestion has not yet reached the stage of official proposal. All that can be said at present is that this and other suggestions point to a great deal of dissatisfaction among informed people with the areas of states now existing as units of government.

Set off against this present feeling of discontent with existing state boundaries is the fact that many of our states compare very favorably in size, population, and wealth with a number of independent foreign states, each of which, standing by itself, must provide for its own defense and foreign service in addition to the functions of the typical American commonwealth. Indeed the union of American states is not insignificant when compared with a group of important states such as once formed the League of Nations.

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FOUR PRINCIPAL CLASSES OF LOCAL UNITS

In practice some of the foregoing criteria are closely allied to others. They work, as it were, in groups, and the number of really different classes of local units is not so large as the vari-

ous criteria might suggest. In fact there are in practice only four major classes of local governmental units with certain subclasses that will be mentioned. Since names like county, township, and town really tell nothing about the characteristics of different units, it is important to remember these classes by the descriptive titles given below.

1. The first class of local units consists of the *major and inclusive divisions of the state area for general state purposes.* These are designated as counties in most of the states and as parishes in Louisiana. All will be referred to as counties hereafter. In one state, Rhode Island, the county exists as an area but is not a unit of government. This state itself is only a little larger in area than the average American county (1,058 square miles, as against 961). In all other states, the counties are units of government, although their functional and financial importance is not everywhere equally large and is rather minor in the New England states generally. In those states the town serves largely as the agent of the state for general state purposes.

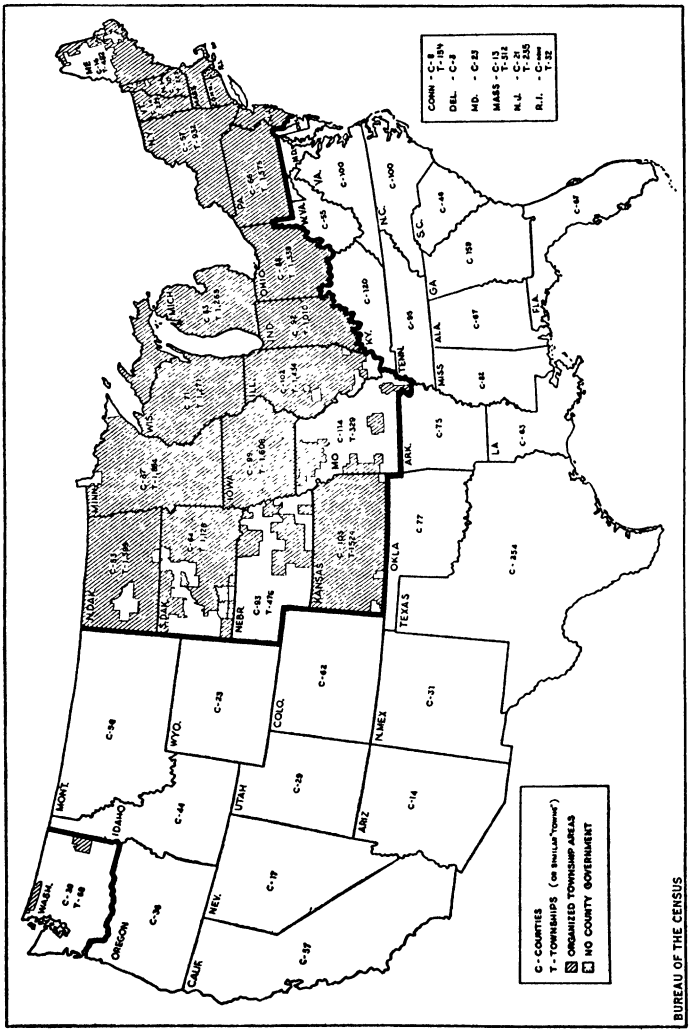
Counties are described above as *major* because they are the principal or largest territorial divisions of the state for purposes of local government. They are *inclusive* because in any state they usually include the whole area of the state. Thus, if all the county areas and the District of Columbia were added together, the resulting figure would represent almost the total land area of the United States.

Counties that are units of government have varied functions, as a rule. These were originally functions of general and statewide interest that the legislature desired to have performed uniformly throughout the state area. Today county functions are still largely of this nature, but others, often of a more limited and local concern, have in recent years been added to them.

Below this first class of major units stand two classes of minor subdivisions or "minor civil divisions" as the Bureau of the Census calls them. Taken together these two classes may include the whole state area, but in many states that have both

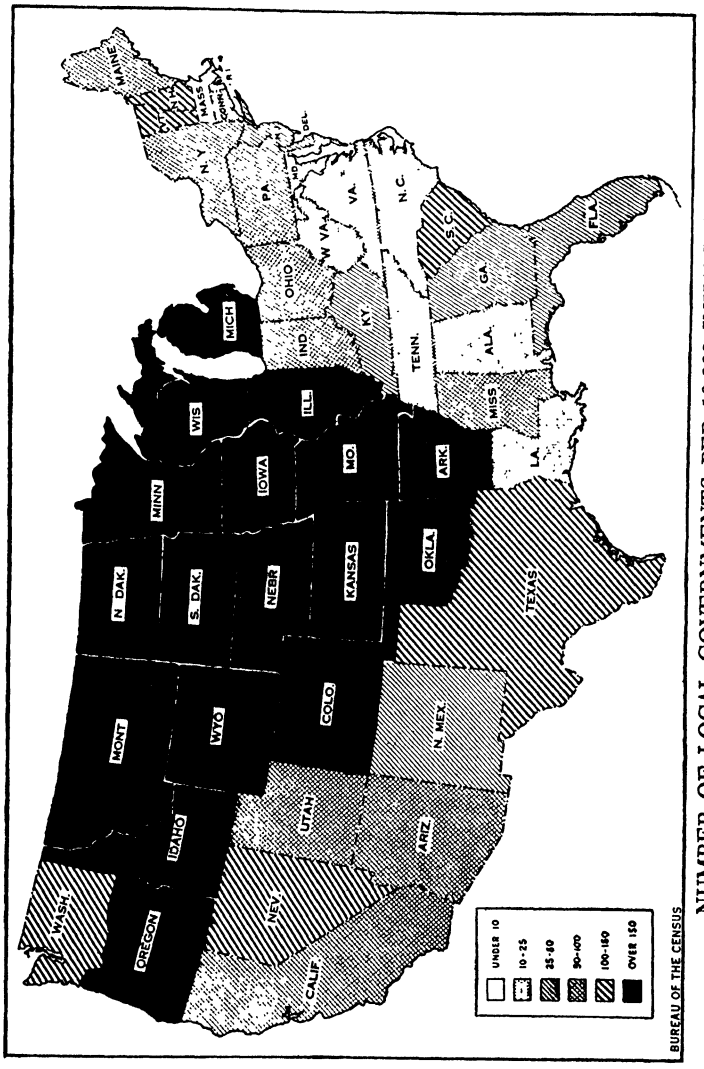
classes they do not; and another large group of states has only one of these classes.

2. The second class of local units (the first class of these minor subdivisions) may be described as *special incorporations in urban or partly urban places for general purposes of local*



NUMBER AND LOCATION OF COUNTY AND TOWNSHIP GOVERNMENTS

government and service. Many examples are to be found in every state in the Union. Washington, D.C., is essentially of this class, although functionally it partakes also in part of the character of a county, and in part of that of a state.



NUMBER OF LOCAL GOVERNMENTS PER 10,000 INHABITANTS

The particular legal titles given to these special incorporations vary greatly from state to state. *City,* for the larger, and *town* or *village,* for the smaller units of this class, are the most common names, but the term *borough* is also found in Connecticut, New Jersey, Pennsylvania, and elsewhere. In the states where neither the New England "town system" nor the land-survey "township system" of local units prevails, i.e., in the South and West generally, "town" is commonly used to designate the smaller special incorporations, while in the Northeastern and Middle Western states they are usually denominated "villages." There is no uniformity of practice, however, and in Oklahoma, Indiana, Iowa, and several other Middle Western states the minor urban incorporated places are called "towns" and the six-mile-square rural subdivisions are called "townships." This confusion in terminology often leads to misunderstanding.

The characteristics of these special incorporations are everywhere very much the same. (a) Their areas are usually small, varying from a fraction of a square mile up to several hundred square miles. Taken all together they do not occupy more than 3 per cent of the land area of the United States, and 2 per cent is probably a much closer estimate. (b) In these limited areas there are, as a rule, much denser settlements of population than in the surrounding countryside, and their combined population amounts to 61.6 per cent of the national total. (c) As a rule their areas and peoples remain for county purposes as a part of the county or counties in which they are situated but are set off by law as separate corporations for providing the varied local services required in urban places. (d) Their corporate status is generally that of true municipal corporations. (e) Many of them have special charters, or are incorporated under general laws that are often referred to as the local charter. (f) Their functions are numerous and highly varied.

3. A third class of units (the second class of minor subdivisions) may be described as *subdivisions of the county in rural areas for rural local purposes.* These include "towns" in the New England and a few Middle Atlantic states, and the usu-

ally rectangular "towns" or "townships" based upon the congressional land-survey townships in many of the public land states. In the New England states, and also in the vicinity of large cities in other states, many of these units are highly urbanized and of large population, with correspondingly important functions, and are not easily distinguished from the urban incorporated places mentioned above, but toward the West and South their importance tends to diminish until one reaches states where over large areas none has been organized. In one or another form they are found today in twenty-two states.

The characteristics of these units are as follows: (a) They are intermediate in area between the county and the small incorporated places called villages. Usually they do not exceed the thirty-six square miles of the survey township. (b) They are generally rural, except in New England and in the vicinity of large urban centers in other states. (c) For county purposes they remain as parts of the county area, but they have a separate corporate or quasi corporate status under general laws. (d) Their functions are fairly numerous, are partly of statewide and partly of local interest, and are basically of a rural nature, although urban functions have been added where needed, especially in New England.

4. The last class of units consists of a great variety of *special or ad hoc districts, created for special purposes. School districts* are the most numerous and most widely known species in this general class, but there are hundreds of other species, existing under many different names, and for unnumbered special purposes. There are no states that are without some units falling in this large class, although Oklahoma and South Dakota report only school districts.

These units vary greatly in size and population. They frequently cut across the boundaries of other units, including boundaries of counties and even, in a few cases, of states. They are usually organized for a single purpose each, such as providing a common school, or for a few closely related functions, such as those connected with drainage and sanitation. In legal status they are usually corporate or quasi corporate.

No. 45

A rational scheme for classifying governmental subdivisions of the states has been formulated in spite of the high degree of diversity of function or purpose of such units from state to state. It will be noted that the most vital governmental units—the state governments, and county, township, and municipal governments—exercise broad governmental functions, and, taken together, comprise only a fourth of all units. Special purpose units make up the other three-fourths. School districts alone constitute 70 per cent of the total, and special districts little more than 5 per cent. The table presented on the following pages is a convenient tabulation of these units as prepared by the Bureau of Census.

GOVERNMENTAL UNITS[1]

[1] Governmental Units in the United States, 1942, Bureau of the Census, p. 9.

SUMMARY OF GOVERNMENTAL UNITS, BY STATE: 1942

Region and State	Number							
	All Governmental Units[1]	Counties	Townships and Towns	Municipalities			School Districts	Special Districts
				Total	Urban[2]	Rural		
United States Total	155,116	3,050	18,919	16,220	3,332	12,888	108,579	8,299
Northeast	17,085	205	4,184	2,144	834	1,310	9,369	1,174
North Central	96,595	1,051	14,667	7,721	1,099	6,622	70,297	2,847
South	25,130	1,386		4,756	999	3,757	17,061	1,911
West	16,305	408	68	1,599	400	1,199	11,852	2,367
Alabama	511	67	. . .	275	60	215	110	58
Arizona	499	14	. . . . .	33	16	17	397	54
Arkansas	3,705	75	. . . .	374	53	321	2,644	611
California	4,149	[3]57	. . . . .	286	167	119	2,809	996
Colorado	2,358	[3]62	. . . . .	239	30	209	1,937	119

Region and State	Number							
	All Governmental Units[1]	Counties	Townships and Towns	Municipalities			School Districts	Special Districts
				Total	Urban[2]	Rural		
Connecticut	349	8	154	37	27	10	14	135
Delaware	70	3	.....	51	8	43	14	1
District of Columbia	2	.....	.....	1	1	.....	.....	1
Florida	503	67	.....	267	70	197	67	101
Georgia	946	159	.....	470	77	393	222	94
Idaho	1,666	44	.....	152	26	126	1,148	321
Illinois	15,854	102	1,434	1,137	208	929	12,138	1,042
Indiana	3,043	92	1,010	529	98	431	1,182	229
Iowa	7,519	99	1,608	932	89	843	4,861	18
Kansas	11,115	105	1,524	589	64	525	8,632	264
Kentucky	771	120	.....	285	56	229	261	104
Louisiana	523	[4]63	.....	194	54	140	67	198
Maine	584	16	482	51	26	25	.....	34
Maryland	207	23	.....	142	22	120	.....	41
Massachusetts	409	[4]13	312	39	39	.....	.....	44

Region and State	Number							
	All Governmental Units[1]	Counties	Townships and Towns	Municipalities			School Districts	Special Districts
				Total	Urban[2]	Rural		
Michigan	8,106	83	1,265	479	126	353	6,270	8
Minnesota	10,398	87	1,884	752	78	674	7,673	1
Mississippi	1,792	82	.....	270	48	222	1,189	250
Missouri	10,740	114	329	734	87	647	8,613	949
Montana	2,175	56	.....	115	23	92	1,932	71
Nebraska	8,307	93	476	530	36	494	7,009	198
Nevada	163	17	.....	12	5	7	115	18
New Hampshire	546	10	223	11	11	.....	231	70
New Jersey	1,143	21	235	331	164	167	490	65
New Mexico	225	31	.....	64	22	42	105	24
New York	8,339	457	932	610	202	408	6,064	675
North Carolina	603	100	.....	431	76	355	.....	71
North Dakota	4,066	53	1,399	333	12	321	2,272	8
Ohio	4,021	88	1,339	890	186	704	1,655	48
Oklahoma	5,100	77	. .	499	74	425	4,518	5

Region and State	Number							
	All Governmental Units[1]	Counties	Townships and Towns	Municipalities			School Districts	Special Districts
				Total	Urban[2]	Rural		
Oregon	2,332	36	.....	193	34	159	1,844	258
Pennsylvania	5,263	[4]66	1,575	984	345	639	2,546	91
Rhode Island	54	([5])	32	7	7	.....	.....	14
South Carolina	2,057	46	.....	241	51	190	1,744	25
South Dakota	4,919	[6]64	1,128	301	19	282	3,423	2
Tennessee	328	95	.....	206	57	149	11	15
Texas	7,360	254	.....	637	196	441	6,159	309
Utah	303	29	.....	201	25	176	40	32
Vermont	398	14	239	74	13	61	24	46
Virginia	323	100	.....	208	53	155	.....	14
Washington	1,906	39	68	221	40	181	1,148	429
West Virginia	326	55	.....	205	45	160	55	10
Wisconsin	8,508	71	1,271	515	94	421	6,569	81
Wyoming	531	23	.....	83	12	71	377	47

[1] Includes the federal government and the 48 state governments. [2] Incorporated places having more than 2,500 inhabitants.

[3] The City and County of San Francisco in California and the City and County of Denver in Colorado are counted as cities and not as counties.

[4] The following counties are counted only as cities because they are wholly or very largely consolidated with the cities indicated: Orleans Parish with New Orleans City; Suffolk County with Boston City; Bronx, Kings, New York, Queens, and Richmond counties, with New York City; Philadelphia County with Philadelphia City. [5] Counties not organized as local governments.

[6] The county areas of Armstrong, Shannon, Todd, Washabaugh, and Washington are unorganized as counties and are attached for administrative purposes to neighboring counties

No. 46

As a matter of public law the county has long been described as a mere agent of the state, created by the latter as a convenient area for use in performing state functions. This description squared fairly well with the facts for many years. As is made clear by the following article, however, counties are increasingly more than mere administrative districts. They are performing functions of importance primarily to local residents and are becoming more and more areas of local government, as incorporated villages and cities have long been.

THE GROWTH OF COUNTY FUNCTIONS SINCE 1930[2]

The past decade has witnessed a tremendous expansion of governmental functions, particularly at the state and federal levels. During this period a few states have assumed complete responsibility for highways and schools; in all of the states there has been increased state and federal activity with respect to many functions formerly considered purely local in nature. While this increase in state and federal activity has occurred primarily at the expense of local units of government, the counties have maintained an important place "in the state plan of local areas." In the first place, they continue to participate in the local administration of such functions as public welfare, which have been assumed largely by the state and federal governments. Furthermore, the necessity for dealing with modern social and economic conditions has forced counties to undertake many new functions. The more important of these include public utility services, public housing, planning and zoning, park and recreation facilities, and others.

[2] M. H. Satterfield, "Growth in County Functions," *Journal of Politics*, Vol. 3, No. 1, February, 1941, pp. 76–88.

PUBLIC UTILITY SERVICES

In recent years the rural resident has come to demand many of the services formerly enjoyed only by the city dweller. This is particularly true in highly urbanized counties where the services now offered are not vastly different from those offered by cities. Thus we find counties operating water, electric, and sewage disposal plants. In Virginia, for example, certain semi-urban counties such as Arlington, Henrico, Washington, and others are vested with the same powers and authority as cities and towns. They are authorized to establish and maintain water, electric, and sewer systems, and to provide fire protection, garbage removal, and other services.

The electrification of rural areas, stimulated in part by the REA and other governmental programs, has proceeded at a rapid rate in recent years; it is estimated that by January, 1940, approximately 25 per cent of all the farms in the United States were receiving electric service. A large part of this service is furnished through rural cooperatives, power districts, and municipalities. In at least 3 states, however, legislation has been enacted authorizing counties to acquire and operate electric distribution systems. To take advantage of the surplus power available from the Tennessee Valley Authority, Mississippi, in 1934, authorized counties to construct or to acquire and operate electric light plants, transmission lines, and such other properties necessary for the generation and distribution of electricity. Similar legislation was passed in 1935 in Alabama and Tennessee. Three Tennessee counties—Benton, Carroll, and Weakley —have purchased distribution systems within their boundaries and have contracted with the Tennessee Valley Authority for the purchase and resale of power. Crisp County, Georgia, acting under an amendment to the Georgia Constitution, has constructed a hydroelectric dam and power plant. The system was put into operation in August, 1930, and now serves over 2,000 customers. Greenwood County, South Carolina, operates its own electric distribution system. Through a loan from the REA, the county has constructed 193 miles of lines, and, on June 30, 1939, was serving 917 customers.

RURAL HOUSING

One of the more recent and significant developments in the United States is the assumption of public responsibility for providing adequate housing facilities, particularly in rural areas. The need for better housing facilities is more acute in rural than in urban areas. The nation-wide survey of farm housing made in 1934, for example, revealed that 60 per cent of all farm families in the United States were living under substandard housing conditions.

The existence of bad housing conditions in rural areas was formally recognized by the passage, in 1937, of the United States Housing Act, which specifically provided for federal aid to public housing agencies in "rural or urban communities." But of the 46 local housing authorities in existence at that time, only 1 represented a rural community. Important strides have, however, been made in the last two years. Twenty states have passed enabling legislation authorizing counties to undertake rural housing. Most of these laws follow a standard form and provide for the establishment of county housing authorities by the county governing body. The Virginia law, for example, provides for county housing authorities of five members appointed by the county governing bodies for five-year overlapping terms. These authorities are empowered to undertake rural housing projects and to cooperate with other counties and towns. By August 27, 1940, there were 208 county housing authorities in 12 states. Most of these county housing authorities have been established in the predominantly rural states of the South where rural housing conditions are particularly bad For example, Arkansas has 28 county housing authorities, Georgia has 109, and Mississippi has 32. Six county housing authorities have received loans from the United States Housing Authority to be used for low-cost rural housing projects. The six states represented in these rural housing projects are Arkansas, Georgia, Illinois, Indiana, Mississippi, and South Carolina.

COUNTY PLANNING AND ZONING

Many of the recent activities of counties deal with land-use planning and control. While a few counties had engaged in planning and zoning activities prior to 1930, most of the developments in these fields have come since 1933. The greatest growth in county planning activities occurred during the period 1933–1936 when, due to the impetus of the National Resources Committee (now National Resources Planning Board) and the state planning boards established as a result of its activities, county planning agencies were created in "wholesale fashion." Although there were only 85 county planning agencies in 1933, the number by the end of 1936 was estimated at 506.

Originally, many of the county planning agencies, particularly in the Northwestern states, were established to plan federal public works and relief programs. After these purposes had been served, many of these agencies continued in existence and devoted their energies to particular phases of planning, such as zoning, recreation areas, land subdivision control, and thoroughfares. Because of insufficient funds, public indifference to the value of planning, and other factors, most of the 506 county planning commissions are now inactive. Although county planning legislation has been enacted in 20 states, it has been estimated that there are not more than 150 counties at present with active over-all planning commissions. Most of these are located in California, Colorado, Florida, Idaho, Missouri, Montana, New York, North Dakota, Oregon, Tennessee, Virginia, Washington, and Wisconsin.

Zoning is the primary interest of many of the planning commissions. In California county planning commissions have been particularly active in the control of suburban and roadside developments. For example, San Mateo County, the California county most active in zoning, has over 1,000 miles of zoned highways where business is restricted and billboards prohibited except in established towns. Los Angeles, Marin, Santa Clara, and Santa Cruz are other California counties active in high-

way zoning. Other states which contain counties that have embarked upon urban and highway zoning programs are Colorado, Georgia, Illinois, Maryland, Missouri, New York, and Virginia.

Rural zoning for the control of rural uses of land has made considerable progress in recent years, particularly in Wisconsin where it was inaugurated for the purpose of directing agricultural settlement to the most suitable farming areas and of reducing the need for and cost of public services in the cutover regions. The first county zoning ordinance dealing strictly with rural areas was passed by Oneida County, Wisconsin, in 1933. The following year other Wisconsin counties adopted rural zoning ordinances and by March, 1938, such ordinances were in effect in 24 counties, most of which are in the cutover regions in the northern part of the state. Under these ordinances, the counties are divided into three use districts—agriculture, forestry, and recreation. More than 5,000,000 acres are zoned against agricultural use in these 24 counties.

Two other Lake states followed the lead of Wisconsin and adopted rural zoning legislation. Michigan adopted a rural zoning enabling act in 1935, and zoning ordinances have been authorized in 4 counties. The Minnesota rural zoning law, effective in all counties having a state or federal forest, or a state conservation area, was passed in 1939. Under this law, county and township boards may adopt zoning ordinances regulating the use of land in rural areas. Excepted from these regulations, however, is the use of land for certain purposes, such as hunting, fishing, cabins, mines, dams, and transmission lines. Early in 1940 hearings were in progress on one county ordinance, and rural zoning was under discussion in several other Minnesota counties. Enabling legislation authorizing rural zoning has also been enacted by Colorado, Georgia, Indiana, Pennsylvania, Tennessee, Virginia, and Washington. In Tennessee, however, practically all the effectiveness of the act has been destroyed by the addition of provisions forbidding its application to agricultural buildings and agricultural uses of land.

CONSERVATION OF RESOURCES

In addition to the over-all planning and zoning described above, there are the county land-use planning and soil conservation activities inaugurated by the United States Department of Agriculture. Through reorganization of the department in 1938, the Bureau of Agricultural Economics was made responsible for the planning and program-forming activities of the department, and for the integration of these activities with state and local agencies. At the county level, county land-use committees will coordinate and localize the various public agricultural programs.

The planning work of the bureau in the counties comprises three stages. The first stage is devoted to organizing county agriculture committees and acquainting them with the scope and objectives of land-use planning. After the county committee has been set up, the next step is to map and classify the land within the county and to formulate immediate and long-range land-use plans for the county. The final stage is the development of a county program translating the land-use plans into action.

During the fiscal year 1939–1940, 1,195 counties were designated to take part in the county land-use planning program. Of these, 765 were to engage in mapping and classification work, while in 46 counties the local committees were to study county problems and to formulate unified county programs.

The adoption of state laws authorizing the creation of soil conservation districts is another of the significant land-use developments effected during the past few years. The first state enabling legislation was passed in 1937 and by June, 1940, legislation permitting the formation of soil conservation districts had been enacted in 38 states. Most of these state laws follow the standard act developed under the leadership of the United States Department of Agriculture, and provide for the creation of soil conservation districts with power (1) to establish and administer erosion control projects and (2) to prescribe land-use regulations for the prevention and control of soil erosion.

Under these laws regulations may be adopted requiring the retirement of highly erosive areas from cultivation, and requiring the construction of terraces, check dams, dikes, ponds, ditches, and other engineering operations. Landowners may be required to observe particular methods of cultivation such as contour furrowing, strip cropping, reforestation, and similar practices. Under this legislation, 314 soil conservation districts have been created.[3] These districts represent 34 states and

COUNTY PARKS AND FORESTS

New impetus has, in recent years, been given to the development of county parks and recreational facilities through the various federal work programs. In Kansas, for example, rural parks have been established with the aid of WPA funds in 19 counties. Similar projects have been carried on in several other states, and federal relief funds have been used to improve and expand existing park facilities in most states having county park systems. By September, 1940, county park systems were reported by 174 counties in 25 states. Only 1 county in each of the states of Montana, Nevada, New Hampshire, Ohio, Virginia, and Wyoming reported county park systems, whereas 36 counties in Michigan, 30 counties in Wisconsin, and 21 counties in California reported county park systems. Other states in which counties are authorized to establish county park systems but which apparently have not yet exercised this authority are Colorado, Louisiana, Mississippi, South Carolina, South Dakota, and Tennessee.

In addition to the established park systems, many counties maintain forest reservations that provide recreation facilities. For example, Hancock County, West Virginia, has a forest park of about 2,400 acres. The 5 Illinois counties with forest preserves ranging in size from 81 to 33,000 acres furnish recreation facilities essentially the same as those of county parks. Another state where county forests are maintained is New York, where there are at present some 400 county and community forests

[3] There were 1,889 soil conservation districts by July 1, 1947 [Eds.].

comprise approximately 190,339,237 acres.

with a total area of approximately 189,000 acres. Although few county forests are found in the South, Peach County, Georgia, operating under management plans promulgated by the state division of forestry, maintains a forest of 400 acres. In North Carolina there are approximately 48,000 acres in county and municipal forests.

Wisconsin has gone further than any other state in the development of county forests. In that state, many of the northern counties acquired ownership to large tracts of tax-delinquent lands. These lands, most of which were unsuitable for agricultural use, have been set up as forest preserves. County forests have been established in 25 Wisconsin counties and comprise a total acreage of 1,746,647. Through state aid and the labor furnished by WPA and CCC, all these forests are being actively developed. Areas are being reforested and picnic and camp areas have been established at suitable locations.

COUNTY AND REGIONAL LIBRARIES

Although county library service began in 1900, the progress has been slow. In recent years, however, because of improved economic conditions and the availability of state and federal funds, library service is being extended to rural areas at a more rapid rate. During the two years ending June 30, 1940, for example, public library service was extended to some 150 counties for the first time. On that date there were 447 counties in the United States with annual appropriations of at least $1,000 for library service. In several states library service is being furnished on a regional basis. In Vermont, for example, four regional library centers serve 14 counties. The Tidewater Regional Library in Virginia serves 10 counties. Other states in which regional library service is being demonstrated include Alabama, Kentucky, North Carolina, and Tennessee.

In addition to established county and regional libraries, a number of counties are being provided with library service through WPA and NYA demonstration projects. In January, 1940, for example, there were state-wide WPA projects for demonstrating rural library service in 32 states. These demon-

strations do not duplicate existing facilities but are intended to supplement existing facilities and to extend service to rural areas not otherwise served. A total of 4,652 individual service units were maintained and the service provided was county-wide in 422 counties. The population served by WPA library demonstration projects was estimated at 11,298,740.

OTHER COUNTY FUNCTIONS

Some counties also provide hospital, airport, harbor, public market, and other facilities. Of the 322 municipal hospitals registered and approved by the American Medical Association as of March, 1940, 55 were reported to be jointly owned by city and county. Another activity which can be expected to become of increasing importance is the provision of airport facilities. Many public airports have been established and improved in the last few years through WPA and local funds, and counties often contribute to the construction and operation of these facilities. Of 22 municipal airports recently surveyed in Mississippi, 4 were jointly operated by city and county. Other airports which are supported in part by counties include those located at Asheville, North Carolina; Bristol, Tennessee; and Manistee, Michigan. Recently, Congress appropriated $40 million for the construction and improvement of 250 publicly owned and operated airports. It is expected that municipalities and counties will acquire the necessary land and will of course maintain the airport after construction has been completed.

County health and welfare activities have taken on increased significance in recent years, largely because of the responsibility assumed by the federal government. Although federal aid for rural health work began in 1917, the amount granted, other than for flood and drought relief, was not very substantial prior to 1935. Under the Social Security Act, however, federal funds for assisting states and counties in establishing and maintaining adequate public health service were greatly increased.

The funds provided under the Social Security Act for public health work have resulted in a rapid increase in the number of local health units. Although the first health unit was established

in 1908, there were, on January 1, 1935, just prior to the passage of the Social Security Act, only 594 counties in the United States with full-time health service. Under the stimulus provided by these federal grants which had to be matched by state and local funds, the number of such counties had reached a total of 1,577 on June 30, 1940—an increase in 5½ years of 165.5 per cent.

The Social Security Act of 1935 also provided federal grants for a wide variety of welfare activities including aid for dependent children, the blind, and the aged. As a condition to receiving these grants the states were required to bear a part of the cost of the programs and to make them mandatory upon local governments. The effect of this legislation was to reduce greatly the responsibility of the counties for public welfare. Nevertheless, since the passage of the act, local welfare machinery has been strengthened and made uniform throughout the states. County departments of public welfare have been established and staffed with competent personnel to replace overseers or superintendents of the poor.

Another result of the program has been the elimination of county almshouses. In Alabama, for example, it was found that 63 per cent of the inhabitants of county almshouses in that state were eligible for old-age assistance. Steps were taken to find suitable homes for these residents and by December, 1939, the number of almshouses had been reduced from 63 to 11. Georgia is another state where a large number of county almshouses have been closed since inauguration of a social security program. Progress has also been made toward closing such institutions in North Carolina, in Tennessee, and in other states.

There are a number of other functions which have been undertaken by some counties in recent years. For example, in some states the counties are authorized to make expenditures for advertising and publicity purposes and to offer inducements to attract new industries. Some counties have promoted agricultural interests through feed and seed loans to farmers, the purchase and operation of terracing machinery, and the establishment and maintenance of agricultural marketing centers.

Many counties have also engaged in a number of regulatory, inspectional, and licensing activities. Examples are the regulation of liquor stores, tourist camps, amusements parks, and various other undertakings.

CONCLUSION

This brief survey of county functions indicates that despite the increase in state and federal activities during the last decade, the county, measured by the functions performed, remains a significant and vigorous unit of government. Moreover, it should continue as an important service unit, particularly if improvements can be effected in its structure and administrative organization. Many of the newer functions are purely local and, although at present stimulated in part by state and federal aid, it seems unlikely that they soon will be assumed by a higher level of government. Furthermore, the continuous pressure on the part of rural residents for added services should result in the development of still other functions at the county level.

No. 47

Because many of the functions performed by units of local government are of interest also to the state at large, all sorts of suggestions have been made at various times to equip the state government with machinery for protecting its interest in the efficient performance of such functions. More or less "centralization" in the administration of such affairs has taken place in many of our states. In North Carolina several matters formerly in the hands of local officials have been transferred to the state government; a number of others, mostly in the field of finance, although left to the local units are supervised by state officers. The article reprinted here describes the central machinery of supervision and gives some estimate of its effectiveness.

NORTH CAROLINA'S LOCAL GOVERNMENT COMMISSION[4]

State centralization has progressed further in North Carolina than in any other state in the Union. The state government has assumed responsibility for maintenance of an eight months' school, construction and maintenance of all public roads except city streets, and custody of all able-bodied, male convicts sentenced for terms of thirty days or more.

This highly significant shifting of local functions to state operation occurred in 1931–1933 as, in part, a recognition of the need for relieving local tax units of burdens that they could not carry under depression conditions.

Drastic measures for state control of local finance were also instituted. No halfway measures could have met the extraordinary problems of widespread defaults on local government debts. As early as 1928 the State Tax Commission had seen that "the inevitable drift" of several counties was "in the direction of insolvency."

Even at that time the composite debt of all units in Carteret County amounted to 38 per cent of the assessed value of its property, and by 1929 it had risen to 42.5 per cent. Another unusual situation was that of Buncombe County, where the 1931 combined debt was $482 per capita, and the overlapping debt of its largest city, Asheville, amounted to $845 per capita.

These were exceptional cases. But if we accept the rule that combined debt of local units in a county should not exceed 12 per cent of the value of taxable property (a rule followed by the New York law regulating savings banks' investments), then in 43 of North Carolina's 100 counties the local government debts were excessive.

Excessive total debt was not the only problem. Many a term

[4] James W. Fesler, *National Municipal Review*, Vol. XXX, No. 6, June, 1941, pp. 327–334.

bond was to come due during the depression. In some cases the sinking fund that was theoretically to pay these bonds was nonexistent; in other cases the sinking funds had been put into real estate, personal loans, and other unreliable investments; in still others, where the sinking funds were in the form of cash on deposit in local banks, the collapse of the banks in the early years of the depression tied these funds up so that they were unavailable.

Even those local governments that had used serial bonds were embarrassed by the depression, for often several serial bond issues were not properly coordinated to provide an equal load for the years to follow. Unfortunately, some of the heaviest obligations fell due in the depression years. In 1930 the State Tax Commission estimated that during the eleven-year period to follow 60 cents out of the state and local tax dollar would have to go for debt service obligations.

The problem of heavy debt service obligations was complicated by other familiar features of the depression. The ordinary operations of the local units had to continue; in fact, there was an insistent demand for new and increased services, particularly as to relief of the unemployed. At the same time property values fell, revenues based on former property tax rates drastically decreased, and a substantial resistance developed to local governments' attempts to increase the tax rate and to enforce the collection of taxes due.

This combination of circumstances resulted in chaos in local government finance in North Carolina. A wave of defaults set in that reached its peak by mid-1933 when 62 of North Carolina's 100 counties and 152 of her 260 cities and towns were in default on their debt payments.

The state government could not be expected to ignore this situation. Quite apart from its paternalistic concern for local units, its own credit was likely to suffer as a result of local government defaults. Earlier experiments with mild restrictions on local financial operations had failed to remedy local situations.

A constitutional limitation on the county tax rate for general expenses had only led to multiplication of funds raised for

"special purposes," excessive use of tax-anticipation notes, and unwise resort to long-term borrowing.

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In 1931 the Local Government Commission was created to absorb the local government functions of the County Advisory Commission (which was abolished) and of the State Sinking Fund Commission. The Local Government Commission is "a separate and distinct division of the Department of the State Treasurer." The commission has nine members, of whom four are ex officio and five are part-time members appointed by the governor. The governor's appointees hold office at his pleasure. Two of these appointees must have had experience in local government—one as member of a county board of commissioners, and the other as chief executive officer or member of the governing body of a city or town.

COMMISSION'S SETUP

The four ex officio members are elective state officials: the state auditor, state treasurer, secretary of state, and commissioner of revenue. These four constitute the executive committee of the commission, and as such are vested with all the powers of the commission proper, except when the commission itself is in session. As the commission is required to meet only once in every quarter, the executive committee is a very powerful body.

The state treasurer is chairman and treasurer of the commission, and director of local government. He appoints the staff of the commission and, subject to appropriations and concurrence of the state's director of personnel, fixes their compensation. In turn the staff members are by law responsible to him.

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A sound understanding of the commission's work requires that the statute's listing of powers should not be read as if it described what the commission actually does. With this, as with most governmental agencies, there are some powers that

are fully used, some that are used cautiously, and still others that are dead letters in practice. The Local Government Commission has vast powers over local debt administration, but if it had used these powers fully, antagonized local officials, ignored public opinion, and, in general, neglected to temper the wind to the shorn lamb, the commission would not be in existence today.

In practice the most important powers of the commission have concerned the approval of bonds and tax-anticipation notes, the marketing of bonds and notes, and the negotiating of refinancing plans. All bonds and tax-anticipation notes proposed for issuance by local governments must be submitted to the commission for its approval. In deciding whether or not it will approve the issue, the commission must consider the necessity or expediency of the issue, the reasonableness of its amount, the adequacy of sinking funds, the burdensomeness of the tax rate that would be necessitated by the new issue, the status of the unit with regard to defaults, its compliance with budgetary control laws, and its tax collection record during the preceding fiscal year. If the commission believes that the proposed bond or note issue does not qualify under the statutory tests, it notifies the local unit, which may then demand a public hearing. If, after such a hearing, the commission still disapproves of the issue, it enters an order to that effect.

According to the statute, the local unit may take the question to the people in an election, but if it does not do so, or if a majority of those voting in the election do not favor the issue, the bonds or notes cannot be issued. It is notable that the commission's disapproval of bond issues has only once been overruled by popular vote in the local unit.

Even if the commission approves the issue, the state Constitution requires that the question be submitted to the people of the unit for approval if the borrowing is for purposes that are not classified by the courts as "necessary expenses." And if the issue would make the total borrowings during the fiscal year exceed two thirds of the amount by which the outstanding indebtedness of the local unit was reduced during the preced-

ing fiscal year, it must be submitted to the people even if it is for a "necessary expense." The only exceptions to this requirement of popular approval relate to funding or refunding existing debt, issuing tax-anticipation notes not exceeding 50 per cent of the taxes due during the fiscal year, supplying a casual deficit, suppressing riots or insurrections, and repelling invasions.

The practical operation of this procedure has emphasized early discouragement of applications for approval of unsound bond and note issues rather than formal disapprovals of such applications by the commission. In reality a representative of a local government unit which desires to issue bonds or notes has a conference with a member of the Local Government Commission's staff. Practically all unsound proposals are killed at that stage.

Similarly, applications for a new issue of tax-anticipation notes might well be discouraged at the start if they are proposed by a town that has recently been embarrassed by its burden of such notes. The commission relies heavily on the recommendations of its assistant director, so local units are naturally inclined to meet such objections as he may have to a proposed issue.

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APPRAISAL OF WORK

There are no fixed standards for appraising the commission's work of approving bonds and notes. Statistics show a net reduction of the bonded indebtedness of local government of $56 million between 1932 and 1940. This is almost 15.5 per cent of the 1932 debt. The pressure of depression demands for new and increased local services, the tempting offers of the federal government to partially subsidize locally sponsored construction projects, and the search for means of raising revenue other than by further taxes on property might well have led to a net increase of indebtedness had it not been for the commission's control over contraction of new debt by local governments. But there is no scientific way to discover whether

or not this control was actually the determining factor in turning the trend in the other direction. Nor can we say whether or not the commission should have adopted a stronger policy that would have effected a still greater reduction in net indebtedness.

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Broadly speaking, the commission has given satisfaction. Through its refinancing plans it has succeeded in reducing the number of local governments in default on their debt obligations. Nine counties and twenty-five towns are still in default, but for seven of these counties and six of the towns, refinancing plans are in process of negotiation.

Comparing the present number of defaulting units with the number of such units in 1933, the commission has been about 85 per cent effective in removing the stigma of default from the local governments of the state. This rough measure of effectiveness should be qualified by the observation that most of the towns still in default are of small size, and that if the negotiations now in progress for some of these units are consummated the percentage of effectiveness will be increased.

There is practically unanimous agreement that the commission has performed an invaluable service to local governments in effecting remarkable reductions in interest rates. Some of this reduction has been accomplished through skillful refinancing work, and some of it through the superior marketing facilities of the commission. Of course, the generally favorable market for local bonds during the depression accounts for part of the reduction, but the commission has shrewdly taken advantage of market conditions.

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No. 48

It is generally agreed that the effectiveness and perpetuity of a vigorous democracy depend upon strong local institutions. The advantages of decentralized administration in educating citizens and

in strengthening free government are set forth in the classic statement by Alexis de Tocqueville which is here reprinted in part. De Tocqueville, a young French aristocrat and lawyer, traveled widely in the United States for several months in 1831–1832. His famous work *Democracy in America* was first published in Paris in 1835 and 1840 and was soon translated into many languages. It is not too much to say that most of the theoretical arguments in favor of local self-government as contrasted with centralization since de Tocqueville's day have been little more than restatements of his conclusions.

DEMOCRACY IN AMERICA[5]

The system of decentralized administration produces several different effects in America. The Americans seem to me to have outstepped the limits of sound policy in isolating the administration of the government; for order, even in secondary affairs, is a matter of national importance.* As the state has no administrative functionaries of its own, stationed on different points of its territory, to whom it can give a common impulse, the consequence is that it rarely attempts to issue any general police regulations. The want of these regulations is severely felt and is frequently observed by Europeans. The appearance of disorder which prevails on the surface leads one at first to imagine that society is in a state of anarchy; nor does one perceive one's mistake till one has gone deeper into the subject.

[5] Alexis de Tocqueville, Tr. by Henry Reeve, ed. by Francis Bowen, Vol. I, Appleton-Century-Crofts, Inc., New York, 1898, pp. 111–117, 118–119, and 120.

* The authority that represents the state ought not, I think, to waive the right of inspecting the local administration, even when it does not itself administer. Suppose, for instance, that an agent of the government was stationed at some appointed spot in each county to prosecute the misdemeanors of the town and county officers, would not a more uniform order be the result, without in any way compromising the independence of the township? Nothing of the kind, however, exists in America; there is nothing above the county courts, which have, as it were only an incidental knowledge of the administrative offenses they ought to repress.

Certain undertakings are of importance to the whole state; but they cannot be put in execution, because there is no state administration to direct them. Abandoned to the exertions of the towns or counties, under the care of elected and temporary agents, they lead to no result, or at least to no durable benefit.

The partisans of centralization in Europe are wont to maintain that the government can administer the affairs of each locality better than the citizens can do it for themselves. This may be true when the central power is enlightened and the local authorities are ignorant; when it is alert and they are slow; when it is accustomed to act and they to obey. Indeed, it is evident that this double tendency must augment with the increase of centralization, and that the readiness of the one and the incapacity of the others must become more and more prominent. But I deny that it is so when the people are as enlightened, as awake to their interests, and as accustomed to reflect on them as the Americans are. I am persuaded, on the contrary, that in this case the collective strength of the citizens will always conduce more efficaciously to the public welfare than the authority of the government. I know it is difficult to point out with certainty the means of arousing a sleeping population and of giving it passions and knowledge which it does not possess; it is, I am well aware, an arduous task to persuade men to busy themselves about their own affairs. It would frequently be easier to interest them in the punctilios of court etiquette than in the repairs of their common dwelling. But whenever a central administration affects completely to supersede the persons most interested, I believe that it is either misled or desirous to mislead. However enlightened and skillful a central power may be, it cannot of itself embrace all the details of the life of a great nation. Such vigilance exceeds the powers of man. And when it attempts unaided to create and set in motion so many complicated springs, it must submit to a very imperfect result or exhaust itself in bootless efforts.

Centralization easily succeeds, indeed, in subjecting the external actions of men to a certain uniformity, which we come

at last to love for its own sake, independently of the objects to which it is applied, like those devotees who worship the statue and forget the deity it represents. Centralization imparts without difficulty an admirable regularity to the routine of business; provides skillfully for the details of the social police; represses small disorders and petty misdemeanors; maintains society in a *status quo* alike secure from improvement and decline; and perpetuates a drowsy regularity in the conduct of affairs which the heads of the administration are wont to call good order and public tranquillity;* in short, it excels in prevention but not in action. Its force deserts it when society is to be profoundly moved, or accelerated in its course; and if once the cooperation of private citizens is necessary to the furtherance of its measures, the secret of its impotence is disclosed. Even while the centralized power, in its despair, invokes the assistance of the citizens, it says to them: "You shall act just as I please, as much as I please, and in the direction which I please. You are to take charge of the details without aspiring to guide the system; you are to work in darkness; and afterward you may judge my work by its results." These are not the conditions on which the alliance of the human will is to be obtained; it must be free in its gait and responsible for its acts, or (such is the constitution of man) the citizen had rather remain a passive spectator than a dependent actor in schemes with which he is unacquainted.

It is undeniable that the want of those uniform regulations which control the conduct of every inhabitant of France is not infrequently felt in the United States. Gross instances of social indifference and neglect are to be met with; and from time to

* China appears to me to present the most perfect instance of that species of well-being which a highly centralized administration may furnish to its subjects. Travelers assure us that the Chinese have tranquillity without happiness, industry without improvement, stability without strength, and public order without public morality. The condition of society there is always tolerable, never excellent. I imagine that when China is opened to European observation, it will be found to contain the most perfect model of a centralized administration that exists in the universe.

time disgraceful blemishes are seen, in complete contrast with the surrounding civilization. Useful undertakings which cannot succeed without perpetual attention and rigorous exactitude are frequently abandoned; for in America, as well as in other countries, the people proceed by sudden impulses and momentary exertions. The European, accustomed to find a functionary always at hand to interfere with all he undertakes, reconciles himself with difficulty to the complex mechanism of the administration of the townships. In general it may be affirmed that the lesser details of the police, which render life easy and comfortable, are neglected in America, but that the essential guarantees of man in society are as strong there as elsewhere. In America the power that conducts the administration is far less regular, less enlightened, and less skillful, but a hundredfold greater than in Europe. In no country in the world do the citizens make such exertions for the common weal. I know of no people who have established schools so numerous and efficacious, places of public worship better suited to the wants of the inhabitants, or roads kept in better repair. Uniformity or permanence of design, the minute arrangement of details,* and the perfection of administrative

* A writer of talent who, in a comparison of the finances of France with those of the United States, has proved that ingenuity cannot always supply the place of the knowledge of facts, justly reproaches the Americans for the sort of confusion that exists in the accounts of the expenditure in the townships; and after giving the model of a departmental budget in France, he adds: "We are indebted to centralization, that admirable invention of a great man, for the order and method which prevail alike in all the municipal budgets, from the largest city to the humblest commune." Whatever may be my admiration of this result, when I see the communes of France, with their excellent system of accounts, plunged into the grossest ignorance of their true interests, and abandoned to so incorrigible an apathy that they seem to vegetate rather than to live; when, on the other hand, I observe the activity, the information, and the spirit of enterprise in those American townships whose budgets are neither methodical nor uniform, I see that society there is always at work. I am struck by the spectacle; for, to my mind, the end of a good government is to ensure the welfare of a people, and not merely to establish order in the midst of its misery. I am therefore led to suppose that the prosperity of the American townships and the

system must not be sought for in the United States; what we find there is the presence of a power which, if it is somewhat wild, is at least robust, and an existence checkered with accidents, indeed, but full of animation and effort.

Granting, for an instant, that the villages and counties of the United States would be more usefully governed by a central authority which they had never seen than by functionaries taken from among them; admitting, for the sake of argument, that there would be more security in America, and the resources of society would be better employed there, if the whole administration centered in a single arm—still the *political* advantages which the Americans derive from their decentralized system would induce me to prefer it to the contrary plan. It profits me but little, after all, that a vigilant authority always protects the tranquillity of my pleasures and constantly averts all dangers from my path, without my care or concern, if this same authority is the absolute master of my liberty and my life, and if it so monopolizes movement and life that when it languishes everything languishes around it, that when it sleeps everything must sleep, and that when it dies the state itself must perish.

There are countries in Europe where the native considers himself as a kind of settler, indifferent to the fate of the spot which he inhabits. The greatest changes are effected there without his concurrence, and (unless chance may have apprised him of the event) without his knowledge; nay, more, the condition of his village, the police of his street, the repairs of the church or the parsonage, do not concern him; for he looks upon all these things as unconnected with himself and as the property of a powerful stranger whom he calls the government. He has only a life interest in these possessions, without the spirit of ownership or any ideas of improvement. This want of interest in his own affairs goes so far that if his own safety or that of his children is at last endangered, instead of

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apparent confusion of their finances, the distress of the French communes and the perfection of their budget, may be attributable to the same cause. At any rate, I am suspicious of a good that is united with so many evils, and I am not averse to an evil that is compensated by so many benefits.

trying to avert the peril, he will fold his arms and wait till the whole nation comes to his aid. This man who has so completely sacrificed his own free will does not, more than any other person, love obedience; he cowers, it is true, before the pettiest officer, but he braves the law with the spirit of a conquered foe as soon as its superior force is withdrawn; he perpetually oscillates between servitude and license.

When a nation has arrived at this state, it must either change its customs and its laws, or perish; for the source of public virtues is dried up; and though it may contain subjects, it has no citizens. Such communities are a natural prey to foreign conquests; and if they do not wholly disappear from the scene, it is only because they are surrounded by other nations similar or inferior to themselves; it is because they still have an indefinable instinct of patriotism; and an involuntary pride in the name of their country, or a vague reminiscence of its bygone fame, suffices to give them an impulse of self-preservation.

It is not the *administrative,* but the *political* effects of decentralization that I most admire in America. In the United States the interests of the country are everywhere kept in view; they are an object of solicitude to the people of the whole Union, and every citizen is as warmly attached to them as if they were his own. He takes pride in the glory of his nation; he boasts of its success, to which he conceives himself to have contributed; and he rejoices in the general prosperity by which he profits. The feeling he entertains toward the state is analogous to that which unites him to his family, and it is by a kind of selfishness that he interests himself in the welfare of his country.

To the European, a public officer represents a superior force; to an American, he represents a right. In America, then, it may be said that no one renders obedience to man, but to justice and to law. If the opinion that the citizen entertains of himself is exaggerated, it is at least salutary; he unhesitatingly confides in his own powers, which appear to him to be all-sufficient. When a private individual meditates an undertaking, however directly connected it may be with the welfare of society, he

never thinks of soliciting the cooperation of the government; but he publishes his plan, offers to execute it, courts the assistance of other individuals, and struggles manfully against all obstacles. Undoubtedly he is often less successful than the state might have been in his position; but in the end the sum of these private undertakings far exceeds all that the government could have done.

I believe that provincial institutions are useful to all nations, but nowhere do they appear to me to be more necessary than among a democratic people. In an aristocracy order can always be maintained in the midst of liberty; and as the rulers have a great deal to lose, order is to them a matter of great interest. In like manner an aristocracy protects the people from the excesses of despotism because it always possesses an organized power ready to resist a despot. But a democracy without provincial institutions has no security against these evils. How can a populace unaccustomed to freedom in small concerns learn to use it temperately in great affairs? What resistance can be offered to tyranny in a country where each individual is weak and where the citizens are not united by a common interest? Those who dread the license of the mob and those who fear absolute power ought alike to desire the gradual development of provincial liberties.

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