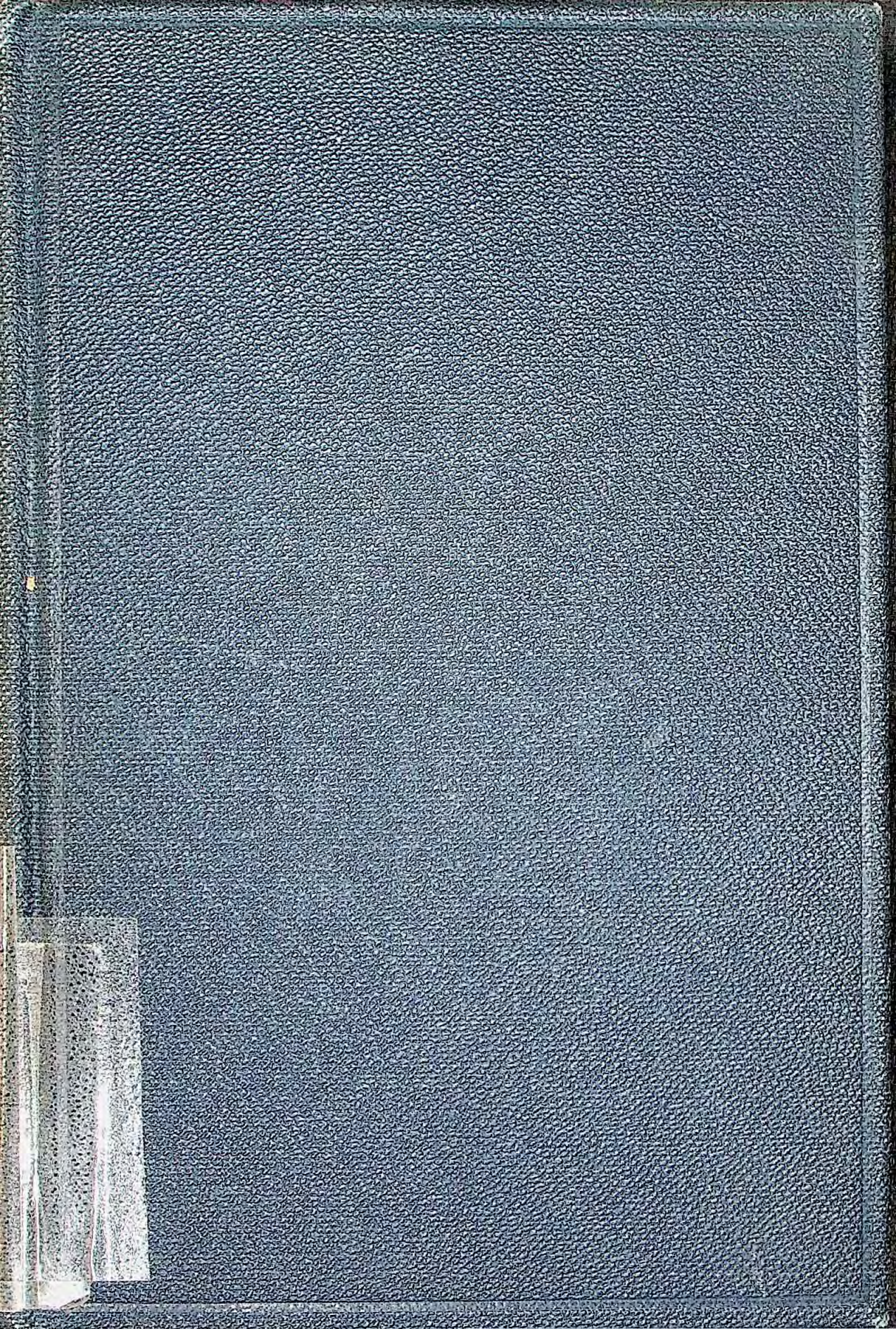

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AMERICAN GOVERNMENT AND POLITICS

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AMERICAN GOVERNMENT AND POLITICS

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BY

CHARLES A. BEARD

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FOURTH EDITION THOROUGHLY REVISED

المعهد العالي للدراسات الدولية
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PREFACE TO THE FIRST EDITION

THE several excellent manuals on American Government now available are written primarily for high schools, and there seems to be room for a volume, not too elementary nor yet too technical, designed for college students and for citizens wishing a general survey of our political system. This volume, taken in conjunction with the companion work, *Readings in American Government and Politics* (cited in the footnotes as *Readings*), is intended to fill this gap. It is not a contribution to political literature, but is frankly based upon the best authorities of recent times.

I have many personal debts to acknowledge. My colleagues, Professors Dunning, Goodnow, Munroe Smith, Shepherd, and G. W. Scott, and Mr. Sait have read portions of the manuscript or proof, and have given firmness to every page they have touched. Dr. Howard McBain has read the parts on Federal and State Government, and through his extensive knowledge of practical politics and administration I have been saved many slips. I am also indebted to him for innumerable corrections in perspective and interpretation. Professor A. R. Hatton has read the chapters on Municipal Government and, in addition to making a number of rectifications, he has shown me how much better they could have been done. Mr. Arthur Crosby Ludington has aided me materially with ballot and primary legislation. Mr. Alexander Holtzoff has helped me at every point in the making of the volume; two chapters, on National Resources and the State Judicial System, were drafted by him under my direction; and I owe him a debt which no mere line in a preface can pay. In planning and executing the work, I have had the constant and discriminating assistance of my wife. Notwithstanding all this coöperation, I must take the burden of responsibility for errors and shortcomings. Only one

who has gone over the same ground can appreciate how many there are; but I trust they will be viewed with charity by those who know how difficult a thing it is to describe a complex political organism which is swiftly changing under our very eyes.

CHARLES A. BEARD.

COLUMBIA UNIVERSITY,
April, 1910.

PREFACE TO THE FOURTH EDITION

For this edition the original text has been completely revised and nearly all of it rewritten. I have reduced the historical sections and placed them with the chapters on current politics to which they relate. I have written a new introduction which seems to offer a better approach than the historical method — one more calculated to enlist at the very outset the interest of the student in practical politics and government. An effort has been made to bring the entire volume up to date, both in letter and spirit. A multitude of details has been deliberately omitted to make room for a discussion of fundamental principles and practices.

I am deeply indebted to Mr. A. E. Buck and Dr. Luther Gulick, of the National Institute for Public Administration, for counsel and advice. I am under very special obligations to Professor Arthur W. Macmahon, of Columbia University, who has given me critical and constructive suggestions of the highest value.

Charles A. Beard.

New Milford, Conn.,
April, 1924.

TABLE OF CONTENTS

PART I

THE LARGER ASPECTS OF GOVERNMENT

CHAPTER		PAGE
I.	The Rôle of Government in Modern Civilization	3
II.	Democracy and the Organization of Government	16
III.	Administration in a Great Society	38

PART II

THE NATIONAL GOVERNMENT

IV.	The Historic Spirit of the Constitution	58
V.	The National Constitution as a Changing Organism	81
VI.	The General Principles of the Federal System	102
VII.	Political Parties and the Processes of Government	125
VIII.	The Nomination and Election of the President	163
IX.	The Office of President	189
X.	The Organization of Congress	222
XI.	The General Powers of Congress	242
XII.	Congress at Work	257
XIII.	The National Judiciary	284
XIV.	Administrative Organization and Civil Service	303
XV.	Foreign Affairs	323
XVI.	National Defense	349
XVII.	Taxation and Finance	363
XVIII.	Commerce, Industry, Labor, and Communications	382

CHAPTER		PAGE
XIX.	The Conservation and Administration of Natural Resources	414
XX.	Territories and Empire	430
XXI.	National Standards and State Relations	442

PART III

STATE AND LOCAL GOVERNMENT

XXII.	Tendencies in State Constitutional Development	451
XXIII.	The Constitutional Basis of State Government	473
XXIV.	Popular Control in State and Local Government	503
XXV.	State and Local Politics	525
XXVI.	The Office of Governor	558
XXVII.	State Administration	575
XXVIII.	The State Legislature	592
XXIX.	The Judicial System	622
XXX.	State Financial Management	654
XXXI.	Economic and Social Functions	672
XXXII.	Municipal Organization and Finance	700
XXXIII.	Municipal Functions	731
XXXIV.	Local Rural Government	769

Appendix:

Constitution of the United States	789
Bibliographical Note	803
Index	813

AMERICAN GOVERNMENT AND POLITICS

PART I

THE LARGER ASPECTS OF GOVERNMENT AND POLITICS

CHAPTER I

THE RÔLE OF GOVERNMENT IN MODERN CIVILIZATION

The work of modern government runs to the roots of life, liberty, property, and the pursuit of happiness. From the cradle to the grave we are within the sphere of its activity and influence. Our births are registered in its official records; it provides schools for our education. We cannot be married without its license, or enter any of the liberal professions without conforming to its standards and securing its sanction. At any time we may be called upon to surrender, for its uses, a large share of our property, in addition to ordinary taxes; to fight for it; and if need be die for it. Wherever we live and work we enjoy its benefits and protection and are subject to its restraints. There is no field of industry, commerce, or labor which it does not enter. It is the symbol of national unity, the pledge of national continuity. Our peace, security, comfort, health, and well-being, in an ever increasing measure, depend upon the wisdom of its policies and the efficiency of its administration. Whenever we inquire into the nature and duties of the good life we confront our responsibilities as citizens. Finally, when the race is run, a permit for our burial must be obtained from the government.

The Increase in the Functions of Government

From decade to decade the functions of government increase in number and variety. This is one of the outstanding facts of

modern civilization. It may be deplored, but it cannot be denied. It is recorded in the new offices created and in the mounting expenditures for public purposes. In 1870 the Federal Government employed approximately 50,000 civil officers; in 1900 about 250,000; in 1924 more than 500,000. While the population multiplied three fold, the number of federal employees multiplied ten times. It is estimated that there are now about 2,700,000 federal, state, and local officers and employees in the United States. The net ordinary expenditures of the Federal Government alone amounted annually to $10,000,000 in round numbers at the opening of the nineteenth century, to about $500,000,000 at its close, and to $3,679,000,000 for the year ending June 30, 1923. We do not know what was the total expenditure for governmental purposes in 1800; but we do know that the taxes collected for federal, state, and local treasuries in 1922 amounted to $7,433,000,000, or $68.37 per capita, approximately $350 per family. When the income of the average family is taken into account we see how significant are these figures. We must not make the common error of supposing that this immense burden of taxation is all due to the World War. The government of the state of New York — central and local — costs about $250 a year for every family dwelling within its borders.

The rapid growth of modern public services, calling for a vast outlay of money, is seen in the newer activities of the Federal Government alone. The functions of the Post Office have been extended to include rural free delivery, savings banks, and parcels post. Congress has created a Shipping Board with enormous powers in the sphere of shipbuilding and operation. It has established a Farm Loan Board which engages in rural banking, supervising the lending of money to farmers. It has established a Federal Trade Commission with authority to inquire into, regulate, and report on the conduct of great business corporations. It has organized a Bureau of Mines, a National Park Service, a Public Health Service, a Forest Service, a Bureau of Public Roads, and a Children's Bureau. Congress has enacted a cotton futures law, a grain standards law, and a warehouse law, all calling for expert knowledge of economic affairs. It has enacted pure food laws which can be administered only by specialists in chemistry and bacteriology. It

regulates the complicated processes of railway operation and controls the rates charged for services. But we also find state and local governments embarking upon large programs of public improvement: tenement house control, the establishment of minimum wages, mothers' pensions, preventive medicine, child hygiene, industrial hygiene, industrial insurance, workmen's compensation, the construction of hospitals, asylums, and sanatoria.

The Changing Concept of Government

Even the very concept of government — its proper functions and responsibilities — has undergone marked changes during the past fifty years. There was a time, not long ago, when able statesmen and publicists spoke firmly and confidently about the "limits on government interference" with individual liberty and property. They held that the essential function of the government was to maintain order at home and defend the country against enemies from abroad. Their views did not arise from indifference to human welfare; on the contrary they believed that the policy of non-interference, *laissez faire*, as the French called it, would work for the general good. They thought that in a society of struggling individuals each person would rise or fall in the scale of wealth and well-being according to his talents and industry. The keen and able would come to the top; they would direct industry into productive channels; all society would benefit from their labors. Those adapted by nature to the arts and crafts would find their proper levels. Thus by the free movement of individuals, without government intervention, harmony would be established, social justice would be done to all, and an ideal civilization would be created. In this scheme of things the prime function of the state was to protect property, maintain order, and defend the country. The essence of the government was *power*.

This well-rounded concept of government, although by no means entirely abandoned, has been seriously modified by events and criticism. In the first place, the idea, as far as applied in practice, did not produce the harmony, social peace, and general contentment which it was supposed would flow from it. With the growth of railways, industries, modern mechanical devices, trusts, monopolies, corporations, huge cities, and other features

of modern civilization there arose conditions and abuses which made collective action imperative.

Theodore Roosevelt described the change: "The government has been forced to take the place of the individual in a hundred different ways; in, for instance, such matters as the prevention of fires, the construction of drainage systems, the supply of water, light, and transportation. In a primitive community every man or family looks after his or its interests in all these matters. In a city it would be an absurdity to expect every man to continue to do this, or to say that he had lost the power of individual initiative because he relegated any or all of these matters to the province of public officers." In short, a thousand forces in modern civilization have been at work bringing about a multiplication of the functions of government. Some of these forces are radical; others are conservative.

Business men call upon the government to protect industries by tariffs, to grant subsidies to shipping companies, to regulate building in cities by zoning laws, and to control the rates of railways in the interests of shippers. Powerful railway unions practically compel the government, under a threat of a strike, to fix eight hours as the normal working day for trainmen on railroads. Dissatisfied farmers, burdened with debt and paying eight or ten per cent interest on loans, insist that the government embark upon rural credit enterprises and lend them money at a lower rate. Tenants in New York City, dismayed by mounting rents, insist that the state legislature come to their relief by fixing the charges of landlords at a more "reasonable" figure. Humanitarians of all classes, distressed by the poverty and suffering in the world, call upon the government to build charitable institutions and grant relief. And so the story might be lengthened to show in minute detail how the practice and theory of government vary with changing conditions.

To-day we have reached a point where the government is no longer defended or justified on the ground of mere power. Justification has shifted to the ground of its service. Indeed in times of peace the acts of state are, in the main, acts of service, not of force. The civil servants of the United States Government outnumber the military servants three to one. New York City has ten thousand policemen, but it has seventy-five thousand teachers, doctors, chemists, firemen, street cleaners, park em-

ployees, and other workers engaged in rendering vital social services to the people of the city. Even policemen do more than maintain order.

In the light of recent experience, no cautious student of government will undertake to state dogmatically just what are the proper limits of government action — just what the government at all times and places should or should not do. He sees one political party demanding one kind of government activity; and another party another kind; but at no time does he witness many drastic cuts in the amount of work already imposed upon government. The ancient doctrine that the government should not undertake any functions that can be fulfilled as well or better by private persons and companies still holds good; but it is too nebulous to serve as a sure guide in practice or to restrain the hand of a majority bent on a wide interpretation of the theory. Indeed in considering the rôle of government in modern civilization, it is a fact, not a theory, that confronts us.

Classes of Governmental Functions

Many attempts have been made to classify the numerous and varied functions of modern government. None of them is both logical and all-embracing. Broadly speaking, of course, these functions may be divided into domestic and foreign, that is, those which pertain to citizens at home and those involving relations with foreign countries. Some of the domestic functions are prohibitive in character. In other cases the government undertakes to regulate the conduct of persons and the use of property. Again, the government seeks to promote definite lines of economic or social activity by grants of money and favorable legislation. It may itself own and operate certain kinds of public enterprises. It may endeavor to control or encourage one kind of intellectual activity and restrain another. Finally it may make radical attempts to change prevailing modes of distributing wealth or economic goods by positive action directed to that end.

Under the head of prohibitive functions may be grouped a vast body of legislative and administrative measures flatly forbidding certain lines of conduct and certain uses of property. Chattel slavery, for example, once lawful throughout the United

States, is now prohibited. So are the manufacture and sale of intoxicating liquor for beverage purposes. So are all business combinations in restraint of trade designed to limit unduly the free play of competition. So are "unfair" practices in business. Under this head may be placed the whole body of criminal law laying penalties for innumerable deeds ranging from murder to smoking in restaurants. Perhaps no country in the world, except Russia, places so many restraints on what is called "personal liberty," the right to do as one pleases in personal conduct and in the use of property. Some of the prohibitions are framed in the interest of public order; others in the interest of economic groups; still others to enforce moral standards entertained by the majority that governs. Since such measures cover the whole field of commerce, industry, and social intercourse, it is evident that their formulation, interpretation, and enforcement involve profound questions in economics, ethics, and sociology.

The regulative functions of government, as distinct from the prohibitive, are designed to control the use of private property in the interest of public health, safety, and economic advantage. There has long obtained in the law a theory to the effect that the government may fix the rates charged by any private enterprise "affected with public interest." In accordance with this doctrine, governments regulate the rates and charges of railway, gas, electric, street car, telephone, telegraph, and other public utility companies.

In recent times the term "public interest" has been widened in its scope. The Federal Coal Commission, which reported on the coal problem in 1923, declared that the mining of anthracite was "affected with public interest." This was merely affirming a principle announced two years before by a Colorado court in sustaining the validity of an act prohibiting, previous to investigation, strikes and lockouts in every business affected with a public interest. "We must take judicial notice," said the court, "of what has taken place in this and other states, and that the coal industry is vitally related, not only to other industries, but to the health and even the life of the people. Food, shelter, and heat before all others are the great necessities of life and in modern life heat means coal." Well may the commentator, Professor R. E. Cushman, add: "This is a line of reasoning which raises the query whether the courts may not yet come to

the point of defining businesses affected with a public interest in simple terms of human necessity."[1]

Supplementing the doctrine just mentioned is that of "the police power." It is a principle of American law that the state governments possess the right to regulate persons and property in the interest of the general welfare. This is a very vague phrase, and in practice it means just what the courts of law permit. Under the police power, however, there has been enacted a wide range of legislation pertaining to factories, hours of labor, the construction of buildings in cities, the elimination of conditions dangerous to health and safety in mines, mills, and shops, and the location of obnoxious industries.

By no means all the functions of government are restrictive in character. On the contrary the government may aid and promote private enterprise by tariffs on imported goods, bounties to certain industries, and subsidies to shipping concerns. It lends its support to manufacturers and merchants seeking to develop trade and secure concessions in foreign countries. Many who object strenuously to "government interference" in other connections approve assistance to private industry, especially if they are the beneficiaries.

Our various governments, federal, state, and local, are operators on a large scale; they construct, own, and direct many economic undertakings. The National Government manages the postal system, the Panama canal, a railway in Alaska, the forest reserves, and institutions for sick and disabled soldiers. Some of the states own and operate canals, warehouses, mines, and mills. In cities the principle of public operation has been widely applied. A great majority of them own water works and sewage systems; many of them, especially the smaller towns, operate electric light plants; and a few, notably Seattle, Detroit, and San Francisco, manage street railway lines. In some cases the government owns but does not operate. For instance, the Federal Government holds a large number of water power sites and leases them to private concerns. The same practice is applied to mineral and oil resources on the federal domain. The city of New York owns the subway system but rents it to operating companies for a long term of years.

In addition to the assumption of the above functions relating

[1] *The Political Science Review*, Vol. XVI, p. 474 (1922).

to property and conduct, the government enters the realms of science, education, and opinion. It fosters science by the establishment of institutions for research and by the promotion of inquiries and investigations into numerous problems of a practical character. Many states support education by maintaining a complete school system reaching from the kindergarten to the graduate departments of the university. In time of war the National Government carries on an immense propaganda to sustain its activities and discomfit its opponents. Even in times of peace it influences public opinion by numerous publications, by official and unofficial interviews, by direct statements to the press, and by "it-is-reported-on-high-authority" stories given to newspaper correspondents. It excludes from the mails certain radical and objectionable books and papers. It fines and imprisons persons who express orally or in print unlawful opinions. Indeed California even goes so far as to imprison a person who merely belongs to a labor organization committed to radical doctrines even though the accused himself may never have expressed objectionable opinions.

We must also take note of a large group of functions and regulations designed to mitigate or level down some of the adversities and inequalities of fortune which were once supposed to be the product of a natural law governing the distribution of wealth. From the days of Aristotle to our own time, statesmen have believed that the concentration of wealth, on the one hand, and the existence of widespread poverty, on the other, are dangerous to the safety of society. "The freest government," said Daniel Webster, "if it could exist, would not long be acceptable if the tendency of the laws were to create a rapid accumulation of property in a few hands and render the great mass of the population dependent and penniless. In such a case, the popular power must break in upon the rights of property or else the influence of property must limit and control the exercise of popular power." It was on this ground that President Roosevelt advocated a heavy inheritance tax. "Such a tax," he said, "would help preserve a measurable equality of opportunity for the people growing to manhood. . . . There are some respects in which men are obviously not equal, but . . . there should be an equality of rights before the law, and at least an approximate equality in the conditions under which each man

obtains the chance to show the stuff that is in him when compared to his fellows."

From assumptions of this character, supplemented by other reasons, federal and state governments pursue economic policies which affect vitally the distribution of wealth. We have abolished in the United States the ancient rule of primogeniture — according to which all of a dead man's landed property goes to his eldest male heir — for the avowed purpose of preventing great accumulations of land in the hands of a privileged class. We impose heavy taxes on private incomes and inheritances, increasing in amount with the size of the income or fortune, and use the proceeds to maintain educational and charitable institutions from which those who have no property derive immense benefits. Indeed there has grown up in American theory and practice the concept that undeserved poverty — the greatest curse springing from inequalities of fortune — may be extirpated by various measures, such as mothers' pensions, workmen's insurance, old-age pensions, and benevolent institutions. In short, the government is now viewed as a collective agency for waging war on the five deadly enemies of mankind: ignorance, poverty, disease, waste, and inhumanity.

So far we have spoken of the domestic functions of government. There remains another vitally important sphere of work committed entirely to the Federal Government, namely, the management of foreign affairs. In this sphere, the outstanding function is that of declaring who are to be deemed enemies of the nation and of waging war on them. The making of peace, like the making of war, is also a function of government. How technical and difficult that task can be is revealed in the history of the negotiations which closed the World War. In times of peace, foreign relations are also complex and difficult to manage. There are innumerable treaties relative to communications and the transactions of commerce which must be negotiated, revised, and enforced by the Federal Government. Very recently there has grown up the idea that it is the duty of the state to provide for keeping the peace as of old for breaking it. Offshoots of this concept are the League of Nations and other schemes for outlawing war. Associated with it, at least in some respects, was the Washington Conference of 1921–22, which resulted, among other things, in the limitation of naval armaments.

The manner in which a government discharges its domestic and foreign obligations may have the most tragic as well as the more fortunate consequences for a nation. Internal revolutions and foreign wars are chiefly responsible for the decline and fall of kingdoms, empires, and republics. An unwise, tyrannical, or oppressive government may permit or actually bring about an accumulation of evils which will end in social revolution and, if not in the destruction of society itself, at least in a long period of suffering and chaos. Illustrations of this truth so crowd the pages of history that none need be cited here. An injudicious foreign policy may plunge a nation into a foolish war with a foreign power or combination of powers and result in its dissolution and partition. The decline and fall of nations, always accompanied by indescribable suffering and usually the destruction of the arts, is a favorite subject of speculation for the philosophers. Indeed no one can think long and seriously about the problems of government without coming face to face with its historic mission in the scheme of life.

The Significance of the Study of Government and Politics

It is not necessary to elaborate the general principles here advanced. Enough has been said to show the immense importance of studying government in all its branches and ramifications. There is no field of human thought upon which it does not impinge. Theologians and philosophers wrestling with the origin and destiny of mankind meet it at every point. Teachers of ethics inquiring into the essence of right conduct must take it into consideration. Men of science making revolutionary inventions may exert upon it a more profound influence than all the reformers who attack it directly. The business man who conducts his enterprise under its regulations must know about its sphere of control. The labor leader, dealing with matters of organization and industrial disputes, comes into constant conflict with its limitations and decrees. The city dweller is especially dependent upon its efficient operation; the farmer on the lonely plain is not beyond the reach of its services. Every citizen, whatever his profession or interest, must be informed about its structure and functions, his points of contact with it, his rights and obligations under it; for, in a democracy, it so happens

that, while he is ruled by the government, he may by his own conduct and opinions in turn influence public policies and help to prepare the national fate.

From what has just been said it may be inferred that the study of government is complex and difficult. That is true. To paraphrase the language of a celebrated English writer on law, Maitland, such is the unity of the subject that the first sentence dealing with government tears a seamless web too large for any human eye. Like every other science, the study of government begins by laying hold of some definite and tangible facts and advances by tracing their myriad relations until they are lost in the great complex of things. We start with the outward and visible signs of government — the public agents and officials charged with specific duties. We work out into the field of political parties organized to secure control of the government authorities. Then we pass beyond into the sources of party divisions and party strength.

The narrower the view of the subject the more unimportant are the conclusions derived from an examination of it. Buckle finely says: "No one can have a firm grasp of any science if, by confining himself to it, he shuts out the light of analogy. He may no doubt work at the details of the subject; he may be useful in adding to its facts; but he will never be able to enlarge its philosophy. For the philosophy of every department depends upon its connection with other departments and must therefore be sought at their points of contact. It must be looked for in the place where they touch and coalesce: it lies not in the center of each science but on the confines and margin." This truth, so profound, so ancient, but so often forgotten or neglected, ought to be implanted in the mind of everyone who enters upon the study of any field of modern knowledge.

It applies to politics and government as well as to the various subdivisions of natural science, and it is an interesting fact that the older writers appreciated it more thoroughly perhaps than scholars in our own time. The Greek philosopher, Aristotle, writing on politics more than three hundred years before Christ, fused history, ethics, economics, administration, public policies, and government into one organic whole. He considered first the constitution and function of the family, making some pertinent reflections on the characteristics and variability of human nature;

he then moved to the subject of property in its multiform relationships. Having surveyed the family and property and the production and distribution of wealth, Aristotle proceeded to the consideration of the forms and nature of government, the causes of revolutions, and the problems of statesmanship. At no time did he lose sight of ethics. The aim of the family and of property, as of the state, was the best life. Property as a means of getting more property or as an end in itself was inconceivable to him. Statesmanship as the art of gaining power and holding it was to him an unworthy concept. Always before him he held an ethical ideal: what is the best kind of society of which human nature is capable? The mere description of government without explanation and without reference to ideal ends would have been to Aristotle, as to Buckle, no science at all, — merely a collection of more or less useful but unrelated data.

A number of forces have conspired to narrow the outlook of modern writers, especially in the field of political economy. During the later years of the eighteenth century, when democratic forces were battling heavily with monarchies in the Old World and the New, there naturally arose the idea that government was an evil — a necessary evil — and that its control over human beings should be restricted to the narrowest limits. "The less government the better!" exclaimed the Jeffersonians. Somewhat later, in England, the mill owners, resenting government interference with their affairs, particularly as regards hours of work, insisted that governments should not meddle with economic matters. Writers, seeking social laws inherent in the nature of things, divided political economy into politics and economics, and put them asunder. Of course it was unscientific for men to speak of the production and distribution of wealth apart from the government which defines, upholds, taxes, and regulates property — the very basis of economic operations — but nevertheless it was done.

There was another force, perhaps more potent still, which contributed to narrowing the concept of government and politics. Ours is an age of intense specialization and enormous accumulations of facts. Every field of knowledge is so vast that the workers therein are driven, in their endeavor to see things as they really are, deeper and deeper into the details of their subject. They shrink from making large generalizations and venturing

far afield to trace the confines of their special branch. Thus the sciences that deal with mankind are broken up into economics, politics, ethics, law, anthropology, psychology, and so on. Books on politics now deal mainly with the forms of government, the machinery and methods of elections, the powers and duties of public officers. The problems of conduct are left to the moralist, the texture of society to the sociologist, the operations of the mind to the psychologist, and the production of wealth — the foundation of physical life — is assigned to the economist. In one respect this specialization is wholesome. It strikes at the roots of superficial dogmatism. But it tends to make each subject dry, matter of fact, and unreal.

It may be that in the future there will come another age of unity and concentration. Perhaps a new Aristotle will arise, combine the subjects which deal with human conduct and give us a great, synthetic, modern treatise on mankind in society. But no such Aristotle is in sight; for the present we are unfortunately confined to partial glimpses of unity — broken fragments like politics, economics, history, ethics, and psychology. Therefore we must be on our guard against the limitations of each fragment, especially those of us who want to know about life and conduct as a whole rather than to accumulate facts about some minute part of it. The life of the citizen is not divided into branches of knowledge; into compartments. To him an understanding of tendencies, breadth of view, and the spirit of scientific inquiry are more important than the amassing of facts, than mere information about facts, which after all are constantly changing and are abundantly recorded in manuals for practitioners.

CHAPTER II

DEMOCRACY AND THE ORGANIZATION OF GOVERNMENT

It will aid us in studying American government and politics in detail if we first make a survey of certain fundamental problems that are common to all governments resting on a popular foundation — national, state, municipal, and rural. To consider them now will avoid duplication later. It will also give us a larger background against which to measure each of them in its specific form. It will guard us against surprise at propositions purporting to be new and against that dogmatism which comes from a restricted vision. Moreover it should help to enlarge our capacity for evaluating duties as well as understanding concrete situations. It is the privilege of us all to contribute at least in a small way to shaping the spirit, form, and practice of our government. We do not pretend that our system was handed down to us from time immemorial by a divine-right king or cast in an unchanging mold by the fathers of the republic. It is a mutable organism committed to our keeping, and each of us may play the part of wisdom or folly with it. Of course it is not always easy to discover just what is the way of wisdom, but we know that mankind does advance by taking thought, by showing curiosity about new things, by making contrasts and comparisons, by illuminating daily questions with the light of analogy.

No matter whether it is the national, state, county, city, village, or township government which is under consideration, certain fundamental problems of organization appear. It is an established principle that "the will of the people," not a monarch or a privileged class, shall be the source of all governmental authority in the United States. Hence provisions are necessary for registering the will of the people. Laws and ordinances must be made and enforced; therefore there must be legislative, executive, and judicial departments or authorities charged with the discharge of these functions. The times change; so the Congress

at Washington, the legislature at the state capital, the council in the city hall, and the board of supervisors at the county seat must give heed to changing opinion, discover what new work must be done, and find ways and means of accomplishing it. Great powers over life, liberty, and property are vested in the agents of government; how can those agents be restrained from arbitrary acts and held to strict accountability for their conduct? Since the people rule, and of necessity through majorities, what rights should be granted to minorities and how are those rights to be maintained against overbearing majorities? A progressive idea in government, as in other spheres, according to Macaulay's formula, starts with the individual thinker; it advances to a minority; then a large minority; then a majority; and finally general acceptance. The deep resources of the human mind are the hope of all great advance in the future. Hence the importance of providing through the machinery of government and politics for the free expression of novel ideas, the fair and full discussion of them, and the rendering of judgment by the people.

The People and the Expression of Their Will

Who should be included among "the people" in the political sense? Obviously, not all the inhabitants of the country, not the children, not the criminals in prison, not the aliens of temporary residence. What should be the limits — the qualifications on the suffrage? This question has been the storm center of politics in all parts of the world for three centuries or more. Upon decisions respecting it have hung the fate of governments, rulers, statesmen, and whole classes. Some of the great revolutions that have shaken the modern world have sprung from agitations over it. At last it seems established as a general rule that, politically speaking, the people, the voters, should consist of all adults. But there are still many exceptions to universal suffrage, even in the United States, in spite of all agitations and constitutional amendments. Around the fringes of the question still hover many debates. In the Southern states negroes are in the main excluded from the ballot; in a large number of states illiterates are denied the ballot. In all states a certain term of residence is required before the citizen can exercise the right of voting and thousands of people are thereby excluded from the

polls at every election. In some cases only tax-payers can vote, especially on proposals to issue bonds and increase debts; as late as 1922 a project to limit the suffrage to tax-payers in cases involving an increase in the state debt was laid before the voters of Arizona and rejected. In fact there is no uniform suffrage in the United States. The federal Constitution does not establish a principle that makes it uniform. It provides in the Fifteenth and Nineteenth amendments that no one shall be denied the right to vote on account of race, color, previous condition of servitude, or sex; but subject to those restrictions any state may decide for itself who shall be included among the "people." The states are still debating the question in one form or another, although in theory the broad principle of universal suffrage is firmly fixed.[1]

What is the "will" of the people? If we stop to analyze ourselves and study our neighbors, we soon discover that we do not have very much will or determination about anything political. Not often are we called upon to make a clean-cut choice between two alternatives or from among a number of variants. We drift about more or less aimlessly amid the circumstances of life in which birth, education, employment, and amusements place us. In domestic and foreign politics, involving immense and complicated issues, sometimes as far removed from our daily lives as the "Open Door in China," we drift even more aimlessly, buffeted here and there by vague ideas and curious impulses aroused by hearing people talk and reading partisan newspapers. Our information is slight, the matters concerning which we are supposed to hold opinions are not clearly defined, and the amount of attention we can give to them is limited by the pressure of making a living and by natural indolence. It is far easier to play Mah Jong, bridge, or golf than to read the financial reports of the Government of the United States or of the city treasurer or county auditor. At times we are alert and profoundly stirred. Again we are hopelessly torpescent. Consequently many political writers are inclined to laugh at the very idea of the "will of the people."

Nevertheless, the force which we attempt to cover by that phrase is a real one. It is manifest in popular revolutions, in

[1] See below, chap. xxiii. Also consult W. J. Shepard, "The Theory of the Nature of the Suffrage," *Proceedings of the American Political Science Association* (1913), pp. 106 ff.

the overwhelming repudiation or adoption of some proposed reform, in great national sacrifices in time of war or other danger. More than one statesman has found to his sorrow that he could not ignore this titanic element in modern life. Yet when we try to reach the marrow of the subject, we find that at best it is only a portion of the people who make decisions and display a will of any kind. At the center of every party, group, or faction that supports a plan or idea there is a small minority determined in spirit, more or less informed, and bent upon action. From that center outward to the circumference of the group, knowledge, interest, and intensity of feeling diminish. Some are active, creative; others are passive and receptive only. Therefore, when we begin to study the will of the people, we strike deep into the mysteries of human psychology and behavior — the most difficult of all subjects. In this book we do not have space to skirt around the fringes of the theme. For the present we shall accept the dictum of Lord Bryce that the world is governed by active minorities who originate ideas and compel the attention of the multitudes. We need not be so cynical as to say with a German philosopher that "the people is that part of the state which does not know what it wants." On the contrary, there is reason to believe that, with the progress of education and opinion, the number of people who really count in the processes of government is on the increase. This is true, even though we must admit that, in most campaigns, the promises of candidates and parties are vague and confused and even though we cannot speak of an election as an expression of popular will on anything without straining our sense of precision in language.

In the midst of much obscurity, one thing is certain: the day is long past when any king, aristocracy, or class can claim a monopoly of wisdom and will. The democratic genie is out of the bottle and cannot be put back. Since this is true there can be no such thing as unanimity on the personalities and projects of politics. Long ago in the days of the Merry King Hal, the English Parliament enacted a law "for abolishing diversity of opinion." It could not be enforced. On all questions of politics, there are differences of opinion, and people tend to divide into two or more groups and parties. In fact the political party, as M. Brunet has remarked, is the agency which unites the isolated desires, emotions, and volitions of individuals, welds them into a

collective will or force, and by a victory in an election or revolution expresses "the will of the people."[1] Persons having similar ideas, feelings, and wills are disengaged from the general crowd and united in one party or group. Those of opposite feelings, ideas, and wills gravitate to another group. In this manner chaos is organized, and individuals are fused into a common body, under the dominance of common leaders. Only in this way is the will of the people normally expressed. Only in this way does it become a driving force in the process of government.

But why are there differences of opinion? There is the psychological rub! Let anyone answer it who can explain why he holds to any opinions either by inheritance or choice. The solutions offered by political philosophers are confused, contradictory, and unsatisfactory. Macaulay tells us that men (and presumably women) divide "naturally" into two groups — one devoted to order and the other to progress; one conservative and attached to the good old things of the past, and the other progressive, adventurous, and eager to hurry on to some untried experiment conceived in the interest of humanity. The same hypothesis was applied to American politics a few years ago by a distinguished professor of literature, Brander Matthews, who classified all Americans politically into Hamiltonians and Jeffersonians. "The Hamiltonian," he said, "believes in government by the best, by the selected leaders, competent to guide the less competent mass; and this is true aristocracy in the best sense of that abused word. The Jeffersonian believes that the average man, however unenlightened, actually knows his own business, or at least knows what he wants, better than any superior person can know it for him; and this is true democracy in the best sense of that abused term. These two attitudes are inevitably antagonistic; they are instinctive, intuitive, innate."[2]

Of course this is like saying, "God made Democrats and Republicans, and that is all there is to it." When anyone states that a man's actions spring from innate, inherent, intuitive sources, he denies the force of environment and with a final air disposes of such little questions as: "Why are they innate? How do you know that they are innate? Where is the proof?" Furthermore a study of the facts of political parties, always

[1] *The New German Constitution*, p. 102. [2] New York *Times* Magazine, September 24, 1916.

disconcerting to the makers of simple hypotheses, reveals some data not easily disposed of by the literary theory of politics. Parties in Europe do not divide into two sections: conservative and progressive, Hamiltonian and Jeffersonian. There we find labor parties, agrarian parties, clerical parties, industrialist parties, Czech, Irish, German, Pole, and what-not parties. A study of the distribution of party membership in the United States shows that the major portion of the Hamiltonian party had its centers of influence in the cities and towns where financial, industrial, and commercial interests were predominant. Hamilton was a New York lawyer. The leadership of the Jeffersonian party came from the slave-owning planters of the South. Jefferson was a Southern planter. How did it happen that most of the business men of the country were instinctive Hamiltonians, intuitive "aristocrats," and most of the aristocratic planters of the South became instinctive Jeffersonians, intuitive "democrats"? The matter is not as simple as Mr. Matthews imagines.

James Madison, the "Father" of the American Constitution, twice President of the United States, and one of our wisest political philosophers, offered out of the depths of his experience an explanation in Number Ten of the *Federalist*. The most common and durable source of parties, he says, "has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors and those who are debtors fall under a like distinction. A landed interest, a manufacturing interest, a mercantile interest, with many lesser interests grow up of necessity in civilized nations and divide them into different classes actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government." In other words, the division of men into parties according to their political sentiments and views springs from the possession of different kinds and amounts of property. Illustrations of this theory may be readily recalled by those familiar with the rôle of the farmer vote, the labor vote, and the business men's vote in American politics.[1]

Still, Madison's explanation does not explain everything. All

[1] See Beard, *The Economic Basis of Politics*.

the farmers are not found in one party, all the business men in another, and all the workmen of the cities in a third. Moreover when a large convention of farmers, business men, or trade unionists is held there immediately ensues a violent difference of opinion among them as to just what their interests are and just what measures are best calculated to realize them. The idea that every person knows what his economic interest is and pursues it automatically and relentlessly is wholly untenable. Men of the same class or occupation tend to have similar ideas, emotions, and habits; one can usually tell a banker from a farmer without making an inquiry; and there easily comes about a solidarity among those of the same economic group. Solidarity of interest is one of the highly significant facts of politics; it cuts across party lines; it operates continuously; but it does not account for everything in the course of political evolution. Economics is the most fundamental branch of politics but it does not exhaust the science of the subject.

In fact the political party itself tends to become an institution apart from its origins and purposes. When created to serve some more or less specific end, it continues after the end has been attained. All this is explained in a concrete way below,[1] but it may be noted here that a party has its slogans, watchwords, and catch phrases which attract and hold followers; it has officers and paid jobs; it controls large funds; and when in possession of the government it distributes employments, honors, emoluments, and favors. In many countries the government officials tend to form a bureaucracy or ruling class; they coöperate with some party and are ever mindful of their positions and their salaries. The spoils of office are often sufficient to maintain a large party quite independent of any ideas or opinions as to the policies or work of government. Hence we must say that some of the forces of politics are clear and others obscure; but nevertheless in practice the will of the people is usually made manifest through political parties.

How shall the people express their will? There was a time when a short and simple answer sufficed: the will of the people on any matter is to be expressed only through agents chosen by them. The business of the people is to elect officers and representatives who in turn are to discover the will of the people, to

[1] Chap. vii.

debate and decide all public questions. Naturally, however, in choosing representatives the people cannot be oblivious to the way in which those representatives will speak and act; hence the will of the people reveals itself more or less in the election of agents. By a gradual process, "representative" government was supplemented by "direct" government. It became a practice for the people to express their will directly by voting on state constitutions submitted to them for their approval or rejection. In the course of time the idea has been extended in many states and cities to such lengths that the people may now initiate laws and constitutions and refer these measures to all the voters for their decision without the intervention of any agents or representatives. This is the initiative and referendum. The details of the matter are discussed below,[1] but it must not be forgotten that the problem of *how* the people should express their will is still open and controverted.

If the will of the people is to be made manifest mainly through representatives, what agents should be elected by popular vote? When we look at the national, state, city, and local schemes of government in force in the United States to-day, we find that question answered in fact in various ways. In the National Government only the members of Congress — Senators and Representatives — are chosen by direct popular vote; the President and Vice President are selected by a popular vote in an indirect manner; the important executive officers and the judges are in turn appointed by the President and Senate. In most of the states, on the other hand, the legislature, the governor and other chief executive officials, and the judges of the courts are all selected by popular ballot. In the cities things are mixed. In the great cities the mayor and council are elective, but in cities having the city manager plan the chief executive, the manager, is chosen by the council or commission. The question is not easy and the way we answer it depends upon many things: our idea of the rôle of the executive in government, our theory as to the relations of the various branches of government, our trust in or fear of popular government. Nevertheless, it is a vital problem in securing effective government and fixing responsibility in government. We shall encounter it many times in the course of this book.

[1] See chap. xxiv; also Ireland, *Democracy and the Human Equation.*

The Legislature

All are agreed that the legislative branch of the government, the branch that formulates the popular will into laws and ordinances, should be elected by the voters. At this point, however, agreement about the legislature ends. Shall it be composed of one house or two? The answer of the national and state governments is decidedly in favor of two, but the great cities which once slavishly followed the model at Washington are almost unanimous in their adoption of the single-chamber council. Shall the members of the legislature be chosen in districts or at large on one common ticket? As to the House of Representatives, state legislatures, and many city councils the district system prevails. On the other hand, in numerous cities, especially those that have the commission plan, all the city councilors or commissioners are chosen by the voters of the entire city; in other words, every voter votes for all members of the city legislature instead of for one from his ward or district. Should the district be large or small? That depends. If it is very large, the representative is likely to be removed too far from the interests, prejudices, and daily opinions of his constituents. If it is too small, he is likely to be what is called in political slang "a peanut politician," that is, one narrow in mind, devoted to petty business, and incapable of taking a large view of things. Somewhere between is the golden mean.

Far more perplexing is the problem of assigning representatives to districts. If practice is a guide, then we are uncertain whether representatives should be distributed throughout the districts of a particular area, on the basis of the number of citizens or the number of voters, or according to geographical units. In the case of the National Government, each state, irrespective of its population, has two Senators; in other words, a political and geographical subdivision of the Union is taken as the basis of representation. The members of the House of Representatives, on the other hand, are distributed among the states according to their respective populations, but each state, no matter how small, has at least one. In the formation of state legislatures, American practice varies: sometimes members are distributed among the districts of the state on the basis of total population including aliens; in some cases only citizens are counted; sometimes voters

are taken as the units. In every instance, however, respect is paid to local units such as counties, towns, and cities.

In the original home of representative government, England, the community was the prominent element in the early make-up of the House of Commons. Each city and each county in the beginning had a fixed number of representatives — usually one or two — but in those ancient days the population was somewhat equally scattered throughout the country so that the system resulted in a rough numerical equality among districts. Now the logical outcome of democracy — strict equality among the voters — demands the distribution of representation among districts as nearly equal as possible. While the theory makes headway in practice, it is still more or less restricted by historical traditions.

In the beginning of representative government, the legislature represented classes, not abstract and equal persons. The English Parliament represented the great landlords, the smaller landlords, and the burghers or townspeople. The French Estates General spoke for the clergy, nobility, and the third estate or the bourgeois. Our first state legislatures were, some of them, class agencies. The idea of class representation runs through the whole history of popular government,[1] but in the course of the nineteenth century it was altered by revolution after revolution in Europe and by progressive changes in the United States. The doctrine that all men — at length men and women — are politically equal and alike won a place. The logical application of this principle means that the members of a legislature should be apportioned among districts containing approximately equal numbers of human heads, without respect to their wealth, their occupations, their interests. It means also that all heads should have the same weight in the election of officers and the determination of public policies.

Political science and political practice based more or less on the theory of abstract human equality and alikeness were hardly established before they were sharply challenged. Economic, social, moral, and intellectual inequality still remained. To say that an employer and his employees engaged in a desperate struggle over wages are alike and have the same interests is to tell only half a truth. Two manufacturers desiring a protective

[1] Beard, *The Economic Basis of Politics*, chap. ii.

tariff have more in common, though they live two thousand miles apart, than a manufacturer and an importer living side by side in the same apartment house. Moreover in actual fact the various economic and social groups in each political district tend to draw together and act together in voting and influencing their political representatives. In real politics we find labor organizations, manufacturers' associations, merchants' associations, real estate owners' associations, dairymen's, fruit growers', and farmers' leagues, and a score or more economic groups pulling this way and that.

In order to marshal a majority of heads in his district a candidate for office must usually be very vague, facile, and elusive for fear of offending one or more groups. This state of affairs has produced a large crop of gentlemen known as "politicians" — men without any business or practical qualifications — men whose stock in trade is oratory, rhetoric, and confusion. Such men usually understand none of the requirements of business enterprise or labor organization or agriculture. So a cry went up against government by oratory from conservatives and radicals, especially in Europe; there arose a demand for the abolition of "political" democracy and the substitution of "economic" democracy — the frank representation of commerce, property, industry, labor, and the professions as such in government — a return to the discredited class system. For a time the idea had a great vogue; experiments with it were made in various parts of the Old World.[1] Then followed a reaction, but the dust raised by the storm has not yet settled.

In fact there is only a half-truth in the concept that economic groups alone should be considered in making up legislatures. People are not equal and alike in all things or even many things. Persons engaged in the same occupation or owning the same kind of property do have much in common and they naturally coöperate more or less in bringing their influence to bear on the government. Trade unions want to enjoy certain rights to strike without the interference of the police; the owners of railroad stocks and bonds do not want their property destroyed by low rates fixed by the government. But a person is more than a trade unionist or a bond-holder. The possibilities of his nature

[1] Brunet, *The New German Constitution*; McBain and Rogers, *The New Constitutions of Europe*, chap. vi.

are not exhausted by his economic activities or affiliations. Moreover people of widely different interests who live side by side in a district have many things in common, such as police and fire protection, the maintenance of public health, the suppression of contagious diseases. They are united by religious, racial, and patriotic ties. So after all there is good reason for the representation of heads as well as economic interests. Besides it is difficult, nay impossible, to classify people to-day into rigid classes.

In an attempt to reconcile the two ideas of economic diversity and abstract political equality, statesmen have devised a scheme which permits persons of similar interests and inclinations to combine, if they choose to do so, in the election of representatives without dividing themselves into rigid classes each with its own representatives. This scheme, known as proportional representation, abolishes the single-member district for the legislature and substitutes for it the large district in which several or all of the members are chosen at the same time. Arrangements are made for balloting in such a way that each group or party in the district obtains a number of representatives roughly proportioned to the relative strength of its vote. For example, if there are ten thousand voters in a district and ten representatives to be elected, mathematical justice would secure to every group of one thousand voters at least one representative and so on according to its numerical strength.

This may be accomplished by any of several schemes. One of the most popular is known as the Hare single-transferable-vote system. Under it each voter votes for one candidate and then indicates his other successive choices by marking 2, 3, 4, etc., after their names in order. After the ballots are all cast, they are laid out in piles according to the first-choice marks indicated on them. All those men who have the quota of first-choice votes required to elect them are declared elected. If ten men are not so chosen in the case under consideration, then the surplus ballots of the men who have received more votes than their respective quotas of first choices are distributed among the other candidates according to the second choices indicated on those ballots. Then the ballots of candidates who have failed to receive the quota are distributed, beginning with the ballots of the lowest candidate, according to the second choices. The pro-

Graduate Institute of International Studies

cess continues until the total number of members to which the district is entitled have been selected.

A second method known as the "list system" is somewhat simpler to operate and gives an advantage to party organization. Many minor variations of this system exist. One form permits political parties to nominate as many candidates as they like. After the ballots are cast and it is ascertained how many votes the respective parties have received, then each secures as many representatives in the legislature as its total vote warrants and its candidates are declared elected in the order in which they appear on the party list. That is, if a party, in the case supposed above, receives six thousand votes, let us say, the six candidates of the party standing first on its list will be declared elected. Furthermore, it may be provided that all the fractions left over in the several districts of a state or nation shall be combined and representatives assigned to the parties on the strength of such combined fractions. This secures almost mathematically exact proportional representation.

The system is defended on many grounds. It permits voters to group themselves naturally and voluntarily and gives parties representation according to their strength. It gives minorities representation, whereas under the single district system, the man who gets the largest number of votes is elected even though his opponents combined may have a great majority of all the votes cast. Proportional representation thus makes it impossible for a party which has only a minority of the popular vote to secure a majority in the legislature. It also does away with the "gerrymander" or practice of laying out districts in such a fashion as to favor one party at the expense of another. It snaps the ties that bind the members of the legislature to small districts. The system has been adopted widely in Europe and Australasia and also in a few American cities, notably Cleveland.

The objections urged against proportional representation are that it encourages the formation of factions and small groups, destroys party responsibility, introduces many inharmonious elements into government, paralyzes official action, and works for obstruction and negation rather than action. Experience with it in America, though brief and limited, indicates that these objections are not well founded. Still there is a danger inherent in the system which must not be overlooked.

There is one evil of the district system which proportional representation certainly does obviate. According to a rule almost universal in America no person who is not a resident of a district can be elected to represent it in Congress, a state legislature, or a city council. This practice is based on the assumption that Providence has made a geographical distribution of brains, which hardly seems to be the case. While it does guarantee that each member will be acquainted with the needs of his district, it closes the political career to many persons who happen to be defeated in a small locality. It thus deprives each party of some of its ablest leaders, because if they fail to carry their own districts they cannot stand for election in some other section where their party is sure of victory. It brings into every legislature a large number of inexperienced men, breaks continuity in policy and action, and weakens leadership in the parties.

The district system also tends to transform the representative into a mere agent of the district; to make the legislature a mere aggregation of local "drummers" engaged in getting all the money they can for their several communities out of the public treasury. The congressman often becomes a seeker after river and harbor improvements, post offices, public buildings, pensions, and jobs for his district or state; the state legislator scrambles for roads, bridges, and jobs for his district; the member of the city council works to secure street improvements, better lights, more schools, parks, and playgrounds for his section of the city. Instead of thinking of the nation, or the state, or the city as a whole they think of sections. What is the result? It is that only men who are willing to devote their lives to shaking hands, slapping backs, carrying on petty trades, and wheedling appointing officers will stand for the legislature if the people of the districts think of nothing but despoiling the public treasury. In such circumstances instead of statesmen capable of taking the large view of things we get shrewd men with the qualifications of the successful horse trader. Indeed this too often happens in the United States.

After all what is the function of the representative? On this point we have two sharply opposite views. There are those who adhere to the doctrine of Edmund Burke to the effect that a representative is elected locally, but on election becomes a national servant. He is not a mere agent slavishly expressing the

will of the voters of his district; he is duty bound to consider all problems as a whole in the light of general, not local, interest. He is not a mere automaton registering the prejudices, feelings, and decisions of his constituents; he is a free and independent statesman pledged to vote on every question according to his conscience and his judgment. If the people do not approve his conduct they can refuse to reëlect him on the expiration of his term. According to the opposite theory, the representative is a mere agent or delegate always constrained to obey the will of the electors in his district, if he can ascertain what it is, and to vote in the legislature as they would have him vote — no matter what his intelligence or conscience may dictate.

These theories are usually treated by writers as if the facts of life actually permitted the adoption of one or the other in its entirety. Suppose that the representative ignores the desires of his constituents; then he will be defeated for reëlection and the desires of the district will be realized at the hands of his successor. There has been a delay; that is all. Suppose that a representative decides to vote according to his conscience and judgment alone. He may, as Ruskin said, have the "conscience of an ass" and the judgment of a fool. Is anyone so sure of his conscience that he ought to ignore the opinions of mankind respecting its operations? Can any representative arrive at a sound judgment on a project of law without inquiring whether it can be enforced in his district, whether it is in harmony with the spirit of his constituents? Certainly not. Moreover, American experience has shown that too often the legislator who is independent of his district is really dependent on someone else — an inner party organization or a powerful lobby of some kind.

Obviously a certain degree of dependence on the will and opinions of the constituents is necessary to the enactment of laws adapted to the genius of the people. Legislators too remote in their thinking and judgment from the electors may become academic if not a hindrance to orderly and progressive development — a development that is in harmony with the deep underlying social forces which after all shape the course of constituents and representatives. On the other hand it is equally obvious that slavish attention to the whims and clamor of noisy minorities among his constituents makes a coward of the representative,

and prevents him from acting like a statesman when confronted by great issues.

The problem is therefore psychological rather than mechanical. It is true that the substitution of proportional for district representation would operate against the predominance of localism in legislatures. Likewise measures designed to deprive state legislatures of the power to enact local and special legislation at all and to vest such powers in local governments tend to restrain the representative from sinking into the position of a perpetual "log-roller." But at bottom mechanism will make little difference, for the legislature in the long run under universal suffrage rather fairly mirrors the genius of the people for petty or grand enterprise.

The Executive and the Legislature

The term "executive" which we apply to the branch of government that carries into effect the will of the people has a broader significance than is embraced within the idea of agency or execution. Neither is the content of the concept covered by the term "president" who merely presides over a people or assembly. The executive is far older than representative government. In England, whence came most of our stock of political ideas and practices, the institution of the executive or king is older by many hundred years than the representative Parliament. The supremacy of the monarch was not broken until 1688 when, after half a century of revolution, the predominance of the legislature was finally established. The executive, as king, was no mere agent; he was a master, a sovereign, a symbol of national unity, head of the army and the administration, and supreme law giver.

Although in the modern democratic age the idea of such an institution has become repugnant to the people and in certain quarters the executive has been regarded as a mere agent to carry acts of the legislature into effect, in fact the executive in the United States is assigned no such subordinate rôle. The President of the United States, the governor of the state, the mayor of the great city is more than a servant of the legislative will. He is a political leader, a creator of public opinion, an organizer of democratic forces, a master in many ways. This is not an accident. If the legislature under the influence of

localism degenerates into a mere aggregation of community merchants and log-rollers, it ceases to represent the larger whole or to conceive of public policies in the grand style. The framers of the American Constitution deliberately sought to create an executive that would share some of the prerogatives of the king and emperor although dependent upon popular election — a sort of democratic monarch, in short. "Energy in the executive," wrote Hamilton in the *Federalist*, "is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of 'dictator,' as well against the intrigues of ambitious individuals who aspired to the tyranny and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome." Of course the dangers of Cæsarism and dictatorship are very great, and one of the gravest problems in the organization and operation of government is that of combining strength in the executive with democratic control. Moreover it must not be forgotten that some, if not most, of the dictatorships in history have been established on the basis of popular support; both Napoleon the Great and Napoleon the Little were made emperors of France by the will of the people, by popular vote, not by choice of the legislature.

In the states and cities, the dangers of executive usurpation are not serious, and there are some who maintain that in these spheres the executive should be a mere agent. In all states and nearly all great cities the decision of the people, however, has been otherwise. The governor of the state and the mayor of the great city are elected by popular vote, not by the legislature or the council, and they are expected to be leaders, organizers of public opinion, and formulators of public policies. The chief reforms in our state and municipal governments are not associated

with legislative leaders, but with governors and mayors. Where grave and complicated questions have to be decided and energetic conflicts waged against powerful forces, there is need of someone to concentrate opinion and lead the drive. In a hydra-headed legislature no such concentration is possible, at least without a revolution in the structure and procedure of that body as conceived in America.

In fact one cannot proceed very far in a discussion of the executive without facing squarely the problem of its relation to the legislature, for the powers and functions of the executive depend upon the source of its authority. Among the popular governments of the world we find only two alternatives presented. The executive as king or emperor has either disappeared in revolution or been reduced to the status of a figurehead. The modern executive, except in the municipal and local sphere, is in fact either a single individual elected by popular vote or a collective or collegiate body selected by the legislature under the leadership of a premier. The former, the great American expedient, is known as the presidential system; the latter, which prevails generally in Europe, is known as the parliamentary system. The American people put their faith in one man elected by the voters; the English and continentals generally prefer to entrust government to a plural executive more or less dependent upon the legislature. Even in English cities, the mayor is elected by the city council and is a figurehead while the real administration is carried on through committees of the council. Interestingly enough it is only in American cities where the commission plan or the city manager plan[1] has been adopted that the English idea of legislative supremacy is carried out in this country, although it must be noted that under the state constitutions framed in revolutionary days the state governor was in nearly all cases elected by the legislature and dependent upon it and that in the early city governments the council dominated the administration.

Now the American concept of executive and legislative relations is not the outcome of fortuitous thinking. It has been formulated deliberately. It is a part of the theory of separation of powers, or checks and balances, which is fundamental in its nature. Power over the lives and property of people is a terrible engine and history is full of illustrations showing abuses of it

[1] See below, chap. xxxii, for commission government and the city manager plans.

leading to social wars and national dissolution. The founders of the American system, looking over the story of the conduct of the human race under various forms of government, came to the deliberate conclusion that popular government might be as dangerous to life, liberty, and the pursuit of happiness as monarchical or any other kind of government. Their fear of the masses has been characterized by Bryce as firm belief in the doctrine of original sin. "We may appeal to every page of history we have hitherto turned over," exclaimed John Adams, "for proofs irrefragable that the people, when they have been unchecked, have been as unjust, tyrannical, brutal, barbarous, and cruel as any king or senate possessed of uncontrollable power: the majority has eternally and without one exception usurped over the rights of the minority." It was out of this philosophy that the doctrine of checks and balances was evolved: the executive and legislative departments should be separated; they should be separately elected; they should have the power to check each other. Hence the American national system: a President elected for four years indirectly; a Senate originally elected by the state legislatures for six years, one third going out every two years; a House of Representatives elected by the people every two years; finally a Supreme Court appointed by the President and Senate for life with power to declare null and void acts of the executive and legislative departments which, in the opinion of the Court, are unwarranted by the Constitution as construed in the light of "sound public policy." The President can veto acts of Congress; the Congress can impeach and expel the President from office. By the time a proposed law runs the gantlet of all these independent agencies of government, the passions of those who support it are likely to be cooled and the will of the majority tempered by much reflection. The same theory is applied in the states, and was once quite generally adopted in city governments.

It is evidently a philosophy of negation rather than of action. Only the President in time of war can assume something like dictatorial power over life and property. In actual operation the theory is open to many objections and is constantly being criticized by publicists and men of affairs. It certainly makes for delays, obstruction, and irresponsibility. The lower house may shift the blame to the upper chamber, the latter to the

former, and both to the executive or the judiciary. Very often one political party controls one branch and another party a second branch, and in such seasons their chief business consists in reckless criticism of each other. Those who propose measures know that they do not have to be responsible for carrying them into effect; those who criticize such proposals and suggest alternatives know that they are not likely to be called upon soon to assume the burden of making good on their criticisms and promises. This system has been characterized by Frederick A. Cleveland, as "government by irresponsible abuse." [1]

For a government of delays and irresponsibility it has been suggested that we substitute a "hair-trigger government" — one that acts quickly. This really means, when carried to its logical conclusion, the parliamentary system with perhaps some modifications. According to the reformers of this school there should be some method of submitting immediately to popular vote all questions involving grave conflicts between the executive and the legislature. The President, the governor, or the mayor should have the power to dissolve the legislature and appeal to the people on his program if it is defeated by the legislature. The legislature in its turn should have the right to appeal to the voters by forcing a new election of the executive if it finds its program blocked by the executive. Such a plan would do away altogether with the idea of a fixed term for either branch. Elections would not have to be held on the time basis — according to the rotation of the earth on its axis; they would be held when some concrete issues must be decided by the voters.

This system would undoubtedly make for speed and decision; but speed and decision were the things most feared by the Fathers of the American system. They took the view, as Hamilton said, that "every institution calculated to restrain the excess of law-making and to keep things in the same state in which they happen to be at any given period was more likely to do good than harm; because it is favorable to greater stability in the system of legislation." To this it is replied by the critics of confusion and delay, that immobility in an age of stage coaches and hand-looms is appropriate enough, but it is disastrous in an age of steam, wireless, and electricity which is constantly changing in the require-

[1] For discussions of the check and balance system in operation see Bradford, *The Lesson of Popular Government;* MacDonald, *A New Constitution for a New America;* and the writings of Dr. Cleveland.

ments of government and administration. So men will choose the one or the other view according to their concept of the ends of government. How to reconcile speed of action with reflection and individual rights is perhaps the major problem of government which has not yet been solved. Indeed it is the very heart of the matter. If anyone is ready to render a quick judgment let him first ask himself this question: "Am I prepared to leave all my rights of person, opinion, and property, to the decision of the majority of the voters who take the trouble to go to the polls at any election?"

It is in this relation that freedom of press and speech is such a vital element in the governing process. It was no mere doctrinaire theory, as sometimes imagined, that led Jefferson to lay emphasis on liberty of opinion and to insist on inscribing a declaration in favor of that liberty in the First Amendment to the Constitution. The chief check upon tyranny and abuse of authority in government is not the separation of powers, for they can be welded together in the hands of a political party which has possession of all branches of the government.[1] The one secure check is the right of the people to discuss freely the measures and policies of the government and to unite peaceably in opposing them.

Government in a democracy is necessarily a majority government, or even a plurality government, for the whole people never agree on any candidates or measures of law. If the agents of the majority — and all government officers are such agents in fact whatever the theory — can suppress newspapers and imprison critics, then the right of the minority to appeal to the people to turn the majority out is imperiled — the democratic idea is utterly destroyed. Liberty of opinion, of course, is open to abuse; it is constantly abused; but far more open to abuse is the right to suppress opinion and far more often in the long history of humanity has it been abused. Still all matters of sentiment may be put on one side. It is a hard, cold proposition: by what process are we most likely to secure orderly and intelligent government, by the process of censorship or that of freedom? On this question a comparison of English and Russian history is illuminating. Again and again those who have attempted to stop the progress of opinion by the gallows and prison have merely hastened their own destruction by violence.

[1] See Goodnow, *Politics and Administration*.

Still liberty of opinion cannot be absolute, that is, no one can have the right to say anything he likes, anywhere, at any time. No government could tolerate a freedom of opinion that counsels direct attempts to overthrow it by violence or the murder of its officials. In ordinary criminal law the man who induces another to commit a crime by persuasion or promises also shares the guilt of the principal and is punished. So in the case of criticism of the government, conspiracies and attempts to overthrow it by violence are necessarily crimes; otherwise the foundations of government would be built on sand.

It is difficult to draw the dividing line between spoken and printed words that lead directly to open violence and those that merely stir up a discontent which may eventuate in violence. Some of the courts have attempted to draw the line by saying that language which has "a reasonable and natural tendency to encourage resistance to the law," should be made criminal. This is a doctrine dangerous to liberty of opinion, for does not every criticism of a law have a "tendency" to encourage resistance to it? A perfectly innocent remark by a responsible citizen to the effect that some particular law, in his opinion, is unwise, unjust, or foolish may turn the scale in the mind of someone else and set him in motion to resist that law. A far sounder doctrine is that of Jefferson to the effect that only when criticism of the government immediately threatens to culminate in open resistance should the law intervene. In fact we have decisions of the courts all along the line from one of these extremes to the other and the whole problem in any concrete case becomes one of fact and inclination. Is there actual danger in the criticism? Should we lean on the side of repression or liberty?

Declarations of principles do not help much. It is painful to most of us to hear and read things with which we do not agree, but how can we claim liberty for our utterances and deny it to our neighbors? This is a question of faith and spirit which few of us can bear to discuss with wisdom and good temper. Have we faith that the human spirit, left free to inquire, will bring the best life for the individual and society, or do we assume that we ourselves have received the whole revelation and are entitled to set the metes and bounds to the minds of others? The moral risks involved in the assumptions of the censor are very great. The political risks of censorship are still greater.

CHAPTER III

ADMINISTRATION IN A GREAT SOCIETY

The making of laws is a relatively simple matter; it is easy for the legislature to appropriate money and declare that the government shall regulate the rates and services of railways or build and maintain a huge canal or water-works system. The legislature can proclaim its will in general terms and adjourn. The work of the executive department, on the other hand, carrying its will into effect continues night and day; it involves the expenditure of great sums of money, the employment of hundreds or even thousands of people, the purchase and management of supplies and complicated equipment, and perhaps the property interests of millions of citizens. The legislature may embrace fifty or a hundred or five hundred members at most; the administration employs tens of thousands, hundreds of thousands. As the work of administration runs to the roots of modern society, touching every phase of social and economic life, so the manner in which it is conducted really determines the destiny of the state. If it is conducted wisely and efficiently it may render incalculable services to the people; if it is managed justly it will command the affections of those whom it serves, building the foundations of social order on the respect and esteem of all classes. If it is inefficient and unjust, it may cast discredit upon the established order and lead to its disintegration and decay. It was not without reason that the poet exclaimed:

> For forms of government let fools contest
> That which is best administered, is best.

This is not the whole truth but it is a fundamental element of the whole truth.

The Science of Administration

There was a time when the functions of administration were few and simple. They consisted mainly of tax collection and the maintenance of order: the record keeper and the warrior were the prime agents of the state. But as the government has been

transformed from a big policeman into a huge service agency, with the transformation of our agricultural civilization into a great industrial society, the entire governing process has been altered. The state takes on the character of industry itself. It still collects taxes and maintains order; but these are no longer its chief functions. It is to-day a great producing agency. It constructs and manages canals, docks, water works, warehouses, hydro-electric plants, sewer systems, and street railways. It regulates railways, carries letters and parcels, conserves and utilizes forests, coal mines, and oil fields. It organizes banks, subsidizes steamship companies, lends money to farmers. In short the government is an economic organism.

Now all administration, whether in a republic or a monarchy, whether in private industry or public enterprise, whether in the local, state, or national governments, involves certain fundamental elements: the management of finances, the organization of work, the employment and direction of persons, and the purchase and use of material goods. In a small and simple industry or local government where the outlays of money are slight and the people employed are few in number, administration can be carried on by any man who is a good judge of persons, materials, and work. But in a great society the outlays are enormous, the processes are complicated, the kinds of specialists and employees necessary are varied, the materials used involve expert chemical, physical, and mechanical knowledge, the work is as complicated as modern technology; and administration calls for almost superhuman talents. Although this is true, the science of public administration is still in inchoate form, and is too often confined to the law of government.

This is to be explained historically. When the functions of government were few, two types of administrators were required: warriors and record-keepers. The latter developed into lawyers; it became their business to execute the laws and decrees of the king. An understanding of the law therefore was the prime requisite of the administrator. Another development augmented the influence of the lawyer. Early in the evolution of government, the settlement of private disputes by battle was forbidden and the function assumed by courts. In time the legal profession flourished. The lawyers were the legal advisers of the crown, they drafted laws and decrees, they acted as judges,

they wrote the treatises on government, and they served as administrators.

Thus it came about that the first books on public administration were written by lawyers. This was true in America and in Europe. The first great work on the subject issued in the United States was Professor Frank J. Goodnow's *Comparative Administrative Law*, a study of the legal rights, duties, and obligations of public officers. The subject matter of the science was the law — the acts of legislatures, the ordinances of city councils, the decisions and opinions of judges, the rulings of officers — words, not actions; declarations and opinions, not material results. This was natural and useful, for no administrator can operate successfully without knowing about the law covering his field, but the law is the beginning, not the end of administration.

While the lawyers were building up the legalistic aspects of public administration, there was growing up outside their ranks an inchoate philosophy of industrial administration known as scientific management. The origins of this new and significant movement in human thought have been traced as far back as 1832 when Charles Babbage, an English student of industry, wrote his treatise on *The Economy of Manufactures*. But it was not until 1903 that the modern science of administration really began to take form. In that year, Charles W. Taylor read before the American Society of Mechanical Engineers a paper on the principles of shop management. This was the beginning of a flood of literature on the subject, which has now grown into an immense body of knowledge founded on experience, action, practice. Many absurd claims are made in the name of scientific management and narrow views of the subject have discredited it in some circles, but there is a substantial core of reality to it.

In the course of time the influence of this new intellectual activity was felt in the field of public administration. Three years after Taylor read his epoch-making paper, the Bureau of Municipal Research was founded in New York City to promote the scientific administration of public business. It did not altogether neglect the study of public law, but it devoted its energies mainly to the study of the actual operations of officers in managing finances, employing labor, buying supplies, and directing public work. This method of approach was destined

to have the same effect on political thinking that experimental science had on thinking about the material world. The Bureau sought its data wherever administration was carried on; in private industrial corporations as well as in governments. It observed the way in which private business concerns managed their finances and accounts, organized their departments of work, kept their payrolls, purchased material objects, and directed huge labor forces. Thus in our day a new social science is being staked out and developed — the science of administration in a "great society." If the great society is to endure, then it must make itself master of administration.

The idea started in a tentative fashion by the New York Bureau of Municipal Research spread throughout the country. Dr. Moley and Dr. Weber, in their books[1] on this movement, show how it was extended to other cities in the organization of new bureaus; to Washington in the creation of President Taft's economy and efficiency commission and the formation of the private association known as the Institute for Government Research; and to many states in the form of special commissions, budget legislation, and administrative reorganization.

By a gradual process the treatment of government and administration in our colleges and universities is being revolutionized. Dry, academic descriptions of laws, official duties, and judicial decisions have become discredited; disquisitions on practices appropriate to the days of the hand-loom and stage coach are left to the historian. The study of the law, though by no means discarded, no longer monopolizes the field. It is being supplemented by the observation of the actual forces and processes of government. The leading professors in our universities are now distinguished not only for their writings on government but also for their contributions to the practical aspects of administration.[2]

So we stand to-day in the course of a new and significant development in the field of administration. The science of the subject is by no means perfected; it will never be perfected; but an approach is being made in the very spirit which has given man his mastery over the material world. Certain principles

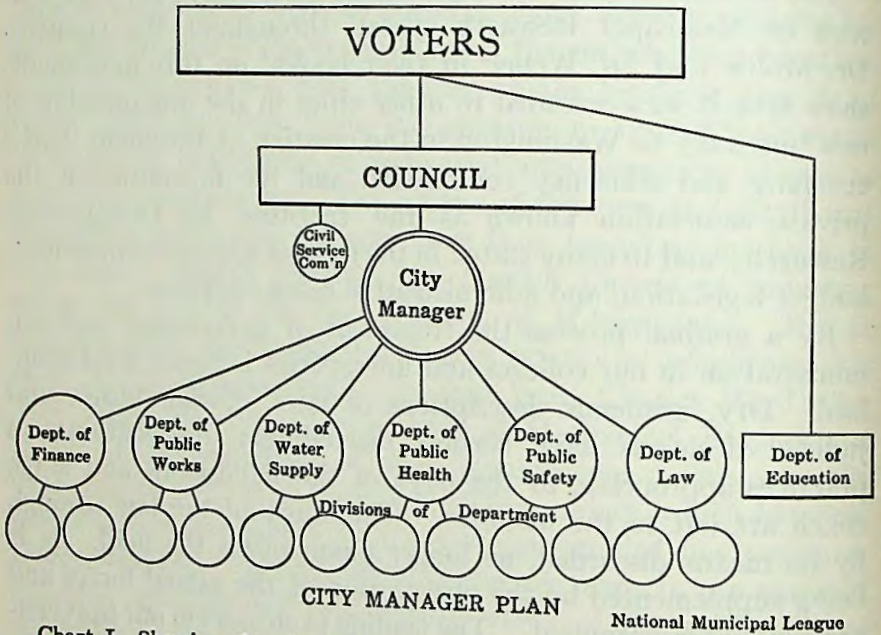
[1] Raymond Moley, *The State Movement for Efficiency and Economy* (New York Bureau of Municipal Research). G. Weber, *Organized Efforts for the Improvement of Public Administration in the United States* (Institute for Government Research).

[2] Consult for example, J. M. Mathews, *Principles of State Administration.*

have already been laid down at least in tentative form, and innumerable workers are pushing their inquiries deeper and deeper in the unexplored regions. The broad outlines of the subject may be surveyed briefly here, for they apply to national, state, and local government.

Administrative Organization

The exact nature of the administrative machinery to be set up depends upon the nature and volume of the business in hand, but certain controlling principles have been worked out. The



CITY MANAGER PLAN

National Municipal League

Chart I. Showing the city manager plan, in which administrative responsibility is centralized.

number of departments in any administration depends on the amount, variety, and magnitude of the work committed to its care. Each department should have a distinct function or group of related functions to perform, if the volume of business is sufficient to warrant it. All closely related functions should be grouped in the same department and the number of subdivisions within each department should be determined by the nature and number of the functions assigned to it. Thus the responsibility for each major function and the power to discharge

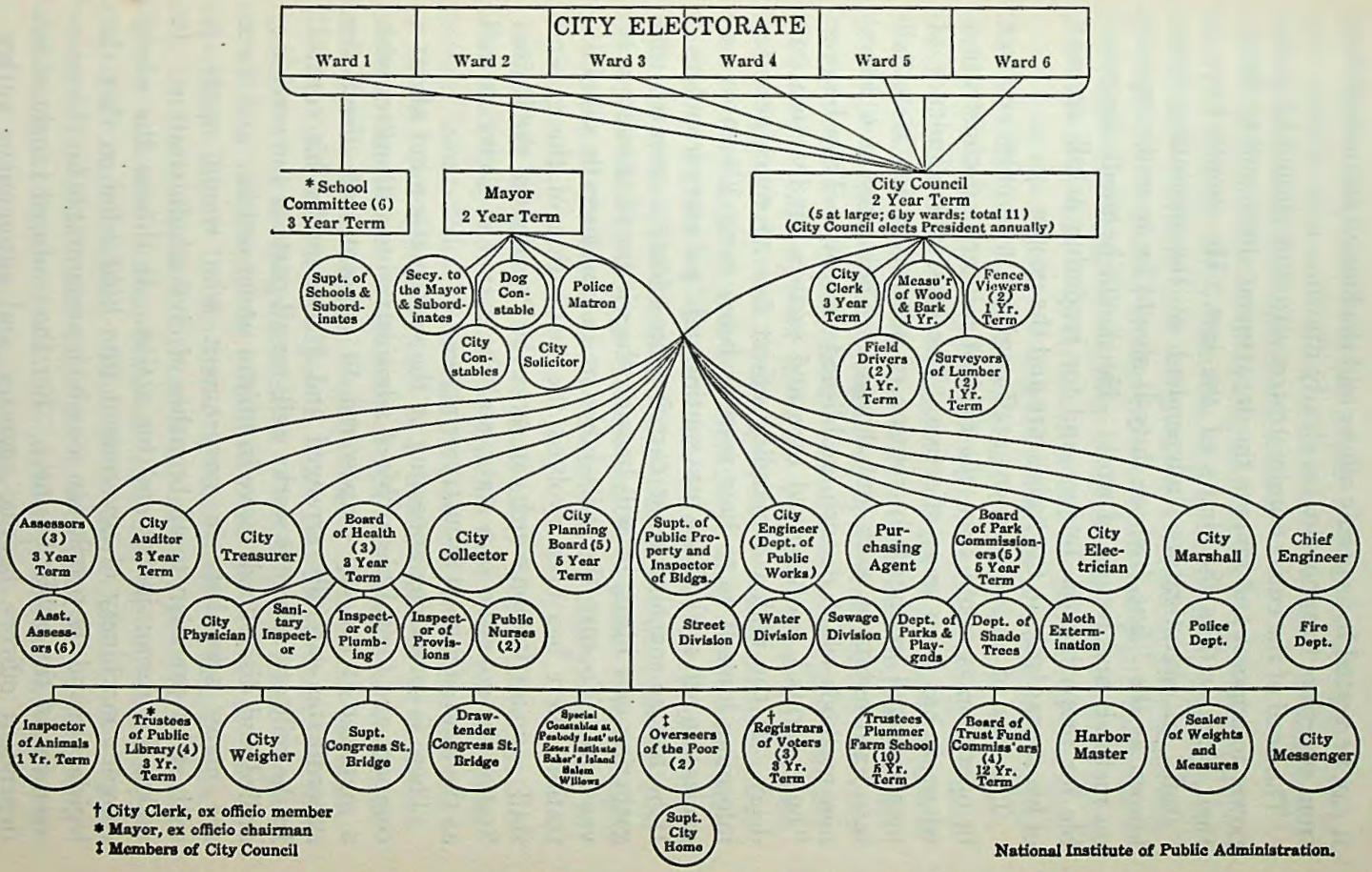


Chart II. Showing a city government in which administrative responsibility is divided among many authorities.

it can be vested in a specific officer and the lines of accountability from superiors to subordinates clearly drawn.

The head of the entire administrative structure should have the power to appoint and remove the department chiefs and to direct their work within the limits of the law. He should have a "staff" of investigators, independent of the operating force known as the "line," whose duty it should be to make reports on methods and results of work. He should be made responsible for preparing the budget and for rendering a full account of his stewardship to the legislature and the people.

The idea of an independent staff engaged in inquiry and not in operation is taken from the field of military administration where it has been most effective. The inevitable tendency of men engaged in the daily routine of administration is to fall into fixed habits of work and thought. They resist new ideas, new methods which disturb established customs. They become "bureaucrats," evolving red tape and excuses for inaction and delay. If the high commanding officer has no machinery for informing himself as to how work is being done, his entire organization will settle down into routine and "get away from him." If he has no machinery for carrying on scientific research and gathering new ideas, he will become the victim of obsolete conventions. To cure the evils inherent in bureaucratic administration, there has been evolved the institution of the general staff — an institution which can serve the President of the United States, the governor of a state, and the mayor of a city as well as the head of a great industry or railway.

There is something appealing to the systematic mind about a compact and logical hierarchy of administrative authorities with a manager at the top empowered to appoint and direct the subordinates carefully arranged and graded under his control. In the military sphere it works well, for all parts of the machine, drilled and disciplined, move in unison under orders; and there are many specialists in government who would apply it with strict precision to all branches of civil administration. It makes for responsibility and for action. It throws the whole complex machinery of government into bold relief so that the legislature and the people can see who is accountable for the management of the public business. For the confused tangle of independent officers, boards, agencies, and autonomous author-

ities such as we find in many states and cities, it offers a clear and orderly structure of administration which, in competent hands, is equipped for speed and action.

Still there are some reasonable objections to the rigid application of the idea to all branches of administration, especially on account of the fact that we give short terms to governors and mayors and constantly change from one political party to another. It is argued with great cogency by Professor Coker[1] that there are some functions of government which are judicial in character — such as the regulation of public utilities and the administration of labor laws; that there are others such as the supervision of education in which continuity of policy is highly desirable; that the first call for judicial qualities and should be vested in commissions while the latter call for steadiness in practice and should be vested in boards composed of several members serving for long and overlapping terms. Moreover it is urged that the continuous board system gives all parties representation and tends to take their work "out of politics." Such arguments are weighty and deserve due consideration; they warn us against sacrificing service for the sake of uniformity. But experience with the actual operations of independent boards, commissions, and authorities condemns the system as a whole even though exceptions to the hierarchical design may be highly expedient in specific cases.

Indeed it is worthy of note that many writers advocate administration by boards on the ground that they put administration "into politics" by making it possible for various interests to be represented on them. If a department of government is under the control of one man, it will of necessity be under the control of a Democrat, a Republican, or some other partisan. If it is organized under a board, there may be as many parties represented as there are members. Recently the frank "representation of interests" in administration has come to be an important factor in American government. "In Oregon," says Professor Barnett, "there is a statutory provision for the representation of various economic interests on ten state boards and one county board. Thus three labor boards, the state board of conciliation and arbitration, the industrial welfare commission, and the state industrial accident commission, are each

[1] *Political Science Review*, Vol. XVI, pp. 399 ff.

composed of representatives of labor, capital, and the public. The statute establishing the accident commission declares: 'Inasmuch as the duties performed by such commissioners vitally concern the employers, the employees, as well as the whole people of the state, it is hereby declared to be the purpose of this act that persons shall be appointed commissioners who shall fairly represent the interests of all concerned in its administration.' . . . There are a number of examples of similar representation of interests on federal boards. . . . The railway labor board is made up of three members, constituting the labor group, nominated by the employees and subordinate officials of the carriers; three members constituting the management group, nominated by the carriers; and three members constituting the public group, representing the public. Besides four *ex officio* members, the federal board for vocational education contains three others representing manufacturing and commercial interests, agricultural interests, and labor respectively. The organization of the federal reserve board was recently changed to accord with the same principle. In selecting the six appointive members, the President is directed to have 'due regard to a fair representation of financial, agricultural, industrial, and commercial interests, and geographical divisions of the country.'"[1] In Illinois the idea of representing interests is combined with that of one-man responsibility by associating with certain department heads advisory boards speaking for various groups directly affected by the work of the departments in question. In other parts of the country the practice is making headway, and while it is strongly condemned by some publicists, it cannot be ignored by those who are called upon to consider the organization of administrative departments.

Administrative Personnel — Civil Service

After the functions of government have been determined, and the departments of administration organized to carry them out, then comes the perplexing question of securing the right persons to do the work. In a simple organization engaged in simple tasks this problem is not difficult. The person in charge can advertise for applicants, interview them, and set them to work. But

[1] *National Municipal Review*, Vol. XII, pp. 347 ff.

in a great organization like a modern government, the task of selecting, directing, and controlling the employees is the most difficult of all. It is estimated that there are about 2,700,000 federal, state, city, county, and village officials in the United States and that their annual payroll is no less than $3,500,000,000.

The proper discharge of their duties calls for a mastery of all professions and crafts, all sciences and arts. A glance through the roster of employees in New York City in alphabetical order reveals accountants, actuaries, alienists, architects, auditors, bacteriologists, boilermakers, bricklayers, cement testers, chemists, draftsmen, demographers, detectives, dietitians, electricians, engineers (mechanical, electrical, and civil), finger-print experts, firemen, franchise searchers, housekeepers, medical examiners, pathologists, pharmacists, psychologists, riveters, shoemakers, statisticians, surgeons, tinsmiths, upholsterers, X-ray experts, and watchmen — to mention only a few of the various classes of persons necessary to the administration of a great city. Obviously no President, governor, or mayor has either the knowledge or the judgment necessary to select all the technicians required in public service. Even if he had freedom of choice and were not besieged by an army of job hunters, he could not, with the best of intentions, find the right men for the right places.

For a long time, however, we pursued a haphazard policy and intrusted the selection of civil servants mainly to the chief executives of the nation, state, and city and their immediate subordinates. By 1835, that is, during the administration of President Jackson, practically all public offices had become the "spoils of politics." Whenever a new political party came to power all, or nearly all, the employees were turned out of office to make room for members of the victorious party. Persons were appointed not because they were competent, but because they were Republicans or Democrats or partisans of some other kind. Competent officials and laborers were discharged after long and faithful service, and inexperienced politicians were put in their places. Unnecessary positions were created to provide employment for party workers. Salaries were not closely related to the nature of the work, but rather to the requirements of the political incumbent. Those who held offices were expected to devote a part of their time to helping the party in elections, and often they

gave more hours to partisan services than to public duties. They made large contributions from their salaries to party campaign funds, and if they failed to contribute they were assessed by the party treasurers. In the course of time, the public officers in each party and those who aspired to hold office became closely organized as party workers. They made up the bulk of the party committees and conventions. They were the directing captains in election campaigns. In short the political party became to a considerable extent an office-getting machine; the ordinary citizen was elbowed aside by office holders who had an abundance of time at public expense to do the active work of parties. Thus administration was perverted from its true purpose of serving the public and made subordinate to the job-hunting interests.

When conditions became so bad as to be unendurable, Congress in 1883 inaugurated civil service reform in the National Government and from that time forward an increasing amount of attention was given to the elimination of politics and to the technical improvement of public service in federal, state, city, and county government.[1] On the one hand, this reform movement has been concerned with excluding the mere politicians from office and on the other with securing competent employees. In the course of time certain broad principles were worked out. Among these principles are the following: (1) Only policy determining officers, such as chief executives, department heads, and their higher subordinates should change with each change of administration; all other officers and employees should hold during good behavior and the efficient performance of their duties. (2) The appointing power of chief executives should be limited by the establishment of a commission or department charged with the duty of formulating rules for entrance into the public service and conducting examinations to test the fitness of candidates for admission or promotion. (3) All positions should be simply and logically classified on the basis of the duties actually performed by the holders of the various jobs and employments. The duties, title, and rate of compensation for each position should be clearly defined and should be the same for all departments of the same government. (4) The standard factors of education, experience, and ability necessary to the efficient performance of the duties of each position should be

[1] See below, chaps. xiv and xxvii.

firmly established and made the basis of examinations for appointments and promotions. (5) The political, religious, and civil rights of public employees should be properly safeguarded and clearly defined. (6) Pension systems should be established for employees of long standing and these systems should be put on a sound financial basis.

During the early years of the civil service reform movement, attention was of necessity directed to preventing the use of public offices for partisan ends; indeed this is an ever present task. About 1910, however, the movement took on new and wider aspects. It was found that the new devices of civil service, while reducing the evils of the spoils system, left untouched other evils such as: (1) irregularity of pay for the same classes of work; (2) the multiplication of useless and fictitious offices; (3) legislative increases in the pay of individuals for party reasons, and (4) lack of opportunities for promotion from the lower to the higher ranges of the public service. These evils became so glaring in the National Government and in many states and cities that special commissions were appointed to study and report on ways and means of eliminating them.

At the same time publicists took up the discussion of civil service with reference to constructive employment policies as well as the elimination of the spoils system. Meanwhile large industrial corporations began to analyze their employment problems and appoint specialists, known as "employment managers," to direct the selection of employees. Suddenly "personnel questions" were found to be very essential elements in "scientific management." The growth of labor organizations, the formation of associations and trade unions among government employees, and the extended discussion of "industrial democracy" introduced a new element into the situation, namely, the right of public employees to organize and participate in the determination of their conditions of employment. It was declared that the representation of employees in management was necessary to efficiency in work, the adjustment of grievances, the prevention of autocratic methods on the part of administrative chiefs, and the establishment of harmony between the managing side of the business and those who do the work in detail.

Undoubtedly this is a movement of great significance for the future of government as well as private industry. It already has

a large and growing literature. New experiments are constantly appearing and every phase of the personnel question is being subjected to the closest scrutiny by representatives of capital, labor, and governments. A large part of our life is affected by decisions in this sphere. Most of us are at one time or another the employees of private concerns or governments, and some of us may have responsible positions as employers and directors. The wise and fair determination of employment relations is essential to the orderly development of society and the efficient administration of government. The whole system of education is vitally related to it; through education persons are trained for the discharge of technical duties. For these reasons no one can pretend to be informed about modern government who neglects that body of knowledge and experience which falls under the head of "personnel administration."

Financial Administration — the Budget

Money is the life blood of administration; without it no persons can be employed, no materials bought, no work done. Every government, large or small, must lay and collect taxes, appropriate money for various public purposes, keep accounts of its transactions, and usually incur debts for certain objects. These operations involving, as they do, billions of dollars annually may be carried on in a reckless, spendthrift fashion, or according to the highest standards of precision and economy. If finances are to be well managed, then the government must command business talents of the best order. No one can be an efficient administrator who is unable to think of the work done under his management in terms of dollars and cents.

For a long time this simple fact was little heeded in American politics. Legislatures, national, state, and city, appropriated money by many separate bills without any general plan and without any reckoning of totals until the end of the fiscal year — or longer. Revenues and expenditures did not balance; some departments were starved while others were granted lavish favors; money was borrowed to pay current bills and the burden placed on future generations; huge sums disappeared from public treasuries without leaving any exact traces in the books and accounts. Not until the opening of the twentieth century was

any very serious attention given to the planned and orderly management of finances in America; the first national budget law was not signed until 1921. When taxes and debts grew to enormous proportions, citizens began to take notice of the methods by which the unhappy results had been brought to pass. Then it was that cities, states, and the National Government began to discuss a budget system.[1]

A budget system is both a document and a process: a plan of finances and a group of practices. The budget as a plan must present proposed expenditures for all purposes during a given period of time and proposed revenues for meeting those expenditures. As to the content of the budget there is general agreement that it should contain at least two important parts:

Part I. The revenue and expenditure program and information designed to elucidate it, embracing among other things:

1. A summary statement showing the total receipts and expenditures of the previous two years and the estimated receipts and expenditures for the coming year correctly classified.

2. Details of the summary statement, including departmental requests for funds (and supporting data from department chiefs) with the allowances made by the executive set forth in parallel columns, presenting to the legislative body and to the public the work requirements as viewed by operating officials. This analysis should be linked line by line with the summary statement and furnish the supporting data for proposed changes.

3. An analysis of all increases over and decreases from the previous year, indicating the purposes for which they are made, such an analysis to present the public policy and work program involved in each material increase or reduction.

4. Any collateral information necessary to explain the exact financial condition of the government, such as fund balance statement, surplus statement, debt statement, operating statement, and departmental reports of accomplishments.

Part II. Proposed bills appropriating money for various public purposes as determined by the legislative body and providing the revenues to meet them. There is much discussion among budget experts as to whether appropriations should be made to departments of government or to functions. It is urged that citizens are interested in the work of government, such as

[1] See below, chaps. xvii and xxx.

public health, education, police protection, etc., and not in departments themselves. For this reason it is urged that the appropriation bill should "ear-mark" the various sums by appropriating them to specific functions. On the other hand it is shown by accountants that all money appropriated is spent by certain departments and that unless funds are made available to specified departments it is almost impossible to hold spending officers accountable for the money allotted to them. Much may be said on both sides of this controversy, but an ideal solution consists in the correct grouping of functions in departments as above indicated. If this is done an appropriation to the department of health means an appropriation for the work of public health, and so on through the entire program.

Another controversy among budget specialists pertains to the form of the appropriations. Should each department receive all of its money in a "lump sum" without any restrictions as to its use or should the lump sum be minutely itemized to give the specific purpose for which each dollar is to be spent? Experience with lump-sum appropriations shows that they make possible the misuse and waste of money by department heads and destroy all accounting control over their actions. Experience with highly itemized appropriations, on the other hand, shows that they tie the hands of the good administrator and make impossible adjustments to meet unforeseen circumstances.

A compromise is desirable in this sphere. It is essential that the legislature should know just how the officer intends to spend the money for which he asks; but it is not necessary to put all the details into the appropriation bill. The documents accompanying the bill should show precisely how the money is to be laid out, but only the general titles need to be put into the bill itself. It may be stipulated at the same time that the details set forth in the supporting documents are to control the spending officer, unless for good reasons and with the approval of the chief executive alterations are made. All departures from the approved program, however, should be reported in detail to the ensuing legislature and spread upon the books of the chief accounting department of the government. By this method officers may be given freedom, under safeguards, in the public interest.

Another scheme for securing flexibility and responsibility is that known as the "executive allotment system," applied in a

few states. According to it, appropriations are made to departments in lump sums, but every quarter the head of each department must submit to the finance department a detailed estimate of proposed expenditures for the period, obtain an allotment of funds, and at the same time secure the approval of the governor. Thus revisions may be made quarterly as long as officers keep within the totals appropriated by the legislature. Responsibility is placed squarely on the governor.

The budget process itself, as distinguished from the document, falls into six parts: (1) The preparation of detailed estimates in advance by all departments. (2) The consolidation of all estimates from all departments into one grand statement by the chief executive — President, governor, mayor, or manager. (3) The scrutiny of the budget by the legislature and the enactment of the appropriation and revenue bills into laws. (4) The execution of the budget by administrative officials charged with the functions for which it provides the money. (5) Control of the spending process by a complete system of accounts to make sure that the money is spent for the purposes designated by the legislature. (6) An audit or review of the accounts at the end of the year, preferably by an independent agency responsible only to the voters or the legislature.

It is clear from this outline that a budget system is a highly complex affair, because all the work of government, all the departments of government, and all the economic processes of society taxed to support government come within its purview. A budget system involves fundamental legislative and executive practices and relations, skill in the arts of planning work programs, carefully devised accounting and reporting methods, a well-ordered administrative organization, accurate cost measurements, and an understanding of the economics of taxation. The very purpose of the budget is to substitute plan for chance in government. A budget is not primarily a financial document; it is a work and tax program. It is designed to furnish continuity in governmental services in spite of political changes, to create unity in planning, to compel the making of careful forecasts, to balance revenues and expenditures, to force the executive to think of work in terms of cost, and to make the legislature consider all phases of governmental work as parts of a greater whole. That is not all. A budget is intended to systematize and consolidate

all expenditures and revenues in such a fashion that the entire range of public services and finance can be made relatively clear and simple for the citizen and thus aid in the maintenance of democratic responsibility on the part of the government.

Naturally such a system cannot be established in any government, central or local, by a simple legislative act or executive decree. It can only be built up slowly as technical methods are perfected and public understanding widened. Moreover there are involved in it a number of questions which are still open. Three of them are of vital importance. Should the budget be prepared by the executive or by legislative committees? Should the legislature have the power to increase sums proposed by the executive or merely the power to strike out or reduce? Should the budget be discussed by the legislature in the presence of the chief executive and the heads of departments?

As to the first question the drift of opinion is in favor of placing responsibility for initiating the budget squarely on the shoulders of the chief executive: President, governor, mayor, or city manager. This principle is established in the national budget law of 1921, in most of the state laws, and in many municipalities. As to the second question there is great difference of opinion. If the legislature cannot increase or add to the budget as proposed by the executive, then the law-making power of that body is materially reduced, for all important laws enlarge the expenditures of government. The power to plan new work is thus in fact taken from the legislature and given to the executive. On the other hand if the legislature can add to or increase the executive plan at will, a proposed budget is likely to be little more than a pious wish expressed by the executive. The entire work program prepared by the executive may be utterly destroyed by the legislature without the assumption of any responsibility on its part.

Those who contend that the legislative branch should not have the power to increase items or add to the budget submitted by the executive cite English practice in support of the proposal. The English House of Commons cannot increase the budget laid before it by the executive, the chancellor of the exchequer speaking in the name of the cabinet. But it must be remembered that the executive branch of the English government is not independent of the legislature as in America; it is nothing but a

committee of the legislature accepted by the majority, subject to removal at any time by that majority. It is evident, therefore, that the transfer of the English budget system to America would involve a radical change in our scheme for separating the powers of government. If the House of Commons does not like a budget laid before it by the cabinet, it can simply oust the government and choose another; if Congress or a state legislature does not like a budget prepared by the President or governor, it cannot discharge the executive and select a new one. In a word, there is no way of resolving deadlocks in the American system.

With respect to the third question put above, there is a growing sentiment in favor of having the legislature and the executive sit together in the discussion of the budget. This of course is a departure from American traditions, but nothing seems more reasonable than that the men who do the work of government and prepare programs of work for the future should sit down with the representatives of the people to discuss in businesslike fashion a proposed plan of expenditures. Only in this way can the executive secure the right to explain and defend his projects. Only in this way can the legislature extract from those who prepare the budget precise information as to what is to be done with the money and how it is to be done. The state of Maryland, in its budget amendment of 1916, makes provision for this coöperation between the two branches of government. In cities which have the manager plan the manager and the council sit around a table and discuss the budget as a whole and in detail. The idea is spreading and doubtless in time it will be adopted in Washington. All over the country technicians are working out the details of budget practices and within another decade a revolution will be wrought in the financial methods of our governments.

The Purchase of Supplies

In the discharge of its functions every government must buy large quantities of material goods — commodities, equipment, machinery, etc., varying widely in kind and quality. If these material objects are bought according to correct weights and standards the administrative personnel will be furnished with the supplies necessary for efficient service. If they are bought with the skill of the good merchant, and used according to scientific

methods, the work of government will rest on an economical basis. Furthermore by correct purchasing methods honesty may be maintained in a sphere where it is especially needed. From twenty to thirty per cent of the money spent by governments goes for material goods. Like the civil service, government purchasing and contracting readily fall into the hands of the spoilsmen who seek to make huge profits out of the business. Some of the greatest scandals unearthed in American politics have grown out of the corrupt use of money in buying goods and letting contracts. In the effort to put our governments on a sound basis it is inevitable therefore that the purchase of supplies should receive careful attention.

In fact during the past twenty-five years, the subject of purchasing has been made a matter of the closest inquiry by private business corporations and public agencies. The broad outlines of a science of purchasing have already been established. The importance of applying exact methods has been recognized by leaders in national, state, and local administration. All over the country measures are being taken to place government purchasing on a scientific basis.

Among the principles worked out are the following: (1) a high degree of centralization in purchasing. This means the establishment of one department or division charged with purchasing supplies for all branches of the administration, thus securing the advantages of buying in large quantities. (2) The standardization of supplies, materials, and equipment and the preparation of precise specifications as to the chemical, physical, and other properties of the goods required. This is to prevent adulteration and the substitution of inferior materials. (3) The establishment of testing laboratories and inspectional methods designed to make sure that goods bought come up to the fixed standards. (4) Ingenious advertising methods and open bidding to obtain the largest possible number of bidders and assure equal opportunity to all. (5) Prompt payment to secure discounts and favorable terms from merchants. (6) Exact accounting control over all goods bought and distributed to administrative officers. (7) The application of fixed scientific standards to all work done by private contractors to make certain that the work comes up to specifications.[1]

[1] A. G. Thomas, *Principles of Government Purchasing* (1919).

From the bare outline given in this chapter it is apparent that a very large part of modern government is technical and has little or nothing to do with mere theory or opinion. The best kind of materials for a highway for given purposes cannot be ascertained by a party caucus or at a conference of "good" men deficient in scientific training; it can only be ascertained by experimentation and laboratory tests. If it is the desire of a government to heat the boilers in its institutions, then the nature of the coal to be bought for the purpose is a matter for specialists to decide. Moreover, as so much of administration is technical in character, it is possible to establish scientific, quantitative standards for measuring results. For example the cost per day of feeding one hundred orphans in asylums should not vary two or three hundred per cent in the same locality or state; an approximately accurate figure can be established by expert dietitians.

When standards and measurements are fixed in administration, the room for mere opinion and for dishonesty is reduced, if not eliminated. In other words, it is possible by the discovery and application of scientific standards in administration to contract the sphere in which personal vagaries, ignorance, and corruption can operate, and to force a high degree of competency and honesty upon administrative authorities. When citizens can measure performances, they can compel officials to be true to their trust. Herein lies the possibility of sweeping improvements in democratic government without a revolution in human nature — by scientific research, by experimentation, by the creation of standards, by the spread of information.[1]

[1] Those who wish to pursue a study of the large questions of modern politics will find an admirable guide in Charles Grove Haines and Bertha Moser Haines, *Principles and Problems of Government.*

PART II

THE NATIONAL GOVERNMENT

CHAPTER IV

THE HISTORIC SPIRIT OF THE CONSTITUTION

No government is ever formed *de novo* with sole reference to theory — to symmetry, balance, efficiency, perfection. As William James would say, political theory and political fact have evolved together. It may be that by the process of trial and error mankind is developing an ideal scheme of things out of the primitive chaos. Indeed Aristotle noted more than two thousand years ago that every government was an approximation to an ideal of some kind; but each particular government is born of time and circumstance and grows under the pressure of "the instant need of things." The same political scheme presents different aspects on different occasions. There are periods of confusion and weakness when power is the essential element upon which governing persons must concentrate their energies; for without a high degree of social order no other ends of government can be attained. There are other times when responsiveness to popular will is the great consideration. Again it may happen, especially in an age of industrialism, that efficiency in administration engages the main interest of political thinkers. Such forces are cumulative. Every government, whether founded on custom as in England or on a written document as in the United States, therefore, has its roots deep in the past. Its structure, its practices, and its spirit cannot be understood by an analysis of the law. The description of existing conditions is not enough; stress upon current problems, no matter how urgent or significant, is not enough. The tough web of politics has come down to us from the past; whether we are merely curious about it or wish to refashion it according to some concept of

our own we cannot ignore its historic realities — the customs, practices, catch-words, vested interests, and loyalties long associated with it.[1] A knowledge of the origins and the development of a government is necessary to an understanding of its structure and spirit.

The Origins of the Federal System

Although the federal Constitution was, in a sense, struck off, as Gladstone said, at a given time by the brain and purpose of man, it was not the product of abstract speculation. Although it was framed in a revolutionary epoch, just as the nation was starting on its career of independence, it made no radical departures from the political heritage derived from England and developed under new conditions in colonial America. In fact the American Revolution made no breach in the continuity of American institutional life. It was not a social cataclysm, the overthrow of a dominant class, the establishment of a new estate in power. Its most significant outcome was the severance of connections with Great Britain. Unlike the French revolutionists, the popular party in America did not have to create any new institutions of a fundamental character. It simply took possession of the executive, legislative, and judicial structures which had been built up in the colonies. Those who engineered the American Revolution were not inexperienced lawyers such as crowded into the National Assembly of France in 1789; they had all served in colonial legislatures and in important offices; they knew the stuff of politics through handling it.

Even the federal Constitution, though a separate creation, was not wrought out of theories and guesses as to the future. As colonies, the states had been united under the supremacy of the British government which almost from the beginning had exercised functions akin to those later vested in the Federal Government. Under the British crown, the American colonies had been defended, intercolonial and foreign commerce regulated, paper money suppressed, and local legislatures restrained through judicial and administrative control. The Revolutionists, in casting off the crown, cast off that control, and it fell to the framers of the Constitution to restore the old functions of union and restraint under national institutions.

[1] See J. Allen Smith, *The Spirit of American Government.*

The very names applied to the Senate, House of Representatives, and President were borrowed from the states, while many clauses of the Constitution, such as those providing the process of impeachment, the presidential message and veto, the origin of money bills in the lower house, and the freedom of each house to determine its procedure under certain limitations, were taken almost verbatim from state constitutions. The powers which the Convention of 1787 vested in Congress were scarcely experimental, for six years' practical experience with the shortcomings of the Articles of Confederation had taught statesmen the necessity of giving the National Government those very powers, and limiting the states in the exercise of the authority which they had previously enjoyed. Nor must it be forgotten that the right later assumed by the Supreme Court to pass upon the constitutionality of laws and declare them void had already been exercised by more than one state court.

Even the idea of union itself on American soil was not altogether novel. In early colonial times a federation was effected by voluntary action among the New England colonies; and long afterwards at the Albany conference of 1754 articles of union and confederation were devised, but the time was not ripe for putting them into effect. It must not be forgotten that the author of those articles, Benjamin Franklin, had a seat of honor in the convention which framed the Constitution more than a quarter of a century later. A year after the Albany conference an experiment in united action was made by the Stamp Act Congress of 1765 and during the Revolution a Continental Congress speaking for the union, weak and feeble as it was, carried on the war, won independence, and with the ratification of the states formed a community of interests under the Articles of Confederation in 1781. In a strict sense, therefore, Lincoln was right when he said that the union was older than independence.

Naturally the men who led in the revolt against Great Britain and in keeping the fighting temper of the Revolutionists at the proper heat were the boldest and most radical thinkers — men like Samuel Adams, Thomas Paine, Patrick Henry, and Thomas Jefferson. They were not, generally speaking, men of large property interests or of much practical business experience. In a time of disorder, they could consistently lay more stress upon

personal liberty than upon social control; and they pushed to extreme limits those doctrines of individual rights which had been evolved in England during the struggles of the small landed proprietors and commercial classes against royal prerogative — doctrines which were well suited to the economic conditions prevailing in America at the close of the eighteenth century. They associated strong government with monarchy, and came to believe that the best political system was one which governed least. A majority of the radicals regarded all government, especially if highly centralized, as a species of evil, tolerable only because necessary and always to be kept down to an irreducible minimum by a jealous vigilance. Jefferson put the doctrine in concrete form when he declared that he preferred newspapers without government to government without newspapers. The Declaration of Independence, the first state constitutions, and the Articles of Confederation bore the impress of this philosophy. In their anxiety to defend the individual against official interference and to preserve to the states a large sphere of local autonomy, the Revolutionists set up a system too weak to achieve even the primary objects of government; namely, national defense, the protection of property, and the advancement of commerce. They understood the shortcomings of their handiwork, but many of them believed with Jefferson that "man was a rational animal endowed by nature with rights and with an innate sense of justice and that he could be restrained from wrong and protected in right by moderate powers confided to persons of his own choice."[1] Occasional riots and disorders, they held, were preferable to too much government.

Attacks on the Articles of Confederation

The new American Confederation had scarcely gone into effect in 1781 when it began to incur opposition from many sources. The close of the Revolutionary struggle removed the prime cause for radical agitation and brought a new group of thinkers into prominence. When independence had been gained, the practical work to be done was the maintenance of social order, the payment of the public debt, the provision of a sound financial

[1] *Readings*, p. 93.

system, and the establishment of conditions favorable to the development of the economic resources of the new country.

The leaders who were principally concerned in this work of peaceful enterprise were not the philosophers, but men of business and property and the holders of public securities — "a strong and intelligent class possessed of unity and informed by a conscious solidarity of interests." [1] For the most part they had had no quarrel with the system of class rule and the strong centralization of government which existed in England. It was on questions of policy, not of governmental structure, that they had broken with the British authorities. By no means all of them, in fact, had even resisted the policy of the mother country; within the ranks of the conservatives were large numbers of Loyalists who had remained in America, and cherished a bitter feeling against the Revolutionists, especially the radical section which had been boldest in denouncing the English system root and branch. In other words, after the heat and excitement of the War of Independence were over and the new government, state and national, was tested by the ordinary experiences of planters and business men, it was found inadequate; these groups accordingly grew more and more determined to reconstruct the political system in such a fashion as to make it subserve their permanent interests. In order that we may understand the seriousness of the situation for the commercial, manufacturing, and financial sections especially, it is necessary to examine somewhat closely the exact ways in which the Confederation failed to afford adequate guarantees to business enterprise.[2]

The most obvious defect in the government under the Articles of Confederation was its inability to pay even the interest on the public debt, most of which had been incurred in support of the War for Independence. Holders of government securities saw the value of their paper sinking steadily as the defaulted interest accumulated and the prospects of payment faded. They would have displayed superhuman qualities if they had quietly acquiesced in the continuance of such a government and such a policy.

The system of raising money provided by the Articles gave them no hope that the long delayed payments would ever be

[1] Woodrow Wilson, *Division and Reunion*, p. 12.
[2] *Readings*, p. 38. Beard, *An Economic Interpretation of the Constitution.*

made. The confederate Congress had no immediate taxing power. The expenses of the government were to be met out of a common treasury supplied by lump-sum contributions from the states. The Congress determined the amount to be raised and apportioned it among the states on the basis of the value of their lands and improvements. Limited to one form of revenue and dependent upon the good graces of the legislatures, the Congress could really do little more than make recommendations and beg from door to door, only meet continued rebuffs and sink deeper and deeper into debt each year.

Not only was the Congress limited in its resources to quotas imposed on the states; the very principle of apportionment according to the value of lands, buildings, and improvements was itself unjust. It is true that the states could raise their quotas by any forms of taxation they preferred, but the amount which they had to pay was determined on the basis of real property, to the exclusion of other forms of wealth — slaves, money, securities, and commerce.

The objection that the system of confederate finance worked injustice only added a welcome sanction to the natural dislike of the states to pay direct contributions in lump sums to a distant central government. Consequently the states vied with one another in delaying the payment of their quotas into the common treasury. As the modern holder of personal property pleads the evasions of others as a justification for not paying taxes on the full valuation of his own property, so each backward state pleaded the delays of other states, and hesitated to pay even when it could, on the ground that it might contribute more than its share. During a period of about four years, from November 11, 1781, to January 1, 1786, Congress laid on the states more than $10,000,000 in requisitions, and received in payment less than one fourth of the amount demanded. During the fourteen months preceding the formation of the new federal Constitution less than half a million was paid into the confederate treasury — not enough to pay the interest on the foreign debt alone.

The dissatisfaction of the financial interests was more than equaled by the discontent of traders and manufacturers with the unbusinesslike character of the confederate government. The Congress could regulate commerce to some extent by making treaties with foreign powers, but it could not enforce its agree-

ments against states that insisted on following their own devices. In reality, therefore, the confederate government could not protect American manufacturers by tariffs directed against foreign competition or aid American ship owners by discriminatory legislation and subsidies. To make matters worse, the states bid against one another for foreign trade; they laid duties on goods in transit through their territory; and they sometimes treated one another worse than they did France, Holland, or England.

The disordered state of American commerce under the Articles of Confederation can best be described in the picturesque language of John Fiske: "The different states, with their different tariff and tonnage acts, began to make commercial war upon one another. No sooner had the other three New England states virtually closed their ports to British shipping than Connecticut threw hers wide open, an act which she followed up by laying duties upon imports from Massachusetts. Pennsylvania discriminated against Delaware, and New Jersey, pillaged at once by both her greater neighbors, was compared to a cask tapped at both ends. The conduct of New York became especially selfish and blameworthy. . . . Of all the thirteen states, none behaved worse except Rhode Island.

"A single instance, which occurred early in 1787, may serve as an illustration. The city of New York had long been supplied with firewood from Connecticut, and with butter and cheese, chickens and garden vegetables, from the thrifty farms of New Jersey. This trade, it was observed, carried thousands of dollars out of the city and into the pockets of detested Yankees and despised Jerseymen. It was ruinous to domestic industry, said the men of New York. . . . Acts were accordingly passed, obliging every Yankee sloop which came down through Hell Gate, and every Jersey market boat which was rowed across from Paulus Hook to Cortlandt Street, to pay entrance fees and obtain clearances at the custom-house, just as was done by ships from London or Hamburg; and not a cartload of Connecticut firewood could be delivered at the back door of a country house in Beekman Street until it should have paid a heavy duty. . . . The New Jersey legislature made up its mind to retaliate. The city of New York had lately bought a small patch of ground on Sandy Hook, and had built a lighthouse there. . . . New Jersey gave vent to her indignation by laying a tax of $1800 a

year on it. Connecticut was equally prompt. At a great meeting of business men, held at New London, it was unanimously agreed to suspend all commercial intercourse with New York. Every merchant signed an agreement, under penalty of $250 for the first offence, not to send any goods whatever into the hated state for a period of twelve months." [1]

The monetary system under the Articles of Confederation was even in worse confusion, if possible, than commerce. During the Revolution, the Congress had created an enormous amount of paper money which so speedily declined in value that in 1780 one paper dollar was worth less than two cents in specie. It took eleven dollars of this money to buy a pound of brown sugar in Virginia; seventy-five dollars for a yard of linen; and one hundred dollars for a pound of tea. Jefferson records that he paid his physician $3000 for two calls in 1781, and gave $355.50 for three quarts of brandy. After the Revolution, a majority of states continued to issue paper money without any specie basis.

In Rhode Island a most extraordinary conflict occurred over the control of the monetary system. The farmers, being in a majority, secured the passage of a law authorizing the issuance of money to themselves on the basis of mortgages against their farms. The merchants refused to accept this paper, and it promptly declined to about one sixth of its nominal value. Heavy penalties were then placed upon those who would not accept it, but without avail. Merchants closed their shops rather than yield, and farmers refused to bring produce to town in the hope of starving the merchants out. In nearly every state determined efforts were made to force creditors to accept depreciated paper in payment of lawful debts.

To the most perplexing economic irregularities were added threats of social dissolution. Shays' rebellion in Massachusetts in 1786 showed that grave dangers to public order might arise in any state and that the duly constituted authorities might be overthrown by violence if no assistance could be secured from neighboring states or the federal authority. The heavy public debt in Massachusetts had necessitated heavy taxes, and the attempt of creditors to recover debts due them added to popular discontent. "A levelling, licentious spirit," says Mr. Curtis,

[1] J. Fiske, *The Critical Period of American History*, pp. 144–147.

"a restless desire for change, and a disposition to throw down the barriers of private rights, at length broke forth in conventions, which first voted themselves to be the people and then declared their proceedings to be constitutional. At these assemblies the doctrine was publicly broached that property ought to be common, because all had aided in saving it from confiscation by the power of England. Taxes were voted to be unnecessary burdens, the courts of justice to be intolerable grievances, and the legal profession a nuisance. A revision of the [state] constitution was demanded, in order to abolish the Senate, reform the representation of the people, and make all the civil officers eligible by the people." [1]

The impotence which characterized the confederate government in enforcing measures of taxation and commercial treaties against recalcitrant states extended throughout the whole domain of its nominal authority. It was dependent almost wholly upon the states for the enforcement of its laws, and yet it had no express power to exact obedience from them or to punish them by pecuniary penalties or suspension of privileges. Indeed, as Madison afterwards pointed out in the convention at Philadelphia, "the use of force against a state would look more like a declaration of war than an infliction of punishment and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound." [2] Thus was afforded "the extraordinary spectacle of a government destitute even of a shadow of a constitutional power to enforce the execution of its own laws." [3]

The reduction of the confederate government's power to a shadow was the logical result of what Hamilton regarded as the great and radical vice of the Articles of Confederation; namely, the principle of legislation for states in their collective or corporate capacity as distinguished from the individuals of which they were composed.[4] Subject to the rule of apportionment, Congress could demand an unlimited supply of money and soldiers from the states, but in respect to both these important matters, upon which, in final analysis, the foundations of all government rest, Congress could bring no pressure to bear upon any individual.

[1] *Constitutional History of the United States*, Vol. I, p. 181.
[2] Elliot's *Debates*, Vol. V, p. 140.
[3] *The Federalist*, No. XXI.
[4] *Ibid.*, No. XV.

It was practically restricted to transactions with states — corporate entities — represented by transient and often hostile legislatures. The complete enforcement of any measure of taxation required the concurrence of thirteen different bodies — a conjuncture which was well-nigh impossible to secure in practice.

The Movement for Constitutional Revision

The Congress of the Confederation was not long in discovering the true character of the futile authority which the Articles had conferred upon it. The necessity for new sources of revenue became apparent even while the struggle for independence was yet undecided, and, in 1781, Congress carried a resolution to the effect that it should be authorized to lay a duty of five per cent on certain goods. This moderate proposition failed because Rhode Island rejected it on the ground that "she regarded it the most precious jewel of sovereignty that no state shall be called upon to open its purse but by the authority of the state and by her own officers." Two years later Congress prepared another amendment to the Articles providing for certain import duties, the receipts from which, collected by state officers, were to be applied to the payment of the public debt; but three years after the introduction of the measure, four states, including New York, still held out against its ratification, and the project was allowed to drop. At last, in 1786, Congress in a resolution declared that the requisitions for the last eight years had been so irregular in their operation, so uncertain in their collection, and so evidently unproductive, that a reliance on them in the future would be no less dishonorable to the understandings of those who entertained it than it would be dangerous to the welfare and peace of the Union.

In fact, the Articles of Confederation had hardly gone into effect before leading citizens also began to feel that the powers of Congress were wholly inadequate. In 1780, even before their adoption, Alexander Hamilton proposed a general convention to frame a new constitution, and from that time forward he labored with zeal and wisdom to extend and popularize the idea of a strong national government. In 1783, Washington, in a circular letter to the governors,[1] urged that it was indispensable

[1] This letter is printed along with other important materials bearing on the movement for the Constitution in Professor Lawrence Evans' *Writings of Washington* (1908).

to the happiness of the individual states that there should be lodged somewhere a supreme power to regulate and govern the general concerns of the confederation. Shortly afterward (1785), Governor Bowdoin, of Massachusetts, suggested to his state legislature the advisability of calling a national assembly to define the powers of Congress; and the legislature resolved that the government under the Articles of Confederation was inefficient and should be reformed; but the resolution was never laid before Congress.

The next year, Virginia invited the other states to send delegates to a convention to discuss duties on imports and commerce in general. When this convention assembled at Annapolis in 1786, delegates from only five states were present. They were disheartened at the limitations on their powers and the lack of interest the other states had shown in the project. With remarkable foresight, however, Alexander Hamilton seized the occasion to secure the adoption of a recommendation advising the states to choose representatives for another convention to meet in Philadelphia the following year "to consider the Articles of Confederation and to propose such changes therein as might render them adequate to the exigencies of the union." This recommendation was cautiously worded, for Hamilton did not want to raise any unnecessary alarm. Accordingly no general reconstruction of the political system was suggested; the Articles of Confederation were merely to be "revised"; and the amendments were to be approved by the state legislatures as provided by that instrument.

The proposal of the Annapolis convention was transmitted to the state legislatures and laid before Congress. Congress thereupon resolved in February, 1787, that a convention should be held for the sole and express purpose of revising the Articles of Confederation and reporting to itself and the legislatures of the several states such alterations and provisions as would when agreed to by Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union.[1] Amendment, not revolution, was evidently the purpose of the confederate Congress.

In pursuance of this call, delegates to the new convention were chosen by the legislatures of the states or by the governors in

[1] For this call, see *Readings*, p. 43.

conformity to authority conferred by the legislative assemblies.[1] The delegates were given instructions of a general nature by their respective states, none of which, apparently, contemplated any very far-reaching changes. In fact, almost all of them expressly limited their representatives to a mere revision of the Articles of Confederation.[2]

The National Constitutional Convention of 1787

It was a truly remarkable assembly of men that gathered in Philadelphia in May, 1787, to undertake the work of reconstructing the American system of government. It is not merely patriotic pride that compels one to assert that never in the history of assemblies had there been a convention of men richer in political experience and in practical knowledge, or endowed with a profounder insight into the springs of human action and the intimate essence of government. It is indeed an astounding fact that at one time so many men skilled in statecraft could be found on the very frontiers of civilization among a population numbering only about four million whites. It is no less a cause for admiration that their instrument of government has survived the trials and crises of more than a century and witnessed the wreck of more than a hundred other paper constitutions and established political systems.

All the members of the convention had received a practical training in politics. Washington, as commander-in-chief of the revolutionary forces, had learned well the lessons of war, and mastered successfully the no less difficult problems of administration. The two Morrises had distinguished themselves in grappling with financial questions as trying and perplexing as any which statesmen had ever been compelled to face. Seven of the delegates had gained political wisdom as governors of their native states; and no less than twenty-eight had served in Congress either during the Revolution or under the Articles of Confederation. Among the leaders were men trained in the law, versed in finance, skilled in administration, and learned in the political philosophy of their own and all earlier times. Moreover, they

[1] Rhode Island alone was unrepresented. In all, sixty-two delegates were appointed by the states; fifty-five of these attended sometime during the sessions; but only thirty-nine signed the finished document.

[2] For example, see the New York instructions, *Readings*, p. 44.

were men destined to continue in public service under the government which they had met to construct; future Presidents, Vice Presidents, heads of departments, and justices of the Supreme Court were in that imposing body. They were equal to the great task of constructing a national system strong enough to defend the country on land and sea, pay every dollar of the lawful debt, and afford sufficient guarantees for the rights of private property.

The criticism has been advanced that this assembly of great men was more interested in strong government than in democracy. It must be remembered, however, that they were convened not to write a Declaration of Independence, but to frame a government which would meet the practical issues that had arisen under the Articles of Confederation. The objections they entertained to unrestrained popular government, and they were undoubtedly many, were based upon their experience with popular assemblies during the immediately preceding years. With the plain lessons of history before them, they naturally feared that the rights and privileges of the minority would be insecure if the principle of simple majority rule was definitely adopted and provisions made for its exercise.

Furthermore, it will be remembered that up to that time the right of all men, as men, to share in the government had never been recognized in practice. Everywhere in Europe the government was in the hands of a ruling monarch or at best a ruling class; everywhere the mass of the people had been regarded principally as an arms-bearing and tax-paying multitude, uneducated, and with little hope or capacity for advancement. Two years were to elapse after the meeting of the grave assembly at Philadelphia before the transformation of the French Estates General into the National Convention opened the floodgates of revolutionary ideas on human rights under whose rising tide old landmarks of government are still being submerged. It is small wonder, therefore, that in these circumstances many of the members of that august body held popular government in no high esteem and took the people into slight consideration — enough "to inspire them with the necessary confidence," as Gerry frankly put it.[1]

Indeed, every page of the laconic record of the proceedings of

[1] Elliot's *Debates*, Vol. V, p. 160.

the convention preserved to posterity by Madison shows conclusively that the members of that assembly were not seeking to realize any fine notions about democracy and equality, but were striving with all the resources of political wisdom at their command to set up a system of government which would be stable and efficient, safeguarded on one hand against the possibilities of despotism and on the other against the onslaught of majorities. In the mind of Gerry, the evils they had experienced flowed "from the excess of democracy," and he confessed that, while he was still republican, he "had been taught by experience the danger of the levelling spirit." [1] Randolph, in offering to the convention his plan of government, observed "that the general object was to provide a cure for the evils under which the United States labored; that, in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy; that some check therefore was to be sought for against this tendency of our governments; and that a good Senate seemed most likely to answer the purpose." [2] Hamilton, in advocating a life term for Senators, urged that "all communities divide themselves into the few and the many. The first are the rich and well born and the other the mass of the people who seldom judge or determine right." [3]

Gouverneur Morris wanted to check the "precipitancy, changeableness, and excess" of the representatives of the people by the ability and virtue of men "of great and established property — aristocracy; men who from pride will support consistency and permanency. . . . Such an aristocratic body will keep down the turbulence of democracy." While these extreme doctrines were somewhat counterbalanced by the democratic principles of Wilson, who urged that "the government ought to possess, not only first, the force, but second the mind or sense of the people at large," Madison doubtless summed up in a brief sentence the general opinion of the convention when he said that to secure private rights against majority factions, and at the same time to preserve the spirit and form of popular government, was the great object to which their inquiries had been directed.[4]

They were anxious above everything else to safeguard the rights of private property against any leveling tendencies on

[1] Elliot's *Debates*, Vol. V, p. 136.
[2] *Ibid.*, Vol. V, p. 138.
[3] *Readings*, p. 47.
[4] *The Federalist*, No. X; *Readings*, p. 50.

the part of the propertyless masses. Gouverneur Morris, in speaking on the problem of apportioning representatives, correctly stated the sound historical fact when he declared: "Life and liberty were generally said to be of more value than property. An accurate view of the matter would, nevertheless, prove that property was the main object of society. . . . If property, then, was the main object of government, certainly it ought to be one measure of the influence due to those who were to be affected by the government."[1] King also agreed that "property was the primary object of society";[2] and Madison warned the convention that in framing a system which they wished to last for ages they must not lose sight of the changes which the ages would produce in the forms and distribution of property. In advocating a long term in order to give independence and firmness to the Senate, he described these impending changes: "An increase of population will of necessity increase the proportion of those who will labor under all the hardships of life and secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this country, but symptoms of a levelling spirit, as we have understood, have sufficiently appeared, in a certain quarter, to give notice of the future danger."[3] And again, in support of the argument for a property qualification on voters, Madison urged: "In future times, a great majority of the people will not only be without landed, but any other sort of property. These will either combine, under the influence of their common situation, — in which case the rights of property and the public liberty will not be secure in their hands, — or, what is more probable, they will become the tools of opulence and ambition; in which case there will be equal danger on another side."[4] Various projects for setting up class rule by the establishment of property qualifications for voters and officers were advanced in the convention, but they were defeated. On account of the diversity of opinion that prevailed, agreement was impossible, and it was thought best to trust this matter to the discretion and wisdom of the states.

[1] Elliot's *Debates*, Vol. V, p. 279.
[2] *Ibid.*, Vol. V, p. 280.
[3] *Ibid.*, Vol. V, p. 243.
[4] *Ibid.*, Vol. V, p. 387.

Nevertheless, by the system of checks and balances placed in the government, the convention safeguarded the interests of property against attacks by majorities. The House of Representatives, Hamilton pointed out, "was so formed as to render it particularly the guardian of the poorer orders of citizens,"[1] while the Senate was to preserve the rights of property and the interests of the minority against the demands of the majority.[2] In the tenth number of *The Federalist*, quoted above,[3] Madison argued in a philosophic vein in support of the proposition that it was necessary to base the political system on the actual conditions of "natural inequality."

The National Idea

The convention had not proceeded very far in the consideration of the problems before it when the question was raised as to whether the delegates were bound by their instructions to the mere amendment of the Articles of Confederation or were free to make a revolution in the political system. Paterson argued that the delegates were bound by their instructions: "If the Confederacy is radically wrong, let us return to our States and obtain larger powers, not assume them ourselves. . . . Our object is not such a government as may be best in itself, but such a one as our constituents have authorized us to prepare and as they will approve."[4] Randolph, however, declared that he "was not scrupulous on the point of power. When the salvation of the republic is at stake, it would be treason to our trust not to propose what we found necessary."[5] With this view, Hamilton agreed: "We owe it to our country to do in this emergency whatever we deem essential to its happiness. The states sent us here to provide for the exigencies of the Union. To rely on and propose any plan not adequate to these exigencies merely because it was not clearly within our powers would be to sacrifice the means to the end."[6]

Fortunately for the cause of national union, these delegates threw off the restrictions placed upon them by their instructions, and frankly disregarded the fact that they had assembled merely to amend the Articles of Confederation, not to make a new instru-

[1] Elliot's *Debates*, Vol. V, p. 244.
[2] *Ibid.*, Vol. V, p. 203.
[3] See p. 21.
[4] Elliot's *Debates*, Vol. V, p. 194.
[5] *Ibid.*, Vol. V, p. 197.
[6] *Ibid.*, Vol. V, p. 199.

ment of government. They refused to be bound either by the letter or spirit of the existing law, for they even provided that the new government should go into effect when ratified by nine states, whereas under the Articles unanimous approval was required for any amendment. In order that their purposes should not be discovered and thwarted by public criticism, the convention sat behind closed doors; their proceedings were kept secret; and members were even forbidden to correspond with outsiders on the topics under discussion. Not until the draft was finished did the people know what the convention had done.

A large majority of the convention had determined to establish a strong national government to take the place of the confederate system, and to do this it was absolutely necessary to throw aside the fundamental features of the Articles of Confederation, which, according to their instructions, they were assembled to amend. On May 30, 1787, five days after the opening of the convention, a resolution was adopted in the Committee of the Whole, "that a national government ought to be established consisting of a supreme legislative, executive, and judiciary." [1] The distinction between a "*federal* and a *national supreme* government" was clearly explained by Gouverneur Morris. "The former," he said, was "a mere compact resting on the good faith of the parties," while the latter had "a complete and compulsive operation"; and he concluded by adding that "in all communities there must be one supreme power and one only." [2] Madison, in discussing the problem of representation, observed that "whatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign states, it must cease when a national government should be put in their place." [3] Read of Delaware even went so far as to say that the national government must soon of necessity swallow up all the state governments;[4] and Wilson of Pennsylvania declared that he could not even admit the doctrine that when the colonies became independent of Great Britain they were independent of each other; he contended that the colonies were not declared to be free and independent states individually, but only unitedly.[5] Hamilton went even further than the other members of the convention in his stanch

[1] Elliot's *Debates*, Vol. V, p. 134.
[2] *Ibid.*, Vol. V, p. 133.
[3] *Ibid.*, Vol. V, p. 135.
[4] *Ibid.*, Vol. V, p. 163.
[5] *Ibid.*, Vol. V, p. 213.

adherence to the idea of a supreme national government; he advocated the appointment of state executives by the general government and wanted to give Congress the power to legislate on every matter whatsoever.[1]

That it was the desire of a majority of the convention to establish a supreme national government is revealed on nearly every page of the debates. That such was their intention was explicitly declared by Luther Martin, of Maryland, in a letter to the legislature of his state justifying his conduct in withdrawing from the convention. He contended that the plan of government, as devised by his colleagues, was "a national not a federal government," and one "calculated and designed not to protect and preserve but to abolish and annihilate the state governments."[2]

In devising this national system it was necessary to make many compromises.[3] In the first place, the small states demanded equal representation and the large states representation according to population; a compromise gave the small states equality in the Senate and the large states proportional representation in the lower House. In the next place, the slave states wished to have slaves counted in the apportionment of representation — a demand which was stoutly opposed by the non-slave states; and a compromise was reached by the provision that in apportioning representation and direct taxes only three fifths of the total number of slaves should be counted. In the third place, the North, having larger commercial interests than the South, wished to give Congress the power to regulate commerce, but the South, being solicitous for the slave trade, feared its prohibition in case unqualified power was vested in Congress; the result was a compromise authorizing Congress to regulate interstate and foreign commerce, but forbidding it to prohibit the importation of slaves before the year 1808. After all, it was a limited and federal government which the fathers created — not an omnipotent and unitary state, not a consolidation of all powers in the hands of one supreme national authority.

In addition to these great compromises which had to be made on account of the diversity among the states in area, population, and wealth, there was a still greater compromise — the most fundamental one of all — the compromise between that party

[1] Elliot's *Debates*, Vol. V, p. 205.
[2] *Ibid.*, Vol. I, p. 362.
[3] For a contemporary view, *Readings*, p. 45.

in the nation which wanted a government strong enough to pay the national debt, regulate commerce, protect creditors, and sustain property rights in general, and that other party which was especially concerned about a democratic and confederate form of government. The result here was a compromise which, Madison contended, secured the spirit and form of popular government while preventing direct and simple majority rule.[1]

Thus the convention established what is known as the check and balance system discussed in Chapter II. In this system, the President is elected for a four-year term by an indirect process; the Senators are elected for a six-year term (one third going out every two years) by another process — by the state legislatures;[2] the members of the House of Representatives are elected by another process — popular vote — for a term of two years; and over against these three institutions is set a Supreme Court composed of judges appointed by another process — the President and Senate — for life terms, and enjoying the power to declare null and void the unconstitutional acts of the other departments.

It is highly improbable, therefore, that any political party at a single national election will secure an unqualified control over all these departments of government and rush through any extremely radical measure. This system is eloquently described in a little anecdote related of Jefferson and Washington. The former on one occasion was advancing many objections to a bicameral legislature, when Washington replied, "You yourself have proved the excellence of two houses this very moment." Astonished at this Jefferson inquired, "I? How is that, General?" "You have," explained Washington, "turned your hot tea from the cup into the saucer to get cool. It is the same thing we desire of the two houses."

Fundamental Features of the New System

1. The Articles of Confederation provided no separate executive department charged with the high function of enforcing federal law. This grave defect was carefully considered by the convention, and warmly discussed by the advocates of a new system. All were agreed that a strong executive power was indis-

[1] See *Readings*, p. 52.

[2] Now by popular vote under the Seventeenth Amendment.

pensable, but they were uncertain as to whether such an important authority should be vested in a single person or in a directorate. They also had no little difficulty in agreeing on the method by which the chief magistrate was to be elected. After much discussion they decided that the executive power should be given to one man — the President.[1] To meet the objections of those who were afraid of intrusting too much political control to the mass of the people, it was decided that the President should be selected indirectly by electors chosen as the legislatures of the several states might determine.

2. No less grave defects were inherent in the Congress created by the Articles of Confederation. Three, in particular, engaged the attention of the convention: the equality of the several states, large and small, in voting power; the instability of a single chamber; and the absence of direct representation of the people in the Congress — the delegates being appointed by their respective state legislatures and thus dependent upon the states as corporate entities rather than upon the people thereof. The convention accordingly decided upon a bicameral legislature: a Senate affording equal representation to all states and elected by the legislatures, and a House composed of representatives apportioned among the states on a basis of population and chosen by popular vote. Moreover, another significant fact must not be overlooked, namely, that the members of the new Congress were to be paid from the national treasury and thus relieved from all dependence upon state revenues.

3. The crowning defect of the Articles, according to Hamilton, was the want of a central judiciary. The old Congress had no authority to organize courts of general jurisdiction, although it could act as a tribunal of "last resort on appeal in all disputes and differences arising between two or more states concerning boundary, jurisdiction, or any other cause whatever."[2] It therefore had no way of enforcing federal laws by judicial process,[3] and as Hamilton said: "Laws are a dead letter without courts to expound and define their true meaning and operation."[4] Moreover, Hamilton, fearing the aggression of the legislature, believed that the court should have the power of declaring laws

[1] C. C. Thach, *The Creation of the Presidency, 1775–1789.*
[2] See *Readings*, p. 30.
[3] Except in maritime and admiralty matters.
[4] *The Federalist*, No. XXII.

unconstitutional. Accordingly a Supreme Court and inferior courts, to be erected by Congress, were given jurisdiction over all cases arising under the Constitution, federal laws, and treaties — a jurisdiction by later congressional enactment and judicial decision interpreted to include the power of declaring state and federal laws unconstitutional.

4. The financial and commercial objections to the Articles of Confederation were met by provisions conferring important enumerated powers upon Congress. The necessity of depending upon the state legislatures for federal funds was entirely eliminated by the clause authorizing Congress to raise revenues by taxes, duties, and excises bearing immediately upon the people as individuals. The continuation of the commercial warfare among the states was prevented by the clause empowering Congress to regulate commerce among them and with foreign nations, as well as with the Indians. The National Government was also authorized to establish uniform bankruptcy laws and thus exercise at will an effective check upon the shrewdly devised state legislation through which debtors sometimes sought to escape from their obligations.[1]

No less important for financial and commercial purposes were the restrictions laid upon the powers of the states. They were forbidden to emit bills of credit, make anything but gold and silver coin tender in payment of debts, pass *ex post facto* laws, lay duties on imports or exports (except with the consent of Congress for specific purposes), lay tonnage duties, or pass any law impairing the obligation of contract.

5. Special effectiveness was given to the new powers conferred upon the National Government by virtue of the fact that it could deal with individuals instead of thirteen distinct and separate states. Hence it was no longer possible for states to violate and disregard treaties made by the Federal Government, or to look upon federal laws as mere recommendations to be obeyed if desirable or neglected altogether.

The Ratification of the Constitution

It is evident from an examination of these departures from the Articles of Confederation that a revolution in the political system was contemplated by the framers of the Constitution.

[1] See *Readings*, pp. 236 ff.

They were doubtless unaware of all the national implications contained in the instrument which they drafted, but they knew very well that the state legislatures, which had been so negligent in paying their quotas under the Articles and which had been so jealous of their rights, would probably stick at ratifying the new plan. Accordingly they cast aside that clause in the Articles requiring amendments to be ratified by the legislatures of all the states; and proposed that the new Constitution should be ratified by conventions in the several states composed of delegates chosen by the voters. They furthermore declared — and this is a fundamental matter — that when the conventions of nine states had ratified the Constitution the new government should go into effect so far as those states were concerned.

Of course, the convention did not resort to the revolutionary policy of transmitting the Constitution directly to the conventions of the several states. It merely laid the finished instrument before the confederate Congress with the suggestion that it should be submitted to "a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and each convention assenting thereto and ratifying the same should give notice thereof to the United States in Congress assembled." [1] The convention went on to suggest that when nine states had ratified the Constitution, the confederate Congress should extinguish itself by making provision for the elections necessary to put the new government into effect.[2]

"What they [the convention] actually did, stripped of all fiction and verbiage," says Professor Burgess, "was to assume constituent powers, ordain a Constitution of government and of liberty, and demand the *plébiscite* thereon, over the heads of all existing legally organized powers. Had Julius or Napoleon committed these acts, they would have been pronounced *coups d'état*. Looked at from the side of the people exercising the *plébiscite*, we term the movement revolution. . . . Of course the mass of the people were not at all able to analyze the real character of this procedure. It is probable that many of the members of the convention itself did not fully comprehend just what they were doing." [3]

[1] For documents illustrating the process of ratification, *Readings*, p. 54.
[2] *Ibid.*, p. 53.
[3] Burgess, *Political Science and Constitutional Law*, Vol. I, p. 105.

After the new Constitution was published and transmitted to the states, there began a determined fight over its ratification. A veritable flood of pamphlet literature descended upon the country. A collection of newspaper articles by Hamilton, Madison, and Jay, brought together later under the title of *The Federalist*, was scattered broadcast throughout the land.

The conflict over the election of delegates to the state ratifying conventions was bitter in all the important states and marked by a sharp division of the voters. Broadly speaking, the support for the new Constitution came from the seaboard regions — the centers of commerce, industry, and finance — while the opposition came from the farmers of the interior. Manufacturers, creditors, bond-holders, and men of substance were in favor of the Constitution; the debt-burdened farmers, friends of paper money and weak government, were against it. Bitter as the contest was, only about one fourth of the adult white males in the country voted in the elections at which the delegates were chosen; three fourths of them were either disfranchised by the property qualifications on the suffrage or by their own indifference. In New York the popular vote was overwhelming against the ratification of the Constitution; in Virginia and Massachusetts it was very close. Nothing but the most heroic efforts on the part of the Federalists saved the day for the Constitution.[1]

Before the lapse of a year the champions of the national system found themselves victorious, for on June 21, 1788, the ninth state, New Hampshire, ratified the Constitution, and accordingly the new government might go into effect as between the agreeing states. Within a few weeks, the nationalist party in Virginia and New York succeeded in winning these two states. In spite of the fact that North Carolina and Rhode Island had not yet ratified the Constitution,[2] Congress determined to put the instrument in force in accordance with the recommendations of the convention. Elections for the new government were held; the date March 4, 1789, was fixed for the formal establishment of the new system; Congress secured a quorum on April 6; and on April 30, Washington was inaugurated at the Federal Hall in Wall Street, New York.

[1] Beard, *An Economic Interpretation of the Constitution.*

[2] For the peculiar case of Rhode Island, see F. G. Bates, *Rhode Island and the Formation of the Union.*

CHAPTER V

THE NATIONAL CONSTITUTION AS A CHANGING ORGANISM

If we use the term "Constitution" in the narrow sense as including only the provisions of the written instrument itself, the history of its development is brief; but such a restriction of the term would be sheer formalism, and a history based upon such an interpretation would be misleading. For constitutional law, as Professor Dicey points out, includes all the fundamental rules which directly or indirectly affect the distribution and exercise of sovereign power; it includes among other things the laws which define the suffrage, regulate the prerogatives of the chief magistrate, prescribe the form of the legislature, and determine the structure and functions of the hierarchy of officials.

A comparison, therefore, of the present body of law and custom relative to such matters with that obtaining in the United States on the morning when Washington took the oath of office reveals most astonishing changes. Only nineteen new clauses, it is true, have been added by way of amendment to the written document, but Congress has filled up the bare outline by elaborate statutes; party operations have altered fundamentally the spirit and working of the machinery; official practice has set up new standards from time to time; and the Supreme Court, by generous canons of interpretation, has expanded, in ways undreamed of by the Fathers, the letter of the law. In fact, custom forms as large an element of our Constitution as it does in the case of the English constitution. A correct appreciation of the evolutionary character of the national system is, therefore, necessary to a true understanding of the genius of the American political institutions.

That is not all. A knowledge of the ways in which the letter of the Constitution has been interpreted from time to time to meet pressing exigencies not foreseen by the framers is an essential part of the equipment of the citizen as well as the statesman. Such a knowledge reveals the normal course of dealing with the

most momentous questions and exposes those prejudices and preconceptions which masquerade under the guise of constitutional dogmas.

The Amending Process

Article V of the Constitution provides a formal method for amending the original instrument. A proposition to amend may originate in Congress, on the approval of two thirds of both houses, and may be ratified by the concurrence of the legislatures, or of conventions, as Congress may determine, in three fourths of the states. On the other hand, Congress, on the application of the legislatures of two thirds of the states, must call a national convention for the purpose of drafting amendments which may be ratified by conventions, or by legislatures, in three fourths of the states. The composition of the national and state conventions, the procedure to be followed by the state legislatures in passing upon amendments, and numerous other questions are left unsettled by the brief article in the Constitution, but it is to be presumed that Congress may make such reasonable elaborations as it may see fit.

In practice only one method has been employed, namely, proposal by a two thirds vote in Congress and ratification by the legislatures of at least three fourths of the states. Whenever the federal Constitution has been amended, Congress has been very brief in its provisions. A proposition for an amendment is submitted by a resolution in the following form: "Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, two-thirds of both houses concurring, That the following article be proposed to the legislatures of the several states as an amendment to the Constitution of the United States which when ratified by three-fourths of the said legislatures shall be valid as part of the said Constitution." The state legislatures are then left to their own devices in approving or rejecting the proposal. Congress merely directs that "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate laws, with his certificate specifying the states by which the

same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." [1]

Owing to the fact that hundreds of amendments were proposed between 1803 and 1865 and between 1870 and 1913 only to meet defeat through failure to secure the requisite two thirds vote in Congress, there arose at the opening of this century an extensive criticism of the amending process itself. It was noted that only three amendments — the Thirteenth, Fourteenth, and Fifteenth — had been adopted in the course of a hundred years and that those had been carried as the result of a civil war. In short, it seemed impossible to amend the Constitution in the regular course of things owing to the large majority required for initiation by Congress, to say nothing of ratification by three fourths of the states. Some radical changes were then proposed in the amending process itself, and they were under discussion when the spell was broken by the adoption of the income tax amendment in 1913 followed shortly by the popular election of Senators, prohibition, and woman suffrage amendments.

Indeed, the subject of amending the Constitution has come under rather severe scrutiny since the adoption of the prohibition amendment. Two fundamental objections are urged against the existing method. Both of them rest on the ground that states — geographical districts — rather than population are the preponderant element in the ratification of amendments. On the one hand the amending system is attacked as being too conservative; approval by three fourths of the states is necessary to give sanction to an amendment laid before the Union for consideration. That means that thirteen states can hold up the entire country in an effort to make even the slightest change in the scheme of government. Now if we take thirteen of the least populous states — Nevada, Wyoming, Delaware, Arizona, Vermont, New Mexico, Idaho, New Hampshire, Utah, Montana, Rhode Island, South Dakota, and North Dakota — we find that they have a combined population less than that of the single state of New York. In other words, less than one tenth of the people of the nation, distributed in the right geographical dis-

[1] Can a state legislature withdraw its ratification, after it has once given it, before the amendment in question is proclaimed? That question has never been judicially determined. Ohio and New Jersey withdrew their approval of the Fourteenth Amendment, but they were counted by the Secretary of State among the ratifying states.

most momentous questions and exposes those prejudices and preconceptions which masquerade under the guise of constitutional dogmas.

The Amending Process

Article V of the Constitution provides a formal method for amending the original instrument. A proposition to amend may originate in Congress, on the approval of two thirds of both houses, and may be ratified by the concurrence of the legislatures, or of conventions, as Congress may determine, in three fourths of the states. On the other hand, Congress, on the application of the legislatures of two thirds of the states, must call a national convention for the purpose of drafting amendments which may be ratified by conventions, or by legislatures, in three fourths of the states. The composition of the national and state conventions, the procedure to be followed by the state legislatures in passing upon amendments, and numerous other questions are left unsettled by the brief article in the Constitution, but it is to be presumed that Congress may make such reasonable elaborations as it may see fit.

In practice only one method has been employed, namely, proposal by a two thirds vote in Congress and ratification by the legislatures of at least three fourths of the states. Whenever the federal Constitution has been amended, Congress has been very brief in its provisions. A proposition for an amendment is submitted by a resolution in the following form: "Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, two-thirds of both houses concurring, That the following article be proposed to the legislatures of the several states as an amendment to the Constitution of the United States which when ratified by three-fourths of the said legislatures shall be valid as part of the said Constitution." The state legislatures are then left to their own devices in approving or rejecting the proposal. Congress merely directs that "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate laws, with his certificate specifying the states by which the

same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." [1]

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tricts, can prevent nine tenths of the people from effecting changes in their system of government. Of course it does not happen that opposition to amendments falls only in the least populous states, but no doubt the requirement of an extraordinary majority to initiate and to put an amendment into effect makes the process very difficult in ordinary times.

On the other hand, it is urged that the same rule makes it possible for three fourths of the least populous states which are rural in character to force an amendment on the twelve great states with their accumulated masses concentrated in cities — twelve states containing about one half the people of the United States. This argument is frequently heard in connection with the prohibition amendment, but in fact it was not the agricultural states alone that forced the Eighteenth Amendment on the country. It is true that prohibition had been adopted by referendum in no populous industrial state before the resolution of Congress was submitted. It is true also that New York and Pennsylvania with nearly one fifth of the inhabitants of the country did not ratify it until after the requisite three fourths had made its adoption inevitable. At the same time among the three fourths that had already ratified were Massachusetts, Michigan, Ohio, Illinois, and California, which stand high in the scale of population. Moreover, it must be remembered that it takes two thirds of the members of each house of Congress to initiate an amendment and that the Representatives in the lower chamber are apportioned among the states according to their respective populations.

Another and perhaps more vital objection to the existing amendment process is that ratification can be effected by a relatively small number of men who happen to be in the state legislatures at the time a proposition is submitted. There are 7400 members in the forty-eight legislatures. Of these, 1760 are senators and 5640 are in the lower houses. Now if we group the thirty-six states with the smallest legislatures together we find that about 2000 members properly distributed between the upper and lower houses constitute a majority and can determine the fate of a federal amendment.

The number of persons taking part in the process of ratification is not as significant as the fact that they are only incidentally concerned in it as members of state legislatures. They are

elected for other purposes. Their main duty is to make laws for the states. Often they are elected before a proposed amendment to the federal Constitution is submitted by Congress, and are asked to pass upon a matter which was not before the voters when they were candidates for office. Moreover the type of man found in the legislature is usually not as high as that generally elected to state constitutional conventions. Many men of great ability are willing to serve in a convention for a short period, men who would not think of spending any time in the business of ordinary legislation. It is therefore not merely the political arithmetic of the amending process which invites criticism. It is to be criticized because it is casual in its nature and does not provide for that special and searching consideration which a change in the fundamental law of the land deserves.

The Nineteen Amendments

The most obvious changes in our Constitution are, of course, those that have been effected by the regular amendments, all of which are to be understood in connection with the historical circumstances that called them into being.

The first ten articles of amendment to the Constitution were adopted so closely after the ratification of the original instrument that they may be deemed almost a part of it. During the struggles which occurred in many states over the acceptance of the new plan of government, it was manifest that a greal deal of the opposition to it was based on the lack of provisions expressly safeguarding personal liberty, freedom of speech, religion, and press, and the rights of property against the action of the Federal Government. Jefferson, who was in Paris at the time the convention finished its work, wrote to a friend in Virginia that he wished four states would withhold ratification until a declaration of rights could be annexed, stipulating "freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by jury in all cases, no suspensions of habeas corpus, no standing armies." [1] Most of the state constitutions had provided such limitations on state governments, and there was evidently a desire on the part of many, who otherwise approved the Constitution, to see the historic doctrine of private rights em-

[1] Quoted in Curtis, *Constitutional History of the United States* (1889), Vol. I, p. 669, note.

bodied in it. Seven of the ratifying state conventions even put their wishes in the concrete form of a total of one hundred and twenty-four articles of amendment to be added to the Constitution.[1]

In *The Federalist*, Hamilton argued ably that such provisions were superfluous and even dangerous, because they contained various exceptions to power not actually granted, and would thus afford a colorable pretext to claim more than was granted. "For," he contended, "why declare that things shall not be done which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"[2] This very plausible argument was met with great cogency by Madison, on introducing the proposed amendments in Congress in 1789; and the history of the Alien and Sedition laws later bore out the contentions he advanced. He admitted that the new government was limited to certain particular objects, but pointed out that it would have a discretionary power liable to abuse, and furthermore that this abuse was all the more likely in view of the special provision that Congress could make all laws necessary and proper for carrying into execution the powers expressly vested in the Government of the United States. Illustrating this, Madison cited a single instance: "The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means of enforcing the collection are within the direction of the legislature; may not general warrants [of arrest] be considered necessary for the purpose, as well as for some purposes which it was supposed, at the framing of their constitutions, the state governments had in view? If there was any reason for restraining the state governments from exercising this power, there is like reason for restraining the Federal Government."[3] Madison then went on to state his conviction that such a measure would rally large numbers to the cause of union, and that, on principles of amity and moderation, the great rights of mankind secured under the Constitution ought to be expressly declared.

After a delay of two months, the House passed seventeen amendments, which were reduced to twelve in the Senate, slightly

[1] Ames, *Proposed Amendments to the Constitution of the United States*, pp. 183 ff.
[2] *The Federalist*, No. LXXXIV.
[3] *Annals of Congress*, Vol. I, pp. 440 ff.

modified at a joint conference committee, and submitted to the states, by two thirds vote on September 25, 1789, with an accompanying resolution to the effect that it had been done to extend the ground of public confidence in the government and best insure the beneficent ends of its institution. Two of the amendments dealing with apportionment and payment of members of Congress failed to receive the approval of the requisite number of states, but the other ten were ratified by eleven commonwealths, Virginia being the last to add her sanction, December 15, 1791.

The Eleventh Amendment, providing that the judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state, was the direct outgrowth of a judicial decision rendered by the Supreme Court in the case of Chisholm *v.* Georgia in 1793. That case involved the question as to whether a state could be sued by a private citizen; and the champions of states' rights stoutly held that the Supreme Court could not try an action by a citizen against a "sovereign state." The Court, however, said that it possessed such jurisdiction, directed the service of papers on the governor and attorney-general of Georgia, and ordered that, unless the state appeared in due form, judgment should be entered by default.

This action instantly aroused the indignation of the advocates of states' rights. The decision of the Court was reached on February 18, 1793; and two days later Senator Sedgwick, of Massachusetts, introduced into Congress the proposed amendment. The Massachusetts legislature soon afterward declared the power exercised by the Supreme Court "dangerous to the peace, safety, and independence of the several states and repugnant to the first principles of a Federal Government"; and the Georgia house of representatives passed an act providing that any official who attempted to enforce the decision should be declared guilty of felony and suffer death without benefit of clergy by being hanged.[1] The proposed amendment, which was sent to the states by Congress in 1794, received the requisite approval of three fourths of the states, and went into force in 1798.

[1] Professor H. V. Ames, in his valuable collection, *State Documents on Federal Relations*, pp. 7 ff., gives this act and citations of authorities.

Little more than two years had elapsed after the ratification of the Eleventh Amendment when a more serious crisis, in the presidential election of 1800, demonstrated the imperative necessity of changing the section of the Constitution dealing with the balloting of the electors for President. The original provision stipulated that the presidential electors chosen in each state should cast their ballots for two persons, without designating which was to be President or Vice President; and then added: "The person having the greatest number of votes shall be President, if such number be a majority of the whole number of electors appointed: and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President," the representation from each state having one vote.

In the election of 1800, Jefferson and Burr received seventy-three votes each, and the latter, willing to defeat what he knew to be the real wishes of his party, sought to secure his election to the presidency by gaining enough votes from the Federalists in the House of Representatives where the election had been thrown under the constitutional provision.[1] Fortunately his design was frustrated; but the outcome of the contest, and the low intrigue which accompanied it, revealed the necessity of requiring the electors to designate the persons for whom they cast their ballots as President and Vice President respectively.

Accordingly an amendment designed to effect this reasonable change was introduced in the House of Representatives in February, 1802.[2] Strange as it may seem, the proposition met with stout opposition in certain quarters. Representatives of the small states contended that it was a good thing to have the election thrown into the House where each state had one vote and the small states had a chance to secure one or both offices. More valid than this argument was one to the effect that the original system guaranteed that both the President and Vice President would be men of substantially equal ability, as illustrated in the case of the previous elections. In spite of the arguments against

[1] If the party tactics had been fully developed, the Burr case would not have arisen.
[2] Such an amendment had really been proposed earlier.

it, the proposal received the requisite majority in Congress and then went to the states in December, 1803; it was promptly ratified and declared in force on September 25, 1804, as the Twelfth Amendment.

An eventful half century now passed before any further changes were made in the letter of the Constitution. Vast territories stretching to the Pacific were acquired; nearly a score of states were added to the Union; the development of industries and the extension of railways began to work a marvelous transformation in the economic system of the country; state constitutions were remodeled over and over, showing at each successive decade an advance in democratic ideas of government; practices of every kind stretched beyond recognition many of the original terms of the written instrument; and yet no changes could be made in the formal rules of the document itself until, in the hot struggles of the Civil War, the whole federal system was thrown into the melting pot.

In March, 1862, less than a year after the opening of the conflict between the states, Congress abolished slavery in the territories; the following month slaves were emancipated in the District of Columbia; and in September, 1862, shortly after the check administered to Lee at the battle of Antietam, Lincoln issued his proclamation announcing that the slaves in those states which had not returned to their allegiance by January 1, 1863, would be treated as free.

However, it was uncertain whether the Proclamation of Emancipation, which duly went into effect, could of its own force prevent the restoration of slavery by the Confederate States when they were brought back into the Union. Accordingly, in December, 1863, simultaneous resolutions were introduced into the House and Senate, providing for an amendment forever prohibiting slavery. In a speech delivered in the Senate in support of the amendment, Mr. Trumbull put the situation concisely: "In my judgment, the only effectual way of ridding the country of slavery, and so that it cannot be resuscitated, is by an amendment of the Constitution forever prohibiting it within the jurisdiction of the United States. This amendment adopted, not only does slavery cease, but it can never be reëstablished by state authority or in any other way than by amending the Constitution. Whereas, if slavery should now be abolished by act of

Congress or proclamation of the President, assuming that either had the power to do it, there is nothing in the Constitution to prevent any state from reëstablishing it. . . . It is very generally conceded, I believe, by men of all political parties, that slavery is gone, that the value of slavery is destroyed by the rebellion. What objection then can there be on the part of any one in the present state of public feeling in the country, to giving the people an opportunity to pass on the question?" [1]

Still, it was apparent to everyone that pressure would have to be exercised on the Southern states in order to secure the requisite three fourths for the adoption of the amendment. This was a ground for the objections urged by Mr. Pendleton in the House of Representatives against the passage of the resolution. "It is impossible," he declared, "that the amendment proposed should be ratified without a fraudulent use — I select the term advisedly — without a fraudulent use of the power to admit new states or a fraudulent use of the military power of the Federal Government in the seceded states. There are thirty-five states. Twenty-seven are necessary to ratify this amendment. There are nineteen free states. Suppose you get them all, where do you get the others? . . . Will the gentlemen call on the Southern states to furnish the requisite number? If these states are to vote in their present condition, it would be a broad farce, if it were not a wicked fraud." [2]

So great was the opposition to the resolution in the House of Representatives, that it failed at first to secure the requisite two thirds, but Lincoln in his message of December 6, 1864, after his reëlection, warned Congress that it was only a question of time until slavery would have to go. Speaking of the election, he said, "It is the voice of the people now for the first time heard upon the question. In a great national crisis like ours, unanimity of action among those seeking a common end is very desirable. Yet no approach to such unanimity is attainable unless some deference is paid to the will of the majority simply because it is the will of the majority." [3] This appeal was successful, and after a long and exciting debate the amendment was passed at the opening of 1865. It was then sent out to the states and

[1] *Congressional Globe*, 38th Cong., 1st Sess., p. 1313.

[2] *Ibid.*, p. 2993; see below, chap. ix, for Dana's account of the method employed by Lincoln in securing the adoption of the Thirteenth Amendment.

[3] Richardson, *Messages and Papers of the Presidents*, Vol. VI, p. 252.

ratified by twenty-seven of them; among these were Nevada, which had been admitted for the purpose, and several Southern states, acting under the pressure of the federal military authority. The Thirteenth Amendment, thus carried through, was declared in force by the Secretary of State on December 18, 1865.

The radical Republicans, headed by the indomitable Thaddeus Stevens, were not content with abolishing slavery; they were determined also to give to the newly emancipated negroes all the civil rights which the whites enjoyed, to impose disabilities on certain secessionists, and to secure the validity of the federal war debt. By the Civil Rights Act of April, 1866, they sought to remove all the incidents of slavery and secure for negroes equality before the law; but realizing that a mere act could be repealed at any time by a subsequent Congress, they decided to place the principles of civil liberty high above the reach of party factions by securely establishing them in the Constitution itself. Furthermore the sponsors of the proposal, or certain of them, took advantage of the opportunity to write into the new amendment a clause protecting individuals and corporations in their personal and property rights against the state legislatures. This was the chief source of the provision to the effect that no state shall deprive any person of life, liberty, or property without due process of law — a clause that makes all local legislation subject to review by the Supreme Court of the United States.[1]

In June, 1866, Congress passed the Fourteenth Amendment, designed among other things to assure citizenship, civil rights, and the suffrage to the freedmen and protection to business enterprise against undue interference by the state legislatures. By refusing to readmit certain Southern states until they had accepted this radical alteration in our political system, the requisite number of ratifications was at length secured; and the Fourteenth Amendment was promulgated by the Secretary of State in July, 1868.

The indirect method (provided by the Fourteenth Amendment) of securing the vote to the freedmen through the threat to reduce the representation of any state excluding them from the suffrage, it was feared, would not be effective enough in practice. The Republicans accordingly decided to complete the work of

[1] Kendrick, *The Journal of the Committee of Fifteen on Reconstruction;* Flack, *The Adoption of the Fourteenth Amendment;* Collins, *The Fourteenth Amendment and the States.*

reconstruction by expressly forbidding any commonwealth to deprive any citizen of the right to vote on account of race, color, or previous condition of servitude. Some of the Northern states still denied the franchise to negroes, and this was a standing reproach to the reformers, who insisted on granting the suffrage in the South in opposition to the known wishes of the whites. It, therefore, seemed expedient to some, and to others abstractly just, to prevent political discrimination against negro men throughout the entire Union; and to achieve this end, the Fifteenth Amendment was passed by Congress in February, 1869. It was declared ratified on March 30, 1870. Thus was ended the formal revolution wrought in our political system by the Civil War.

Forty-three years then elapsed before another amendment was added to the Constitution, in spite of the fact that a large crop of proposed changes was produced in every Congress during the intervening period. It was not until 1909 that a two thirds majority could be secured in both houses of Congress in favor of any change in the fundamental law. In that year there culminated a long and bitter struggle over the taxation of incomes by the Federal Government. During the Civil War such a tax had been laid by Congress and sustained by the Supreme Court, which declared it to be an indirect tax and hence not subject to the rule of apportionment among the states on the basis of their respective populations. In 1894, after a sharp political fight, a Democratic Congress, driven by Populistic forces, enacted another income tax law, which was declared unconstitutional by the Supreme Court during the following year. The Southern and Western states had deliberately sought to shift a large part of the burden of federal taxation to the accumulated fortunes of the Northeast, and the Supreme Court by a five to four decision had blocked their effort. Undaunted, the sponsors of the income tax kept up their fight and at the end of fourteen years they had won enough Republicans and Democrats to carry through both houses a resolution providing that Congress shall have power to "lay and collect taxes on incomes, from whatever source derived without apportionment among the several states and without regard to any census or enumeration." The Sixteenth Amendment was duly ratified and proclaimed in effect on February 2, 1913. In time, the income tax, which seemed so

revolutionary to some in 1895, became an established part of the federal system of taxation.

Somewhat closely connected with the progressive movement which carried through the income tax amendment was the effort to establish the popular election of United States Senators. This proposal, warmly advocated by all Populistic and radical parties, was brought up in Congress many times and more than once it secured the requisite majority in the House of Representatives, only to be blocked by the Senate, the stronghold of conservatism on this point. In the meantime state after state, by means of direct primary legislation, compelled the nomination of Senators by popular vote, and in effect, not in theory, established the popular election of Senators. At length in 1912 there were enough Senators chosen by that process to work a revolution in the upper chamber, and the proposed constitutional amendment was passed by both houses. It was duly ratified by the states and put into force on May 31, 1913.

Somewhat in the same way, the Eighteenth Amendment prohibiting the manufacture and sale of intoxicating liquors for beverage purposes was finally adopted. Shortly after the Civil War a Prohibition party arose and kept up a lively agitation throughout the country. Amendments establishing prohibition were introduced from time to time in Congress, but without any appreciable effect. All the while prohibition advocates carried on their propaganda and actually secured the adoption of their reform, county by county and state by state, until by 1917 thirty-six states and large sections of other states were "dry" by popular vote. In December of that year, Congress adopted the prohibition amendment to the Constitution. It was ratified by forty-six states and proclaimed in January, 1919. One year later it went into effect.

A similar process is to be observed in the history of the woman suffrage amendment. As early as 1868 that proposition was laid before Congress amid much derision. From year to year its supporters pressed the matter upon the attention of Congress without apparent effect. Discouraged at Washington, they turned to the states, winning one after another in a long and arduous campaign of agitation. By 1917 twelve states had adopted woman suffrage for all elections and many other states applied it in certain local and special elections. Then the issue became

national. Candidates for the presidency could not ignore it and national parties were compelled to give heed to it. On June 4, 1919, Congress adopted the Nineteenth Amendment providing that no citizen of the United States shall be denied the right to vote on account of sex. On August 28, 1920, Tennessee, the thirty-sixth state, making the necessary three fourths, ratified the amendment and it was immediately declared to be in effect.

There is a great deal of significance in the processes by which the last three amendments were adopted. All of them were before Congress for a long time and were repeatedly rejected. The advocates of the three propositions kept at work in the states, carrying one after another until they made all three issues inescapable at Washington. It would seem therefore that if we seek to divine the future of the Federal Constitution we must study the tendencies in the states. Indeed that eminent observer of American institutions, Lord Bryce, regarded our states as laboratories of experimentation in politics — laboratories in which many devices can be tested before their application to the whole country.

Although nineteen amendments have been adopted since 1789, it is to be noted that nearly all of them impose restraints on the Federal Government or on the states or on individuals. A few make changes in the suffrage and in election methods. Only one, the Sixteenth, enlarges the power of Congress to legislate substantially and positively, and that merely overcomes the effect of a decision of the Supreme Court. The most important phases of national growth are not reflected in formal amendments to the Constitution.

Statutory Elaboration of the Constitution

It would be a mistake, of course, to confuse the formal amendments, which we have just considered, with statutes, especially in the matter of the sanction which each of the two forms of law has behind it. The former are placed beyond the reach of the legislature by an extraordinary process of enactment, and can be abrogated only by a similar process. A statute, on the other hand, is made by Congress, and may be altered or repealed at any time by the same body without further authority. Nevertheless, when viewed from the standpoint of content, there is no

intrinsic difference between many statutes and the provisions of the Constitution itself; and, if we regard as constitutional all that body of law relative to the fundamental organization of the three branches of the Federal Government, — legislative, executive, and judicial, — then by far the greater portion of our constitutional law is to be found in the statutes. At all events, whoever would trace, even in grand outlines, the evolution of our constitutional system must take them into account.

Such, for instance, are the laws organizing all the executive departments which have grown out of the authority conferred by the barest mention in the Constitution of the fact that some appointments may be made by the "heads of departments," and that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." To take another example, the Twelfth Amendment is scarcely more important than the statute of 1887, which elaborates it in great detail by providing the modes of counting the electoral votes and determining controversies. Indeed, Senator Garland, at the time, declared such a statute to be constitutional in its nature and beyond the power of Congress. Whether the statute in question is one which the framers of the Constitution would have deemed within the letter of the written document it is obviously impossible to determine; it may quite properly be regarded as an amendment which the general acceptance of the nation allows to stand in force as a mere statute. Such reasoning is not without its justification, and illustrates the shadowy character of the distinctions between constitutional and statute law. A striking and curious illustration of the way in which the federal system may even be altered by state legislative action was afforded by the practice, adopted in some commonwealths, of requiring the legislature to choose for the United States Senate the nominee indicated by popular vote — a practice regularized by the Seventeenth Amendment.

The Custom of the Constitution

It is the fashion for English publicists to congratulate their American colleagues on the simplicity of the task of commenting on a written constitution as compared with the complicated task

of discovering in fluctuating party customs the mysteries of the English political system. "Whatever may be the advantages of a so-called 'unwritten' constitution," declares Professor Dicey, "its existence imposes special difficulties on teachers bound to expound its provisions. Any one will see that this is so who compares for a moment the position of writers, such as Kent and Story, who commented on the Constitution of America, with the situation of any person who undertakes to give instruction in the constitutional law of England. When these distinguished jurists delivered, in the form of lectures, commentaries upon the Constitution of the United States, they knew precisely what was the subject of their teaching and what was the proper mode of dealing with it. The theme of their teaching was a definite assignable part of the law of their country; it was recorded in a given document to which all the world had access, namely, 'the Constitution of the United States established and ordained by the People of the United States.'" [1]

Now, as a matter of simple fact, anyone who relied upon the commentaries of these distinguished jurists for a knowledge of the actual government of the United States would not penetrate beyond the outer boundaries of the subject. For example, Kent dismisses the topic of the Speaker of the House of Representatives with this sentence: "The House of Representatives choose their own Speaker." This statement throws as much light on our Federal Government as the observation that the prime minister for the time being is the First Lord of the Treasury throws on the British cabinet system. Surely no commentator on the British constitution would leave out of account the entire cabinet system and its vital relation to party practices.

Indeed, the most complete revolution in our political system has not been brought about by amendments or by statutes, but by the customs of political parties in operating the machinery of the government.[2] So radical is this transformation in the letter and spirit of the system of 1789, and so completely does it extend to the utmost extremities of the system, that it seems necessary to devote special chapters to an examination of its diverse aspects.[3] A few examples, however, will be given

[1] *The Law of the Constitution* (1885 ed.), p. 4.
[2] On this important subject, see Goodnow, *Politics and Administration*.
[3] Chaps. vii and xxv, and *Readings*, chaps. vi, vii, and xxx.

here to illustrate concretely the ways in which party practices transform the written law.

1. The Constitution tells us that the President is elected by electors chosen as the legislatures of the states shall see fit. In practice a few candidates are selected at national party conventions — institutions wholly unknown to federal law; the electors are figureheads selected by the parties and bound to obey party commands; and the voters, in effect, merely have the right to choose from among the candidates nominated. The Cabinet is unknown to the Constitution; even the statutes of Congress seldom mention it and then by inadvertence. It has arisen from the President's custom of asking heads of departments to meet him as an advisory body.

2. The Constitution informs us that the Senators are elected by the "people" of the states; but to understand how Senators are really chosen it is necessary to examine the direct nomination laws and party practices in the several states.

3. The Constitution states that the Speaker is chosen by the House of Representatives. In fact, he is selected by a caucus of the majority members of the House.

4. In the view of the Constitution the Speaker is the impartial presiding officer of the House. In fact, he is one of the leaders of the majority party in that body.

5. The Constitution informs us that revenue bills must originate in the lower House. In plain fact, revenue bills originate in the Senate quite as much as in the House, although the latter body nominally exercises its prerogative.[1]

6. The Constitution says very little about legislative procedure, but the whole spirit and operation of Congress depend upon the rules, organization of committees, and agreements among the leaders of the majority party.

Closely related to the alterations introduced into the original system by party methods are the changes wrought in the presidential office by the exigencies of party leadership. This aspect of our constitutional evolution is regarded by some as apparently fortuitous, dependent upon the personality of the President and the circumstances under which he carries on his administration, but by others it is considered as a permanent and salutary outcome of our political development. It would be interesting

[1] See below, chap. xviii.

to know, at all events, the feelings that would be entertained by a member of the federal convention of 1787 if he could compare the deliberate and austere administration of Washington with that of Roosevelt or Wilson, both of whom were preëminently party leaders. Through his personal representative Roosevelt participated in the gubernatorial campaign in New York in 1906; he aided Congressman Burton in his contest with Tom L. Johnson for the mayoralty of Cleveland; and finally he was chiefly instrumental in selecting his own successor. Taft likewise declared his belief in the duty of the President to act as party leader and assume party responsibilities. Wilson's control over the legislative policies of the Democratic Congress for six years almost amounted to a dictatorship. In 1918, while the whole country was in the throes of the great war against the Central Powers, President Wilson, during the congressional campaign, called upon the voters to elect Democratic members who would support his policies. It requires no far stretch of the imagination to believe that the original framers would regard the recent developments as entirely beyond their intentions. This is not meant to imply any criticism of such presidential policies, but it shows how the American people are actually not very much hampered in practice by constitutional theories.

Judicial Expansion of the Constitution

Though there is a large and eminently respectable school of thinkers who maintain that the courts do not make law, it nevertheless remains a fact that the Supreme Court of the United States has on several occasions expanded the written instrument under the guise of an interpretation. Indisputable evidence of this fact is offered by the reversals of opinion showing that either in one case or the other the Court had read into the document ideas which it did not contain. Furthermore, the numerous dissenting opinions, often by the considerable minority of four out of nine, lend the weight of eminent authority to the contention raised in many quarters that certain decisions are not mere applications of the letter and spirit of the Constitution to specific circumstances, but positive additions to the venerable fabric which the convention constructed. This, of course, is controversial ground, but a few illustrations will make clear what is

meant by those who maintain that the Supreme Court *makes* constitutional law from time to time to meet the demands of new circumstances, or to express the opinion of the Court as to what ought to be the law.[1]

A notable instance is the case of Chisholm *v.* Georgia, mentioned above, in which the Court took jurisdiction over a suit against a state by a citizen. That it was not the intention of the states at the time of the ratification to confer such jurisdiction is evidenced by the general protest which went up against it and the facility with which the Eleventh Amendment was provided. Furthermore, Hamilton in *The Federalist* had expressed his belief that no such power was given by the Constitution, and the general principles of law up to that time seem to have been contrary to the ruling of the Court; but the Court, desiring to make the Constitution a broadly national instrument, assumed jurisdiction over the suit against Georgia. A more notable case was that of Marbury *v.* Madison, in which the Court decided for the first time that it had power to declare invalid statutes of Congress which it deemed contrary to the Constitution. Whether the majority in the convention intended to bestow such a high prerogative on the federal tribunal is a matter of controversy. Certain it is that some of the members, notably Hamilton, ascribed that power to the Court;[2] but no express warrant was conveyed by the document itself, and there is reason for holding that it was not the intention of those who ratified the instrument to give the Supreme Court that authority.

A few years later, the Court extended the clause forbidding any state to pass a law impairing the obligation of contract to cover even agreements made by the states themselves in the form of charters and concessions. This ruling, however expedient from the standpoint of the protection of private rights, certainly widened the meaning of the term "contract," as generally understood at the time. To cite a more recent example: until the acquisition of our insular dependencies, an achievement as far beyond the range of the vision of the convention of 1787 as any imaginable, the Court had uniformly ruled that the provisions safeguarding individual liberty, laid down in the first ten amendments, restricted the federal authorities everywhere, in the government of territories as well as in the districts organized into

[1] *Readings*, p. 62.

[2] Beard, *The Supreme Court and the Constitution.*

states. When it became apparent, however, that such practices as indictment and trial by jury were not applicable to Philippine and Hawaiian peoples in other stages of culture and with diverse historical antecedents, the Court, by a process more subtle than logical, found a way of freeing the administration of the dependencies from some limitations that had hitherto applied in the government of territories.[1]

The Changing Spirit of the Constitution

More elusive, but no less real, than any written word or observed custom, is the changing spirit of the Constitution, or rather the changing spirit of the minds in which the Constitution is mirrored. No longer do statesmen spend weary days over finely spun theories about strict and liberal interpretations of the Constitution, about the sovereignty and reserved rights of states. No longer are men's affections so centered in their own commonwealths that they are willing to take up the sword, as did General Lee, to defend state independence. It is true that there are still debates on such themes as federal encroachments on local liberties, and that admonitory volumes on "federal usurpation" come from the press. It is true also that conservative judges, dismayed at the radical policies reflected in new statutes, federal and state, sometimes set them aside in the name of strict interpretation. But one has only to compare the social and economic legislation of the last decade with that of the closing years of the nineteenth century, for instance, to understand how deep is the change in the minds of those who have occasion to examine and interpret the Constitution bequeathed to them by the Fathers.

Imagine Jefferson, for example, reading Roosevelt's autobiography affirming the doctrine that the President of the United States can do anything for the welfare of the people which is not forbidden by the Constitution! Imagine Chief Justice Taney of the Supreme Court, who laid down his office in 1864, called upon to uphold a state law fixing the hours of all factory labor or one compelling employers to compensate employees injured in the course of their labors! Imagine James Monroe, who thought federal appropriations of money for building roads a violation of the Constitution, called upon to sign bills appropriating federal

[1] See below, chap. xx.

money for roads, education, public health, vocational rehabilitation, and other social purposes![1] Imagine James Buchanan, who thought that the President had no power to compel seceding states to remain in the union, confronted by President Wilson's majestic concept of a League of Nations! Why multiply examples?

The pages that follow describing the organization and operation of our system of government, federal and state, are in a large part but a commentary on the ways in which the Constitution — "the solemn determination of the people enacting a fundamental law" — has been transformed in the hands of those who from generation to generation have exercised political power. Over and over the plain record of political practices and official operations bear eloquent testimony to the truth of the measured summary by Judge Cooley so often quoted: "We may think that we have the Constitution all before us; but for practical purposes the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens recognize and respect as such; and nothing else is. . . . Cervantes says: 'Every one is the son of his own works.' This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it."

[1] See below, chap. xxi.

CHAPTER VI

THE GENERAL PRINCIPLES OF THE FEDERAL SYSTEM

The Doctrine of Limited Government

It is a common error to regard the federal Constitution as an instrument relating solely to the government that has its seat at Washington. In reality, it provides a general political system by dividing the public functions between the state and the National Government and by laying down certain fundamental limitations on the powers which each may exercise. In other words, while creating a national executive, legislature, and judiciary, and marking out their spheres of power, the Constitution, expressly and by implication, also limits the domain within which each state must operate. It does more: it creates a system of private rights secure against all government interference; it provides for each person "a sphere of anarchy" [1] — of no government — so to speak, within which he may act without any intervention on the part of public officials. In some matters the individual is protected from the National Government, in others from the state government, and in still others he is entirely free from both governments. These limitations are not mere political theories or vague declarations of rights; they are fairly precise rules of law expounded and applied by the courts, enforced by proper executive authorities, and respected by the citizens.[2]

This system of private rights or individual liberty, however, cannot be understood by learning the clauses of the Constitution which contain prohibitions on the states and the National Government. It is really a difficult and technical branch of law, to be mastered only by a painstaking examination of a long line of

[1] See Burgess, *Political Science and Constitutional Law*, Vol. I, pp. 174 ff.

[2] For the constitutional limitations on the Federal Government, see *Readings*, pp. 134 ff., and on the state governments, *ibid.*, pp. 391 ff. By a comparison the limitations common to both may be ascertained.

judicial decisions interpreting those clauses. Failure to recognize this fact constantly leads to many incorrect assertions about "the rights of American citizens." For example, the police of a city forbid a Socialist parade or break up a street corner meeting; immediately there appear in the newspapers letters from indignant citizens denouncing the police for preventing the exercise of the "rights of free speech guaranteed by the Constitution of the United States." An examination, however, of the clause to which they refer shows that it is *Congress* that can make no law abridging the freedom of speech, the states being left to their own devices in dealing with these matters.

It is not only ill-informed citizens that make such errors. As serious and responsible a body as the Republican national convention of 1860 asserted in its platform, "That the maintenance of the principles promulgated in the Declaration of Independence and embodied in the federal Constitution — 'that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed' — is essential to the preservation of our republican institutions." Of course any student of history and law knows that the Constitution does not embody any such principles, and that the Federal Government is controlled only by definite rules of law imposed by the written instrument itself.

The fundamental character of these rules may be best illustrated by a comparison with the English system. Any law passed by Parliament — that is, by King, Lords, and Commons — must be enforced; it cannot be called into question by any court; the only remedy for the citizen is at the ballot-box when members of the House of Commons are elected. If the British Parliament, therefore, should pass a law confiscating the land now owned by private persons, there would be no relief for the victims, unless the same Parliament or a succeeding one could be induced to repeal the law in question. If the Congress of the United States, however, should pass such a measure, it would be the duty of the courts on the presentation of the proper case to protect the land-owner in his property rights by declaring the law null and void — in conflict with that section of the Fifth Amend-

ment which provides that no person shall be deprived of life, liberty, or property without due process of law; and that private property shall not be taken for public use without just compensation.[1] Likewise, if the legislature of a state should pass such a measure it would be the duty of the courts to protect the citizen under the Fourteenth Amendment forbidding any state to deprive a person of life, liberty, or property without due process of law — compensation being, under judicial interpretation, an indispensable feature of "due process." [2]

The Doctrine of Delegated Powers and the Supremacy of Federal Law

In considering the limitations on the Federal Government, we must remember at the outset that Congress differs fundamentally from a state legislature. The former has only those powers which are expressly conferred by the clauses of the written instrument; the latter enjoys all powers of government, except those denied to it by the federal Constitution and the state constitution under which it operates. The limited character of congressional authority is evident in the Constitution itself; and it is expressly enunciated in the Tenth Amendment, declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Nevertheless, Congress can make all laws necessary and proper for carrying into execution the powers expressly conferred, and is by no means as limited in fact as the literal interpretation of this doctrine would seem to imply.[3]

Though the powers of Congress are delegated, not inherent, federal law within its sphere is supreme over all state law. "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land." So runs the federal Constitution — apparently as clear as a statement of law can be — but it leaves unsettled the question as to the agency that shall decide what laws of the United States are duly made in pursuance of the pro-

[1] Of course private property cannot be taken for private use at all.

[2] It should be noted, however, that the state retains its "police power" in spite of the constitutional limitations — that is, its power to make laws in the interest of health, public safety, morals, etc. See *Readings*, p. 394, and below, chap. xxiii.

[3] *Readings*, pp. 66 ff. and 237 ff.; see above, p. 100.

visions of the Constitution and what state laws are in conflict with the superior law. This question involves the very nature of the Union, and for more than half a century the famous controversy over states' rights raged around it.

On many occasions states declared that they had the power to decide when acts of Congress violated the federal Constitution and that they could nullify such laws within their borders, no matter what the Supreme Court said. This was the doctrine of defiance and nullification announced from time to time by states, North and South, and made famous by the Kentucky and Virginia resolutions of 1798–99 and the Nullification Ordinance of South Carolina passed in 1832. On the other hand, the Supreme Court has consistently held to the principle that it alone is the rightful tribunal for determining what powers are delegated to Congress and when they are lawfully exercised. Happily this question is now one of historic interest only. The Constitution and laws of the United States are supreme and the Supreme Court at Washington is the tribunal of last resort for deciding all controversies on this point.

The application of this principle may be illustrated by an example. Congress provided by law that when any civil suit or criminal prosecution was begun against a federal revenue officer in any court of a state in connection with some official act,[1] the case could be immediately removed into the federal courts. A federal revenue officer, in the discharge of his duty, killed a man in Tennessee, and his case, against the protest of the state, was removed to a federal court in due form. In discussing the constitutionality of this law, Mr. Justice Strong said of the Federal Government:

"It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, these officers can be arrested and brought to trial in a state court for an alleged offence against the law of the state, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere *at once* for their protection — if their protection must be left to the action of the state courts — the operations of the General Government may at any time be arrested at the will of one of its members. The legislature of a state may be unfriendly. It may affix pen-

[1] *Readings*, p. 140.

alties to acts done under the immediate direction of the National Government and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal law, in such a manner as to paralyze the operation of the Government. . . . We do not think such an element of weakness is to be found in the Constitution. . . . No state government can exclude it from the exercise of any authority conferred upon the Federal Government by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."[1]

Private Rights under the Federal Constitution[2]

The fundamental limitations laid down in the federal Constitution fall into two groups: those imposed on the National Government and those imposed on the states. The latter will be considered below.[3] The former are divided into two classes: (*a*) those designed to protect personal liberty against arbitrary interference on the part of the government, and (*b*) those designed to protect private property against confiscation and irregular action on the part of federal authorities.

I. The limitations on behalf of personal rights which, under the Constitution, run against the National Government, may be divided into five classes. In the first place, Congress cannot make any law respecting the establishment of a religion, nor can it interfere with the freedom of religious worship. This does not mean, however, that any person has a right to commit an act, under the guise of a religious ceremony, which transgresses the ordinary law of the land. This point was discussed by the Supreme Court in a case involving the right of Congress to prohibit polygamy in the territory of Utah and punish offenders who violated the law.[4] Under this statute a Mr. Reynolds, who was indicted for the crime of polygamy, set up by way of defense the contention that under a religious sanction and according to a religious ceremony, he had married two wives. The Court replied that religion has to do only with the relations of man to

[1] Tennessee v. Davis, 100 U. S. 257.
[2] Burgess, *Political Science and Constitutional Law*, Vol. I, pp. 184 ff.
[3] For limitations on the state governments, see below, chap. xxiii.
[4] Reynolds v. United States, 98 U. S. 145.

"an extra-mundane being," and that no citizen can claim a right, in the name of religious freedom, to violate a criminal statute.

In the second place, Congress has no power to abridge freedom of speech or of the press.[1] It was the purpose of this clause to prevent Congress from establishing a press censorship or enacting any law prohibiting political criticism. In spite of this express provision, Congress passed in 1798 a Sedition Act providing heavy penalties for resisting the lawful acts of federal officials and for publishing anything bringing or tending to bring the National Government or any of its officers into disrepute. Under this Act many American citizens were fined and imprisoned for what would be regarded to-day as harmless criticism of public authorities. Popular feeling against the act became so strong that Jefferson, on becoming President, pardoned all prisoners held in jail under the law, and Congress later repaid the fines that had been collected.

In theory the constitutional limits in behalf of freedom of press and speech apply in war time as well as in peace, for the amendment makes no discrimination as to circumstances. In practice, however, the National Government has imposed many restrictions on the exercise of such rights in time of war, and has been sustained by the Courts. Mr. Justice Holmes once remarked in the course of an opinion: "When a nation is at war many things which might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and the Court could not regard them as protected by any constitutional right."

During the Civil War, the National Government suppressed newspapers, arrested and imprisoned editors, and punished speakers for criticizing its activities and advocating a stoppage of the war. When attacked by his opponents for "violating" the Constitution, President Lincoln replied that he had taken an oath to support the Constitution and that he had the legal right to do all things necessary and proper to sustain the Constitution and the government founded upon it.[2] "Must I shoot a simple-minded soldier boy who deserts," he asked, "while I must not touch a hair of the wily agitator who induces him to desert? The man who stands by and says nothing when the peril of

[1] In the territories and the District of Columbia, of course, Congress, having general legislative power, can establish the law of libel and slander.

[2] *Readings*, p. 69.

his government is discussed cannot be misunderstood. If not hindered, he is sure to help the enemy." Although his critics declared that by this line of reasoning he destroyed the Constitution and made himself "Caesar," President Lincoln was unshaken in his course.

During the war against Germany and Austria, when the danger to public safety was not so great as during the civil conflict, the National Government was even more severe in placing limitations on liberty of the press and speech, and was again sustained by the courts. In the Espionage Act of 1917 and the amending Sedition Act of the following year, Congress laid heavy penalties on all persons who (1) said or printed anything that interfered with the operation or success of the armed forces of the country, or (2) printed, wrote, or published any "disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States . . . or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States or the uniform of the Army and Navy into contempt, scorn, contumely, or disrepute." The second part of the above measure, as is evident from the language, was not directed as much against those who interfered with military affairs as those who criticized the form and operations of the National Government. It was hotly denounced during the debates on it in the Senate, Senator Johnson going as far as to say that it would "suppress the freedom of the press in the United States and prevent any man, no matter who he is, from expressing legitimate criticism of the present Government." Nevertheless it was adopted in the House with only one dissenting vote and in the Senate by a vote of forty-eight to twenty-six, and was sustained by the federal courts.

Under the law, hundreds were arrested and scores were sent to prison. As applied in practice, "it became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional, . . . to say that the sinking of merchant vessels was legal, to urge that a referendum should have preceded our declaration of war, to say that war is contrary to the teachings of Christ." Many who openly opposed the war or denounced it as a "capitalist" quarrel were sent to prison for long

terms of years. One girl twenty-one years of age was sentenced to prison for fifteen years for taking part in issuing a circular severely attacking President Wilson's policy of intervention in Russia.[1]

In the third place, the Constitution guarantees to the people the right to assemble peaceably and petition the government for redress of grievances. This right is upheld against state governments as well as the National Government; but, of course, it does not secure to the petitioners the privilege of having their petition acted upon by federal authorities.[2]

Moreover the right of petitioning is, apparently, limited to requests for things lawful under Espionage and Sedition Acts. Under the Sedition Act of 1798 a man was indicted for petitioning for the repeal of the Act. During the World War, "twenty-seven South Dakota farmers were opposed to the draft and believed that an unduly high quota was exacted from their county. They petitioned various state officers, asking a new arrangement, a referendum on war, payment of war expenses from taxation, and repudiation of war debts. As an alternative they threatened defeat to the officers, their party, and the nation. . . . The twenty-seven were sentenced to more than a year in prison." [3]

In the fourth place, the power of the National Government to punish persons is hedged about in many ways. Congress is not authorized to define treason; it is defined in the Constitution: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." Congress cannot, therefore, vindictively declare any act treason which does not meet its approval.

Furthermore, the trial of persons accused of this high crime is carefully safeguarded. No person can be convicted of treason unless on the testimony of two witnesses to the overt act or on confession in open court. In the case of the United States *v.* The Insurgents,[4] the Court, interpreting a federal statute, ordered that the names of the jurors and a list of witnesses should be furnished the accused; and that a reasonable time be allowed for the defense to prepare its case after receiving this in-

[1] For an extensive and critical discussion of the issues at stake see *Freedom of Speech*, by Professor Chafee, of the Harvard Law School; also Tully Nettleton, "The Philosophy of Justice Holmes on Freedom of Speech," *Southwestern Political Science Quarterly*, Vol. III, pp. 287 ff.

[2] Burgess, *Middle Period*, pp. 253–296.

[3] Chafee, *Freedom of Speech*, p. 64.

[4] 2 Dallas, 335.

formation. The Court, furthermore, declared that until the overt act of treason had been proved by the testimony of two witnesses, no evidence relating to the charges could be introduced.

While Congress has the power to provide the penalties for treason, the Constitution expressly stipulates that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. In old English practice, corruption of blood meant the destruction of all inheritable qualities, so that any attainted person could not inherit lands or other hereditaments from his ancestors or retain those which he already possessed or transmit them to his heirs.[1] The constitutional provision mentioned above was designed to prevent the punishment of the relatives of traitors; and accordingly no punishment or proceedings may be construed to work a forfeiture of the real estate of a traitor longer than his natural life.[2]

In the fifth place, proceedings against persons charged with crime under the federal law are controlled by several explicit provisions. Congress cannot act as a court by passing a bill of attainder condemning any person to death or to imprisonment or imposing any penalty whatsoever. Congress can pass no *ex post facto* law; that is, no law making an act a crime which was not a crime when committed, or adding new penalties after the commission of an act, or modifying the procedure in any such way as to make it substantially easier to convict.[3] Federal authorities have no power of arresting wholesale on general warrant; all warrants of arrest must be issued only upon probable causes supported by oath or affirmation and particularly describing the place to be searched and the persons and things to be seized. Indictment by grand jury and trial by jury are secured to all persons coming within the jurisdiction of the federal authorities, except in the insular possessions.[4] The writ of habeas corpus cannot be suspended except in case of rebellion or invasion, when it may be required by public safety; that is, under all ordinary circumstances any person held by federal authorities has the right to have a speedy preliminary hearing before a proper judicial tribunal.[5] Excessive bail cannot be demanded by federal au-

[1] Story, *Commentaries on the Constitution* (5th ed.), sec. 1299.
[2] Bigelow v. Forrest, 9 Wallace, 339.
[3] Of course, Congress is not so limited in making laws applicable to acts which may be committed in the future.
[4] See below, chap. xx.
[5] Below, chap. xiii.

thorities; in other words, except in capital cases, federal courts must release prisoners on bail, and must not fix the amount at such an unreasonable sum as practically to deny the right. Finally, in general, the National Government must allow due process of law in all of its criminal proceedings: the trial must be open and speedy and in the state and district where the crime was committed; the defendant must be informed of the nature and cause of the charge against him; the witnesses against him must be brought face to face with him; he may force, by compulsory process, the attendance of witnesses in his favor; he cannot be compelled to testify against himself in any criminal case; and he has a right to have the assistance of counsel in his own behalf.[1]

Such at least are the grand principles of personal liberty set forth in the Constitution. In actual practice, during American participation in the World War and for many months afterward, federal authorities played fast and loose with them — so fast and loose that a committee of eminent lawyers, among whom were two members of the Harvard Law School, was moved to make a public protest and file a list of violations of law committed by the government itself. It was alleged, and the allegation was well supported, that arrests had been made by federal authorities without proper warrants and on trivial and trumped-up evidence, that many persons were herded in jails and held for a long time without bail and without an opportunity to communicate with counsel or friends, that federal detectives actually stirred up meetings said to be seditious and then arrested participants, and that the Attorney-General of the United States made improper use of his high office to pursue and punish persons accused of entertaining radical opinions. These charges were indignantly denied by the Attorney-General, but no person should form an opinion on the subject without examining the evidence in the case.[2] It is conservative to say that the constitutional limitations on behalf of personal liberty proved no barrier to the Federal Government in arresting and imprisoning persons charged with holding objectionable opinions. The officers of the law had a practically free hand, and they were almost uniformly sustained by the courts of law.

[1] These privileges in criminal matters are not extended to cases arising in the land and naval forces or in the militia when in active service in time of war or public danger.

[2] See *Report on Illegal Practices of the United States Department of Justice*, by the National Popular Government League, Washington, D. C.

II. The limitations on the National Government [1] in behalf of property rights are relatively few in number, but they are fundamental in character. The power to define property is under our system left to the state governments, subject to the one great restriction that slavery and involuntary servitude, that is, property in man, shall not exist. Congress has no power to define property except in the territories not organized into states.[2] Moreover, the Constitution provides some explicit limitations on the power of the Federal Government to attack the property of private persons: Congress cannot impose duties on articles exported from any state. Duties, imposts, and excises must be uniform, that is, must fall upon the same article with the same weight everywhere throughout the United States. In order to protect the tax-payer, it was provided in the Constitution that revenue bills must originate in the House of Representatives, which is composed of members chosen directly by the voters; but this provision is a dead letter in practice. The Constitution also stipulates that no money shall be drawn from the treasury except under appropriations made by law; consequently the executive authority cannot on its own motion take money from the public treasury.

It is not only by way of taxation that the National Government may approach private property. It enjoys the power of eminent domain; in other words, it may take private property for public use; but it must make just compensation to the owner. In determining what is just compensation, federal authorities must take into account the use for which the property in question is suitable and pay due regard to the existing business or wants of the community and such as may be reasonably expected in the immediate future. The proceedings in ascertaining the value of property taken for public use may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury as Congress may determine. All that is required is that the examination into the value of the property shall be conducted in some fair and just manner affording to the owner of the property in question an opportunity to present evidence as to its value and to be heard on that matter.[3]

[1] For federal limitations on state governments in behalf of property, see below, chap. xxiii.

[2] Congress may define property, however, in inventions and publications under its right to grant to authors and inventors special privileges with regard to their respective writings and discoveries. It may also affect property by bankruptcy legislation.

[3] Boom Co. *v.* Patterson, 98 U. S. 403; United States *v.* Jones, 109 U. S. 513.

The Separation of Powers

Second in importance to the doctrine that both the state and national governments are limited by certain fundamental principles laid down in the federal Constitution is the theory that the powers conferred on the National Government are distributed among three distinct departments: legislative, executive, and judicial. This is a doctrine which publicists delight to expound with a great show of historical learning; it is a legal principle interpreted by the courts and applied to concrete cases like any other rule of the Constitution;[1] it is a political slogan reiterated in Congress with great vehemence, especially in times when the President, expressing more accurately the living forces of the nation than do the Senators and Representatives, overshadows, in influence, the legislative branch of the government.

According to the traditional account, this doctrine came into our law and practice from Montesquieu, whose treatise on the *Spirit of the Laws* was a veritable political text-book for our eighteenth-century statesmen, and it was derived by that distinguished French author from his study of the English constitution. In point of fact, however, the doctrine, as far as Montesquieu was concerned, was a notion which he acquired during a conflict between the judiciary and king in France in which he participated; afterwards he read the idea into his study of the institutions of England.[2] As a principle of law and government, it is a part of that system of checks and balances and subdivisions of power by which statesmen have sought to prevent the development of the type of democracy that functions through simple legislative majorities. It is explained with great insight by Madison,[3] and thus eloquently defended by Webster: "The spirit of liberty . . . is jealous of encroachments, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it intrenches itself behind strong defences, and fortifies itself with all possible care against the assaults of ambition and passion."

The doctrine is not expressly stated in a separate article in the federal Constitution, as in several state constitutions, but is thus embodied in the opening sentences of the three articles relating

[1] See *Readings*, p. 138, for an important judicial decision on this point.
[2] Hatschek, *Englisches Staatsrecht*, p. 24.
[3] *Readings*, p. 50.

to the legislative, executive, and judicial power: "All legislative powers herein granted shall be vested in a Congress of the United States. . . . The executive power shall be vested in a President of the United States. . . . The judicial power . . . shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish." Thus, says Kent, the Constitution has effected the separation of powers "with great felicity of execution, and in a way well calculated to preserve the equal balance of the government."

A close examination of the Constitution, however, shows that the men who framed it were unable to maintain the purity of the principle when they came to prescribing the mode of exercising the powers of government in detail. Indeed, it was thoroughly understood by the framers that a complete separation of powers was impossible, save in the realm of pure theory.

Numerous illustrations of the point are available. The appointing power of the President is shared by the Senate; so is his treaty-making power. Owing to the amount and variety of executive business, the President must function through departmental offices; these are created and to some extent controlled by Congress. On the other hand, the President shares in legislation through his veto power and his right to send as many messages as he chooses. Even the Supreme Court which is created by the Constitution lies at the mercy of Congress, for Congress may prescribe the number of the judges and fix their salaries subject to certain restrictions. It might, for instance, fail to create the requisite lower and intermediate courts, reduce the number of judges, and through the confirming power of the Senate secure pliant judges; and thus overthrow the prestige of the judiciary or make it subservient to the legislative branch.

Furthermore, political practice has shown that the influence of a department of the government depends not so much upon the legal authority which it enjoys in theory as upon the great interests which function through it in practice.[1] For example, during the period of Reconstruction, Congress dominated the executive, overrode his exercise of the veto power, and through the Tenure of Office Act and other measures gathered into its hands almost the whole domain of federal authority.[2] During the entire

[1] *Readings*, p. 265, for Senator Beveridge's view of executive influence.
[2] Haines, *Conflict over the Judicial Powers*, pp. 165 ff.

course of American participation in the World War, leadership in legislation as well as administration went to the President as it had during the Civil War. All the great measures of law passed during that period were drafted under President Wilson's scrutiny, and many of them were forced through a recalcitrant Congress under the influence of his personality and prestige and power. Commenting on a bill presented to Congress by the executive department, a Senator complained: "If this bill passes, there would be only one more thing left for Congress to do, and that would be to make the President a king." Although there was partisan rancor in this lament, it remained a fact that President Wilson completely overshadowed and dominated Congress during both of his administrations.[1]

As a legal doctrine used in some instances by the courts, the theory of the division of powers takes a more precise form. It was early applied in Hayburn's case relative to an act of Congress authorizing judges of the circuit courts to receive and hear certain claims to pensions, subject to the supervisory powers of the Secretary of War. The judges agreed that the power which Congress sought to confer was not judicial in its nature, and they therefore refused to serve in the capacity required by the law.[2] The judges for the district of North Carolina stated that the courts were not warranted in exercising "any power not in its nature judicial or, if judicial, not provided for upon the terms the Constitution requires." It must be said, however, that the occasions on which one branch of the Federal Government has by a law or order trespassed upon the domain of another branch have been few indeed, and the Supreme Court of the United States has been loath to hold acts of Congress invalid on the general theory of the separation of powers.[3]

The soundness of the theory of the separation of powers as a practical working scheme of government has been rather severely criticized by two eminent publicists, Professor Ford and Professor Goodnow.[4] They hold that the functions of government are only twofold, the formulation and execution of public will — that is, legislative and executive — the judiciary being merely a branch of the law-enforcing power. In this view the separation

[1] Above, p. 100.
[2] Supreme Court decisions: 2 Dallas, 410.
[3] See article by Professor T. R. Powell, *Political Science Quarterly*, Vol. XXVII, pp. 215 ff.
[4] Ford, *Rise and Growth of American Politics;* Goodnow, *Politics and Administration.*

of powers only creates friction in the government, divides responsibility, necessitates iron-bound party machinery outside the government to overcome the unwieldiness of the system, and altogether works for confusion and obscurity instead of simplicity and efficiency. They cite the English system, in which the legislative and executive powers are fused under the direction of the Cabinet, the responsibility of the Cabinet is definitely fixed, and the judiciary cannot pass on the constitutionality of laws.

In response to this criticism, Professor Burgess contends: "I think that we are upon the right line, and that those nations which have developed parliamentary government are beginning to feel, as suffrage has become more extended, the necessity of greater executive independence. Parliamentary government, *i.e.*, government in which the other departments are subject to legislative control, becomes intensely radical under universal suffrage, and will remain so until the character of the masses becomes so perfect as to make the form of government very nearly a matter of indifference. There is no doubt that we sometimes feel embarrassment from a conflict of opinion between the independent executive and the legislature, but this embarrassment must generally result in the adoption of the more conservative course, which is far less dangerous than the course of radical experimentation. . . . The feature *par excellence* of the American governmental system is the constitutional, independent, unpolitical judiciary and the supremacy of the judiciary over the other departments in all cases where private rights are concerned."[1] This undoubtedly represents the prevailing view of American publicists and statesmen, and is at all events the fundamental doctrine of our law.

The Supremacy of the Judiciary

The crowning feature of the federal system is the supremacy of the judiciary over all other branches of government in matters relating to the rights of persons and property. In no European nation, federal or centralized in form of government, except Poland, is the high authority of declaring null and void the acts of other departments conferred upon a judicial tribunal. This judicial supremacy, says Professor Burgess, is "the most momen-

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

tous product of modern political science. Upon it far more than upon anything else depends the permanent existence of republican government; for elective government must be party government — majority government; and unless the domain of individual liberty is protected by an independent, unpolitical department, such government degenerates into party absolutism and then into Cæsarism." [1]

It is the Supreme Court, therefore, that stands as the great defender of private property against the attempts of popular legislatures to encroach upon its fundamental privileges. This fact has been so clearly and cogently demonstrated by Arthur T. Hadley that his statement deserves quotation at length. The theoretical position of property-holders, he says, — "the sum of the conditions which affect their standing for the long future and not for the immediate present — is far stronger in the United States [than in other countries]. The general status of the property-owner under the law cannot be changed by the action of the legislature, or the executive, or the people of a state voting at the polls, or all three put together. It cannot be changed without either a consensus of opinion among the judges, which should lead them to retrace their old views, or an amendment of the Constitution of the United States by the slow and cumbersome machinery provided for that purpose, or, last — and I hope most improbable — a revolution.

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

"This theory of American politics has not often been stated. But it has been universally acted upon. One reason why it has

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

not been more frequently stated is that it has been acted upon so universally that no American of earlier generations ever thought it necessary to state it. It has had the most fundamental and far-reaching effects upon the policy of the country. To mention but one thing among many, it has allowed the experiment of universal suffrage to be tried under conditions essentially different from those which led to its ruin in Athens or in Rome. The voter was omnipotent — within a limited area. He could make what laws he pleased, as long as those laws did not trench upon property right. He could elect what officers he pleased, as long as those officers did not try to do certain duties confided by the Constitution to the property-holders." [1]

Interstate Relations

The Constitution secures to the citizens of each state the privileges and immunities of the citizens in the several states, and the federal judiciary defines and enforces them by proper processes. This means that there are certain great legal rights[2] necessary to free migration throughout the American empire, to the successful conduct of business and industry, and to the enjoyment of property, which no state may take away from a citizen of another commonwealth coming within its borders. It means also that no state may confer civil rights on its own citizens and at the same time withhold those rights from citizens of other states.[3] It does not mean, of course, that A. of Illinois, on moving into Indiana, may claim all privileges which he enjoyed in the former state; he is, on the contrary, entitled only to the rights enjoyed by citizens of the latter state.

A concrete illustration is afforded by the case of Ward *v.* Maryland.[4] By a law passed in 1868 the Maryland legislature provided that persons not permanent residents in the state must take out licenses before offering for sale, within certain districts, goods not manufactured within that commonwealth. Ward, the plaintiff in the case, was a resident of New Jersey, and, without procuring a license, he sold within a prohibited district goods

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

[2] *Readings*, p. 146, for judicial interpretation of the rights; see also the lucid discussion of the question in Willoughby, *American Constitutional System*, pp. 278 ff.

[3] *Civil* rights — rights of person and property — should always be distinguished from *political* rights — the right to vote, hold office, etc.

[4] 12 Wallace, 418.

not manufactured in Maryland. He was accordingly arrested for violating the law, but set up the contention that the law of Maryland was in contravention of the federal Constitution. When the case came before the Supreme Court of the United States, it was held that the statute in question was "repugnant to the second section of the fourth article of the Constitution, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." [1]

To facilitate intercourse among the several states, especially in the transaction of legal business, the Constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Congress has provided by law the form in which such acts and proceedings shall be authenticated, and has ordered that, when so authenticated, "such faith and credit shall be given them in every court within the United States as they have by law and usage in the courts of the state from which they are taken." This provision works out in the following way. A. brings suit on a debt against B. in a court in Ohio, of which state they are both residents; after trial, the Ohio court decides that B. owes A. $1000 and gives judgment accordingly. B. thereupon moves into New York, taking his property along, before it can be attached for the debt. When A. in quest of his money goes after B. into New York, it is not necessary for him to bring another suit in that state in order to get the proper process to recover his money. All he has to do is to show in the New York court of proper jurisdiction the authenticated judgment of the Ohio court. B. may contend that the records are not authentic, or that the court which rendered the judgment did not have jurisdiction, but he cannot secure a reopening of the case on its merits.[2]

The extradition of criminals, long an international practice based on treaty stipulations between independent countries, was carried over into the federal Constitution; a clause expressly provides that any person charged with crime, fleeing from justice and found in another state, shall be delivered up on demand of the executive authority of the state from which he fled to be removed for trial to the state in which the alleged offense was committed. Congress has amplified the constitutional provision by an act

[1] Willoughby, *op. cit.*, pp. 280–281; *Readings*, p. 146.
[2] Willoughby, *op. cit.*, pp. 273 ff.

declaring that on demand, "it shall be the duty of the executive authority of the state" to cause the fugitive to be seized and handed over to the agent of the state making the requisition. The words "it shall be the duty" were interpreted by Chief Justice Taney as merely declaring a moral duty, not as mandatory and compulsory. "The act," continued the Justice, "does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United States with this power." The governor of a state is therefore under a moral obligation to surrender criminals, but he may use his discretion in the matter.[1]

The exact process followed in the rendition of criminals is prescribed in an act of Congress. In addition most states have statutes providing that an accused person can be arrested when information of the charge is received, and held until the official demand is made. Let us suppose that A. commits murder in Ohio and escapes into Indiana. As soon as his whereabouts is discovered, the authorities of the place where the offense was committed will request his arrest, and he will be taken into custody by the police or the sheriff of the locality where he is found. A regular charge will then be lodged against him in Ohio, if this has not been already done, either by an indictment by grand jury or an affidavit made before a magistrate. Thereupon the governor of Ohio will issue to the governor of Indiana a formal demand for the surrender of A., appending to it a certified copy of the indictment or affidavit. If the governor of Indiana finds that the papers are regular and that A. is a fugitive from Ohio and was there at the time the alleged murder was committed, he will issue an order for his surrender to the agent appointed for that purpose by the governor of Ohio. A. will then be taken to Ohio and tried for the murder.[2]

Citizenship and the Suffrage

In international law, the term "citizenship" means membership in a nation, but at the time of the formation of our federal Constitution it had no very definite connotation either in law or

[1] See *Readings*, p. 148, for a practical example.
[2] J. B. Moore, *Extradition and Interstate Rendition.*

popular practice.[1] The Constitution, therefore, speaks of "citizens of the United States" and "citizens of the states"; but a strict usage of the term would require us to speak of citizens of the United States and residents or inhabitants of the states, although this distinction might popularly be regarded as a species of pedantry. The state, however, has no power to confer or withhold citizenship, although it may, as will be seen later, confer many civil and political rights on foreigners. The exclusive right to admit aliens to citizenship is given to the National Government by the clause authorizing Congress to make uniform rules of naturalization.

Citizenship in the United States may be acquired by birth or by naturalization. All persons born in the United States, with some exceptions such as the children of foreign diplomatic and consular officers, and Indians not taxed, are *ipso facto* citizens of the United States. This is called citizenship by reason of birth in a particular place, *i.e.*, *jure soli*. To secure citizenship to American children born abroad, Congress has provided by law that all children born out of the jurisdiction of the United States, whose fathers are at the time of their birth American citizens, shall be deemed citizens of the United States. The rights of citizenship, however, do not descend to children whose fathers never resided in the United States.

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

The process of naturalizing individuals is subject, in all its details, to the laws of Congress, and it is committed to the charge of certain specified courts. Naturalization can be effected only in a circuit court of appeals or district court of the United States, or a district or supreme court of a territory, or a court of record of a

[1] Thayer, *Cases on Constitutional Law*, Vol. I, p. 459, note.

state having law or equity jurisdiction in cases in which the amount in controversy is unlimited, and having a seal and a clerk. Only white persons and persons of African descent may be naturalized; Chinese are excluded expressly by law, and this exclusion has been extended to Japanese and other Asiatics. Formerly it was the rule that an alien woman who married an American citizen immediately became an American citizen; and an American woman who married an alien lost her citizenship. In conformity with the modern spirit which asserts the right of a woman to her own individuality and property, an act of Congress passed in 1922 abolished the ancient law that the status of a woman automatically follows that of her husband. It provided a somewhat easy process by which an alien woman who marries an American may be naturalized if she wishes to do so. American women who married aliens before the passage of the above law may be restored to citizenship by naturalization; they do not have to declare their intention or reside in the country more than one year before filing a petition for the recovery of their citizenship. Henceforward American women who marry aliens may retain or give up their American citizenship as they prefer; a mere declaration of purpose is all that is necessary.

The leading provisions of the Naturalization Act are as follows: (1) The alien in quest of citizenship must be at least eighteen years old when he files his first application and must be a resident of the United States of at least five years' standing on the date of his admission.[1] (2) Not less than two years previous to his admission he must go before a court and in the presence of the clerk declare on oath his intention of becoming a citizen and renouncing his allegiance to all foreign powers. (3) Not less than two years or more than seven years after declaring his intention he must again go before a court, and file in his own handwriting his petition for citizenship, stating that he is not opposed to organized government, is not a polygamist, intends to become a citizen, and renounces his allegiance to his former country. This petition must be verified by the affidavits of two citizens certifying to the residence and good moral character of the applicant. (4) After ninety days have elapsed from the date of filing the petition, the application is heard by the court. The appli-

[1] An applicant must have resided at least a year in the state or territory in which he makes application.

cant renews his adherence to the declarations made in the petition, and is then examined by the court. This examination may be formal or thorough and searching, according to the standards of the judge conducting the final hearing. Examining judges are required to satisfy themselves that all the provisions of the law have been complied with, that the applicant has behaved as a man of good moral character, is attached to the principles of the Constitution of the United States, and is well disposed to the good order and happiness of the same. When the court is duly satisfied the certificate of naturalization is issued. A large power of discrimination is thus conferred upon the court, and there are some instances of its being abused by judges personally opposed to the political principles expressed by the alien applicants.

The original Constitution contained no provisions defining the suffrage; it left the question to the states for solution by stipulating that voters for members of the House of Representatives should have the qualifications requisite for electors of the most numerous branch of the state legislature, and at the same time permitting the state legislatures to decide how presidential electors should be chosen.[1] Thus matters stood until the close of the Civil War when the Republican party sought to make secure its supremacy and enable the newly emancipated negro to protect himself against his former master by forcing the adoption of the Fourteenth and Fifteenth amendments.

These provisions, however, did not contain positive qualifications on the suffrage. They left the regulation of the matter to the states subject to two conditions: (1) that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such states, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such states"; and (2) that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous condition of servitude. The negative character

[1] Senators of the United States were to be chosen by the state legislatures.

of these conditions was also reflected in the Nineteenth Amendment providing that no citizen shall be denied the right to vote on account of sex.

Therefore we must note that there is no uniform suffrage throughout the United States. In more than one third of the states tax, educational, property, and other qualifications are imposed; and in a few states we have the peculiar anomaly of foreigners, who have announced their intention of becoming citizens, being permitted to vote for state and even national officers.

The various restrictions operate in such a manner as to exclude thousands of adult citizens, and they are by no means confined to the South. Massachusetts with an educational test, or Pennsylvania with a tax qualification, is legally quite as liable to a reduction of representation as any Southern state with a property or literacy qualification in its constitution. Nevertheless, no serious attempt has yet been made to secure an enforcement of the Fourteenth Amendment. Indeed how could it be carried into execution without great confusion since it refers to the exclusion of male citizens and women have been enfranchised since its adoption?

CHAPTER VII

POLITICAL PARTIES AND THE PROCESSES OF GOVERNMENT

The Place of Parties in Government

Turning from the broad principles of the national system to the actual operation of government, we inevitably confront political parties and party organizations. We may know all the written provisions of the federal and state constitutions and the names of all the legislators and public officers, their qualifications, terms, emoluments, and statutory duties; we may be familiar with the organization of the various departments of administration, local and national, and with the decisions of the Supreme Court of the United States on every important point of constitutional law; we may be intimately acquainted with law and juristic theory — and yet not understand government as a "going" concern. This is true because a government is not a collection of laws to be found in sheepskin or buckram volumes; it is a large group of persons engaged in making and enforcing laws. Although we speak somewhat pompously of "a government of laws and not of men," it remains a fact that every act of government is an act of a certain person or group of persons. Furthermore since the law is susceptible of interpretation, now narrow, now wide, it follows that we cannot really know the law as fact until we know the character, policies, and conduct of those who interpret and apply it.

Indeed we do not have the whole government before us even when we are in the presence of the legislators and officials who make and enforce the laws. They are but the representatives and spokesmen of the parties and groups of citizens who put them in positions of power. The relations between officials engaged in governing and the group or party dominant for the time being are so intimate and subtle that no one can draw the line separating them and say: "Here the government begins and the party ends." It sometimes happens that the chairman of a national

party committee may dictate terms to the President of the United States, that the chairman of a state committee controls the governor, and that the party leader in a city tells the mayor what to do and how to do it. The chief officials in the government are nearly always leaders if not officials in some party organization; generally speaking, party leaders are men who hold, or have held, or hope to hold political positions.

The influence of party runs throughout the entire government from the capital to the township. In ordinary circumstances, the President of the United States, in the performance of his constitutional duties, is bound to consult the interests of his party, by taking the advice and counsel of its leaders. Theoretically, the President nominates officials with the advice and consent of the Senate; but in actual practice the President does not have a free hand in making nominations. As a matter of fact, the nominations for most of the offices are made in close consultation with the members of the President's party in the Senate or in the House of Representatives. Theoretically, the President should formally consult with the Senate on the making of treaties; practically, many an important treaty is settled at a dinner-table, where the influential party members in the Senate are present. Theoretically, laws are made by the Senate and House of Representatives; practically, they are made by the party in power under the direction of the party leaders, and in the actual process of law-making there are innumerable joint and separate party caucuses.

Indeed the very process of government is set in motion and kept going by the political parties. They formulate policies of government; they nominate and elect candidates; they are agencies for propaganda of various kinds. Public opinion is to a large extent party opinion. The personalities and issues of parties, rather than the principles and forms of government, constitute the staples of American politics. Ordinarily in choosing public officers the citizen in the election booth can only select from among names presented to him by parties. It is through the party that the citizen generally discharges his political duties; his influence on the government is usually brought to bear through party channels. If he aspires to public office other than technical or administrative he can only realize his hopes through party affiliations. Powerful individuals may be inde-

pendent and may through their pens and voices influence the policies of parties and governments; but such persons are exceptions. The independent critic has his place, a very important place, in the processes of democracy, but few indeed are the persons who rise to high positions in government outside the course cut by party practice. Bryce was therefore amply justified when he said nearly half a century ago that the study of party politics in America was as important as the study of the framework of government.

The Origin of American Parties — The Federalist-Republican Alignment

On no matter were the framers of the federal Constitution in more complete harmony than on the undesirability of party politics. It must be remembered that they worked at a time when the modern democratic idea of responsible party government was not recognized. The government of England, which was their principal model, had not reached its present form, in which the king reigns but does not rule, while the majority in the House of Commons controls all the executive officers through whom the actual administration is carried on. England's government in the eighteenth century had passed out of the absolute stage in which the king made laws, appointed ministers, declared war, and conducted foreign affairs at his own pleasure; but it had not passed into the modern stage in which the will of the electors, expressed through the party, dominates the whole machinery of government. When our forefathers were busy framing the federal Constitution, the English government was at a halfway point between these two stages. Party government was not then frankly recognized; it was not finally settled that the king must select his ministers from the party in power; the democratic doctrine that the will of the electors must control the legislature and the executive was not yet accepted. Nevertheless, the possibility of democratic government was known and feared, and in framing our federal Constitution, the members of the Convention, as we have seen, had constantly in mind plans to break the force of majority rule.

The Fathers not only sought to check the growth of party control by structural devices in the government. After the new system had gone into effect, they found themselves in the

possession of the offices, and they naturally deprecated opposition, which they attributed to "the factional spirit of party." Washington, in his Farewell Address, strongly admonished his countrymen against cherishing partisan feeling. "There is an opinion," he said, "that parties in free countries are useful checks upon the administration of the government, and serve to keep alive the spirit of liberty. This, within certain limits, is probably true, and in governments of a monarchical class, patriotism may look with indulgence, if not with favor, on the spirit of party. But in those of a popular character, in governments purely elective, it is a spirit not to be encouraged."

At its very inauguration, the new Federal Government passed largely into the hands of that powerful and conservative group of men who had been most instrumental in framing and ratifying the Constitution. Under the leadership of Alexander Hamilton, the Federal Government provided for paying every penny of the national debt with accrued interest at full value and assumed responsibility for paying the debts incurred by the states during the Revolution. In furtherance of its policies, Congress established a United States Bank, notwithstanding the constitutional objections urged against it by Jefferson and his friends.[1] While providing revenues to meet expenses, Congress frankly used the taxing power to protect American manufacturers against European competition. Indeed, it was Hamilton's avowed policy to gain the support of capitalists for the new government by linking their interests with its fate.

These measures naturally aroused the antagonism of many people. Agriculturists and persons with no commercial or financial interests and no government bonds were greatly excited over what appeared to them to be the transference of the government into the hands of powerful commercial and financial groups. They wanted the Federal Government to be as inexpensive as possible, and, therefore, they wished to restrain its operation within the narrowest limits under a strict interpretation of the Constitution. They wanted to buy their manufactured commodities cheaply from the more advanced European countries where they could find also a profitable market for their own raw products. Finally, the excise on whisky to provide revenue for Hamilton's policies was sharply resented by the tax-payers, and,

[1] See *Readings*, pp. 62 and 237.

as everyone knows, the liquor duty brought about a brief armed opposition called the "Whisky Rebellion." Thus the policy of the new administration called forth a sharp antagonism based on economic interests.[1]

The foreign policy of the new government added to the irritation started by the domestic policy. In the very spring in which Washington was inaugurated with such acclaim, the Estates General met at Versailles and began the first scene in the great drama of the French Revolution; in 1791 a new constitution was put into effect and the power of the king was practically destroyed; the next year the first French republic was established; in 1793 Louis XVI was executed, and war was declared on England. These events were watched with deep interest by American citizens.

The more radical elements of the population, fresh from their own triumph over George III, recalled with satisfaction the execution of Charles I by their ancestors, and took advantage of the occasion to rejoice in the death of another ruler — the French monarch. The climax came in 1793, when France called on the United States to fulfill the terms of the treaty of 1778, in return for the assistance which had been given to the Revolutionists in their struggle with England. The radicals wanted to aid France, either openly or secretly, in her war on England, but Washington and his conservative supporters refused to be drawn into the European controversy. So the Americans were divided into contending groups.

Thus a long chain of circumstances led to the formation of two parties: the Federalists and the opposition, known in the beginning as the Anti-Federalists but later as the Republicans or Democrats, the two terms being used in some places as synonymous and sometimes joined together. The Federalists were deeply angered by this antagonism to what they regarded as their patriotic efforts in behalf of the nation. Chief Justice Ellsworth, in a charge to a grand jury in Massachusetts, denounced "the French system mongers from the quintumvirate at Paris to the Vice President [Jefferson], and the minority in Congress as the apostles of atheism, anarchy, bloodshed, and plunder." Hamilton, Jay, and John Adams, realizing the seriousness of the opposition, began to organize their followers for political warfare;

[1] Beard, *Economic Origins of Jeffersonian Democracy.*

and in the second presidential election a real compaign was waged. In the third presidential election the party alignment was complete. Jefferson, the leader of the Anti-Federalists, was roundly denounced as an atheist and leveler; while Adams, the Federalist candidate, was characterized by his opponents as "the monarchist."[1] So sharply drawn was the contest that Adams was chosen by the narrow margin of three electoral votes.

During Adams' administration a series of events thoroughly discredited the Federalist party. The Republican newspapers heaped the most indiscriminate abuse upon the head of the President and the Federalists generally. As a result Congress pushed through the Alien and Sedition Acts — the first authorizing the President to expel certain aliens who might be deemed dangerous to the safety and peace of the country, and the second making the publication of attacks on any branch of the Federal Government a crime.

Under the Sedition Act many of the Anti-Federalists were sharply punished for what seems to us, in view of modern liberties, trivial criticisms of the administration. For example, Callender, a friend of Jefferson, was convicted for saying, among other things, "Mr. Adams has only completed the scene of ignominy which Mr. Washington began." The Sedition Act seemed to be in flat contradiction to the amendment to the federal Constitution securing freedom of press and speech against official interference; undoubtedly it was unconstitutional. The two laws called forth the famous Kentucky and Virginia Resolutions, and convinced even those moderately inclined towards democracy that Federalism meant an unwarranted extension of the powers of the National Government and perhaps the establishment of party tyranny. The death knell of the Federalist party was rung. Jefferson was elected in 1800 by a substantial majority over the Federalist candidate and the Federalists, after making a few more feeble efforts to recover the presidency, disappeared from the political scene.

The leaders of the Anti-Federalists, who in the course of time became known as the Republicans (in some places the Democratic-Republicans) were avowedly the champions of the agricultural population as against the commercial, industrial, and

[1] For Jefferson's view of the difference between the Federalists and Anti-Federalists, see *Readings*, p. 92.

financial sections. Jefferson proudly boasted that his party was composed of "the landed and laboring interests of the country." On one occasion he asserted that "the whole landed interest is Republican." Jefferson also feared the growth of the great cities and the accumulation of riches. The arts of finance and commerce he regarded as fraught with corruption; the mobs of the great cities he condemned as "sores on the body politic" and the makers of revolution. He sincerely believed that agriculture was the only solid foundation for a republic. The spirit of independence, he was fond of saying, could be kept alive only by free farmers, owning the soil they tilled, and looking to the sun in heaven and the labor of their own hands for sustenance. Trusting as he did the "innate goodness" of man, he was an ardent advocate of freedom of the press, freedom of speech, and freedom of scientific inquiry.

It would be a mistake, however, to suppose that the triumph of the Republicans meant the complete repudiation of Federalist policies. Indeed the contrary thing happened, but, it was claimed, in the interests of agriculture. Though advocates of a strict construction of the Constitution, the Republicans, by purchasing the Louisiana territory, stretched the document far more than Hamilton did with his Bank Act; but the purchase added millions of acres for Jefferson's free farmers! In 1816, the Republicans enacted a high tariff law, but its sponsor, John C. Calhoun, justified his position by saying that the tariff was to make home markets for cotton, tobacco, and other agricultural products — products which perished in the hands of the growers whenever a European war cut off the sea-borne trade. In the same year, also, the Republicans created a Second United States Bank, but this was made necessary by the chaos in war finance. The measure also created a schism in the ranks of the faithful and within a few years was utterly repudiated by the Democrats — the radical wing of the Republicans for whom Andrew Jackson spoke.

The National Republican (Whig) and Democratic Alignment

During the period from 1816 to 1828 American politics took on an aspect of personal and factional dispute. Federalist organizations had disappeared, and the Republican party seemed to embrace in its ranks the entire electorate. Though political

feeling ran high, the leaders of the bellicose elements were unable to group the electors into two great contending parties. They searched about for principles upon which to reorganize the political fragments, but they were unable to agree upon any set of doctrines that would produce the desired effect.

Meanwhile there were going on certain fundamental economic changes, the significance of which was not appreciated by contemporary observers, but which were destined to give an entirely new direction to American political life. These great changes were connected with the settlement of the Northwest Territory, and the transformation of slavery from a domestic to a capitalistic institution by the extension of cotton culture into the Southwest and the increased demand for cotton brought about by the advance of manufacturing methods. The balance of power was being shifted from the seaboard states to the West, and within the Eastern states industries were rising which were destined to overthrow the landed classes. Kentucky was admitted to the Union in 1792, Tennessee in 1796, Ohio in 1803, Louisiana in 1812, Indiana in 1816, Illinois in 1818, Mississippi in 1817, Alabama in 1819, and Missouri in 1821.

In these Western states there arose a type of economic society such as had never before appeared in the history of the world and never can exist again, at least on a large scale. They were settled by hardy and restless pioneers who crossed the mountains, cut down the forests, built their log cabins, and founded homes. In the possession of this world's goods they were, for the most part, substantially equal; it was easy to acquire land; any thrifty and industrious pioneer with his family could readily secure the comforts of a rude but healthful and independent life. Practically every white man could vote. In the log cabins of these pioneers were developed political ideas fundamentally different from those entertained by the rich merchants of the East or the aristocratic land-holders in their manors along the Hudson.

There in the West existed a substantial economic equality, and the leveling theories of Jefferson were realized on a large scale. Owing to the simple life which pioneers lived, government was to them a simple thing; anyone could hold the office of sheriff, county clerk, road supervisor, state auditor, or governor. As the duties of the offices were slight and easily understood, and the emoluments connected with them attractive, especially to

men who earned their bread with the ax and plow, the Western settlers seized with eagerness upon the doctrine of short terms and rotation in office.

These Western communities, moreover, needed capital to develop their latent resources, to complete highways and construct canals, and to found industries; for this capital they were compelled to look principally to the accumulations of the East. This necessity made them dependent largely upon Eastern financiers, and they determined if possible to rid themselves of their "servitude" by the establishment of state banks, and the issue of paper money in large quantities. It is easy to ridicule Western theories on fiat money, but when one appreciates the grinding necessities of frontier life one can understand, even if one does not approve, its financial devices.

The industrial revolution in England and the invention of the cotton gin, which created an enormous demand for raw cotton, brought about a revolution in the agricultural system of the South. In the place of the old plantations, where masters and slaves dwelt side by side from generation to generation, thus mitigating the bondage of slavery by a somewhat patriarchal relation, there appeared a new type of plantation, on which slaves bred in the older states, or snatched away from Africa in spite of the law, were herded together and worked with less regard for human consideration than in former times. With the demand for cotton came the demand for more territory. The bonds of the old South were burst asunder; an irresistible pressure for the extension of the soil available for cotton culture set in, and swept everything before it. The slave population increased rapidly; the lust for money seized the dominant class as it seized the mill-owners in New England. Thus slavery, once condemned or merely condoned, became intrenched, and it thereupon inevitably drew to its defense the best intellectual strength of the South.

In the East, as well as West and South, a revolution was going on. The industries of New England and the Middle States, founded in colonial times and fostered by protective tariff especially after the War of 1812, began to take on a new life. Mechanics from England came in large numbers, bringing with them the designs of machines which had so recently wrought the revolution in English industry. In 1807, Fulton inaugurated steam

navigation on the Hudson; and far and wide hamlets were transformed into manufacturing centers through the magic of steam. The tide of immigration from Europe steadily increased, and most immigrants found their homes in the growing cities of the East. In the twenty years from 1800 to 1820 the population of Boston almost doubled, while that of New York rose from 60,000 to 123,700. Owing to the property qualifications placed on the suffrage by the constitutions of the Eastern states, most of the immigrants and native workers in the factories were excluded in the beginning from the right to vote; but before the first quarter of the nineteenth century had elapsed, the restrictions on the suffrage had been relaxed in nearly every commonwealth.

Here were the changed social conditions which made the United States of 1825 as different from the United States of Washington's day as the England of Cobden and Bright was different from the England of Bolingbroke and Walpole. The landed, financial, and industrial interests of New England and the Middle States had now aligned against them the diverse interests of the laboring classes, the pioneers of the West, and the slave-owning cotton producers. In 1828, there was found a standard-bearer who, curiously enough, seemed to represent all these diverse elements. That was Andrew Jackson, a resident of Tennessee, a bold frontiersman, immensely popular on account of his victory over the English at New Orleans and his unqualified championship of what he called "the rights of the people." Triumphantly elected, and feeling behind him the irresistible pressure of popular support, he began an executive policy which seemed for a time to transfer the seat of government from the capitol to the White House. He adopted the most novel notions on the rights of the President under the Constitution;[1] he ousted the old office-holding aristocracy without regard to appearances and circumstances, and placed his friends and supporters in office; he destroyed the United States Bank, the stronghold of powerful financial interests, in spite of the opposition raised up against him in Congress; and when nullification appeared in South Carolina he issued a ringing proclamation which showed that he was a stanch defender of nationalism as against states' rights.

For a time it looked as if Jackson was destined to sweep everything before him, and his second election seemed to confirm him

[1] See *Readings*, p. 190.

in his opinion that he was opposed only by malignant minority factions. Nevertheless, the elements of opposition to Jackson's policy steadily gained in strength. The members of the old ruling aristocracy dreaded the dominance of a man whom they regarded as an ignorant and violent military chieftain backed by the vehement passions of the populace. The banking and financial interests of the East had every reason to fear that a calamity would inevitably follow the destruction of the United States Bank and the flooding of the country with paper money through the state banks; many Southern Democrats, who sympathized with the nullification policy of South Carolina, violently attacked Jackson for his determined stand against the action of that state. Furthermore, there was a well-organized group of Eastern manufacturers who wanted to extend the system of protective tariff beyond the point to which Jackson was willing to go. In addition to this host of enemies, Jackson raised up against himself many disappointed office-seekers, as well as the old office-holders whom he turned out. There was also in the West a growing number who wanted to secure larger federal grants for internal improvements than he was willing to concede.[1]

These elements of opposition were brought together in the National Republican or Whig party, which numbered among its famous leaders J. Q. Adams, Webster, and Clay. It would be wrong, however, to attribute the rise of this new party wholly to Jackson's personal policy. Even before his advent to power, the political factions were beginning to divide into two fairly distinct groups — one under the leadership of Adams and Clay and the other composed of the Jackson-Calhoun-Crawford combination.[2] The first of these two parties was inclined toward a broadly nationalist policy with regard to internal improvements and the protective tariff. The second took the more particularist or states' rights view which would restrict the activities of the Federal Government to the narrowest limits.

Jackson's high-handed policy in destroying the Bank, and his fondness for "strong executive government," simply helped to consolidate more effectively certain of the opposition elements into the National Republican party, which soon received the

[1] For Horace Greeley's description of the Whig party, see *Readings*, p. 94.
[2] Burgess, *Middle Period*, p. 146.

name "Whig" — a title taken from English politics that signified "opposition to high executive prerogative and approval of congressional control over the President."

The Whig party lasted nominally until 1852. It put forward Clay as its candidate in 1832, only to meet certain defeat; but it enjoyed two brief periods of triumph. In 1840 without having made any declaration of principles at all, it elected William Henry Harrison, a popular hero. After a second defeat four years later, with Clay as the candidate again, the party once more resorted to the old device and in 1848 carried the day with another military hero, General Taylor, of Mexican War fame. Even this design failed the Whigs the next time, for their third military hero, General Scott, was utterly routed in the political field and the doom of the party was rung.

Broadly speaking, the Whigs were heirs of the old Federalist traditions. They favored Federalist economic policies: a United States Bank, a sound currency system, subsidies for shipping, and a protective tariff; but on all of them they were defeated by the rising tide of agrarianism in the South and West. The Democrats absolutely refused to revive the Federal Bank; they made a deep cut in the tariff in 1846 and 1856; they swept away the ship subsidies which kept the American merchant marine on the high seas. As Chief Justice Marshall and the other Federalist members of the Supreme Court passed away, Democrats were appointed to take their places; and the rights of states were emphasized in judicial decisions. Many of the principles laid down by Marshall were in fact repudiated. The clause of the Constitution forbidding states to issue bills of credit was re-interpreted in such a way as to permit states to set up banks empowered to flood the country with paper notes. In short, the Democrats, between 1830 and 1860, undid the work of the Federalists and made serious inroads upon the Constitution as interpreted by Federalist statesmen and judges. But great events were now forcing a new alignment of parties.

The Democratic-Republican Alignment

The slavery issue, with its economic and moral implications, was stirring the whole nation. Though the abolitionists were few in number, they carried on a vigorous agitation that forced

the slavery question to the front, in spite of efforts to obscure it. The abolitionists, however, did not constitute a political party of any weight. The opponents of slavery organized a convention at Buffalo in 1843, and nominated James G. Birney as candidate for President on "the principles of 1776," but Birney polled only about 62,000 out of some 2,600,000 votes in the election of the following year. Four years later another anti-slavery convention, held at Buffalo, nominated Van Buren on a platform of opposition to slavery in the territories; but this faction, known as the "Free Soil" party, only polled about 290,000 votes. In the campaign of 1852, the Free Soil party declared: "No more slave states, no slave territory, no nationalized slavery, and no national legislation for the extradition of slaves"; but its candidate, Hale of New Hampshire, received only 156,000 votes.

Events, as well as agitation, however, were making slavery the issue. The war with Mexico had added to the territory of the United States a large domain comprising California, Utah, Nevada, Arizona, and portions of Colorado and New Mexico; and the organization of this territory became at once the burning issue. A heated debate in Congress culminated in the Compromise of 1850: Utah and New Mexico were organized as territories with or without slavery as their future constitutions might prescribe; the slave trade in the District of Columbia was abolished, the South receiving full compensation in an act for the more efficient rendition of fugitive slaves. The enforcement of this last provision by federal officers in Northern states brought slavery home to the people of Northern cities and hamlets, and made it odious to thousands who had formerly been indifferent to it.

The climax came, however, in 1854 with the Kansas-Nebraska act; it expressly repealed the provision of the Missouri Compromise excluding slavery from the northern portion of the Louisiana purchase and thus reopened a sore controversy which opponents of slavery in the territories had thought forever closed. On the very morning after the House of Representatives took up the Kansas-Nebraska bill, several members of that body held a conference, and agreed that the advance of the slave power could be checked only by the formation of a new party. About the same time a mass-meeting was held at Ripon, Wisconsin, and

a resolution adopted to the effect that a new organization, to be called Republican, should be formed on the question of slavery extension, if the bill passed. Indeed, all through the North and East there were signs of dissolution among the old parties and a general re-alignment. Many newspapers, with the New York *Tribune* under Horace Greeley in the lead, were advocating the formation of a new party; in the spring and summer of 1854 meetings were held in Illinois, Maine, Vermont, Michigan, Iowa, Indiana, Massachusetts, and New York at which the Kansas-Nebraska bill was roundly denounced. On July 6, 1854, a state convention was held at Jackson, Michigan, and a full state ticket of Republican candidates was nominated. The congressional elections of that autumn revealed the strength of this movement, for in the new Congress there were 117 Representatives and 11 Senators in the Anti-Nebraska party.

The new Republican party — bearing the significant title which Jefferson had given to his hosts in 1800 — held its first national convention at Philadelphia in June, 1856, on a call issued by a preliminary meeting assembled at Pittsburg, in the preceding February. At this convention Delaware, Maryland, Virginia, and Kentucky were represented, as well as all the Northern states and some territories. Frémont was nominated as the candidate on a platform which declared that it was the right and duty of Congress to prohibit in the territories those "relics of barbarism, polygamy and slavery." In the campaign which followed, Frémont polled 1,341,264 votes against 1,838,169 polled by Buchanan.

By this time the Democratic party had taken a fairly clear stand on the question of slavery.[1] It asserted that Congress had no control over the domestic institutions of the several states, and deprecated the activities of the abolitionists; it announced its adherence to the compromise measure of 1850, and declared that it would resist all attempts at renewing the agitation of the slavery question in Congress or out of it. In the contest of 1860, however, the Democrats split into two factions, one headed by Stephen A. Douglas, who hoped to solve the slavery question by allowing the people of each territory, on their admission to the Union as a state, to decide it for themselves; the other by John C. Breckinridge, who stood on a platform advocating the extreme

[1] For the Democratic platform of 1852, see *Readings*, p. 95.

Southern view that Congress had no power to prevent slavery in the territories.[1]

During the four years which followed its first national convention, the Republican party steadily gained in strength. It found its most effective support among the Northern farmers, who believed that slavery should be excluded from the great western territories, in order that homesteads might be erected there by free men; indeed, it has been called "The Homestead Party" by an eminent publicist.[2] To the homestead element were added the manufacturing interests of the East, which were clamoring for more protection against European competition.[3] The alliance of these two great forces made a formidable party — not an abolitionist party, but a homestead and protective tariff party, standing for the exclusion of slavery from the territories. This party held its second convention at Chicago in 1860, and nominated Abraham Lincoln of Illinois and Hannibal Hamlin of Maine. Owing to the dissensions in the ranks of the Democrats, it was able to carry the election with a popular vote of 1,866,452 against a total vote of 2,815,617 cast for the three opponents.

As the Southern leaders had warned the North, the election of Lincoln precipitated the long-impending crisis. When the Civil War broke out many Northern Democrats came to the support of the administration, but throughout the armed conflict a large number of them maintained an attitude of hostility toward Lincoln's policy and openly sympathized with the Confederate states.

During the period of the War and Reconstruction, the Republicans swept away the economic policies which the Democrats had laboriously translated into law between 1830 and 1860. The Democrats had destroyed the United States Bank; the Republicans, in 1863, created a new national banking system. The Democrats had cut the tariff to a low figure; the Republicans raised it to the highest point yet reached in the history of the country. The Democrats had created innumerable state banks empowered to issue paper money; the Republicans

[1] After the split of the Democratic party in 1860, a small group taking the name of the Constitutional Union party held a convention in Baltimore and nominated John Bell, of Tennessee, on a platform that begged the whole slavery question. Bell received 39 electoral votes.

[2] See article by Professor J. R. Commons, *Political Science Quarterly*, September, 1909, on Horace Greeley and the Republican party.

[3] For the Republican platform of 1860, see *Readings*, p. 97. For the campaign, consult E. D. Fite, *The Presidential Campaign of 1860*.

in 1866 taxed their notes out of existence. The Democrats by judicial decisions had whittled away the Federalist interpretations of the Constitution; the Republicans by amendments to the Constitution, especially the Fourteenth, reëstablished strict judicial control over the economic legislation of the states.[1]

The Republican party emerged from the period of Reconstruction, during which the Southern states were restored to their former position in the Union, as a reorganized party fortified by an intense patriotism,[2] by the support of the manufacturing interests which had flourished under the war tariffs, and by the patronage of capitalists eager to swing forward with the development of railways and new enterprises.[3] In possession of all the important offices, controlling the federal legislature, executive, and judiciary, with the Democratic party prostrate and branded with treason, the Republicans had a control over the destinies of the country greater than that wielded by Democrats during the period preceding the Civil War.

Wherever there is such tremendous power, vigilant self-seekers of every kind are sure to congregate. During the years which followed the war, the ranks of the Republican party were permeated with mercenaries of every type — the spoilsmen hunting offices, railway promoters seeking land grants and financial aid from the government, manufacturers demanding more discrimination in the tariff legislation, and the great army of hangers-on who attached themselves to these leaders. The integrity of the party was further injured by the "carpet-baggers" in the South, who, in the name of the Federal Government and the Republican party, plundered the Southern states and heaped upon them an enormous burden of debt. Those who plundered under the guise of patriotism helped to discredit sadly the great party which made the proud boast that it had preserved the Union and abolished slavery.

In these circumstances the Democratic party began to be rehabilitated. It had had a long and triumphant history previous to the Civil War; it had great traditions, and numbered on its roll some of the most distinguished men in American history. It is not surprising, therefore, that the Democratic party sought

[1] See above, p. 91.

[2] See the patriotic appeal in the Republican platform of 1876, *Readings*, p. 101.

[3] For a first-hand study of the economic aspects of the period, see Dunning, *Reconstruction, Political and Economic* (American Nation Series).

to close up its shattered ranks in opposition to Republican rule. In the South the whites recovered their old predominance; in the North and West the farmers protested against the high protective tariffs; here and there throughout the Union discontent with the railway and corporation policy of the Republican party began to appear; and the spoils system stirred to action a small but vigorous minority of "civil service reformers." [1]

As a result, the Democratic party, in 1884, was able to bring together an effective opposition, and Cleveland was narrowly elected President, principally by the support of the "mugwumps," who bolted the Republicans after the nomination of Blaine at the Chicago convention. This Democratic triumph was short-lived, however, for four years later, when Cleveland forced the tariff issue by his celebrated message of 1887, the Republicans were able to elect Benjamin Harrison by a slight majority. Taking advantage of their victory, the Republicans forced through the McKinley tariff bill, though it was regarded by many members of the party as entirely too drastic. In the succeeding election of 1892 Cleveland was again able to lead his party to success.

The Economic Revolution and Growth of Dissent

Although the two historic parties commanded the allegiance of the mass of the people during this period, there was always a dissenting element in each of them. In fact every party is a more or less miscellaneous aggregation with a conservative right and a radical left shading off into each other by imperceptible degrees. If a citizen does not approve the policies adopted by the party with which he is associated by birth or temper, he has three choices before him. He can stay within the party and work to secure the nomination of other men and the declaration of other principles. He can go over to another party which more nearly represents his idea about politics. Or he may leave his party and join others who are of a like mind in forming a new organization. Since the candidates and platform of any party usually represent the middle average, the person of a critical mind is likely to be disgruntled with them especially in times when changing circumstances call for progressive men and progressive measures.

[1] For the spirit of the Democratic opposition, see *Readings*, p. 103.

Near the closing years of the nineteenth century American politics entered a new phase. During the period following the Civil War there was an economic transformation more revolutionary in character than that which formed the basis of the Jacksonian upheaval. Small business concerns grew into gigantic corporations capitalized at untold millions and controlling nation-wide industries. There were built up colossal fortunes from which the total national debt of Washington's day could have been paid many times over. The western lands, once the hope of the poor laborer of the East, were practically all taken up by 1890. The vast timber and mineral resources of the nation passed largely into private hands. Cities grew by leaps and bounds, and millions of poor were crowded in congested quarters. The village workshop, the old-fashioned woolen mill by the brookside, the hand-loom, the short railway line, the small individualist factory, were conquered by mighty captains of industry, whose bold enterprises and remarkable genius for world-wide organization are the wonder of our age. With this industrial revolution came an immense increase in the number of industrial workers. It may be demonstrable that there are many gradations of fortune in modern life and that industrial workers are constantly passing to other ranks, but this should not be allowed to obscure the fact that a permanent working-class, dependent almost entirely upon the sale of labor power, is the inevitable concomitant of the industrial revolution. In connection with commercial enterprises insular dependencies were acquired, and the National Government was drawn into the mesh of world politics. Surely the United States of our time is further away from Lincoln's day than his America was from the America of Washington.

The new conditions of American life inevitably created new interests, and, therefore, forced steadily to the front novel political doctrines. These various doctrines, as far as they proposed radical changes, usually found their first exponents in minor parties; and as the respective issues came within the range of practical politics, they were presented to the country in national campaigns by the two great parties. Accordingly it seems worth while to review briefly the minor parties since the Civil War, for, in spite of their apparent insignificance, they are by no means negligible factors in the American governing process.

These parties fall readily into three groups: temperance, labor, and agrarian.

1. About the middle of the nineteenth century there arose a temperance movement which carried several states for absolute prohibition. A reaction, however, speedily set in, and the temperance question was overshadowed by the great slavery issue. After the Civil War the Prohibitionists appeared once more upon the political scene. At a convention, held in Columbus, Ohio, in 1872, they nominated a presidential candidate and launched a national party. From year to year they kept up what seemed to be a forlorn and hopeless battle. At no time did they muster three hundred thousand votes; at no time were they regarded as more than harmless "cranks." But their influence exceeded their numerical strength. Moreover, the idea of prohibition was taken up by leaders in the old parties, who utterly repudiated the harsh and uncompromising tactics of the Prohibition party; the Anti-Saloon League was formed to wage war on the saloon by state and local action. In the course of time, localities and states were made "dry" by referendum after referendum; and finally prohibition of intoxicating liquor as a beverage was incorporated in the Eighteenth Amendment to the Constitution, put into effect in January, 1920. Still the question of enforcing the Amendment kept the liquor question "in politics" even more prominently than before the establishment of legal prohibition. The fortunes of many candidates still depended upon the degree of their "dryness" or "dampness."

2. Almost immediately after the Civil War labor entered American politics as a separate and independent element. In 1872 a party known as the "Labor Reformers" held a national convention in Columbus, Ohio, which was attended by representatives from seventeen different states. The party at that convention declared in favor of restricting the sale of public lands to bona fide homeseekers, Chinese exclusion, an eight-hour day in government employments, civil service reform, one term for President, regulation of railway and telegraph rates, and the subjection of the military to civil authority. For a time, the labor element seems to have been absorbed into the agrarian groups described below; but in 1888 a "Union Labor" party met in a national convention at Cincinnati, and drafted a platform embodying the principal doctrines of the Labor Reformers

and demanding, in addition, popular election of United States Senators.

Although the American Federation of Labor was organized under its present name about this time, namely in 1886, it lent no countenance to the idea of a separate labor party. Experiments of that kind had been made without marked effect in the days of Jacksonian Democracy, and Samuel Gompers, the president of the Federation, denounced, in season and out, independent political action on the part of trade unions. It is true that the Federation from time to time advocated many specific measures of law, state and national, and gave its support to candidates of the two major parties who declared themselves favorable to its policies. It is true also that certain local leaders in the Federation, in 1920, launched a new labor party, later fused into the Farmer-Labor party, but the small vote polled by its candidate only convinced the higher labor officials that their policy of playing one party off against the other was the better way of securing influence in politics.

Labor forces appeared on the national stage as an avowed socialist organization in the campaign of 1892, when the "Socialist Labor" party held its first convention in New York. This party made its appeal almost exclusively to the working class. It declared that "man cannot exercise his right of life, liberty, and the pursuit of happiness without the ownership of the land and the tools with which to work. Deprived of these, his life, liberty, and fate fall into the hands of the class that owns these essentials for work and production." The radical appeal of the Socialist Laborites to the working class to unite against the property-owning class met, however, with no considerable response; its candidate in 1896 polled only 36,373 votes; in 1920 the number was about 21,000.

Internal dissensions and the extreme views of the Socialist Labor party led to the organization of another radical group taking the name of the "Socialist" party, which held its first convention in 1900, and at the presidential election of 1908 polled 448,453 votes — more than the combined vote of the other minor parties. Four years later its vote rose to almost a million, only to fall materially in the election of 1916. This party also made its appeal especially to the working class, but it did not demand the complete abolition of all private property in the

means of production. From time to time it has declared in favor of graduated inheritance and income taxes; universal suffrage; the initiative and referendum; proportional representation and the right of recall; popular election of judges; employment of unemployed working men on large government undertakings; collective ownership of all industries in which competition has ceased to exist; extension of the public domain to include mineral resources, forests, and water power; compulsory government insurance for the working class; and an extended labor code designed to raise the standard of life for the working people in every branch of industry.

The opposition of the Socialist party to the war against Germany led to the withdrawal of many prominent leaders. On the other hand, the world-wide reverberation of the Russian Revolution forced the remaining officials of the party into a relatively moderate position; the conservatism of the party on various matters brought about a secession of radicals and communists in 1919. In the election of the following year, the Socialists polled about 900,000 votes — a figure not much above that of 1908 if the increase in population and the new votes of women are taken into account.

3. There has been in American politics since the period of the Revolution a distinctly agrarian element, but it did not appear as a separate political party until after the Civil War. With the rapid decline in the prices of agricultural produce which accompanied the general collapse of the inflated war prices, the farmers began to grow dissatisfied with their lot. At length they came to believe that the railways, the corporations, and the financial policy of the Federal Government were principally responsible for the evils under which they labored. Working through the legislatures, especially in Illinois, Iowa, Wisconsin, and other Western states, they attempted to secure relief by means of laws regulating railway rates and warehousing. The distress of the countryside invited organization, and from the advent of the Grange just after the Civil War, associations of farmers multiplied. Though they were not parties themselves, they prepared the way for parties.

The discontented farmers entered politics in 1876 as the Independent National or "Greenback" party, and waged warfare especially on the Republicans, charging them with having

brought about the decline in prices by placing the monetary system on a specie basis and contracting the currency. In spite of the small vote polled by their candidate, Peter Cooper, of New York, the Greenbackers put forward a candidate in the next campaign, and even made a third attempt in 1884. In view of later developments, their platform of 1880 is interesting, for it included, among other things, free coinage of silver, advanced labor legislation, the establishment of a national bureau of labor, Chinese exclusion, a graduated income tax, and the regulation of interstate transportation.

Although it gained in votes at first, the Greenback party went to pieces completely after the campaign of 1884. Within a short time, however, the restless agrarians formed a new association, known as the Farmers' Alliance, which, although it did not officially enter politics, was the precursor of the Populist party. This party drew together, in 1892, both agrarian and labor elements in a national convention which met at Omaha and put forth a radical program, demanding government ownership of railways, telegraph and telephone lines, a graduated income tax, postal savings banks, and the free coinage of silver and gold at the legal ratio of 16 to 1.

On this radical platform the Populists went into the campaign of 1892, and polled more than a million votes, principally in the Western and Southern states, carrying Colorado, Idaho, Kansas, Nevada, and securing one electoral vote in North Dakota and another in Oregon. This unprecedented achievement by a minor party was partially due to fusion with the Democrats in some of the states, but beyond question the Populists had attained a numerical strength which made them a force to be reckoned with in American politics. Indeed, in 1896 the Populistic wing among the Democrats captured the party and tested its principles in the memorable campaign of that year.

The distraction of the Spanish-American War and the prosperity that followed it turned the attention of the country from domestic issues for a while; but the diversion was short lived. Discontent with the Republican tariff of 1909 split the party and merged into the Progressive revolt under the leadership of Roosevelt. In a short time, a still more radical agrarianism appeared in the Northwest, especially in North Dakota, and though overshadowed by the agitations of the World War, it actually spread far

and wide. This time the agrarians sought to avoid breaking the sacred ties of party. They called themselves non-partisan. One faction organized the Non-Partisan League, which worked mainly through the formal organization of the dominant party. But the principles of the new faction were almost identical with older agrarian doctrines: control of the railways or national ownership, "easier money" for the farmers through state banks and farm loan schemes, state warehouses for grain, agrarian control over the national banking and currency system, and heavier taxes on accumulated fortunes. Like the Populists in older days the discontented farmers elected state governors, members of the state legislatures and Congress, and other officers, and made great inroads upon the orthodox membership of the established parties, at last contributing to a formidable combination of many elements in Congress known as "The Farm Bloc."

The Effect of Dissent on the Major Parties

Although the minor factions and groups that appeared with changing economic conditions and recurring economic depressions never rose to the dignity of powerful national parties, they did have a profound effect upon the fortunes of the Democratic and Republican organizations. Often holding the balance of power, they compelled the two major parties to bid for their support, or make accommodations. In 1896 the dissenters captured the Democratic party, and in 1912 they split the Republicans. In the former year the sectional issues growing out of the Civil War and Reconstruction were for the first time thrust entirely into the background by newer questions connected with finance, trusts, and labor organizations, that had been brought forward by the industrial revolution. The free coinage of silver, which Bryan made the leading issue, appealed particularly to the farmers with heavily mortgaged property and to debtors generally; but back of that issue was a deep-seated antagonism of small property owners, merchants, petty manufacturers, and a large portion of organized labor to the great financiers and the corporation interests.[1] Bryan marshaled in his ranks radicals of every school who were opposed to what they called government by a "plutocracy."

[1] *Readings*, p. 105.

This shifting of political interest to the newer issues of capital, labor, and monopolies worked more or less disorganization in both of the old parties. Each of them developed a conservative and a radical wing. For a while, the Spanish War turned popular interest into a new field, but the diversion was only temporary; within a short time the discontent of the West, which made itself felt particularly in the Democratic party in 1896, began to make inroads upon the apparent solidarity of Republican ranks. The accession of Roosevelt to the presidency on the death of McKinley in 1901 hastened the rupture in that party, for he aroused the distrust of the conservative groups and appealed to the sentiments that had fostered Populism. In his messages and speeches he brought railway, trust, labor, and other social questions prominently into politics. He advocated income and inheritance taxes partly with a view to helping equalize fortunes; he recommended a stricter federal control of corporations; he attacked "malefactors of great wealth" with a vehemence never before exhibited by a President; and he advocated a few measures for the benefit of the working classes. He found a very large group of supporters in his own party and they insisted on his becoming a candidate for renomination in 1912 after it was apparent that President Taft's sympathies were with the conservative elements. Failing to secure his nomination at the Republican convention in Chicago, Roosevelt's supporters "bolted," and formed a new party which took the name of "Progressive."

In the campaign of 1912 the new social and economic questions growing out of the industrial revolution received a more extended consideration than ever before in the history of our parties. The Republicans and Democrats dealt circumspectly with trust and labor questions; while the Progressives and Socialists sponsored such concrete measures as minimum or living wages, prohibition of child labor, special laws safeguarding the health and welfare of laborers, and workmen's compensation. The former looked upon these as reforms designed to save the present system, and the latter as mere preliminaries to the conquest of the government by the working class. The Republicans promised "in all possible ways to satisfy the just demand of the people for the study and solution of the complex and constantly changing problems of social welfare." The Democrats promised to exempt trade unions from the provisions of the law which made them liable

to penalties as combinations in restraint of trade, agreed to afford jury trial in labor injunction cases, and pledged the party to the establishment of a Department of Labor. As the Republican party was shattered by the Progressive defection, Woodrow Wilson was easily elected President, although his popular vote was two million less than a majority.

Within a little more than a year after Wilson's inauguration, the European war broke in upon the peace of the world. American industry and agriculture were made prosperous by the extraordinary demands of the European belligerents, especially the Entente powers. The social questions which had emerged in 1912 were thrust into the background, and the campaign of 1916, waged while the war was still raging, naturally took on the color of the times. Domestic issues were neglected. The protection of American rights, national preparedness, disturbances in Mexico, and the national marine occupied the center of interest. The Progressives held their convention in Chicago at the same time as the Republican convention and nominated Roosevelt, only to have him decline. The Republicans selected as their stand-bearer, Justice Charles E. Hughes, former governor of New York, and after the refusal of Roosevelt to accept the nomination, the Progressive national committee indorsed the Republican candidate. The Republicans favored maintaining "a straight and honest neutrality between the belligerents in Europe" and the protection of American rights. They roundly condemned the Democratic administration for its Mexican, European, Philippine, and legislative policies. The Democrats renominated President Wilson and based their appeal mainly on the record of achievement. They commended the "splendid diplomatic victories of our great President, who has preserved the vital interests of our government and its citizens and kept us out of war." The question of woman suffrage was warmly debated at both the Republican and Democratic conventions, and both indorsed equal suffrage by state action. The Progressives declared that "a nation to survive must stand for the principles of social justice. We have no right to expect continued loyalty from an oppressed class." The Socialists condemned the war in Europe as "one of the natural fruits of the capitalist system of production." Wilson's victory at the polls reckoned in terms of popular vote was decisive.

In April, 1917, the United States was at war with Germany and for nearly two years the energies of the nation were bent to that enterprise. At the next election, the war and the terms of peace, including the League of Nations, naturally occupied the center of the political stage. The country was enjoying the artificial prosperity created by the armed conflict, and social questions were once more put on one side. The campaign of 1920 turned on the war and foreign affairs. The party whose leader had carried America into the European conflict and had been chiefly instrumental in framing the League of Nations at the peace table was repudiated by a majority of more than eight million votes — the most terrible débâcle in its long history. Warren G. Harding, the victorious Republican candidate, laid great stress upon a "return to normalcy" — the old days of peace and prosperity; but before his untimely death in 1923 he found labor and agrarian dissent abroad in the land once more.

The Origin and Development of Party Machinery

Although parties originate in differences of opinion among voters on political and economic matters, they become, if they are successful or continue long in existence, institutions in themselves. The continuance as well as creation of party machinery is the direct result of the requirements of practical politics. The necessity of nominating candidates for numerous offices, national, state, and local, leads inevitably to the rise of caucuses and conventions. In the conduct of campaigns leadership and discipline are indispensable; hence we have concentration of power in the hands of party workers and directors. American elections, unlike those of England and France, are nation-wide — hence a nation-wide army of party officers and workers is called into existence. The frequency of elections compels party leaders to have their machinery in working order all the time, so that discipline can never be relaxed. The number of elective offices to be filled is so great that the citizens cannot give much attention to the nomination of candidates; hence the rise of expert politicians who assume that function for the voters. It costs money to employ workers, speakers, printers, musicians, and other officers and privates in the army of political conquest; so the party must have a treasury and funds. When a party is in

power, it fills offices, makes and enforces (or neglects to enforce) laws, grants contracts and franchises to public utility and other corporations, and in a multitude of ways regulates private interests; out of these functions come campaign funds, rewards for loyal workers, and enormous power over the lives of citizens. Such are the sources from which spring large and complex party organizations in America.

Generally speaking, there have been four periods in the growth of party machinery in the United States, each characterized by certain practices and tendencies. The first of them runs back into the colonial times. That was the period of informal conferences and caucuses for the purpose of nominating candidates for the coming elections. It appears that the Boston town meeting, so celebrated in history for its democracy, had fallen into the hands of a caucus long before the Declaration of Independence.[1]

The second period in the growth of the party system opened shortly after independence when rather definite forms were given to nominating machinery. By the end of the eighteenth century there had sprung up in all parts of the country local conventions composed of regular delegates elected by party members in smaller subdivisions. In the states which provided for popular election of the governor, there arose a nominating machine known as the legislative caucus which embraced all the party members in the state legislature. In the year 1800, the legislative caucus was adopted by parties in Congress as a device for making nominations for President and Vice President.

After about twenty-five years, the legislative caucus and the congressional caucus were both destroyed by a popular uprising and the third period in the history of party machinery opened. This uprising accompanied the movement which swept Andrew Jackson into the presidential office. The last congressional caucus, held in 1824, refused to nominate Jackson. His supporters at once declared war on the institution itself. A general revolt occurred in the states as well as at Washington. In a few years the legislative caucus was abandoned and its place was taken by the state convention composed of delegates elected by party voters in local districts. Just previous to the presidential election of 1832 the party convention appeared upon the national

[1] *Readings*, p. 11.

political stage, and within a decade it seemed as firmly established as the Constitution itself. From 1840 onward the presidential candidates of all parties were nominated at regular conventions composed of partisan delegates from the states and territories.

The fourth period in the evolution of party machinery opened about 1880; it is characterized by attempts to regulate party organization and methods by law. In the beginning the political party was regarded as a purely private association; for many decades this view obtained. In the course of time, however, scandals and investigations revealed innumerable specific abuses by party machines. In order to secure pliant tools as delegates to conventions and members of committees, political directors resorted to tactics which excluded the honest voters from participation in the party primaries. They instituted the "snap primary," that is, one held without proper notice, or unexpectedly, or at some unusual date. They packed primaries with their henchmen, who drove out or overwhelmed dangerous opponents. They padded the rolls of party members with the names of dead men, or men who had long ago left the community. They stuffed the ballot boxes, and they prepared the slates which were forced through the nominating conventions in the face of opposition. They entered into alliances with railway and other corporations from which they received campaign contributions or heavy tribute in other forms. It was thus that Jay Gould was able to declare, with a note of triumph: "I wanted the legislatures of four states, and to obtain control of them, I made the legislatures with my own money; I found this plan a cheaper one." Municipal councils and state legislatures all too frequently granted franchises, special laws, and valuable privileges without regard to public welfare or the future of the country, generally under the dominance of political leaders who had sold out to the privilege seekers.

Aroused by revelations of abuses committed by their leaders, citizens in all parties and in all sections of the country began a struggle for legislation to control party machinery and practices, and to give the rank and file more power over the conventions and officers of their respective organizations.

The first attack was made on the evils connected with elections. Under historic practice, the printing and distribution

of ballots were left entirely in the hands of the various political organizations. Generally speaking, there was no secrecy about elections. Each party furnished its members with ballots of a certain color and it was easy to see how everyone voted. The cost of printing ballots deterred poor men from running for office independently, and made it almost impossible for a third party, with no spoils, to obtain a foothold. In the early eighties a cry went up from the reformers who demanded the introduction of the Australian ballot system requiring public authorities to furnish ballots free of charge to all parties and to provide secrecy for the voters in casting their ballots. Beginning with Massachusetts in 1888, state after state adopted the Australian ballot; by the end of the first decade of the twentieth century it was to be found in every state in the union except two. Even in its best form it failed to realize the high hopes of its advocates, although it did eliminate some of the worst abuses of the ancient system. The party boss and the party machine remained intrenched; the independent citizen received scant courtesy at the hands of party manipulators. Then came an attack on the whole range of political devices: caucuses, conventions, and primaries, and a demand for even more sweeping regulation of party operations.[1]

Even before the adoption of the Australian ballot, California seems to have opened this new phase in the evolution of party government by passing, in 1866, a permissive measure providing for regularity and publicity in the conduct of primaries and caucuses, but at the same time allowing party committees to decide whether the rules laid down in the statute should become binding on them. Five years later, Ohio enacted a law containing similar optional regulations; and in a short time other states followed with uncertain and halting steps the example thus afforded.

Permissive statutes failed completely to accomplish the purpose for which they were at first deemed sufficient. After a lapse of a few years, during which the results of the Australian ballot were awaited, there began to come from our state legislatures a series of compulsory statutes, attacking first the minor features of party organization and operations, and then extending in every direction, until at length the party system was made

[1] See below, chap. xxv.

an integral part of the legal framework of government. "The method of naming candidates for elective public offices by political parties and voluntary political organizations," runs the Oregon primary law of 1905, "is the best plan yet found for placing before the people the names of qualified and worthy citizens from whom the electors may choose the officers of our government. The government of our state by its electors and the government of a political party by its members are rightfully based on the same general principles." This is the underlying principle of the direct primary: the political party is a state within a state, and all its officers and candidates should be chosen by a direct vote of the party members.

A careful, but probably not exhaustive, review of the state legislation of the six years, 1901–06, reveals more than sixty-two statutes, many of them broad and comprehensive, regulating political parties in their varied operations. The years 1907–08 showed no relaxation of legislative activity in this direction, for they gave us revolutionary direct primary laws: those of Wisconsin, New Jersey, Iowa, Illinois, Missouri, Nebraska, Washington, and Kansas, leaving out of account less striking measures. Oklahoma came into the Union in 1907 with a startling constitution requiring, among other things, that the legislature shall enact laws for a mandatory primary system and shall provide for the nomination of all candidates in all elections for state, district, county, and municipal offices, including that of United States Senator. Maine, Massachusetts, and New Jersey adopted state-wide primary laws in 1911; New York followed in 1913, and in subsequent years there was a steady extension of the principle of direct nominations until nearly every state in the Union had adopted the system in some form.[1]

In the presidential campaign of 1912 it was carried over into the national sphere. Delegates to the national conventions were chosen by popular vote in several states; and in about one fourth of them the voters were given an opportunity to express a preference among the candidates for nomination, either directly or by voting for delegates pledged to certain aspirants. It was confidently predicted that the nominating convention was a thing of the past, but the prophecy was not fulfilled. In 1916 the presidential primary received scant attention, and four years

[1] For a description of primary legislation, see below, chap. xxv.

later though extensively used it was without material effect on the nomination of candidates. By that time the inevitable reaction had set in. New York, under conservative Republican leadership, abolished the direct primary for state-wide nominations, and all over the country currents of opinion ran against the new system. But predictions that it was at the end of its career proved false, for attempts to repeal the primary laws in several states, sometimes on a popular referendum, met with stunning defiance on the part of the voters.

The Nature of the Political Party

The changes here recorded have not destroyed party machinery. They have merely standardized it from top to bottom and given it a firm position in the American scheme of government. The nature of the party remains the same. If it is carefully examined, it will be found to consist of several elements. Of course it is customary to regard the party as composed of all those who vote its ticket, but a close analysis shows that this is a very loose idea. Thousands who vote a party ticket are independents and members of opposing parties, who for the time being favor other candidates and platforms. Additional thousands who regularly vote a ticket devote no thought or time to party debates and conferences, and could not give a fifty-word account of why they happen to be in that particular party. According to another definition the term "party" covers just those who are openly enrolled on the party roster, according to law and practice, and thus entitled to participate in party primaries. This group consists of from thirty to eighty per cent of the party voters. The number who actually go to the primaries and take a hand in electing party officers and nominating party candidates is still smaller than the number enrolled, ranging sometimes as low as ten per cent of the enrolled voters and not often higher than seventy per cent.

Among the fifty per cent who may be reckoned as taking some positive interest in the affairs of the party, only a small proportion can be regarded as active and influential. There are at the center some loyal and zealous party members who believe that the welfare and safety of the republic depend upon the principles which they advocate — members who hold no office and are

really disinterested. There is no political micrometer for measuring the size of this element in each party. More constantly active, as a rule, are the regular and permanent officials of the party, such as the committee members and chairmen (national, state, and local), paid workers, office-holders dependent for their positions upon the party, would-be office-holders looking to the party for preferment, representatives of various interests (real estate, commercial, industrial, labor, etc.) which expect favors at the hands of the party, and editors of party newspapers.

Thus a great human association which springs up informally outside the institutions of government to express certaini ideals and theories in politics may end in becoming an institution itself. Indeed, all organizations controlling sources of money and power tend to perpetuate themselves and to become institutions after their original purposes have been realized. Herbert Spencer tells an amusing story of a society founded in England to carry on an agitation in favor of a certain act of Parliament. It had its president, secretaries, treasurer, paid workers, and petty officers; after a long season of agitating, it secured the passage of the Act in question. Shortly after the great triumph, Spencer called at the organization headquarters expecting to find general rejoicing. To his surprise he found universal sorrow. The achievement of the purpose for which the society was founded abolished all the lucrative offices which it maintained! The same principle usually applies to political organizations.

The party institution once established tends to become an *imperium in imperio* — a state within the state. It has its constitution, its officers, its laws, its treasury, its loyal subjects, and its penalties for treason. No citizen can hope to rise to any office except through the agency of some party. An independent citizen who refuses to call himself a party member is looked upon as a "crank" or a "goody-goody." One who leaves his party and joins another is treated with contempt and scorn by his former colleagues. The vilest words in our political vocabulary are reserved for the party "deserter."

The whole spirit of party was accurately reflected long ago in the Richmond *Whig's* editorial on the "no-party man." "We heartily join in desiring the extermination of this pestiferous and demoralizing brood, and will do whatever we can to effect it. . . . Let the Whigs and Democrats everywhere resolve that the

gentry who are too pure to associate with either of them or to belong to either party, shall not use them to their own individual aggrandizement. Let them act upon the principle that the Whig or Democrat who has sense enough to form an opinion, and honesty enough to avow it, is to be preferred to the imbecile or the purist, or the mercenary, who cannot come to a decision, or is ashamed of his principles, or from sordid considerations is afraid to declare them." The party alignment, sharp enough before the Civil War, became even sharper for a long time after that great crisis, so that political independence or sympathy with any "third party" principles came to be regarded as a species of treason coupled with intellectual dishonesty. "The party," says Ostrogorski, "became a sort of church which admitted no dissent and pitilessly excommunicated any one who deviated a hair's-breadth from the established dogma or ritual, were it even from a feeling of deep piety, from a yearning for a more perfect realization of the ideal of holiness set before the believer."

The Roots and Sources of Party Strength

Why is it that party organization has become more minute and more powerful in the United States than in any other country in the world? To answer that question adequately, one would have to explore all the ramifications of American society; but some of the more obvious reasons are agreed upon by publicists and may be enumerated here.

As noted elsewhere, the large number of elective offices makes it impossible for the mass of the people to take an active part in making nominations and running the political machinery. Wherever elective officers are provided for, machinery for making nominations inevitably follows, with its long train of primaries, caucuses, conventions, committees, and officials. Each new elective office adds to the weight, strength, complexity, and immobility of the machine. Party business of necessity falls into the hands of professional workers experienced in the art of managing primaries and elections.

Even the very structure of our federal system makes party government and strong party organization indispensable if the will of the voters is to be realized. The legislative powers are divided between the federal Congress and the state legislatures,

so that if a party has a policy that requires federal and state legislation it must be in power in both governments. For example, if a party wants an interstate commerce law, it must go to Washington; if it wants a supplementary law regulating commerce within the state in a manner consistent with the federal law, it must go to the state legislature. If a party, therefore, has a systematic and rational policy covering the important questions of our day relative to railway, insurance, and trust regulation, it must embrace within its plans federal and state laws; and in order to realize completely its policy, it should be strong enough to control state and national legislatures.

In the second place, the separation of executive and legislative powers serves to strengthen the political party; for democracy, as now understood, requires the coördination of those two branches of the government.[1] To take a homely example from daily life: no business man who has made up his mind that a certain thing shall be done would think for a moment of choosing an executive agent bitterly opposed to the plan; and yet this is exactly what may happen and does often happen in American government. It frequently occurs that the legislature of a state is Republican and the governor Democratic; that is, men are chosen to make laws which are to be enforced by an executive whose party may be in violent opposition to those very laws. In order, therefore, for popular government actually to function, it is necessary that those who have decided upon a certain public policy should control not only the makers of law, but also the principal officials charged with its execution. In England, this fact is frankly recognized in the unwritten constitution; for the executive branch, that is, the Cabinet composed of the heads of departments, is usually selected from the party having a majority in the House of Commons. The makers of the law and those charged with its execution are one. In the United States, however, this coördination of the legislature and the executive must be secured *outside* the written law; and it is the party system which makes it possible. It is through the party that there are nominated for the legislature and executive positions, candidates who are in a fair degree of harmony with one another, and who, if elected, can work consistently together to carry out the will of the voters expressed at the ballot box.

[1] This is the thesis of Professor Goodnow's *Politics and Administration*.

Passing outward from the elements of government itself which work for strong party organization, we encounter the "spoils system" as a factor in the case. The adoption of the principle of civil service reform has reduced to some extent the relative number of offices to be filled by partisan workers, but nevertheless there remains an enormous number of federal, state, and local offices to be distributed. The political appointments within the gift of the President have an annual value of many million dollars. The multiplication of the functions of state government tends to place an ever larger appointing power in the hands of the governor and the state senate or some other central authority. Every state legislature has within its gift appointments to legislative offices and positions available for partisan purposes, usually free from civil service control. For example, there are sergeants-at-arms and assistant sergeants-at-arms, principal doorkeepers, first and second assistant doorkeepers, journal clerks, executive clerks, index clerks, revision clerks, librarians, messengers, postmasters, janitors, stenographers, and messengers to the various committees and assistants first and second, too numerous to mention. The legislature of New York costs the state for its mere running expenses alone more than $1,000,000 a year. Then there are the city offices, high and low, steadily multiplying in number and, in spite of the civil service restrictions, to some extent within the gift of the political party that wins at the polls. Finally there are the election officers, a vast army of inspectors, ballot clerks, and poll clerks for the primary and regular elections, who derive anywhere from $10 to $50 a year for their services. Every large city annually pays thousands of dollars to the officials who preside at primaries and elections.

The party treasury always makes huge levies on the candidates. Generally speaking, no one can hope to be elected to office to-day without being nominated by one of the political parties. The party organization wages the campaign which carries the candidate into office. What is more natural and just than the demand that the candidate shall help to pay the legitimate expenses of the campaign? It is a regular practice, therefore, for party organizations, state and local, to levy tribute on candidates for nomination as well as on nominees to office — generally in proportion to the value of the office they seek. There are in addition levies on office-holders after election, sometimes in spite of the

laws forbidding it. Office-holders do not always wait to be pressed by party managers in this matter. It is not expedient.

The construction of parks, school buildings, highways, and other public works is a fruitful source of revenue to the party organization which controls the letting of contracts. High bids may be accepted on the condition that the surplus shall go to the party war chest or to party leaders. The capitol building and grounds at Albany cost the state nearly $25,000,000, and the plunder of the public treasury in the construction of the capitol at Harrisburg is a notorious chapter in Pennsylvania history.

Even more important, as an economic factor, than the spoils of office are the large funds secured by party organizations from private interests and distributed among their officers and workers. The most fruitful source of revenue for party treasuries during recent years has been contributions from business corporations — even though forbidden by law in many jurisdictions. All of them must apply to the government, national, state, or municipal, for the right to come into existence in the first place, and for the right to extend their operations in the second place. They are subject to constant regulation by municipal councils, state legislatures, or Congress (possibly by all three agencies); they are compelled to do things which cost them large outlays of money or to abstain from doing things which are highly profitable. Industrial concerns which thrive under protective tariffs warding off foreign competition are especially sensitive to the fiscal policies of the National Government. Far more reprehensible is the collection of party revenues in return for the protection of gambling, liquor selling, and vice in various forms. The extent to which this source of funds is exploited at any time by any party is, of course, impossible to ascertain; but authentic documents in American history afford indisputable evidence that in the not distant past huge sums for party war chests have come from the government protection of those who violate its laws. Sometimes the private interests affected by governmental action contribute heavily to parties to secure favors or prevent regulations really designed in the public interest. Sometimes they are forced to contribute, "blackmailed," by party leaders under threats of punitive legislation if they do not. On many occasions important private interests have contributed to both the leading parties with a view to being sure of "a friend at court."

Leaving the economic realm for that of social psychology, we are on less secure ground, but here too are factors which contribute to the strength of party organization. From the days of de Tocqueville to those of Bryce, foreign observers have noted that the people of America are given to the formation of associations of every kind. There are in the United States literally thousands of lodges, orders, and fraternal societies; there are clubs, boards of trade, chambers of commerce, and trade unions; there are political, social, benevolent, religious, and reform societies without number. It is a rare American who is not a member of five or six.

The causes of this phenomenon are obscure, but it may be in part attributed to the ferment of ideas in a democracy. Anyone who gets a new idea or a variant on an old one wants to start a society to propagate it. There are practical benefits, too, which are not to be ignored — assistance in business, trade, and professions. The phenomenon has also been attributed by some acute foreign observers to the weakness of the individual and the power of the mass in a democracy where ideas of equality prevail. Where equality is professed and no aristocracy is legally recognized, the individual who refuses to associate on equal terms with all other members of the community is an object of curiosity if not suspicion. If he must live by a trade or profession, he cannot hope to succeed if he isolates himself and refuses to join clubs and societies.

The political party, like a church or any other society, may be used as a social club through which a young man or woman may make valuable acquaintances capable of helping to secure business, clients, or patients as the case may be. The social power of the party organization enables it to intrench itself by drawing into its ranks the best energies and talents of young people who, though by no means void of patriotic motives, cannot be oblivious to the stern necessities of the struggle for existence. In some cities, it is well for the young lawyer practicing in certain courts to be known as a prominent worker in the party to which the presiding judges belong. A Democratic doctor in a strongly Republican district of some Northern city would doubtless find his rise in the world somewhat handicapped if he were overzealous in the support of his party, and a belligerent Republican lawyer in a Southern city might very well find his

business limited to practice in the federal courts. The subtle influences of party control are doubtless more powerful than the gross influences which appear upon the surface.

Equally subtle and elusive is the influence of the press and propaganda. Nearly all newspapers are affiliated with political parties; even the avowedly independent papers are controlled by men affiliated with parties. Most political editorials are written with a party bias or with a view to party advantage. Even the news is colored more or less by party opinions. The emphasis given to events, the headlines, and the method of treatment reflect party influences. During campaigns especially, the political atmosphere is charged with propaganda — printed, written, and oral. Even gossip, damaging or advantageous to candidates, sweeps like a whirlwind through party clubs and organizations. Someone has said that a party is "a great political whispering gallery," and the remark is both true and shrewd.

The last, but not least, powerful element in party organization is the assistance given to the voters by the machine. Party leaders and workers favor the poor voters by a thousand charitable acts. They give outings, picnics, clam-bakes, and celebrations for them; they help the unemployed to get work with private corporations or in governmental departments; they pay the rent of sick and unfortunate persons about to be dispossessed; they appear in court for those in trouble, and often a word to the magistrate saves the voter from the workhouse or even worse; they remember the children at Christmas; and, in short, they are the ever watchful charity agents for their respective neighborhoods. A kind word and a little money in time of pressing need often will go further than an eloquent tract on civic virtue. Thus politics as it operates through party organization is a serious and desperately determined business activity; it works night and day; it is patient; it gets what it can; it never relaxes.

CHAPTER VIII

THE NOMINATION AND ELECTION OF THE PRESIDENT

The spectacle of twenty or thirty million people going about the process of nominating and electing a chief executive to preside over them for four years is perhaps the most arresting pageant in the long course of political evolution. It is an operation of the first magnitude, putting at stake the ambitions of individuals, the interests of classes, and the fortunes of the entire country. Everybody in America takes part in it, from the President in the White House, busy re-nominating himself or helping in the selection of his successor, down to the bootblacks and stable-boys who discourse on the merits and demerits of candidates with as much assurance as on the outcome of the latest prize fight or horse race. The performance involves endless discussions, public and private, oratory, tumult, and balloting, the election of thousands of delegates to grand national conventions, the concentration of opinion on a few ambitious leaders, a nation-wide propaganda as the sponsors for various aspirants exhibit the qualifications of their favorites to the multitude, and the expenditure of millions of dollars in publications, meetings, "rounding up delegates," and "seeing that goods are delivered."

This thundering demonstration of democratic power occupying the better part of six months every four years springs from no design of the Fathers who framed the Constitution. They intended to remove the chief executive as far as possible from the passions of the masses; they provided that he should be elected by a small body of electors chosen as the legislatures of the states might decide. They contemplated a quiet, dignified procedure about as decorous as the election of a college president by a board of trustees. Their grand scheme has been upset, however, by the rise of political parties; it is necessary, therefore, to preface a discussion of our quadrennial campaign by a consideration of the extra-legal organization, known as the national convention, which selects the candidate of each party for whom the presidential electors of the party are morally bound to vote.

The Composition of the National Convention

The national convention assembles on the date and at the place fixed by the national committee at a preliminary meeting held on the call of the chairman. Before the convention is formally opened, the committee holds another conference, determines upon the program of proceedings, selects the temporary officers whose names are to be laid before the grand party conclave for its approval, and makes up a provisional roll of delegates from the returns sent in by the proper officers under whose auspices the primaries were held.

Although in theory the national convention is a representative party assembly, the delegates who compose it are not apportioned among the states on the basis of the party vote in each.[1] The Democrats allot each state a quota of delegates equal to twice the number of congressmen to which it is entitled — New York with two Senators and forty-three Representatives has ninety delegates. The principle is invariably followed. A state in the solid South with its triumphant Democracy, receives no more consideration than a Northern state in which the Democrats are in a hopeless minority.

This rule was formerly applied by the Republicans. There are several states in the South which have only a handful of Republicans and never give an electoral vote to a Republican candidate. In those states, the party machine, or at all events the dominant leaders, are usually federal office-holders who are nominated and can be removed by the President of the United States. Consequently, whenever a Republican President is in the White House, he can handpick the delegates from the Southern states. In this way he may almost dictate his own re-nomination or the choice of his successor, as the case may be. Roosevelt used the Southern delegates to drive through the nomination of Taft in 1908; four years afterward the latter used them at Chicago on his own behalf.

Since that time there have been several changes in the composition of the Republican organization. For the convention of 1916 each state was given its four delegates at large; one delegate instead of two was assigned to each congressional district; and one additional delegate was allotted to each district in which

[1] A certain number of delegates is assigned to each territory as a matter of courtesy to party members, although the territory has no voice in electing the President.

at least 7500 Republican votes were cast at the previous election. This rule made a cut in the strength of the Southern states and gave the convention a far more representative character.

Another readjustment was made in the representation of Southern states for the convention of 1920; for the next party assembly the system was again revised. In December, 1923, the Republican national committee, in spite of bitter protests from many quarters, provided that each state should have in the coming convention four delegates-at-large, one delegate for each congressional district, two delegates for each Representative-at-large, and one additional delegate for each district which polled 10,000 or more Republican votes in the previous election. It then redressed the balance somewhat by giving each state which went Republican in the last presidential election three additional delegates-at-large. This made a convention of 1109 delegates and gave the Southern states more delegates than they had four years before.[1]

The political significance of this apportionment is revealed in the following table which gives the delegations of the Southern states at the Republican conventions of 1920 and 1924 and the Republican vote in them in 1920 as compared with three Northern states:

State	Delegates in 1920	Delegates in 1924	Republican Vote in 1920
Alabama	14	16	74,690
Arkansas	13	14	71,117
Delaware	6	9	52,858
Florida	8	10	44,853
Georgia	17	18	43,720
Kentucky	26	26	452,480
Louisiana	12	13	38,538
Maryland	16	19	236,117
Mississippi	12	12	11,576
Missouri	36	39	727,162
North Carolina	22	22	242,848
South Carolina	11	11	2,244
Tennessee	20	27	219,829
Texas	23	23	114,269
Virginia	15	17	87,456
Maine	12	15	136,355
Michigan	30	33	762,865
New Jersey	28	31	611,670

[1] Delegates were allotted to the District of Columbia, Alaska, Porto Rico, Hawaii, and the Philippines.

The glaring inequalities in representation produced by the system of apportionment are obvious at a glance, but still too much stress should not be laid on political arithmetic. The vote for President fluctuates from decade to decade and the vote in one election is not always an exact criterion for estimating the probable vote in the next. Moreover, the Republicans, always suffering from the burden of sectionalism, cannot afford to destroy their organization in the states of the far South where they have no strength at present. The future may be different from the past. At all events something is to be said for giving the Southern states a considerable share of power. The amount required by justice and expediency is not easily ascertainable.

For more than half a century the Democratic and Republican parties prescribed different methods for the choice of delegates. The former, regarding the state as the unit of representation, provided that the delegates should be chosen at a state convention or by the state committee. The latter ordered the choice of the four delegates-at-large at the state convention and the remainder at congressional district conventions. The appearance of the direct primary in various forms as a means of choosing delegates, of necessity, forced alterations in party rules; both parties finally acquiesced in the changes wrought in their procedure by state legislation. Some states now order the election of all delegates at primaries; others leave the choice of delegates to state conventions; and others combine a state convention with local congressional district primaries.

In addition to applying the direct primary to the choice of delegates to the national convention, at least twenty states give their voters an opportunity to express at a primary their preference among the aspirants for the presidential nomination. These states are California, Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Vermont. Naturally the presidential primary laws vary widely in character, but two general methods are employed to give the voters a chance to express an opinion on presidential aspirants as well as on delegates to the national convention. In some states the names of the aspirants are printed on the primary ballot and the voter may indicate his choice by merely making a pencil mark

after the name of his favorite. In other states, candidates for the position of delegate to the convention may indicate on the ballot whom they will favor for President if elected, and voters may thus express their will indirectly.[1] The presidential primary was first used in the campaign of 1912 when Roosevelt and Taft waged such a bitter campaign to secure control of the Republican convention. It was not extensively employed in 1916, but was brought prominently into action four years later.

At no time, however, has the presidential primary been a deciding factor. At no time have enough votes been cast in the primary to warrant a judgment as to the opinions of a majority in any party. In 1912 it was not the results of the primary that decided the fate of Roosevelt and Taft at Chicago. The drift of party opinion revealed by the primary was in favor of Roosevelt; but he was not nominated. Again in 1920 more than two million votes were cast in the Republican presidential primaries. Senator Johnson led the poll with nearly a million and General Wood followed with about 700,000; but neither was selected. Senator Harding, who carried the day in the Republican convention, had scarcely figured in the primaries outside his native state; but in the conflict and deadlock of forces at Chicago he was the victor. In the Democratic party the presidential primary was used to some extent in 1920 when less than half a million votes were cast; but it was not decisive; the winner in the convention, James M. Cox, did not stand highest on the list of eleven candidates. The work of organizing and financing a presidential primary is stupendous, and it remains to be seen whether it can be so employed throughout the Union as to become the deciding factor in the nomination of candidates.

It is very easy to pick flaws in the presidential primary. Not half the states have the system, so that no truly national test can be made. The primaries are held at different dates, ranging through two or three months. There is confusion in the laws. There is no method of securing the submission of the names of all the prominent aspirants in all the states. Candidates may refuse to lay their names before the voters of those states in which they believe their strength to be slight. There is no way of binding delegates who have pledged themselves to vote in the

[1] For an able treatment of the subject see Dr. R. S. Boots' article on "The Presidential Primary" *National Municipal Review*, Vol. IX, supplement (1920).

convention for the aspirants preferred by the electors at the polls. In the best of circumstances the vote is small and only a slight indication of the drift of opinion.

In fact, confusion reigns everywhere. Still the system is not abandoned. Indeed, there is some demand for federal legislation on the subject; more than one presidential primary bill has been proposed in Congress. The difficulties of federal action on the matter are enormous. It is of doubtful constitutionality in view of the decision of the Supreme Court in the Newberry case.[1] If a separate national system for enrolling voters and holding primaries for the presidential election were instituted, the cost of operating it would be tremendous. If an attempt were made to lay a federal system upon the foundations of state primary legislation there would arise the perplexing problem of adjusting it to the varying, confused, and conflicting laws of the separate states. So we seem to be between two worlds. It is impossible, in view of popular temper, to go back to the ancient ways or forward to a nation-wide system of direct primaries for presidential elections. So we "muddle along."

The National Convention at Work

The purpose of the national convention is threefold. It formulates the principles of the party into a platform on which the appeal is made to the voters during the ensuing campaign. It nominates candidates for the presidency and the vice presidency, and appoints committees to notify both nominees. Finally it organizes a new national committee charged with carrying on the campaign and acting for the party for four years — until the next national convention is held.

The convention usually assembles in some huge building where the thousand delegates and perhaps ten or twenty thousand spectators are seated. Each delegation is arranged around the banner of its state, and has a chairman to direct its part in the convention. Some of the more important delegations are accompanied by brass bands, and often carry curious symbols and transparencies. In the audience are usually gathered the most active politicians who are not serving as delegates, enthusiastic partisans from all over the country, and interested visitors

[1] See below, p. 241.

attracted by the spectacular affair. Bands play popular airs; party heroes are greeted with prolonged cheering as they appear on the scene; wire-pullers rush here and there among the delegations, making and extracting promises; all are apparently intoxicated with boisterous party zeal. It is indeed a cool-headed politician who is not swept off his feet by the excitement of the hour.

The convention is called to order by the chairman of the national committee[1] and before any business is transacted, prayer is offered. Clergymen from different congregations are chosen for the several sessions, so as to avoid offending religious susceptibilities. The first business is the reading of the call for the national convention by the secretary of the committee; the chairman then puts in nomination the temporary officers, who have been selected by the committee before the meeting. Usually these nominations are accepted without question, for the business of the temporary organization is largely formal. The temporary chairman, it is true, makes an address appropriate to the occasion, which is often regarded as the "keynote" to the proceedings, but he is not called upon to make any important decisions from the chair which may affect either the platform of the party or its nominations. The first day's session is then concluded by calling the roll of the states and territories, each one of which announces the names of its members for the four great committees of the convention: on credentials, on permanent organization, on rules and order of business, and on resolutions or platform.

After the second session of the convention is called to order by the temporary chairman, the reports of the various committees are heard, not necessarily in any fixed order. The committee on credentials is charged with the important work of deciding questions of contested seats. All notices of contests between delegations are filed in advance with the national committee, which makes up the temporary roll. The documents relative to the several disputes are passed on to the credentials committee, which holds meetings and prepares reports for the convention. Sometimes the contests are very exciting; for the policy of the party on national issues and the fate of candidates may be

[1] The order of business, of course, varies from time to time in details, but this general description is substantially true of all conventions.

decided by the admission or rejection of certain delegations as in the case of the Republican convention of 1912. Generally speaking, however, the report of the majority of the committee on credentials is accepted by the convention.[1]

The next important report is that of the committee on permanent organization, which names the permanent chairman, the secretary, and other officers of the convention. This report is also generally approved without debate, although, of course, the convention may, if it sees fit, refuse to accept the nominees of the committee. The permanent chairman is duly installed, makes a long speech, and is presented with a gavel. The rules, under which he controls the assembly, are reported by the committee on rules, and are, in principle, those of the House of Representatives with some modifications. The chairman is constantly called upon to decide points of order of a highly technical nature; he must prevent the convention, which sometimes bursts out into storms of applause lasting more than an hour, from degenerating entirely into an uncontrolled mob; he is often compelled to choose from among five or ten speakers trying to get the floor at the same time; and it is, therefore, important that he should be a master of the rules of procedure, and capable of prompt and firm decision.

On the second or third day, the convention is ready for the report of the committee on resolutions, which is charged with drafting the platform. This committee begins its sessions immediately after its appointment, and usually agrees on a unanimous report, but sometimes there is a minority report. The platform is not often a statement of the particular things which the party proposes to do if it gets into power; it is rather a collection of generalities which will serve to create good feeling and unite all sections around the party standard. It usually contains, among other things, references to the great history of the party, interspersed with the names of party leaders, and denunciations of the policies and tactics of the opposite party. Frequently a platform deals with matters that do not concern American politics primarily, such as the persecution of the Jews in Europe or the struggle of Ireland for home rule. These resolutions do not imply that the government can or will do anything

[1] It sometimes happens that, to avoid open rupture, both delegations from a state are admitted — each member having one half of a vote.

positive on such matters, but they serve to appeal to the imagination and sympathies of certain classes of voters. The report of the committee on resolutions seldom meets opposition in the convention, for care is taken by the committee to placate all elements. It is only when there is some very contentious matter, such as free silver in 1896 and Progressivism in 1912, that there is likely to be a divided report from the committee or any debate on the floor.

About the third or fourth day, the chairman announces that the next order of business is the calling of the roll of the states for the presentation of names of the candidates for President of the United States, and the roll is called in alphabetical order, beginning with Alabama. If a state has no candidate to present, it may defer to another farther down on the list. When Alabama is called upon in the Republican convention, the chairman of the delegation will say something to this effect: "The State of Alabama requests the privilege and distinguished honor of yielding its place upon the roll to the State of New York." A representative of the state which is thus named thereupon places a candidate in nomination, in a speech full of high-sounding phrases and lofty sentiments dealing with many subjects and ranging over a wide geographical area from "the rock-bound coasts of Maine to the sunny shores of California." The first speech may be followed by speeches seconding the nomination, from the representatives of various delegations scattered over the House, if the chairman sees fit to recognize them. It is usual now to have at least one seconding speech made by a woman. The nominations may be closed without calling the full roll of the states, or the calling of the roll may be resumed and each state heard from, as it is reached in regular order.

When the nominations are made, the vote is taken by calling the roll of the delegations; the chairman of each announces the vote of his group. Previous to the rise of the direct primary each party followed its own rules with respect to casting the vote of the delegations in the convention. The Republicans assumed in theory that each delegate could vote as he pleased, although in practice he was often instructed by his party organization at home to cast his ballot for a certain candidate. The Democrats on the other hand permitted the state convention to authorize the majority in the delegation to decide how the entire

delegation should cast its votes. For example, New York had ninety delegates; forty-six of them could cast the ballots of the entire group as a bloc. This practice, known as the "unit rule," was defended on the ground that the party organization of a state had greater weight when it could "swing" the entire delegation at the national convention.

The direct primary and the presidential preference primary wherever applied have upset the historic practices of both parties. Delegates in the Republican convention may be bound to some extent by their pledges made in the primary or by preferences indicated by the party voters. For the same reason the Democratic state organization cannot always bind its delegation to follow the unit rule; so the individual member may be pledged to a certain aspirant, or may be free to vote as he pleases, no matter what the majority of the delegation from his state may wish to do.

When the roll of all the states and territories has been called and the vote of each one has been registered by the tally clerks, the total result is announced. If any nominee in the Republican convention receives a majority of all the votes cast, he is thereupon declared the candidate of the party for the presidency of the United States. In the Democratic convention, however, it is an inflexible rule that the successful nominee must receive a majority of two thirds. This practice has long been associated with the unit rule and in a way offsets some of the effects of that rule. If no nominee receives the requisite majority on the first ballot, the process is repeated until some one secures the proper number of votes. It is the practice of both parties, immediately after the nomination of the presidential candidate, to nominate the candidate for Vice President in the same manner and by the same majority.

When the convention has chosen its candidates, a separate committee is appointed to convey to each of them a formal notification. Shortly afterward the notification committee calls on the candidate, and through an official spokesman announces the will of the party. The candidate thereupon replies in a long address, and sometimes follows this by a special letter of acceptance. The acceptance speech is often an important campaign document for the reason that the candidate may interpret the platform of his party in his own way, going even so far as

to modify the spirit, if not the letter, of that pronunciamento. For example, Taft in his acceptance speech of 1908 elaborated at length the Chicago platform and committed himself personally to many doctrines which had not been specifically endorsed at the convention which nominated him. Wilson, in the following campaign, dismissed the Democratic platform with the brief remark that "the platform is not a program," and devoted his address to certain large general principles. Harding in 1920 adhered rather more closely to the letter of his party declaration and refused to strike out on any new lines. After all, it is the candidate's speeches, not the platform, that attract the attention of the country. It would be interesting to know how many voters ever saw a political platform.

What are the qualities of men that make them available candidates for the presidency? What factors, geographical, historical, religious, and so on, enter into consideration? The problems raised by these questions are elusive, but a few notes may be set down for scrutiny. Bryce has a chapter devoted to inquiring why great men are not chosen Presidents. One answer is that some of the greatest have been chosen, but still it must be admitted that a number of mediocrities have been elevated to that position. Another answer is that greatness is difficult to assess. Was Clay greater than Jackson, Blaine than Garfield, Hill than Cleveland? Who in the Republican party was greater than Roosevelt in 1904 or in the Democratic party greater than Wilson in 1912? Friends of defeated aspirants like Clay, Webster, Sherman, and Bryan are wont to lament the failure of democratic elections to choose the best, but on the whole not much gain can come from threshing out the matter. Many great men, real and imaginary, have been defeated in their ambitions for the presidency, and several great men have been chosen.

The leading facts in the case are as follows. Very often unknown men, "dark horses" as they are called, have been selected as candidates. This frequently happens when there is a spirited contest among a number of prominent party men, none of whom can command enough votes in the convention to win. An eminent man whether great or not, a man who has seen long service and taken positive steps in one direction or another is sure to have enemies, so many that nomination is out of the question.

Protestantism in religion seems to be one prerequisite, for America is predominantly a Protestant country. Since the Civil War no Southern resident has been elected. The Republicans for obvious reasons do not look in that direction. The Democrats know that it is "solid" anyway, and ignore its claims. Since 1860, the Democrats have been successful only with candidates from the East, Cleveland and Wilson; the conservative wing of the party distrusts Western radicalism. The Republicans, on the other hand, commanding for historic and practical reasons the support of Eastern conservatism, usually offer the nomination to the Middle West. Its successful candidates except one, Roosevelt, have been from Ohio, Indiana, or Illinois. Roosevelt was chosen in peculiar circumstances. When the Republicans nominated Blaine from Maine and Hughes from New York, they were defeated.

What career leads to the White House? One thing is certain, it is not a straight and narrow road like that to the premiership in England — political service in and out of power for many years and marked qualities of leadership among men. We have had many generals: Washington, Jackson, Harrison, Taylor, Pierce, Grant, and Garfield; two colonels, Monroe and Roosevelt, and one major, McKinley. So we might venture the suggestion that military service, often disassociated with any political opinions, is a factor of high significance in availability. Men of marked power and leadership in the Senate are never chosen. Harding was a Senator but not among the dominant group in that body or widely known in the country for any service there. To carry a strategic state as a candidate for governor, as did Cleveland and McKinley, is to enhance one's value in the presidential field. Distinguished governors in the right geographical sections have been more often elected than distinguished Senators. Lincoln was somewhat unique in that, beyond a term in the House of Representatives, his political experience had been slight. He was not regarded as a great man when he was elected, and had he been chosen in a time of unromantic peace he might to-day be reckoned among the mediocre occupants of the presidential chair. Law and arms are the professions to which parties most often resort. Roosevelt and Harding stand apart — the former was a gentleman of private fortune without any profession and the latter the proprietor and editor of a newspaper. There was a time when birth in a

log-cabin was an asset to an aspirant, but in an age of bungalows and Ford automobiles that appeal has lost its strength. There is still a dramatic element in the story of the poor boy who works, rides, drives, and stumbles along the uncertain way that leads to Washington. Many that have deliberately set out in it have missed the goal, and others have been blown into it by the winds of fortune.

A word should be said about the candidates for Vice President. As the sole function of that officer, in ordinary circumstances, is to preside over the sessions of the Senate, not much consideration is usually given to his qualifications for the presidency to which he may be called on the death of his superior. Two rules seem to be controlling in the choice of candidates for this office. The first is that he should be from some geographical district quite removed from that of the presidential candidate. If the latter is from the Middle West, the former will be from the East, and vice versa. Wilson was from New Jersey; Marshall from Indiana. Harding came from Ohio; Coolidge from Massachusetts. The second rule, by no means so strictly applied, is that the candidates for the two offices shall represent different wings of the party, right or left as the case may be. As to what the Vice President would do if called to succeed his chief, little thought is ever given.

History shows that this is unfortunate. Six times the Vice President has been summoned to the higher post: after the death of Harrison in 1841, Taylor in 1850, Lincoln in 1865, Garfield in 1881, McKinley in 1901, and Harding in 1923. In only one instance so far has a Vice President, raised to the higher place, been able to secure his election to the office in the ensuing campaign. Roosevelt after serving McKinley's unexpired term was nominated by the Republicans and elected in 1904. This is exceptional. Johnson, who succeeded Lincoln, was a Union-Democrat who had been selected to please the South; shortly after coming to the presidency he was impeached by the leaders of the Republican party in Congress and narrowly escaped expulsion from his office. Arthur, who followed Garfield, did not win the support of his party and could not be nominated for President. Generally speaking, the experience of the country with Vice Presidents elevated to the presidency has not been altogether happy.

The National Campaign

The great work of directing the campaign is intrusted to the national committee composed of two members — one man and one woman — from each state and territory. The committee members are chosen at state conventions, by state committees, or at direct primaries as local customs and laws prescribe. The principal officers of the national committee are the chairman, secretary, and treasurer. The chairman, who is by far the most important political leader in the national organization, is the choice of the candidate for President, although the wishes of the committee and other leaders of the party are taken into consideration. The power of selecting the chairman is very important to the presidential nominee, because the immediate task of that officer is to conduct the presidential campaign, and it is essential that the two men should work together in complete harmony. The chairman is not necessarily a member of the original committee, for it may so happen that no prominent and energetic organizer is to be found in its membership. The secretary and treasurer are sometimes appointed by the chairman, and sometimes by the committee. The treasurer is often not a member of the committee; owing to his important position as collector of campaign funds, he is selected for his financial influence from among the most available members of the party. It is therefore impossible to lay down any absolute rules in regard to the way in which officials of the committee are chosen, for the choice is not determined under any written or unwritten law. It is left for adjustment according to circumstances.

Immediately after the adjournment of the convention, the newly elected committee meets and proceeds with the preparations for the campaign. The leadership in this great national contest is taken, of course, by the chairman, who disburses enormous collections made by the treasurer, directs the huge army of speakers, organizers, and publicity agents scattered over the Union, and as the day of election approaches surveys the whole field with the eye of an experienced general, discovering weak places in his battle array, hurrying up reënforcements to the doubtful states, and, perhaps, pouring an immense sum of money into districts where wavering voters may be brought into line. The outcome of the campaign, therefore, depends in a large

measure upon the generalship of the chairman of the national committee.

Fully as important as the general who leads the army in the field is the organizer of the department which furnishes the sinews of war. Consequently, in a political campaign, the treasurer of the national committee takes a prominent place by the side of the chairman. It is his business to discover innumerable ways of raising the million dollars or more required to wage the great political contest. It is, therefore, apparent why the treasurer of the national committee should be a financier of peculiar genius, and a man influential in wealthy circles.

The amount of money which a party must and can raise for the fray depends upon circumstances. If an attack is made during the campaign on the great financial and manufacturing interests of the country the amount is likely to be large and the spending lavish. For example, in 1888 the manufacturers engaged in industries fostered by the protective tariff were frightened by President Cleveland's famous message directed against the tariff and feared his reëlection. John Wanamaker, the treasurer of the Republican committee, went to them and asked them to contribute to his campaign fund on the basis of the benefits to be derived from an insurance against free trade.[1] Again, in 1896 when the banking and financial interests were alarmed by the menace of free silver, Mark Hanna, chairman of the Republican committee, made "a tour of the high places in Wall Street," his biographer tells us, and had no difficulty in raising huge sums. How much was spent in that campaign no one knows. The amount has been placed at $16,000,000, but counting state and national expenditures it was probably not more than one third or one half that sum.[2] The silver mine owners of the West, expecting to benefit from Bryan's doctrines if applied, made generous, though not princely, gifts to his fund. Shortly after that memorable campaign a great hue and cry went up against the excessive use of money in politics, and much was said about "plutocracy's capture of the government." Bryan, in 1908, announced that he would not receive any single contribution in excess of $10,000 and called upon loyal Democrats to give one dollar each. The revenue from small contributors, however, was pitifully inadequate, for it

[1] *The Forum*, Vol. XIV, pp. 29 ff.

[2] Croly, *M. A. Hanna*, p. 219.

appeared that the average party member's zeal was exhausted before he reached the point of sacrificing a dollar. Campaigns cost money. The rank and file of the parties will not give in large amounts; so rich men must pay the bills.

Protests against lavish campaign expenditures, however, resulted in a large amount of legislation, state and federal, on the subject. In 1907 Congress forbade all corporations chartered by the United States to contribute to campaign funds and prohibited corporations chartered by the states to give money for use in connection with federal elections. Three years later Congress required all organizations aiding or opposing candidates for federal offices in two or more states to publish their receipts and expenditures after each election. The following year a third statute prescribed the publication of receipts and expenditures before and after primaries and elections.[1]

The actual methods employed by the parties in influencing voters vary of course from time to time; new expedients for attracting the attention of the people are constantly being devised. Nevertheless, we can draw from a study of the methods of recent campaigns certain general practices which the parties adopt to accomplish their ends.

The first important step is to choose the right place for the party headquarters from which the contest is to be directed. The strategic value of putting the center of the campaign in a doubtful region was recognized by the Republicans in 1896, when they selected Chicago as the point from which to control the militant forces in the field. It is not always the rule, however, to maintain one center; on one occasion the Republicans divided their national headquarters into two branches — one at New York and one at Chicago.

Since the chief work of the national committee in carrying on the campaign is to influence the minds of the voters, its attention is given in a very systematic way to the preparation of the campaign literature. As soon as the issues of the contest are fairly well settled, each party publishes a campaign text-book, which usually contains the platform, notification and acceptance speeches, biographical sketches of the candidates, statistics on business, tariff, trusts, money, and other economic issues, addresses by prominent leaders, papers in defense or criticism of

[1] See below, p. 240.

the administration, and the most cogent arguments which the party can advance in support of its position. The campaign text-books are sent out in large quantities, not to the public generally, but rather to the newspapers, speakers, and others in a position to win voters by argument. In addition to the regular campaign text-book there is usually a text-book issued by the congressional committee[1] which contains additional information on the "records" of the parties and their policies in Congress.

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

A far more effective way of reaching the public at large is through the newspaper. Thousands of the uninteresting documents sent out by the national committee are doubtless thrown away unopened or unread, and there must be an enormous waste of this branch of the campaign work. The newspapers, however, which have regular readers, reach the public directly; and accordingly the national committee makes extensive use of the established journals, from the great city daily with its huge editions, down to the rural weekly with a circulation of five hundred printed on a hand-press.

In addition to the printed arguments addressed to the people, there are oral arguments made by campaign speakers directly and through the broadcasting radio. The national committee generally has a bureau of public speakers which prepares a list of available orators by testing applicants and drafting leading statesmen and "spell-binders"; it directs the speakers in the field by sending them to sections where their special talents may be most effective. These orators are of every rank, from the person with the strong voice who can harangue a crowd on a street corner to the finished speaker whose very name will draw multitudes. Hundreds of these speakers are directed from the national headquarters, while thousands of local volunteers are enlisted by state and county committees, sometimes in consulta-

[1] Composed of members chosen by the party delegation in Congress.

tion with the authorities higher up. Itineraries are laid out, halls and bands engaged, parades organized, and every device utilized to make the oratorical effort of the greatest possible effect.

Sometimes the presidential candidates themselves enter the lists. In 1896 Bryan toured the country in a private car and delivered at least four hundred reported speeches in twenty-nine different states — the greatest oratorical record of any candidate up to that date. Twelve years later Bryan equaled his first record, while Taft, his opponent, outdid him by traveling 18,500 miles and making 436 speeches in thirty states. In 1912 Roosevelt and Wilson both made long speaking excursions; four years later Hughes made a transcontinental journey supplemented by a special tour through the Pacific states. On the other hand the candidate sometimes remains at home and addresses crowds that are brought to him from far and near-by enterprising organizers and railway companies. In this way McKinley did effective work at his home in Canton, Ohio, in 1896. Harding followed this example in 1920 by delivering his speeches on the front porch of his home in Marion, Ohio, while his competitor, Cox, took the "stump."

A very practical and useful part of the national committee's work is the polling of the doubtful states. Early in the campaign a political census is taken of the regions in which the vote is known to vacillate or in which an incipient revolt appears. Frequently this survey is minute in the extreme. Thus the party leaders find out exactly how many voters they can rely upon, and obtain a fairly accurate list of the doubtful persons whose opinions may be changed by various methods. With the results of the census in its hands, the national committee is very much in the position of a military command on the field of battle; it is acquainted with the strength and weakness of the opposing army and knows the lines of advance necessary to win the victory. The effective means for influencing the several categories of doubtful persons are immediately dispatched to the scene of action.

It is indeed a marvelous contest that closes on the day[1] when the ballots of nearly thirty million voters are cast for the presidential electors in the several states.

[1] The Tuesday following the first Monday in November was fixed by Congress in 1845.

Casting and Counting the Electoral Votes

The political activities described above, important as they are, are wholly unknown to the Constitution. That document, in fact, contains only a few clauses with regard to the actual choice of the President and Vice President.[1] In the first place it contemplates a system of indirect election: each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the number of Senators and Representatives to which the commonwealth is entitled in Congress. To remove the electors from any direct contact with the Federal Government, it is provided that no Senator or Representative or person holding any office of trust under the United States shall be appointed an elector.

In the second place the electors of each state are to be chosen as the legislature thereof may determine. In the course of our history no less than three distinct methods have been tried. (1) In the beginning, the state legislatures themselves often chose the electors; but within a quarter of a century the majority of them had abandoned this practice in favor of popular election. (2) Where the more democratic system was adopted it was frequently the custom at first to have two electors chosen by the voters of the state at large and the remaining electors chosen by congressional districts — thus each voter would have the right to vote for three electors, two at large and one from his own district.[2] (3) It was at length discovered that a state's influence in national politics was greatly increased if all its electors could be carried by one party or the other; consequently the system of election by districts was abandoned in favor of election by general ticket through the state at large.[3]

It is necessary, accordingly, for each party in each state to prepare a list of candidates equal to the total number of electors to which the particular commonwealth is entitled. In practice, the presidential electors are usually nominated by the state convention or state committee; very often the office of elector is regarded as a titular honor to be given to distinguished citizens

[1] *Readings*, p. 154.

[2] "In 1824, twenty-four states took part in the election. In six, the electors were chosen by the legislatures and in eighteen by popular vote, and of these in thirteen by general ticket and by districts in five. . . . South Carolina continued the practice of legislative appointment until 1860." Finley and Sanderson, *The American Executive*, p. 332.

[3] In 1892 Michigan temporarily reverted to the district system. See *Readings*, p. 157.

or to partisans willing to make liberal contributions to campaign funds.

On election day, the voter [1] does not vote directly for President and Vice President, although for his information the names of the candidates of all parties appear on the ballot. On the contrary, if he votes a straight ticket, he simply votes for all the electors put forward by his party in his state. There is no point at all in splitting the vote for presidential electors, unless there is a fusion, such as existed for example several years ago in some of the Western states between the Democrats and Populists whereby each of the two groups was to have a certain share of the electors according to a predetermined arrangement. What happens, therefore, on a presidential election day is the choice in each state of a certain number of presidential electors — 531 in all.

Normally the party which secures a plurality of votes in any state is entitled to all the electoral votes of that state for President and Vice President, no matter how large the opposition.[2] No elector would dare to break faith with the party which placed him in nomination and vote for the candidates of another party. Consequently, the deliberative, judicial, non-partisan system designed by the framers of the Constitution has been overthrown by party practice.

It is sometimes held that through this party practice we have secured the popular election of President and Vice President but, if we mean by popular election, choice by majority or plurality vote throughout the United States, it has not yet been attained. Indeed, several of our Presidents have been elected by a minority of the popular vote. Lincoln, for example, was chosen President in 1860 by a vote of 1,866,452 against a total of 2,815,617 polled by all his opponents — the large opposition vote being so divided and distributed as to elect less than a majority of the total number of electors. Two Presidents, Hayes and Harrison, did not even receive a plurality; Wilson's popular vote in 1912 was less by 2,000,000 than the combined vote of the opposing candidates, and yet he secured all but eight electoral votes.

This possible contingency of election by a minority of the popular vote cast is due to the fact that when a party carries a

[1] On the suffrage, see below, chap. xxiii.

[2] There have been a few instances of split electoral tickets — California and Kentucky in 1896 and Maryland in 1908, for example.

state, even by the smallest margin, it secures all the presidential electors to which that commonwealth is entitled. A party, therefore, that wins, although by narrow margins, in a sufficient number of states to obtain a majority of the electors may in fact poll a smaller number of votes than the opposing party which may have carried its states by enormous majorities. For example, Harrison in 1888 polled 5,440,000 votes throughout the Union and secured 233 electors, while Cleveland who polled 5,538,000 votes won only 168 electors. In fact the present system only works with a fair degree of justice because the voters are somewhat evenly divided between two great parties. The appearance of a strong third party or the multiplication of parties would result in the frequent election of a President by minority vote or in throwing the choice of President into the House of Representatives.

The practice of giving the entire electoral vote of a state to the party that wins at the polls, even by the slightest plurality, has another significant effect. It concentrates the campaign principally in the states that are counted as "close" and are liable to swing to either party in the election. The importance of carrying these pivotal states leads campaign managers to employ in each of them every art of winning votes known to practical politics. For example, the narrow margin of 1149 votes in New York, in 1884, gave that state to Cleveland instead of Blaine, and changed the result of the presidential election. The Republican national chairman in the campaign of 1888, remembering the lesson of the preceding election, threw a force of detectives into New York City to check false registration and illegal voting, with results which more than exceeded his expectations. The concentration of the campaign in the pivotal states has many bad features, especially the lavish use of money for questionable purposes. It is a notorious fact that in the states in which the rivalry between the parties is keenest, there is the largest amount of bribery. On the other hand, the system works for "cleaner" politics in states where one party is certain to win, since no advantage can come from piling up votes.

The rules according to which the electors so chosen in each state shall meet and cast their votes are prescribed in the Constitution and in federal and state statutes. It is provided by federal law that the electors of each commonwealth shall con-

vene on the second Monday of January, immediately following their appointment at such place as the legislature of the state may direct — in practice, the state capital. When they have assembled, the electors vote by ballot for President and Vice President, "one of whom at least must not be an inhabitant of the same state with themselves" — that is, for the two candidates, nominated by their party; they thereupon make separate lists of the number of votes so cast, and sign, certify, seal, and transmit the documents to the president of the Senate of the United States. With the lists of their votes for President and Vice President, the electors must transmit their certificates of election as evidence of their power to act — evidence of crucial importance in case of contested elections. When they have cast their votes and transmitted their documents according to law, the electors have performed their whole duty. They are not paid by the Federal Government, but are regarded as state officers, and must look to the state legislature for remuneration for their services.[1]

The counting of the total electoral vote polled throughout the United States[2] begins in the Hall of the House of Representatives on the second Wednesday in February, following the meeting of the electors in their respective states. It is conducted in the presence of the Senate and the House of Representatives with the president of the Senate in the chair. Except in the case of a contested election, this count is, of course, merely an impressive formality, for the result is ordinarily known three months before.

If no candidate for President receives a majority of all the electoral votes cast, the House of Representatives thereupon chooses the President by ballot from the three candidates who have received the highest number of votes. It should be noted, however, that, in selecting the President, each state represented

[1] *Readings*, p. 160.

[2] The constitutional clauses relative to counting the electoral vote do not provide for cases of disputed returns from the several states. In 1876 a grave crisis arose on account of frauds and irregularities in several of the commonwealths and the result of the presidential election was in doubt. The Senate was Republican and supported the Republican candidate, Mr. Hayes; and the House was Democratic and favored the Democratic candidate, Mr. Tilden. A deadlock occurred between the two houses in attempting to decide on the merits of contesting sets of electors from three states. Congress finally found a way out by creating an electoral commission of five Senators, five Representatives, and five Supreme Court Justices. On all important matters the eight Republicans on the commission voted together, and declared Mr. Hayes elected. See P. L. Haworth, *The Disputed Election*. In 1887 Congress, by an act, provided a method of settling such disputes. For the details, see the act in Stanwood, *A History of the Presidency*, Vol. I, p. 453.

in the House is entitled to only one vote; a quorum consists of the members from two thirds of the states; and a majority of all the states is necessary to a choice. Accordingly, the vote of each state for the presidential candidate must be determined by the majority of its Representatives in the House. In case of the failure of the House to choose a President (whenever the election devolves upon that body) before the fourth of March following, it becomes the duty of the Vice President to act as President. There have been only two instances of presidential elections by the House of Representatives — Jefferson in 1801 and J. Q. Adams in 1825.

Whenever no candidate for Vice President receives a majority of all the electoral votes, the election is thrown into the Senate, and the Senators voting as individuals must choose the Vice President from the two candidates having the highest number of votes. Two thirds of the whole number of the Senators constitute a quorum for this purpose, and a majority of the whole number is necessary to a choice.

The qualifications for President are stated in the Constitution. He must be a natural-born citizen, at least thirty-five years old, and must have been fourteen years a resident in the United States. The same qualifications apply to the Vice President. The term is fixed at four years, and so far as the Constitution is concerned, the President or Vice President may be reelected indefinitely.[1]

To these constitutional requirements, another has been added by political practice: no person is eligible to the office of President for more than two terms, at least, in succession. This "third term doctrine," as it is called, is supposed to rest upon the example set by Washington in declining reëlection at the expiration of eight years' service. Tradition has it that Washington acted on principle, but this seems to have slight historical foundation. He did not share Jefferson's ideas on rotation in office, and there is apparently no reason for believing that he objected to a President's serving three terms or more. In fact, his Farewell Address contains excuses why he in particular

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

ought not to be charged with lack of patriotism or neglect of duty in refusing to serve for another term.

Jefferson originally believed that the President should have been given a seven years' term, and then made ineligible for reëlection.[1] Later, however, he came to the conclusion that service for eight years with the possibility of removal at the end of four years was nearer the ideal arrangement. He accordingly followed the example set by Washington, and thus the third term doctrine received such high sanction that it became a political dogma almost as inviolable as an express provision of the Constitution. The question was raised anew in 1912 in the case of Roosevelt, but his supporters urged that his candidacy was only for a second "elective" term. The Democratic platform of that year pledged the party and the candidate to a single term and promised a constitutional amendment to that effect; but when in power the Democrats overlooked the pledge.

The Inauguration

The new President does not assume his official duties until about four months after his election, namely, on March 4th. This is a long delay and in case the outgoing and the incoming executives are committed to radically different policies it works for uncertainty and confusion, especially among those classes intimately affected by such policies. Its serious consequences were illustrated in a marked fashion in 1860–61 when President Buchanan played a supine rôle during the fateful closing months of his administration. He permitted several Southern states to secede without taking any action in the matter, and left the country in chaos. He could with some reason justify his conduct, however, on the ground that it was not proper for him to involve his successor, Lincoln, in a desperate situation created by desperate action. To obviate just such difficulties it has been suggested that the President and the new Congress should take office immediately after election. The only argument against this proposal is that ordinarily it is a good thing for a victorious party to have a few months "to cool off" before getting hold of the reins of power.

It was formerly the practice for Congress, after having made

[1] *Readings*, p. 70.

the official count, to select a committee for the purpose of notifying the new President of his election, but this was not uniformly followed, and has now been abandoned altogether. Curiously enough no official notice whatever is given to the President-elect. He is supposed to be sufficiently aware of the fact himself, and on the fourth of March he appears to take the oath of office. He usually arrives in Washington a few days before, and calls upon the retiring President to pay his respects. On the day of inauguration, the President-elect, in charge of a committee on ceremonies, is conducted to the White House, whence, accompanied by the President, he is driven to the Capitol. If the weather permits, the oath of office, administered by the Chief Justice of the United States, is taken in the open air upon a platform built for the special purpose at the east front of the Capitol; otherwise it is taken in the Senate Chamber. Following the example set by Washington, it is the practice of the President to deliver an inaugural address. After this ceremony, the new President is driven back to the White House, where, from a reviewing-stand, he surveys a long procession, which is usually hours in filing past.

As soon as the new President has been installed, he is confronted with the problem of selecting his Cabinet and of filling a large number of minor places which are either vacant or whose occupants are ousted for one reason or another.[1] It is common for the President to select for the post of Secretary of State the member of his party who is generally deemed to be next to himself in the esteem of the country. For example, Lincoln called to the State Department William H. Seward who had been his chief rival for nomination at the convention of 1860 in Chicago. Wilson in 1913 selected as Secretary of State William J. Bryan who had been three times the Democratic candidate for President and was, next to Wilson himself, the most influential person in the party. Harding gave the first place in his cabinet to Charles E. Hughes, who had been the Republican standard-bearer in the campaign of 1916.

Sometimes the new President rewards with Cabinet positions the men who have been especially prominent in securing his election. For example, Harrison appointed John Wanamaker, who had been treasurer of the Republican committee, to the posi-

[1] Of course, many appointments are decided upon long before inauguration.

tion of Postmaster-General; Taft and Harding rewarded with the same office the chairmen of the national committee during their campaigns. Though as a rule the President confines his appointments to members of his own party, he sometimes chooses men from the opposition, who have either been friendly or at all events lukewarm in their political activities. Usually he attempts to have all sections of the country and all factions of his party fairly well represented in his Cabinet. He is expected to select men with whom he can work harmoniously — men who are willing to coöperate with him in carrying out the main lines of his policy. In this he has a free hand, subject to the exigencies of party politics. It is true that his nominations must be approved by the Senate, but in practice the Senate accepts his decisions without protest, so that the Cabinet is in reality a council of political associates upon whom he can rely for advice and help in making his administration successful.

CHAPTER IX

THE OFFICE OF PRESIDENT

The duties of the President are prescribed by the Constitution; but his activities in practice are not bounded by the letter of that instrument. They are determined rather by his personality, the weight of his influence, the strength of the leadership in Congress, the circumstances of war and peace, his capacity for managing men, and the effectiveness of the party forces which support him. He may take a narrow view of his prerogatives; thus did Buchanan in 1860 when he declared that the Southern states had no right to secede, but that he had no power to hold them in the Union by force. He may take a wide view of his function as head of the nation; thus did Roosevelt when he said that his powers were not limited to the matters expressly mentioned in the Constitution, but extended to every question of public welfare not closed to him by the Constitution. As spokesman of the nation in foreign affairs he may announce doctrines that influence the opinion of the country for generations; consider the famous message of Monroe to Congress in 1823. In the same capacity he may so define American rights as to involve the nation in war and so formulate American theories of state as to make a deep impress on the thought of the whole world. Of this significant truth the administrations of President Wilson furnish abundant illustrations. As head of the administration, with its official hierarchy centering at Washington and ramifying throughout the American empire, he may hold all agencies of government up to high standards of performance, or he may allow them to sink into a state of neglect and inefficiency.

As a political leader he may use his exalted position to appeal to the nation or to sectional, class, or group interest; he may use his veto power against laws passed by Congress; he may agitate by means of his messages; and he may bring pressure to bear in Congress and within his party through the discriminating use of the federal patronage. Owing to his preëminence he can

exert a tremendous influence on public opinion by the distribution through his messages and interviews of selected facts, alleged facts, and theories of government and policy. There is a corps of astute journalists in Washington ever alert to catch even the most trivial phrase that falls from his lips and spread it broadcast over the country. Such is the state of modern science that the President can even dispense with the press and through the radio speak to his listening countrymen directly. Thus President Coolidge read his first message not merely to Congress and the press, but to millions of people in city, town, and country. So we may say that mechanical inventions may make a greater revolution in the powers of the President than a constitutional amendment. At all events, we cannot discover the whole office of President by looking into the Constitution, laws, and judicial decisions.

The President's Cabinet — Its Rôle as a Council

There is no head of a government in the world so heavily burdened with duties as the President of the United States. He works constantly under the fierce light of public scrutiny. He cannot shift his responsibilities, either as political leader or chief administrator, to any other person or body. It is true that the heads of the great executive departments form a Cabinet or sort of council, but this is a matter of custom not of law, and the President cannot make it collectively accountable for the policies of his administration. Congress, in creating the first departments in 1789, did not recognize, in any way, the possibility of a Cabinet council composed of the heads. Indeed, the act establishing the Treasury Department was designed to bring the Secretary under congressional control in many ways. The Senate, being a small body, was then regarded as the real executive council on account of its powers of ratifying treaties and confirming appointments.

Whatever may have been the view of Congress, however, Washington regarded the four chief executive officials, including the Attorney-General, who was not made a department head until 1870, as his confidential advisers, though the term Cabinet was not immediately applied to them. He also exercised his constitutional right of requiring opinions from the heads of departments, and took them into his confidence in all important

matters very soon after the first appointments were made. We have direct evidence of Cabinet meetings as early as 1791, when Washington, having departed on a tour to the South, wrote to the three Secretaries: "I have expressed my wish, if any serious or important cases . . . should arise . . . that the Secretaries for the Departments of State, Treasury, and War may hold consultations thereon, to determine whether they are of such a nature as to demand my personal attendance." During his first administration, Washington, by a gradual process, welded the departmental heads into an executive council, and by 1793 we find the term Cabinet or Cabinet Council applied to this group of presidential advisers.[1]

Some Presidents have Cabinet meetings regularly at stated times, but others merely call sessions when public business requires common action. The meetings are usually secret, and no record is kept of the transactions. As the special business of each department is discussed separately with the President by the appropriate officer, only certain matters relative to the general policy of the administration are brought up for consideration at Cabinet meetings.[2] Any important piece of legislation desired by the President or by a department head and about to be submitted to Congress, will very probably be discussed in detail, especially if it concerns party principles. Votes are seldom taken on propositions, and they are of no significance beyond securing a mere expression of opinion. This is illustrated by an incident related of President Lincoln, who closed an important discussion in the Cabinet in which he found every member against him, with the announcement: "Seven nays, one aye, the ayes have it." Nevertheless, Cabinet meetings are of service to the administration, especially in maintaining harmonious coöperation among the departments and in formulating the executive policy. When, in 1919, President Wilson became seriously ill, it was reported that many questions were decided at Cabinet meetings which he was unable to attend. Later, however, he repudiated the legality of the meetings.

In the ordinary course of things, it appears from such glimpses of Cabinet meetings as we can catch in the letters and papers of former Cabinet members, most of the sessions are of slight

[1] See *Yale Review*, Vol. XV, pp. 160 ff.
[2] Harrison, *This Country of Ours*, pp. 105 ff.

importance, especially under a dominant personality like President Wilson. This at least is the conclusion to which we are driven by reading the informing letters of the late Franklin K. Lane, who served under him as Secretary of the Interior. A few entries will illustrate the point: "To-day's meeting has resulted in nothing, though in Mexico, Cuba, Costa Rica, and Europe we have trouble. . . . Yesterday we had a cabinet meeting. All were present. The President was manifestly disturbed. For some two weeks we have spent our time at cabinet meetings largely in telling stories. Even at the meeting of a week ago, the day on which the President sent his reply to Germany . . . we were given no view of the note which was already in Lansing's hands and was emitted at four o'clock; and we had no talk upon it, other than some outline given offhand by the President to one of the cabinet who referred to it before the meeting; and for three fourths of an hour we told stories on the war and took up small departmental affairs. . . . Another cabinet meeting, and no light on what our policy will be as to Germany." [1]

The Cabinet is the President's council in a very peculiar sense. Having no legal existence or warrant, it is not subjected as such to congressional control. In the first administration of President Jackson, the Senate requested the transmission of a paper supposed to have been read by him to the heads of the executive departments, and he replied in no uncertain language: "The executive is a coördinate and independent branch of the government equally with the Senate, and I have yet to learn under what constitutional authority that branch of the legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of departments acting as Cabinet council. As well might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own." [2]

The President as Director of the Administration

The President is the head of the national administration. It is his duty to see that the Constitution, laws, and treaties of the

[1] *Letters of Franklin K. Lane*, pp. 237, 238, 293.
[2] Richardson, *Messages*, Vol. III, p. 36.

United States and judicial decisions rendered by the federal courts are duly enforced throughout the country. In the fulfillment of this duty, he may direct the heads of departments and their subordinates in the discharge of the functions vested in them by the acts of Congress. Some of the departments, however, are made more directly subject to the President's control than others. For example, the Secretary of State, in the conduct of foreign affairs, is completely subject to the President's orders; and the Attorney-General must give an opinion or institute proceedings when required. On the other hand, when the Treasury was organized in 1789, it was definitely understood that Congress had a special control over the administration of that department. In fact, it was specifically provided that the Secretary should perform the services relative to finance which he might be directed to perform by Congress. Executive direction does not seem to have been contemplated. Nevertheless, in the course of a century's development, this concept of congressional control was abandoned in theory and generally in practice, although some of the old statutes were not disturbed.

During the war against the Central Powers, Congress took steps with regard to the organization of departments which may foreshadow new policies in time of peace when the work of government becomes still more complicated. In vesting immense powers over industries, shipping, food supplies, and other matters in President Wilson, Congress did not attempt to create all the boards, commissions, and other agencies necessary to the exercise of those powers; neither did it often prescribe the exact methods to be pursued. These important matters it left almost entirely in the hands of the President. By the Overman Act, passed in 1918, it even authorized him, during the war and for six months afterward, to consolidate existing bureaus, offices, and agencies and to rearrange them and their functions in any way which he deemed useful in the efficient prosecution of the war.

How far the President, in ordinary times, may go in directing administrative officers is a matter of dispute among lawyers. The Supreme Court has held that the President is bound to see that an officer faithfully discharges the duties assigned to him by law, but is not authorized to direct the officer as to the ways in which they shall be discharged. It is doubtful, however, whether this view of the issue would be taken to-day. Moreover,

in fact, the President has the power to remove the head of a department who refuses to obey his orders, and it is, therefore, rather difficult to see why, in actual practice, he cannot determine, within the lines of the statutes, the general policy to be followed by that officer. When President Jackson wanted the government funds withdrawn from the United States Bank, he removed two Secretaries of the Treasury, and finally appointed a third who was known to be subservient to his will. He had his way in the end.

Certainly the President's power over the enforcement of law through the agency of the Attorney-General is very great. He may instruct the Attorney to institute proceedings against anyone suspected of violating federal law. Since the principles which control the proceedings of federal officers in arresting and holding accused persons are general in character, the very spirit as well as the practices of law enforcement can be determined by the President. Laxness or severity is, therefore, largely within his discretion. In the case of open resistance he may employ the armed forces of the United States. Indeed he is not limited to such cases. If the mails are obstructed or interstate commerce is interfered with by local disturbances, he may order out the regular troops. In 1894 President Cleveland, against the protest of the Governor of Illinois, sent troops to Chicago which was the scene of a great railway strike that had blocked commerce and the mails. President Wilson took similar action on the occasion of a strike at Gary, Indiana, among the steel workers, and President Harding turned to the army in 1922 when a strike threatened to tie up the railways. President Roosevelt even prepared to use the army to open and operate coal mines in 1902, when the operators and workers were deadlocked in a strike and the country was in peril of freezing; nothing but arbitration of the dispute prevented him from taking that action.

In the discharge of his administrative duties, the President enjoys a large ordinance power — that is, the authority to supplement statutes by rules and regulations covering details sometimes of great importance. Among other things he makes rules for the army and the navy, the patent office, the customs, internal revenue, consular and diplomatic, and other services. Sometimes he issues these rules under his general executive

power; many army ordinances he promulgates as commander-in-chief. On other occasions he acts in accordance with the general provisions of the statutes. It has, for instance, become a common practice for Congress to make the rates of tariff duties imposed upon foreign goods flexible, dependent upon certain conditions, and then to authorize the President to vary them in application. During the war against the Central Empires, Congress, in nearly all its great statutes, gave the President full power to prescribe the administrative rules necessary to enforcement.

Such legislation is in line with the recent tendency of Congress to enlarge what is called "executive discretion," by passing laws in general terms and leaving the details to the President, department heads, and great agencies such as the Interstate Commerce Commission. This practice is made necessary by the growing complexity and fluidity of the social and economic matters on which Congress legislates. Congress cannot foresee all contingencies and provide for them; it must leave a great deal to federal officers charged with the application of the principles of the law. To use the language of a witty French poet in relation to a similar state of affairs in his own country, Congress "must leave something to Providence." Ultimately this means an immense increase in presidential power. When Congress authorizes the Postmaster-General or an immigration officer to issue sweeping orders,[1] it really leaves the determination of policy to the President who appoints and removes such officers.

The Power of Appointment and Removal

In connection with his administrative functions, the President may choose a large number of federal officers. This is significant from the point of view of politics, as well as administration.

When considered in relation to the manner of their selection, the civil authorities of the United States — other than the President, Vice President, presidential electors, Senators, and Representatives — fall into two groups: (1) those officers whose appointment is vested by the Constitution or by act of Congress in the President and Senate; and (2) those "inferior" officers, established by law, whose appointment is vested by

[1] See below, p. 408.

Congress in the President alone, the courts of law, or the heads of departments.[1]

The first group embraces most of the important officers of the Federal Government — the heads of departments, most of the bureau chiefs, judges of the federal courts, the civil service and interstate commerce commissioners, revenue collectors, and immigration officers. Taken together, they constitute an official army numbering about 15,000 persons, whose salaries amount to many million dollars a year. In filling these positions, the President and Senate are not hampered by any rules regarding qualifications; and as most of these officers hold for a term of four years, either under the Tenure of Office Act of 1820[2] or under other acts or in practice, each President has the disposal of an enormous amount of patronage.

The right of Congress to determine what is an "inferior" office has never been questioned, but no very consistent rule has been adopted in this matter. A few bureau chiefs of great importance — principally in the Department of Agriculture — are "inferior" officers in the view of the law because their appointment is vested in the President alone or in the head of the department. On the other hand, many bureau chiefs are appointed by the President and Senate. The great army of clerks and minor officers are chosen by heads of departments subject to the terms of the Civil Service Act.

The offices that are filled by the President and Senate may be divided into groups according to the degree of freedom which the President enjoys in making his own selections:[3]

1. Members of the Cabinet, that is, heads of departments, are usually the President's personal selection, although in this matter he is often controlled by preëlection promises or by obligations incurred in gaining the support of certain prominent persons in his party. At all events, the Senate, even when it is in the hands of an opposition party, does not seek to control the appointments to these offices; it usually ratifies the President's nominations

[1] Each house of Congress, of course, controls the appointment of its own officers — except the presiding officer of the Senate.

[2] Congress, by this act passed in 1820, fixed the term of a large number of federal officers at four years subject to the President's removal power. The officer holding one of these positions is not guaranteed a four-year term, but may be removed by the President at will. Finley and Sanderson, *The American Executive*, p. 258. Federal judges, of course, hold office during good behavior.

[3] It should be noted that, under the Constitution, the President may fill vacancies occurring during a recess of the Senate by granting commissions which expire at the end of the next session of that body. See Ford, *Rise and Growth of American Politics*, p. 290.

promptly and without objections. The choice of diplomatic representatives is also left largely to the President's discretion, as far as the Senate is concerned; although he always has many party obligations to consider in this connection. Military and naval appointments, especially in times of crisis, are principally subject to presidential control, but political influences are by no means wanting here. It is not often that the Senate rejects nominations to the Supreme Court.

2. A group of local federal offices filled by the President and Senate is subject largely to the control of the latter, as the result of a time-honored practice, known as "senatorial courtesy." Under its power to advise and consent, the Senate does not officially suggest nominations to the President, but it will ratify nominations to many offices only under certain conditions. If either one or both of the Senators from the state in which the offices under consideration are located belong to the President's political party, then his freedom of choice practically disappears. He must consult one or both Senators as the case may be. If only one Senator is of his political party, then the President must respect the preferences of that Senator. If both Senators are party colleagues, the senior Senator will probably control the nominations, especially if he is the stronger of the two. In such circumstances appointments must be made in fact or at least approved by the Senator or Senators in question; otherwise the Senate, acting under the rule of senatorial courtesy, will reject the nominations.

The rule, however, is not always followed. President Garfield, for example, once refused to place before the Senate certain candidates for federal offices in New York suggested by Senators Platt and Conkling of that state. The Senators feeling that their rights had been flouted thereupon tendered their resignations, but on asking vindication at the hands of the state legislature failed to secure reëlection. Here, again, it is not a matter of fixed principle but of time and circumstances — the character of the President, the Senators, and the appointees. In case, however, the federal offices to be filled are located in a state which has no Senator of his party, the President has more freedom in action, but even here he is bound to consult the party leaders in the locality concerned.

3. A third group of offices filled on presidential nomination is

composed of minor positions within congressional districts.[1] It has become a settled custom to allow the Representative,[2] if he is of the President's party, to name the appointees of his district; but if he is not of the President's party, the patronage goes to the Senators or Senator, as in the case of offices of the second group. The advice of the member is not always taken, but it has great weight in appointments. In most states such patronage is of considerable political importance and is used to sustain the local party organization.

Moreover, the President in selecting local officers of the government is compelled to rely more or less on persons familiar with local opinion. Speaking on this point, President Taft once remarked: "A member of a community remote from the capital . . . wonders that a President, with high ideals and professions of a desire to keep the government pure and have efficient public servants, can appoint to an important local office a man of mediocre talent and of no particular prominence or standing or character in the community. Of course the President cannot make himself aware of just what standing the official appointed has. He cannot visit the district; he cannot determine by personal examination the fitness of the appointee. He must depend upon the recommendations of others; and in matters of recommendations, as indeed of obtaining office, it is leg muscle and lack of modesty which win, rather than fitness and character. The President has assistance in making his selection, furnished by the Congressmen and Senators from the locality in which the office is to be filled; and he is naturally quite dependent on such advice and recommendation. He is made more dependent on this because the Senate, by the Constitution, shares with him the appointing power; . . . practically because of the knowledge of the Senators of the locality, the appointing power is in effect in their hands subject only to a veto by the President." [3]

The power of removal, so indispensable to the conduct of an efficient administration, has been one of the controverted points of our constitutional law, but it seems now to be settled with a fair degree of definiteness. The Constitution makes no provision for removal except by way of impeachment, but this is too cum-

[1] *Readings*, p. 212. These officers include revenue collectors, customs officers, United States marshals, district attorneys, etc.

[2] On this see Reinsch, *American Legislatures*, pp. 87 ff.

[3] *Four Aspects of Civic Duty*, p. 98.

bersome a process to be used often, especially for minor places. It was, therefore, early agreed that the President, without consulting the Senate, could remove the officers whom he nominated. The principle was followed until 1867, when Congress, then engaged in a bitter controversy with President Johnson, passed the Tenure of Office Act providing that the President must secure the consent of the Senate in making removals. This law, however, was later modified, and in 1887 repealed altogether; so the former rule is restored, namely, that the President can remove all officers whom he appoints or nominates in the executive branch of the government. The President can even remove before the expiration of the term for which an officer is appointed, and is not required to assign any causes at all for his action.[1]

It is obvious that the appointment and removal of federal officers must consume a large share of the President's time, especially just after his inauguration. The rush of office-seekers in 1841 contributed to the illness and death of the first Harrison; the second Harrison declared that he spent about half his time for the first two years of his term haggling over patronage. Of course the task is made far more difficult by the necessity of consulting Senators and Representatives, hearing complaints from them, considering their suggestions, and allaying their grievances. It has been proposed, therefore, that nearly all the 15,000 offices now filled by the President and Senate be placed under civil service rules.[2] This would require in some cases a constitutional amendment and in others changes in law calling for a self-denying ordinance on the part of the Senators.

Professor Young believes that if the President could appoint without having to consult the Senate, the quality of men selected would be improved.[3] This is doubtless true, but the President could thus build up a political machine of his own. This is exactly what Republican Presidents usually do in the Southern states where they have no Republican Senators to placate. By this method President Roosevelt practically forced the nomination of his friend, Mr. Taft, in 1908, and by the same method the latter assured his own renomination at Chicago four years later. President Coolidge was not oblivious to the advantages of the

[1] *Readings*, p. 197. The federal judges, of course, hold office during good behavior and can be removed only by impeachment.

[2] See below, p. 312.

[3] *The New American Government*, p. 33.

system in seeking his own nomination in 1924. The elective system inevitably involves politics, and appointments will be made with reference to political exigencies as well as efficiency. For some social problems there is no mechanical solution; but no doubt it would be well to place at least nine tenths of the presidential offices under civil service rules.

The War Powers of the President

The President is commander-in-chief of the army and navy and of the state militia when called into the service of the United States. He holds this power in time of peace as well as in time of war. The equipment of the army and navy and the right to declare war, however, belong to Congress, and it is not possible to say just how far into the actual direction of the forces Congress may go under its constitutional authority. Some publicists have even contended that Congress can provide that a particular officer shall be assigned by the commander-in-chief to a particular division, and that in case a regiment or company has been dispatched to a certain point by presidential order, Congress can countermand the order.[1] If this is true, it is difficult to see why Congress might not in a slow and cumbersome way practically direct the conduct of a campaign. Still, it is contended, on the other side, with more reason, that the power of Congress ends with providing and maintaining the army and navy and declaring war; and that the entire command of the military and naval forces is vested in the President, whose guidance, under the Constitution, is the law of nations and the rules of civilized warfare.[2]

The President appoints all military and naval officers by and with the advice and consent of the Senate — except militia officers who are in theory at least appointed by the respective states[3] — and in time of war he may remove them at will. In time of peace, however, they are removed by court martial.

The President is not limited in the conduct of war to the direction of the armed forces; he may do whatever a commander-in-chief is warranted in doing under the laws of war to weaken and overcome the enemy. It was under this general authority,

[1] Reinsch, *Readings*, p. 22.
[2] See below, chap. xvi; and *Readings*, pp. 184 and 308 ff.
[3] See below, p. 353.

inherent in his office, that President Lincoln, during the Civil War, suspended the writ of habeas corpus in states that were not within the theater of the armed conflict.[1] It was under this authority that he emancipated the slaves in the sections at war with the Union, arrested those charged with giving aid and comfort to the Confederacy, established a blockade of Southern ports, and, in short, brought the whole weight of the North, material and moral, to bear in the contest.

Even still more extensive, if possible, was the power exercised by President Wilson in prosecuting the war against the Central Empires. By act after act Congress conferred upon him almost unlimited authority over the economic resources and the man power of the nation.[2] It prescribed general principles and left their interpretation and application to him. Even the bureaus, offices, and other civil agencies already in existence were made as wax in his hands under the Overman Law already cited. Under his direction and leadership drastic control over the expression of opinion — the most drastic in our history — was established by the Sedition Act of 1918. Even more extraordinary was the invasion of Russian territory and war upon Russian armed forces without authorization of Congress. The country was at war, it is true, with the Central Powers, but previous to the Bolshevik revolution the United States had been an associate of Russia in that war. Nevertheless, in August, 1918, American troops were landed at Archangel and at Vladivostok in coöperation with certain of the Allied Powers. Nominally, war was not declared and the purpose of the armed expedition was to protect supplies, but in fact American troops took part in fighting the Bolshevik troops. The causes of this action and its constitutionality are obscure questions. The fact remains.

Indeed, the power of the President to move the military and naval forces of the country about in foreign territory and to make use of them in actual fighting without a declaration of war from Congress has never been closely limited in practice. Many punitive expeditions have been made into Mexico, the last in 1917, to capture the bandit Villa who had murdered and plundered on the American border. In 1900 the President coöperated with European and Asiatic powers in an armed expedition to rescue

[1] The courts have held that Congress has the power to suspend the writ of habeas corpus, but Congress has conferred it on the President.

[2] See below, chap. xvi.

foreigners in Peking from the hands of the Boxer rebels. During President Wilson's administration, when marines were landed in Haiti and Santo Domingo on presidential authorization, considerable fighting took place in which a large number of natives were killed, and American military supremacy was established over the two countries — this without any declaration of war by Congress. Under his war power, the President may govern conquered territory, appoint officers there, make laws and ordinances, lay and collect taxes of all kinds, and, in short, exercise practically every sovereign right, until Congress has acted.

The President may use armed forces in carrying into execution the federal law against resistance that cannot be overcome by ordinary civil process. The United States, under the Constitution, guarantees to each commonwealth a republican form of government, and protects it against invasion, and, on application of the legislature or of the executive (if the legislature is not in session), against domestic violence. By act of Congress, the President is authorized to call forth the militia when aid is asked in due form by the authorities of a state struggling against an insurrection. It is by statutory law also that the President is empowered to use the militia or the army and navy whenever, by reason of obstructions, assemblages, or rebellion, it becomes impracticable, in his judgment, to enforce federal law within any state or territory by the ordinary course of judicial procedure. It was under this authority, and his general obligation to see to the faithful execution of the law, that President Cleveland used federal troops in the case of the Chicago strike cited above.[1]

The President and Foreign Affairs

The President is the official spokesman of the nation in the conduct of all foreign affairs,[2] and he is primarily responsible for our foreign policy and its results. It is true, however, that he is controlled in some matters by the Senate and in others by Congress. The Senate may confirm or reject his treaties and his nominations to diplomatic and consular positions; Congress alone can create diplomatic and consular positions and provide the salaries attached to them. Congress must also, in many

[1] *Readings*, p. 317. [2] *Readings*, p. 183.

cases, make provision for the execution of treaties, but it has no right to establish and conduct relations with any foreign power independently of the President.

Under the Constitution, the President appoints ambassadors, other public ministers, and consuls, subject to the confirmation of the Senate; he makes treaties with the consent of two thirds of the Senators present; and he receives ambassadors and public ministers from foreign countries;[1] but his authority is not limited to the formal letter of the law. He may do many things that vitally affect the foreign relations of the country. He may dismiss an ambassador or public minister of a foreign power for political as well as personal reasons, and, if on the former ground, he might embroil the country in war. His power to receive any foreign representative authorizes him to recognize the independence of a new state, perhaps in rebellion against its former legitimate sovereign,[2] and thus he might incur the risk of war. He may order a fleet or a ship to a foreign port under circumstances that may provoke serious difficulty; the ill-fated battleship *Maine* was sent to the harbor of Havana by President McKinley at a time when it was regarded by many Spaniards, though not officially, as an unfriendly act. The result all the world knows. As commander-in-chief of the army he may move troops to a position on the very borders of a neighboring state and bring about an armed conflict. A notable instance of such an action occurred at the opening of the Mexican War, when President Polk ordered our troops into the disputed territory, and, on their being attacked by the Mexicans, declared that war existed by act of Mexico. Again, in his message to Congress the President may outline a foreign policy so hostile to another nation as to precipitate diplomatic difficulties, if not more serious results. This occurred in the case of the Venezuelan controversy, when President Cleveland recommended to Congress demands which Great Britain could hardly regard as anything but unfriendly. President Wilson, in his negotiations with Germany after the sinking of the *Lusitania* in 1915, followed a policy destined to make war on the German Imperial Government the one recourse open to the Congress of the United States. It was his definition of American rights that made war the

[1] See below, chap. xv.
[2] For example, Roosevelt's recognition of the Republic of Panama in revolt against Colombia.

only alternative to a surrender of national prestige. In short, by his enunciation of principles, his notes to Germany, his dismissal of the German ambassador, and his appeal to the nation to support his leadership and his acts, he placed Congress in a position in which war was its only choice.

On the other hand, the negative attitude of a President may be of high significance in foreign affairs. The refusal of President Harding to take part in the numerous conferences held in Europe after the war to adjust many vexatious matters still in dispute kept the United States definitely out of the official international assemblies of the Old World. He could have pursued policies which would have committed the country to responsibilities and obligations; but he refused to do so.

In his management of foreign affairs, the President may even go as far as to make "executive agreements" with foreign powers without asking the consent of the Senate. The Constitution requires that only "treaties" shall be confirmed by the Senate, and long practice has established the fact that the term does not cover every kind of international arrangement which may be made. An adjustment of a minor matter with a foreign country is an agreement, but it need not take the form of a treaty.

Congress has recognized the existence of a distinction between various kinds of agreements by empowering the Postmaster-General to make "conventions" with foreign countries respecting the carriage of international mails, without asking for senatorial approval. Another class of agreements is covered by the term "identical note." Such a note is really an exchange of letters between the Secretary of State, who is under the President's immediate direction, and the representative of some foreign power. A remarkable illustration is afforded by the Lansing-Ishii agreement of 1917 between Mr. Lansing, our Secretary of State, and Mr. Ishii, the Japanese ambassador, recognizing, so to speak, "by correspondence," the special position of Japan in the Far East — a sort of Oriental Monroe doctrine for Japan. This was a vital matter in American foreign policy. The agreement was declared by Secretary Hughes to be set aside by the arrangements of the Washington Conference, in 1921–22.

The line between a treaty and an executive agreement is difficult to draw; but the character of the power which the President can wield under his right to make such agreements is well illus-

trated by President Roosevelt's action with regard to Santo Domingo. In January, 1905, he signed a treaty with the government of the republic to the effect that the United States would maintain the integrity of that country, supervise the administration of its finances, make provisions for the settlement of foreign claims, and generally assist in keeping order there. The Senate refused to ratify this treaty. The President thereupon secured from the Dominican government the appointment of American citizens to supervise the finances; he made provision for depositing a certain portion of the republic's revenues for the benefit of foreign creditors; and he sent American battleships to the ports of that country. In short, he carried out the main terms of the agreement without senatorial approval, although his policy was severely criticized by the opposition in the Senate. "The treaty has been practically carried into effect without consulting the Senate," contended Senator Rayner. "The appointment of an American agent as an official of Santo Domingo to collect its customs was simply a cover and an evasion. Under the principles of international law and the comity of nations, this government is morally bound for the proper custody of this fund, and would be liable in case of its waste or loss. . . . When you add to this the fact that our warships are in the harbors of the island ostensibly for the purpose of protecting American interests, but in reality protecting the officials of the island against any menace from without and revolution from within, you have the establishment of a sovereignty or a protectorate without a word from Congress or the Senate sanctioning the same." [1] It is evident that the President, under his unquestioned authority to make executive agreements, might go to great lengths and make an arrangement with a foreign power far more serious in character than is often stipulated by formal treaty. Nevertheless, in this matter as in many other matters of government, time and circumstance must determine the proper limits to executive action.

The Pardoning Power

The President, in addition to his administrative duties, enjoys the power to grant reprieves and pardons (except in cases of impeachment) for offenses against the United States. No

[1] Reinsch, *Readings*, pp. 79 ff., for a full discussion of this important point.

limits are imposed on his exercise of this power, and therefore it may be used as he sees fit. He may remit a fine, commute a death sentence to a term of imprisonment, or free the offender altogether; but when forfeiture of office is one of the penalties imposed, he cannot restore the offender to his former position. Though the usual process is to pardon after conviction, a pardon may be granted before or during trial.

In the exercise of his power of pardon, the President relies, of course, largely upon the opinions of others. The application for executive clemency with all the papers attached is sent to the Attorney-General, in whose department there is a pardon-clerk in charge of the preliminary stages. Usually the judge and district attorney under whose supervision the case was first tried are asked to make any statement they may choose about the merits of the case. The Attorney-General endorses on the application his opinion as to what course of action should be pursued, and the papers are then sent to the President for final determination. "If the trial seems to have been fairly conducted," said President Harrison, "and no new exculpatory evidence is produced, and the sentence does not seem to have been unduly severe, the President refuses to interfere. He cannot weigh the evidence as well as the judge and jury. They saw and heard the witnesses, and he has only a writing before him. It often happens that the wife or mother of the condemned man comes in person to plead for mercy, and there is no more trying ordeal than to hear her tearful and sobbing utterances and to feel that public duty requires that she be denied her prayer."

The President's Privileges and Rights

In addition to his powers and duties, the President enjoys certain privileges and rights. No tribunal in the land has any jurisdiction over him for any offense. He cannot be arrested for any crime, no matter how serious — even murder.[1] He may be impeached, but until judgment has been pronounced against him, he cannot be in any way restrained in his liberty.

The President is entitled by right to payment for his services, for the Constitution provides that he shall receive at stated times a compensation which may not be increased or diminished during

[1] Burgess, *Political Science and Constitutional Law*, Vol. II, p. 246.

the term for which he is elected. He is forbidden, however, to receive any other emolument from the United States or from any state. The salary of the President was fixed at $25,000 in the beginning; it was increased to $50,000 in 1871; and to $75,000 in 1909. In addition to his personal salary the President is furnished an Executive Mansion, executive offices, and certain other allowances.

The President and Legislation

The President's position as chief executive is so exalted and his powers in that respect are so extensive that his functions as legislator, both constitutional and customary, are often neglected by commentators. He is required by the Constitution to give Congress from time to time information on the state of the Union and to recommend such measures as he may deem necessary and expedient. The presidential message may be delivered orally in the presence of both houses or sent to them in written form. Washington and Adams adopted the former procedure; Jefferson discontinued the custom and substituted for it the practice of sending written messages to Congress. This was the rule for more than a hundred years, until President Wilson in 1913 with a somewhat dramatic gesture returned to the custom inaugurated by Washington and read his communications to the houses in joint session. His successor followed in his footsteps. President Coolidge, with the aid of the radio, read his message to the general public.

The nature and purpose of the message vary from time to time. Often it is a formal document conveying definite information on some special issue. Again, particularly at the opening sessions of Congress, it may have great political significance. It may be a solemn declaration of party policies formulated in consultation with party leaders. It may be a bid for a reëlection in the form of a careful statement of the views of its author. It may be an announcement to some other country, warning it against pursuing a certain course of action. It may contain a noteworthy statement of principles, such as the Monroe doctrine, incorporated in Monroe's famous message of December, 1823, or the Fourteen Points in which President Wilson summarized the war policy of the United States in 1918 and outlined the basis of peace to the enemy countries. Sometimes the message

even goes into details and suggests specific laws. Indeed the President may and often does actually draft bills for presentation to Congress and coöperates closely with party directors in Congress in securing the passage of important measures.

Whatever may be its purport, the message is the one great public document of the United States which is widely read and discussed. Congressional debates receive scant notice, but the President's message is printed almost *in extenso* in nearly every metropolitan daily, and is the subject of general editorial comment throughout the length and breadth of the land. It stirs the country; it often affects congressional elections; and if its recommendations correspond with real and positive interests of sufficient strength, they sooner or later find their way into law.

The treatment which the President's recommendations receive, of course, varies according to circumstances. They may be accepted, because Congress feels that they are sound in principle or because there is an effective demand for them in the country; or they may be accepted because the President by his party leadership, or personal favors, or use of patronage can bring the requisite pressure to bear on Congress.

In addition to bringing pressure upon Congress to secure the sanction of policies which he favors, the President may veto acts of Congress which he does not like. Every bill or joint resolution must be presented to the President; if he signs, it becomes a law; if he disapproves, he must return it to the house in which it originated, with a statement of his objections; and the house must, thereupon, reconsider it. A two thirds vote of both houses is sufficient to carry the measure over the executive veto. The same procedure is applied to orders, resolutions, and votes to which a concurrence of both houses is necessary, excepting questions of adjournment.[1] If the President fails to return a measure within ten days (Sundays excepted) after it is presented to him, it becomes a law without his signature, unless Congress prevents its return by adjourning, in which case it does not become a law if the President vetoes it, or does not sign it. When Congress adjourns leaving many bills to be signed, the President may sup-

[1] In practice "concurrent resolutions" are not submitted to the President. See below, p. 278. In practice also amendments to the federal Constitution are not submitted to the President. Burgess, *Political Science and Constitutional Law*, Vol. I, p. 148.

press quietly those to which he entertains objections; this is known as the "pocket veto." [1]

The President cannot veto single items in appropriation bills, and Congress on more than one occasion has attached other measures — disapproved by the President — to appropriation laws with a view to forcing his signature. This practice of attaching "riders" is somewhat discredited, and is employed only in exceptional circumstances.

The veto power, in Hamilton's view, was conferred on the President on account of the propensity of the legislative department to intrude upon the rights and absorb the powers of the other departments, as well as the necessity of furnishing the executive with a means of defending his constitutional prerogatives. But he added: "The power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body." [2]

On the question of exercising the veto, different views have prevailed. Jefferson contended: "Unless the President's mind, on a view of everything which is urged for and against the bill, is tolerably clear that it is unauthorized by the Constitution — if the pro and con hang so even as to balance his judgment — a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion." [3] General Taylor held [4] that the veto power should never be exercised "except in cases of clear violation of the Constitution, or manifest haste and want of consideration by Congress." President Jackson, however, whose relations to Congress were very different from those of either Jefferson or Taylor, had his own opinion of what the Constitution was; he even alleged unconstitutionality as one of the grounds for vetoing the Bank Bill, although such a measure had been declared constitutional by the Supreme Court.[5] In vetoing a bill, President Grant assigned as his reason the fact that it was "a departure from true principles of finance, national

[1] *Readings*, p. 187.
[2] *The Federalist*, No. LXXIII.
[3] Quoted in Lincoln, *Works*, Vol. II, p. 61.
[4] *Ibid.*, Vol. II, p. 61.
[5] *Readings*, p. 187.

interest, national obligations to creditors, congressional promises, party pledges (of both political parties), and personal views and promises made by me in every annual message sent to Congress and in each inaugural address." Cleveland expressed his opinion that the veto power was given to the President for the purpose of invoking the exercise of executive judgment and inviting independent executive action.

Generalizing from the statements of many Presidents we may say that the President is expected to safeguard the Constitution by vetoing acts of Congress which he deems unconstitutional. This is especially significant because frequently laws cannot be brought before the courts to be tested except possibly in some indirect or collateral way. It is also the duty of the President to exercise an independent judgment as an independent agent of government speaking for the whole nation. Only in this way can combinations of local interests contrary to the general interest be circumvented.

In actual practice the exercise of the veto varies according to circumstances. President Washington vetoed only two general bills. John Adams, Jefferson, and John Quincy Adams did not veto any. President Jackson, whose long contest with Congress forms one of the dramatic episodes in our political history, vetoed six general bills, and made the veto a terrible engine for political agitation. Not until another great fight between the executive and legislative departments arose after the assassination of Lincoln in 1865 was the veto again a prominent feature in politics. Lincoln's successor, Andrew Johnson, was a "War Democrat," not a Republican; he had been nominated to the vice presidency for the purpose of attracting Democratic votes. When he became President he collided at once with the Republican Congress; he vetoed eighteen general bills and was reversed fifteen times. The next noteworthy exercise of the veto power was under President Cleveland, who refused to sign more than two hundred private bills granting pensions to former soldiers. Since Cleveland's day there has been no such sweeping exercise of the power. Roosevelt vetoed forty measures, Taft thirty, and Wilson twenty-six. The veto frequently comes into play when the President is of one party and Congress of another. When the two branches are in the hands of the same political organization, differences of opinion on important issues are usually smoothed

out in conferences and not brought to the attention of the country. There are exceptions, of course, as for example in President Wilson's administration when Congress enacted a bill imposing a literacy test on immigrants, and then repassed it over his veto. Sometimes it is even understood among party leaders that a specific bill is to be vetoed by the President; thus the party members in Congress carry out their promises to their constituents knowing that the President will kill the measure at the White House.

Executive procedure in dealing with bills has been described by a former President, Benjamin Harrison.[1] After its passage through Congress, a bill is signed by the president of the Senate and the speaker of the House; it is then taken to the Executive Mansion and usually referred to the head of the executive department to which its subject matter relates; in case a question of constitutionality arises, the Attorney-General is consulted. The bill then goes to the President with the departmental report upon it; if he approves he signs the bill, dates it, and sends it to the Department of State for filing and publication. If he disapproves the bill, and Congress is still in session, he returns it to the house in which it originated, with his objections, and perhaps with recommendations for amendment.

The veto power, taken in connection with the message and the appointing power, is an effective political instrument in the hands of the President. By threatening to use the veto, he may secure the passage of bills which he personally favors. By holding up appointments to federal offices he may bring congressmen to terms. At all times, in considering important measures, Congress must keep in view the possible action of the President, especially where a party question is involved and a correct attitude before the country is indispensable. Roosevelt even went so far as to warn Congress publicly that he would not sign certain measures then before that body, and raised a storm of protest from those who said that he should not veto a bill until it was laid before him.

The Relations of the Executive and Legislative Departments

There is a tradition in American political theory to the effect that the executive and legislative departments ought to be kept

[1] *This Country of Ours*, p. 128.

entirely separate. An examination of Numbers 47 and 48 of *The Federalist* shows, however, that the framers of the Constitution were aware of very decided limitations on the theory. Madison, the author of these numbers, called attention to the fact that among the first state constitutions "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." He went on to say that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The leadership which Washington and Hamilton took in drafting and supporting important measures of law passed by the early congresses under the Constitution proved that they did not think the executive a mere agent to carry into effect the decisions of Congress after they had been independently reached.

As a matter of practice from that time to this, it has been found impossible, even highly undesirable, to keep the departments separate. Such separation would break the natural tie that should exist between the body that expresses popular will and the authority charged with carrying that will into execution. It would strip the President of the rightful power which he enjoys as a leader in formulating public policies. Accordingly there has been established a fairly close connection between the executive and legislative departments. This has been accomplished in many ways.

1. In the first place, the political tie, of necessity, binds the President and the members of his party in Congress. Although they may from time to time engage in controversies more spectacular than edifying, yet on fundamental matters of policy, the President and Congress must come into a sort of working agreement. Furthermore, the President is regarded as the leader of his party, and it is to him, rather than to Congress, that the party members look for the enforcement of any specific promises laid down in the platform or made officially during the presidential campaign. Congress cannot, therefore, ignore the leadership of the President, and, however much it may oppose his policies, it must give heed to those measures in which he has unquestioned national support.

Within recent years, we have come to recognize more frankly

than ever the position of the President as a party leader. Roosevelt was largely responsible for the policies which the Republican party made national issues. In speeches delivered at different points throughout the country and in his presidential messages, he advocated doctrines and measures which Congress was compelled, even against its will, to accept because it realized that he had behind him powerful national interests which could not be disregarded.[1] As party leader he issued, in 1906, a general letter endorsing the Republican members of Congress and calling upon the country to support them in the coming election; two years later he singled out individual members of Congress and gave them special letters of commendation.[2]

Taft expressly declared that he believed it to be the duty of the President to assume the position of leadership in his party. "Under our system of politics," he said, "the President is the head of the party which elected him, and cannot escape responsibility either for his own executive work or for the legislative policy of his party in both houses. He is, under the Constitution, himself a part of the legislature in so far as he is called upon to approve or disapprove acts of Congress. A President who took no interest in legislation, who sought to exercise no influence to formulate measures, who altogether ignored his responsibility as the head of the party for carrying out ante-election promises in the matter of new laws, would not be doing what is expected of him by the people. In the discharge of all his duties, executive or otherwise, he is bound to a certain extent to consult the wishes and even the prejudices of the members of his party in both houses, in order that there shall be secured a unity of action by which necessary progress may be made and needed measures adopted." [3]

The climax in executive leadership in recent times was reached during the six years of Wilson's administration (1913–19) in which his party had a majority in both houses of Congress. He exerted a powerful influence on the drafting and passage of every great measure of law enacted during that period. Some of them he forced through under the pressure of his prestige, his control over the patronage, and his appeals to the country. He very often went personally to the Capitol to consult Senators

[1] *Readings*, p. 265.
[2] New York *Times*, May 28, 1908.
[3] *Four Aspects of Civic Duty*, p. 100.

and Representatives; in order to bring some issues forcibly to the attention of Congress and the nation he made them the subjects of special messages which he read in person. His personality and his doctrines overshadowed the personalities and opinions of congressmen. In the legislative branch no dominant figure stood out above the rank and file. President Wilson was the master of the political scene. Finally in the election of the lower house in November, 1918, he appealed to the country to choose Democrats, on the principle that divided councils were dangerous and a return of a Republican majority would be interpreted in Europe as a repudiation of his leadership. The Republicans, he said, "have sought to take the choice of policy and the conduct of the war out of my hands and to put it under the control of instrumentalities of their own choosing. . . . It is well understood . . . that the Republican leaders desire not so much to support the President as to control him." The Republican victory in the election which ensued marked the turn in the tide, for President Wilson afterward incurred stout opposition on all significant measures, especially the Versailles treaty submitted to the Senate for ratification. After a serious breakdown in health in the autumn of 1919, he lost his unquestioned predominance in the Federal Government. His successor, President Harding, deliberately chose another course and flatly refused, except in one or two instances, to "whip members of Congress into line" by executive action. A reaction had set in and for the time being the country showed marked impatience with dictation from the White House.

2. The party tie is by no means the only bond of union between the executive and legislative departments. By vesting the appointing power in a large number of cases in the hands of the President and Senate, the Constitution draws the two departments together. The extent to which the President may use his power over appointments to influence his party friends in Congress, and the extent to which the Senate may employ its confirming power to bend the President to its will, depend upon circumstances; but it is perfectly clear that either may take advantage of the opportunity offered by this constitutional connection. An excellent illustration of the way in which the President may influence legislation through patronage is afforded by C. A. Dana's account of President Lincoln's maneuvers to

secure the passage of the Thirteenth Amendment. It is so eloquent that it deserves quotation in full.

Lincoln was a supreme politician. He understood politics because he understood human nature. I had an illustration of this in the spring of 1864. The administration had decided that the Constitution of the United States should be amended so that slavery should be prohibited. This was not only a change in our national policy, but it was also a most important military measure. It was intended not merely as a means of abolishing slavery forever, but as a means of affecting the judgment and the feelings and the anticipations of those in rebellion. It was believed that such an amendment to the Constitution would be equivalent to new armies in the field, that it would be worth at least a million men, that it would be an intellectual army that would tend to paralyze the enemy and break the continuity of his ideas.

In order thus to amend the Constitution, it was necessary first to have the proposed amendment approved by three fourths of the states. When that question came to be considered, the issue was seen to be so close that one state more was necessary. The state of Nevada was organized and admitted into the Union to answer that purpose. I have sometimes heard people complain of Nevada as superfluous and petty, not big enough to be a state; but when I hear that complaint, I always hear Abraham Lincoln saying, "It is easier to admit Nevada than to raise another million of soldiers."

In March, 1864, the question of allowing Nevada to form a state government finally came up in the House of Representatives. There was strong opposition to it. For a long time beforehand the question had been canvassed anxiously. At last, late one afternoon, the President came into my office, in the third story of the War Department. . . .

"Dana," he said, "I am very anxious about this vote. It has got to be taken next week. The time is very short. It is going to be a great deal closer than I wish it was."

"There are plenty of Democrats who will vote for it," I replied. "There is James E. English, of Connecticut; I think he is sure, isn't he?"

"Oh, yes; he is sure on the merits of the question."

"Then," said I, "there's 'Sunset' Cox, of Ohio. How is he?"

"He is sure and fearless. But there are some others that I am not clear about. There are three that you can deal with better than anybody else, perhaps, as you know them all. I wish you would send for them."

He told me who they were; it is not necessary to repeat the names here. One man was from New Jersey and two from New York.

"What will they be likely to want?" I asked.

"I don't know," said the President; "I don't know. It makes no difference, though, what they want. Here is the alternative: that we carry this vote, or be compelled to raise another million, and I don't know how many more, men, and fight no one knows how long. It is a question of three votes or new armies."

"Well, sir," said I, "what shall I say to these gentlemen?"

"I don't know," said he; "but whatever promise you make to them I will perform."

I sent for the men and saw them one by one. I found that they were afraid of their party. They said that some fellows in the party would be down on them. Two of them wanted internal revenue collector's appointments. "You shall have it," I said. Another one wanted a very important appointment about the custom house of New York. I knew the man well whom he wanted to have appointed. He was a Republican, though the congressman was a Democrat. I had served with him in the Republican county committee of New York. The office was worth perhaps $20,000 a year. When the congressman stated the case, I asked him, "Do you want that?"

"Yes," said he.

"Well," I answered, "you shall have it."

"I understand, of course," said he, "that you are not saying this on your own authority?"

"Oh, no," said I; "I am saying it on the authority of the President."

Well, these men voted that Nevada be allowed to frame a state government, and thus they helped secure the vote which was required. The next October the President signed the proclamation admitting the state. In the February following, Nevada was one of the states which ratified the Thirteenth Amendment by which slavery was abolished by constitutional prohibition in all of the United States.[1]

3. The imperative necessity under which Congress is placed of securing information from executive departments with regard to legislative matters, and the desire of executive officers to secure new laws and amendments to old laws, constitute another important bond of union between the executive and the legislature. Congress is constantly making demands upon the executive for papers, documents, and special information of one kind or another, and in so far as the President regards these demands as reasonable and compatible with public interest he complies with them. As a matter of right, Congress may call upon the President for information, but it has no power, under the Constitution, to compel him to furnish papers and documents.

Ordinarily, the eagerness of the administration to secure favorable consideration of its own measures in Congress leads it to comply readily with requests for information. This is as it should be, for frequently those who have charge of the execution of the laws know more about the actual conditions to which the laws must apply and the actual effect of the laws than do the

[1] C. A. Dana, *Recollections of the Civil War*, pp. 174–177.

legislators themselves.[1] Furthermore, it is desirable that those who are called upon to execute the laws should know the spirit and intention of those who have passed them.

4. An intimate relation is established between Congress and the executive through the practice of the former in inviting the assistance of departmental chiefs in drafting bills. Very frequently the Attorney-General, who is supposed to be merely the legal adviser of the President, is asked to give his opinion before a committee or to advise members of Congress informally on some particular matters up for legislative action. It is sometimes the practice for heads of departments to draft complete measures, transmit them to Congress either through a friend in that body, or even directly, and secure their reference to proper committees and ultimately their passage.[2] It is a matter of common knowledge also that the President from time to time invites to the White House members of Congress who may be of influence in securing the enactment of laws favored by the administration. On the other hand, Congress has in a number of instances even assumed the right to advise the President, by a statute or by a resolution, to adopt some particular executive policy.

5. Another important line of connection is established between the executive and the legislature through appropriations. The Treasury Department is by law placed in a special relation to Congress; for Congress has the power to call directly upon that department for financial information without going through the form of making a request to the President. The first Secretary of the Treasury, Hamilton, claimed the right to report to Congress personally whenever he pleased on financial matters, although in practice his famous reports and recommendations were submitted to Congress only upon request. His demand for admission to the House of Representatives for the purpose of defending his policies was denied; but throughout his term he maintained very close relations with his supporters in Congress and directed legislative tactics especially with regard to the funding of the national debt and the assumption of state debts. In a letter to Jay he wrote: "'Tis not the load of proper official business that alone engrosses me, though this would be enough

[1] It should be remembered that many members of Congress have seen long committee service and know more about administration than a new President or executive officer.

[2] *Readings*, pp. 196 and 267.

to occupy any man. 'Tis in the extra attention that I am obliged to pay the course of legislative manœuvres that alone adds to my burden and perplexity." [1]

The relation between the executive branch and Congress in the matter of finance was made still more intimate by the enactment of the national budget law in 1921.[2] By this act the President is made directly responsible to Congress for the preparation of a carefully balanced program of expenditures and revenues. It gives the executive more power over the appropriations, especially over those sought by members of Congress in the interests of their districts, and compels them to sue for favors at the President's door. The weight of executive influence in legislative matters is correspondingly increased.

Proposals to Establish Formal Connections between the Executive and Legislative Departments

Several times in our history it has been suggested that the heads of departments should be given the right to appear before Congress for the purpose of explaining and defending the measures recommended by the administration, and the various policies pursued in the execution of the law. It is true, the Constitution prevents the heads of departments, as civil officers, from being at the same time members of Congress, but the houses, either separately or jointly, may admit persons who are not members and authorize them to speak on any matter. Indeed, the act of 1789 organizing the Treasury Department, provided "that the Secretary of the Treasury shall, from time to time, digest and prepare plans for the improvement and management of the revenue and for the support of public credit . . . shall make reports and give information to either branch of the legislature, *in person* or in writing as may be required, respecting all matters referred to him by the Senate or House of Representatives or which shall appertain to his office."

There are a number of examples in our early history of executive officers appearing in the Senate for the purpose of making explanations and reading messages and papers. President Washington always read his messages at the opening of Congress before the two houses and sometimes he appeared before the Senate to

[1] Hamilton, *Works*, Vol. X, p. 29.

[2] See below, p. 374.

consult that body about the terms of treaties then in process of negotiation. Jefferson, when he was Secretary of State, visited the Senate, in accordance with instructions, and explained the nature of certain executive business. Examples of this kind might be easily multiplied. It is a matter of authentic record that in the days of the men who framed the federal Constitution, Congress and the Cabinet officers maintained very close relations.

From time to time, the idea of establishing formal connections between Congress and the executive has been up for discussion. In 1881, for instance, a Senate committee, appointed for the purpose of investigating the question of the relation of the executive to the legislature, reported in favor of giving heads of departments the right to appear in Congress.[1] This committee urged that such a practice was no violation of the principle of separation of powers; that complete isolation of the two departments would produce either conflict or paralysis. Though the two departments of government have a separate existence, runs the report, "they were intended to coöperate with each other as the different members of the human body must coöperate with each other in order to form the figure and perform the duties of a perfect man." The introduction of heads of departments upon the floor of Congress, the committee said, would make the information given to Congress more pertinent and conclusive, and would put the members of the legislature on the alert to see that executive influence was only in proportion to the value of the information, thus enabling the public to determine whether that influence was exerted by partisanship or by argument.

In answer to those who urged that it would institute an unconstitutional relation between the executive and Congress, the committee replied: "No one who has occupied a seat on the floor of either house, no one of those who year after year so industriously and faithfully and correctly report the proceedings of the houses, no frequenter of the lobby or the gallery, can have failed to discern the influence exerted upon legislation by the visits of the heads of departments to the floors of Congress and the visits of the members of Congress to the offices in the departments. It is not necessary to say that the influence is dishonest or corrupt, but that it is illegitimate; it is exercised in secret by

[1] *Senate Report*, No. 837, 46th Cong., 3d Sess. (1881).

means that are not public — by means which an honest public opinion cannot accurately discover and over which it can therefore exercise no just control." In response to the contention that the imposition of these quasi-legislative responsibilities upon heads of departments would make it impossible for them to perform their regular administrative duties, the committee recommended that under-secretaries should be appointed and entrusted with the routine business requiring only order and accuracy, so that the chief officers could confine their attention to those larger duties involving important policies.

The idea of executive participation in congressional debates was revived again in 1913 by a special message from President Taft, but no action was taken to carry it into effect. Those who had read President Wilson's remarkable book on *Congressional Government* and knew about his warm admiration for the English parliamentary system, expected him to initiate a movement for bringing the executive and legislative branches into some kind of closer coöperation; but he assumed leadership himself and made no attempt to introduce institutional changes. During the debates on the national budget law of 1921 it was urged that Cabinet officers should be given the right to appear on the floor and explain and defend their proposals; but the argument did not prevail.

Indeed there is a firm opposition to the very idea. Perhaps the case against even an approach to parliamentary government has been best stated by Dr. A. Lawrence Lowell as follows:[1] If the Cabinet officers sat in Congress, the power of the President would be reduced and the chief control of the administration would pass to the legislature. If the President were of an opposite party to that in power in Congress, his administrative authority would be reduced to almost nothing, for, in those countries where parliamentary government has been introduced, the titular executive officer, whether he be the King of England or the President of France, loses his political power. Furthermore, deadlocks between the Senate and the House over any ministerial policy would inevitably lead to the supremacy of one branch of the legislature and the decline of the other. If our development should follow the line indicated in other countries having parliamentary government, the House of Representatives

[1] *Essays on Government*, pp. 25–45.

would become supreme, the Senate would sink into a mere opposition of the House like the House of Lords in England, and the President would become a nominal head. Furthermore, such a fusion of executive and legislative departments would strengthen the Federal Government at the expense of the states, and would destroy the power of the courts to declare statutes invalid. In other words, it is contended, anything like parliamentary government would make a revolution in the whole framework of our federal system, and dislocate the distribution of powers among the three departments.

This argument, of course, does not apply to a mere proposal to allow Cabinet officers to discuss and defend administrative policies in either house of Congress. Doubtless such a moderate change, however, would be regarded as a step in the direction of a political revolution. We shall, therefore, probably continue for a long time to maintain by subterranean and extra-legal methods the connections between the executive and legislature which are maintained openly and in the full light of public scrutiny in countries which have parliamentary government.

Still there is reason to believe that the forces which at last drove Congress into adopting a national budget system requiring the President to lay before it a consolidated financial plan [1] will be accelerated as government grows more complex until some similar method of consolidating the legislative program of each Congress is effected. If it is important that appropriation bills should not be passed one after another without reference to unity or totals, it is even more important that laws vitally touching the life and property of the citizen should not be passed by Congress in a piecemeal fashion. Dr. Frederick A. Cleveland, who has been the leader in budget reform for nearly two decades, always couples the idea of executive responsibility with legislative as well as fiscal programs.[2]

[1] See below, p. 374.

[2] For observations on the vice presidency, see *Proceedings of the American Political Science Association*, Vol. IX, pp. 162–77, and the *Century Magazine*, Vol. LXXIX, pp. 208–14.

CHAPTER X

THE ORGANIZATION OF CONGRESS

The Congress of the United States is composed of two houses: a Senate representing the commonwealths in their corporate capacities, and a House of Representatives apportioned among the states according to their respective populations. Two leading motives were responsible for the adoption of the bicameral system. In the first place, it was necessary to secure the support of the smaller states for the new Constitution by granting them equality of power in one branch of the Federal Government. In the second place, the Fathers believed that some check was necessary upon the impulses and passions of the more popular body. Then, of course, they had before them the example of the English Parliament and their own colonial assemblies.

The House of Representatives

The number of members in the House of Representatives is fixed by Congress, subject to the limitation that it shall never exceed one for every 30,000 of the population. The first House consisted of sixty-five members; the number has been increased until it is now 435. At each recurrence of the decennial apportionment there is a strong pressure on Congress to add more members to the already unwieldy assembly. Those states whose populations have increased only slightly, or not at all, are unwilling to have their representation reduced in order that the rapidly growing states may receive the proportion due them under the numerical rule; hence new members are usually added. It must be noted also that with the growth of population the number of inhabitants in each congressional district has increased enormously, from about 33,000 in 1793 to more than 225,000 at the last apportionment. This makes a constituency of great size when compared with the parliamentary district in England or in France.

A member of the House of Representatives must be a citizen of the United States of at least seven years' standing; he must be not less than twenty-five years old and an inhabitant of the state in which he is chosen. He cannot be at the same time a military or civil officer of the United States; nearly all the states, by law or constitutional provision, have likewise forbidden their officers to hold positions of trust under the Federal Government. Some states have gone further and provided that each member must be a resident of the district which he represents. This restriction is regarded by most lawyers as unconstitutional, because it adds a qualification to those imposed by the federal Constitution; but it is difficult to see how it could be set aside by legal process.

However, it is practically an unwritten law that the member must be a resident of his district, although there are a few exceptions, as for example in New York, where down-town constituencies are sometimes represented by men residing in up-town quarters. Bryce has thus summarized the reasons for the adoption of this general custom: State pride, of course, will prevent a district from going outside the commonwealth for its Representative; the member of the House is relatively well paid, and the local party machine does not want to waste the post on strangers, preferring to reserve it to strengthen the local organization; owing to the vast amount of party work required by our complicated system, it is necessary to have as many offices as possible to give to the workers; the Representative in Congress is expected to know local needs and to secure harbor and river appropriations, post-office buildings, special protection for industries, and other favors for his constituents; Americans regard the Representative as a spokesman of local interests rather than as a statesman, "formulating reason and justice into law." It is, therefore, highly improbable that any change will be made in this custom, at least in the near future, notwithstanding the fact that it often excludes able men from Congress because talent is not distributed by nature according to congressional districts.

While it seems clear that states cannot add qualifications to those imposed by the federal Constitution on members of Congress, it is conceded in practice that the House of Representatives, in the exercise of its constitutional power as judge of the elections, returns, and qualifications of its members, may exclude persons on other grounds than those laid down in the Constitution.

For example, in 1900, the House excluded Brigham H. Roberts of Utah on the ground that he was a polygamist. The committee reporting in favor of this action contended: "Must it be said that the constitutional provision, phrased as it is, really means that every person who is twenty-five years of age and who has been for seven years a citizen of the United States and was when elected an inhabitant of that state in which he was chosen, is eligible to be a member of the House of Representatives and must be admitted thereto even though he be insane or disloyal or a leper or a criminal? Is it conceivable that the Constitution meant that crime could not disqualify? The whole spirit of the government revolts against such a conclusion."

The minority of the committee reported, however, against this view, declaring: "The adding by this House alone of a disqualification not established by law would not only be a violation of both the Constitution and the law, but it would be a most dangerous precedent which could hardly fail to 'return to plague the inventor.' . . . What warrant have you, when the barriers of the Constitution are once broken down, that there may not come after us a House, with other standards of morality and propriety, which will create other qualifications with no rightful foundations? . . . It will no longer be a government of laws but of men. To depart thus from the Constitution and substitute force for law is to embark upon a trackless sea without chart or compass." This view was also held by those who claimed that the proper way of getting rid of Mr. Roberts was to admit him to membership and then expel him under the right to eject by two thirds vote; but the party of exclusion triumphed.

The same ruling was applied long afterward to Victor J. Berger, who was elected to the House in a Wisconsin district in 1918. Shortly after his election, Mr. Berger was tried under the Sedition Act and found guilty of obstructing and embarrassing the government in the prosecution of the war against the Central Powers. He appealed his case and appeared in Washington to take his seat but he was quickly excluded by the House, only one member dissenting from the decision taken. A new election was then held and Mr. Berger was once more chosen, this time by a tremendous majority. Once more the House, with but little deliberation, closed its portals to him. The chairman of the committee that reported against him did not rest the case on the

ground that Mr. Berger had been convicted of a crime. On the contrary, he said: "The one and only issue in this case is that of Americanism." The former Republican floor leader, James R. Mann, one of the six men who voted this time in favor of giving Berger his seat, replied: "Has it come to the point that a man who believes certain things cannot be heard? His people, his constituents, desire him to represent them. It is not our duty to select a representative from this congressional district. That is the duty of the people back at home. . . . To me the question is whether we shall maintain inviolate the representative form of government where people who desire changes in the fundamental or other laws of the land shall have the right to be represented on the floor of this House when they control a majority of the votes in a congressional district." As things now stand it would seem that the House can exclude a man for conduct and opinions which it deems immoral and un-American.[1]

The Constitution provides that no person holding any office under the United States shall be a member of either house during his continuance in office; acting on this principle the House of Representatives has several times excluded army officers. Does the same rule apply to members of the House and Senate appointed by the President to serve as commissioners to negotiate treaties and make investigations? The Senate committee on the judiciary, in passing on this question several years ago, established a precedent by declaring that "a member of a commission created by law to investigate and report but having no legislative, judicial, or executive powers, is not an officer within the meaning of the constitutional inhibition."[2]

Members of the House of Representatives are apportioned among the several states[3] according to their respective numbers, counting the whole number of persons in each state, exclusive of Indians not taxed — subject, however, to the limitation that each state must have at least one Representative. Until 1842, Con-

[1] The principle here involved was the subject of one of the most notable constitutional battles in the history of English liberty. Between 1768 and 1773, John Wilkes was elected to the House of Commons and excluded four times on charges respecting his political opinions and moral conduct. He was elected a fifth time and allowed to take his seat. The previous resolution of the Commons declaring him ineligible was struck from the records "as being subversive of the rights of the whole body of electors of this kingdom." May, *Constitutional History of England*, Vol. I, pp. 310 ff.; Chaffee, *Freedom of Speech*. The Supreme Court of the United States finally cleared Berger of the charges.

[2] Hinds, *Precedents*, Vol. I, p. 604.

[3] Alaska, Hawaii, and Porto Rico have one delegate each in the House of Representatives, and the Philippine Islands have two delegates. These delegates have seats in the House, and may speak there, but they have no vote.

gress left the states to their own devices in election methods, but in that year the Apportionment Act provided "that in every case where a state is entitled to more than one Representative, the number to which such state shall be entitled under this apportionment shall be elected by districts composed of contiguous territory, equal in number to the number of Representatives to which said state may be entitled, no one district electing more than one Representative." It is now the rule of Congress to require that congressional districts shall be composed of "contiguous and compact territory containing as nearly as practicable an equal number of inhabitants," each district electing only one Representative; if, however, the state legislature fails to carry out this provision, certain or all of the members may be elected at large on a general ticket.[1]

Notwithstanding the intention of Congress to provide for substantially equal congressional districts, our state legislatures have succeeded in creating, principally for partisan purposes, gross inequalities. By this abuse of power, known as "gerrymandering,"[2] the political party dominant at the time makes its vote go as far as possible in congressional elections and causes that of its opponent to count for as little as possible. To accomplish this design it masses the voters of the opposing party in a small number of districts, giving it an overwhelming majority in each, and so distributes its own voters that they can carry a large number of districts by slight majorities. Gerrymandering is responsible for some very curious political geography. In one of the Southern states there was once a famous "shoe string" district which ran through a large part of the state and counteracted the effect of the negro vote. At another time there was an equally famous "saddle bag" district in Illinois, in which a large number of Democratic counties were linked together in a strange assembly, assuring the Republicans safe majorities in the neighboring regions.

Gerrymandering is partly responsible for the great variation in the number of voters for whom the several Representatives

[1] See *Readings*, p. 218. Congress has, in a few instances, specially authorized election on a general ticket.

[2] The term "gerrymander" originated in Massachusetts. It appears that Elbridge Gerry, a distinguished Democratic politician of his day, was instrumental in redistricting his state in such a way that one of the districts had the shape of a lizard. When an artist saw the map of the new district, he declared, "Why, this district looks like a salamander," and gave it a few finishing touches with his pencil. The editor, in whose office the map was hanging, replied, "Say rather a gerrymander," and thus an ancient party practice was given a new name. See *Readings*, p. 219.

speak, but it does not account for the most striking discrepancies. Limitations on the suffrage, especially in the South, and the exclusion of alien residents from the suffrage everywhere, make the differences in the number of voters — eligible and active — even more glaring than differences in population. For example, in 1924, the representative of the second congressional district in Georgia spoke for 2217 voters while the representative of the seventh district of Illinois spoke for 79,782 voters. It must be remembered, however, that the number of voters will vary according to the character of the contests; if one party normally has an overwhelming majority in a district, there will be no spirited battle and the number of votes cast will be relatively small. On the other hand in the close districts party leaders may drag even the most negligent voter from his home to the polls.

As a result of gerrymandering and other forces, the House of Representatives is seldom an exact mirror of the political opinion of the country. Sometimes one party secures a majority of the popular vote, counting the total congressional vote, and the other party obtains a majority in the House. Taking the vote state by state, the Democrats in 1918 were victorious, but the Republicans won the House; if each party had secured a number of representatives proportioned to its share of the vote state by state, the Democrats would have had 231 members and the Republicans 193, whereas the tables were almost reversed. There is always a large minority in each state which is not represented at all; in 1920, for example, the Republicans cast 1,114,000 votes in the congressional elections of Pennsylvania and won thirty-five representatives while the Democrats and the minor party voters numbering about 600,000 in all succeeded in electing only one Representative.[1] Nothing but a system of proportional representation can cure the evils of the gerrymander and the district system, but that reform is not at present within the realm of "practical politics."

The term of the member of the House is two years — a short period which has received so much criticism recently that it is difficult for us to understand the necessity that led the authors of *The Federalist* to apologize for the action of the Philadelphia convention in not providing for annual elections. The disadvantages of the short term are increased by the practice of not

[1] Schuyler C. Wallace, "Does Your Vote Count?" *The Woman Citizen*, January 26, 1924, p. 13.

convening a new Congress until more than a year after the election of the Representatives; that is, the election is held in November of each even year and, unless the President calls a special session, Congress does not meet until December of the following year. Ordinarily, therefore, when members take their seats, nearly half their term of office has expired; and within a year, if they expect to continue in Congress, they must enter into a campaign for renomination and election. This often has a double effect. It diverts the attention and energy of the member from his official duties, and, if he is defeated for reëlection, it leaves him disgruntled and more subject to pernicious forces. It is a well-known fact also that no member of Congress can exert a considerable influence during one term of service, since it requires a great deal of practical experience to discover the mysteries of congressional procedure and get a hearing from the leaders in the House. On the other hand there is no provision for a dissolution of the House or recall of members, and long terms might frequently result in a Congress that misrepresented the country.

The time, place, and manner of holding elections for Representatives may be prescribed by the state legislature subject to the provision that Congress may at any time by law make or alter such regulations. For almost a hundred years congressional elections were held at different times and according to the different methods prevailing in the various states — the old system of viva voce voting being retained for a long time in some commonwealths. At length, Congress, by laws passed in 1871 and 1872, provided that congressional elections should be by ballot and that they should occur throughout the Union at the same time, that is, on the Tuesday following the first Monday in November. An exception to the uniformity rule allows Maine to hold its election somewhat earlier, according to the former custom.[1]

Party machinery has been developed in every state for nominating candidates to the House of Representatives. Where the older methods have not been overthrown by primary legislation, candidates are nominated by party conventions of delegates representing units of local government within the congressional

[1] On the qualifications for voters for Representatives, see above, p. 123, and below, p. 499, and *Readings*, p. 399. They are merely the qualifications requisite for electors of the most numerous branch of the state legislature.

districts, such as counties in the regions more thinly populated, and assembly districts, or wards in the more thickly settled areas.

In a great majority of the states,[1] however, the convention has been abolished altogether, and an official direct primary election is provided for each party. Any member of any party who wishes to be a candidate for Congress must have his name put on the party primary ballot by petition, and at the primary election the party voters are given the opportunity to select from among the several candidates on this ballot.[2] Candidates for Representative-at-large are nominated by state conventions or by state primaries.

The House of Representatives and the Senate are the judges of the election, returns, and qualifications of their own members, and therefore contested elections are not determined by a judicial tribunal as in England. The House has three committees on elections, whose duty it is to investigate election contests. The law requires any person intending to contest an election to serve notice on the member whose seat he claims, and to specify the grounds upon which he expects to rely. The member whose seat is contested must answer. Copies of the papers are transmitted to the House, and the clerk makes up the records of the case, which he reports to the House. These are referred by the Speaker to one of the three committees on elections; testimony is taken; the contestants are given an opportunity to be heard, and to be represented by counsel; on the basis of the evidence and pleadings, the committee presents to the House a report, which is usually accepted. Inasmuch as each committee on elections is composed of a majority of members from the dominant party, a contested election, where the case is not too glaring, is quite likely to be decided in the interests of that party.

The Senate

The Constitution prescribes that there shall be two Senators from each state, and that no state, without its consent, shall be deprived of equal representation in the Senate even by a constitutional amendment. This rule of absolute equality grew out of the fear of Maryland, Connecticut, and Delaware that the

[1] See below, chap. xxv.

[2] When a vacancy occurs in the House of Representatives by the death or resignation of a member, or in some other way, a special election is held.

great commonwealths of New York, Pennsylvania, and Virginia would override them in federal matters; and out of apprehension entertained by the agricultural and slave-owning states that the numerical strength of the manufacturing and commercial states would lead to discriminative legislation. The result of this equality of representation in the Senate is a most glaring violation of the democratic principle of distributing representation with some regard to population.

On examining the statistics in the case we find conditions which remind us of the "rotten borough" system of England in the days before parliamentary reform. The state of Nevada with about 80,000 inhabitants has the same weight in the Senate as New York with more than ten million people. Indeed it takes eighteen of the less populous states — Nevada, Wyoming, Delaware, Arizona, Vermont, New Mexico, Idaho, New Hampshire, Utah, Montana, Rhode Island, South Dakota, North Dakota, Maine, Oregon, Colorado, Florida, and Nebraska, with thirty-six Senators to their credit, to equal in population the Empire State with its two Senators. Ten states in the Union have within their borders more than half the people but command less than one fourth the total number of Senators. In practice, however, we do not find the small states aligned against the large states; social and economic factors work against any such mathematical or geographical distribution of political forces.

The qualifications of the Senator are fixed by the Constitution. He must be not less than thirty years old, an inhabitant of the state for which he is elected, and a United States citizen of nine years' standing. The same question has arisen here as in the case of the House of Representatives,[1] namely, whether the Senate, under its power to judge of the qualifications of its members, can add any to those fixed in the Constitution. The correct answer to this question seems to have been made by Senator Hopkins, in a speech of January 11, 1907, on the proposition to exclude Reed Smoot of Utah, on the ground that he was a polygamist. Mr. Hopkins said that neither the Senate, Congress, nor a state can add to the qualifications prescribed by the Constitution; that the power given to the Senate is not to create Senators, but to judge whether they have the qualifications prescribed by the Constitution; that the Senate has no constitutional authority

[1] Above, p. 224.

to inquire into the antecedents and early career and character of a Senator who applies for admission with the proper credentials of his state; that no Senator has ever been denied a seat in the Senate of the United States because of any lapse of career prior to his election by the state; and that the Senate should content itself with the exercise of its power to expel a member for disorderly behavior whenever his conduct is such as to lower the standard of that body or bring it into disrepute. Mr. Smoot was accordingly given his seat and became one of the leading conservative Senators.

Until the adoption of the Seventeenth Amendment in 1913, the Constitution provided that Senators should be elected by the legislatures of the respective states, but even before that time the application of the direct primary and other devices to senatorial elections in a majority of the states had practically established popular election by a circuitous method. The Amendment in question, adopted after a long and bitter struggle, provides that the two Senators from each state shall be "elected by the people thereof for six years. . . . The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. When vacancies happen in the representation of any state in the Senate, the executive authority of the state shall issue writs of election to fill such vacancies: Provided that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Under this amendment, it became necessary for the states to make provision for the nomination of Senators, and the direct primary or the convention system was adopted according to the policy of the state, the former being chosen in nearly all cases.

The term of Senators is fixed at six years and in practice they are more frequently reëlected than members of the lower house. There are many cases of Senators serving for thirty years. The terms of all the Senators do not expire at any one time, for the Senate is a continuous body, one third of the members going out automatically every two years. At its first session in 1789, the Senate divided its membership by lot into three classes, the seats of the first class being vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the

sixth year, thus making way for a renewal of only one third of the Senate biennially. As new states were admitted their Senators were likewise distributed by lot among the three classes, provision being made for giving the two Senators of each state different terms.

Privileges of Members and Questions of Internal Organization

Members of the Congress of the United States are entitled to certain privileges by virtue of their position. First among these may be reckoned compensation. The Constitution provides that Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the treasury of the United States. Until 1855, it was the custom to pay members a certain per diem allowance;[1] in that year a salary of $3000 per annum was voted; this amount was raised to $5000 in 1865; and increased in 1873 to $7500 — an increase which met such a public protest that it was repealed at the next session. In 1907, however, the salary of Senators and Representatives was again fixed at $7500 per annum, to which is added an allowance for clerk hire, stationery, and traveling expenses.

The second privilege enjoyed by members of Congress is freedom from arrest during their attendance on the sessions of their respective houses, and in going to and returning from the same, in all cases except treason, felony, and breach of the peace. This privilege, as Story points out, exempts Representatives and Senators from many processes, the disobedience of which is punishable by imprisonment. That is, a Congressman, during the period mentioned above, cannot be compelled to testify in a court, serve on a jury, or respond to an action brought against him. The term "breach of the peace," however, extends to "all indictable offences, as well those which are in fact attended with force and violence as those which are only destructive to the peace of the government"; therefore, the member of Congress really enjoys no exemption from the ordinary processes of the criminal law. In going to and coming from Congress the member is allowed reasonable delays and reasonable deviations from the nearest course.

[1] A salary was voted in 1816, but the law was speedily repealed.

The third privilege enjoyed by members of Congress is freedom of speech during debate. The Constitution expressly provides that for any speech or debate no member of either house shall be questioned in any other place. This famous right, supposed by some persons to have been designed to guarantee full and free discussion of public matters in debate, is really derived from the practices of the English Parliament, where it was formerly employed to protect the members against arbitrary arrest for criticism of the king. According to Professor Ford, it was placed in the American Constitution to protect members against responsibility to their constituents.[1] The effect of this privilege is to free the members from the liability to prosecution for libel or slander for anything said in Congress, in committees, in official publications, or in the legitimate discharge of their legislative duties. Members of Congress also constantly act upon the supposition that the privilege includes the right to circulate their speeches, not only among their own constituents, but anywhere throughout the United States.

The internal organization of each house of Congress is limited by certain provisions of the Constitution.[2] The Vice President of the United States is made the presiding officer of the Senate with a vote only in case of a tie; neither house can expel a member for a breach of its rules except on a two thirds vote, a quorum being present; each house must keep a journal of its proceedings and publish the same from time to time, except such parts as it may deem necessary to keep secret; if one fifth of the members present in either house demand a record of the yeas and nays upon the journal with regard to any question, that record must be taken by roll-call. Subject to these limitations, each house has the right to elect its own officers, compel the attendance of members, and prescribe rules of procedure and discipline.

The right of Congress, in the course of its proceedings, to interfere with private citizens — a right which has, in times past, caused many serious constitutional conflicts in England — is clearly limited by our Constitution: neither house has any general power to punish outsiders for contempt, for such a power is judicial in its nature.[3] If, however, the examination of private citizens is necessary to the performance of regular legislative

[1] *Rise and Growth of American Politics*, p. 63.
[2] Burgess, *Political Science and Constitutional Law*, Vol. II, p. 56.
[3] *Readings*, p. 138.

duties, it would appear that Congress may require the attendance of witnesses and compel them to give testimony.[1] Each house may also punish its own members for disorderly behavior, and, with the concurrence of two thirds, expel a member; but it has been held by the Court that the power of Congress to punish its members is confined to the session in which the condemnation occurs and cannot extend beyond imprisonment during the remainder of that session.

The quorum necessary to do business in each house[2] is fixed by the Constitution at a majority of all the members, but a smaller number may adjourn from day to day, and may compel the attendance of absent members. This question of the quorum is no formal matter. It is necessary to fix the number at a majority of members in order to prevent "snap" legislation by minorities, but the rule is often attended with serious inconveniences.

For a long time it was a common practice for the minority party in the House of Representatives, whenever it desired to delay business, to refuse to answer the roll-call, and thus compel an adjournment, on the ground that there was no quorum present, until a quorum could be mustered. To stop "filibustering," as these dilatory tactics were called, Speaker Reed, in January, 1890, held that members actually present in the House and declining to answer should be counted as legally present in determining the question of a quorum. Shortly afterward the House embodied this principle in a rule authorizing the clerk, on demand of a member or at the suggestion of the Speaker, to count as present those physically present but refusing to answer the roll-call.

The present method of marshaling a quorum and dealing with delinquent members is illustrated by this brief extract from the *Congressional Record:*

MR. WILLIAMS: Mr. Speaker, I make the point of order that there is no quorum present. . . .

THE SPEAKER: The Sergeant-at-Arms will close the doors and bring in the absentees, the clerk will call the roll, and those in favor of the passage

[1] Reinsch, *American Legislatures*, p. 176. The point came up for a test in 1924.

[2] When the House is once organized, the quorum consists of a majority of those members, chosen, sworn, and living, whose membership has not been vacated by resignation or by the action of the House. Hinds, *Precedents*, Vol. IV, p. 62. When a point of order is made with regard to the quorum it must be that no quorum is present, not that no quorum has voted. *Ibid.*, p. 79.

of the bill will, as their names are called, answer "aye," and those opposed will answer "no," and those present and not voting will answer "present." . . .

ASSISTANT SERGEANT-AT-ARMS PIERCE: Mr. Speaker, in accordance with the rules of the House and the warrant of the Speaker, I present at the bar of the House, under arrest, Mr. Buckman and Mr. Rucker.

THE SPEAKER (pro tempore): The gentlemen will be noted as present and discharged from arrest.

. . . Does the gentleman from Minnesota desire to vote?

MR. BUCKMAN: I vote "aye."[1]

The Sessions of Congress

The Constitution requires an annual session of Congress and provides that Congress shall meet on the first Monday in December unless, by law, it appoints some other day. Each Congress, therefore, normally has two sessions. The first, known as the long session, begins in December of each odd year, 1925, 1927, 1929, etc., and extends theoretically until the following December, though as a matter of practice Congress usually adjourns sometime in the spring or summer. In a few instances it has continued at work until the opening of the next session. The second session of each Congress, known as the short session, begins in December of each even year, 1926, 1928, 1930, etc., and extends until the fourth of the following March. Every Congress expires at noon on March 4th of each odd year; thus the President has a new Congress at the opening of his administration.

As noted above, a member of the House of Representatives, according to the arrangement of the sessions, does not take his seat until more than a year after his election, unless the President calls a special session; that is, he is elected in November of the even year and does not ordinarily begin his legislative work until one year from the December immediately following. Thus it happens that an expiring House lasts for about four months after the choice of the members of a new House, and an important measure may be passed by a party which the country has voted down at the preceding election. Congress may, accordingly, enact laws opposed to the latest expression of popular will. "Under the present law," said Mr. Shafroth, formerly a member of the House, "a Representative in Congress who has been turned down by the people legislates for that people in the second regular session. A man who has been defeated for reëlection is not in a

[1] *Congressional Record*, Vol. XL, part 8, p. 7585 (59th Cong., 1st Sess.).

fit frame of mind to legislate for the people. There is a sting in defeat that tends to engender the feeling of resentment, which often finds expression in the vote of such members against wholesome legislation. That same feeling often produces such a want of interest in proceedings as to cause the members to be absent nearly all the second session. . . . It is then that some are open to propositions which they would never think of entertaining if they were to go before the people for reëlection. It is then that the attorneyship of some corporation is often tendered, and a vote is afterward found in the *Record* in favor of legislation of a general or special character favoring corporations."

Special sessions of Congress may be called by the President under his power to convene either house or both of them on extraordinary occasions. Unlike the governors of many states, however, he cannot limit the special session to the consideration of any particular matters. Special sessions have been held many times, the most noteworthy occasion being the call of July 4, 1861, to prepare for the Civil War. The special session summoned by President Wilson in the spring of 1919 lasted until the opening of the regular session in December. The Senate is often called at the beginning of a new administration to confirm appointments.

There is no provision in the Constitution stipulating that members of Congress can be instructed by their constituents, and it is held by many American publicists that a representative, though chosen by a district, is in reality a member of a national legislature bound to act on broadly national grounds. In practice, however, this theory is not always observed, for Senators and Representatives are often instructed by the legislatures of their states in solemn resolutions.[1] There is, of course, no penalty for violating these instructions, because the state legislature cannot compel the resignation of a member of Congress. Nevertheless every congressman is extremely sensitive to the wishes of the leaders of his party in his community.

The Two Houses Compared

The difference in the organization of the two houses makes it necessary to say a few words by way of comparison.[2] The Senate is, of course, the smaller body, being composed of ninety-six

[1] *Readings*, p. 233.
[2] For the original purpose of the Senate, see *Readings*, p. 222.

members, as against 435 members in the House of Representatives. The Senate, generally speaking, is also composed of men older in years and wider in political experience. The Senators frequently have served in some branch of state government or in the House of Representatives. As the term of service is longer and the chances for reëlection greater, the Senate usually contains a relatively larger number of political experts, acquainted not only with the problems of law-making but also with the inner workings of the Federal Government.

The influence of the Senators is also augmented by their position as party leaders within their respective states. They have, as we have seen, a large power in appointing to federal office; and sometimes they are able to construct political machines of extraordinary strength. They usually have great weight in selecting delegates to national party conventions, and in fact they are mainly responsible for the predominance of the federal office-holding element in those assemblies. This command over party resources within their states enables the Senators to bring more or less pressure on the members of their party in the House of Representatives. When the state organization, in close touch with its Senator or Senators, adopts a policy, it is usually wise for the member of the House of Representatives, if he expects further party favors, to fall in line with the policy.

There can be no doubt that the Senate is assuming an ever larger share in shaping federal legislation. The almost unlimited debate in the Senate enables each member to hold up legislation, and especially appropriation bills, in favor of any particular interest which he may represent. Though the Constitution provides that revenue bills shall originate in the House of Representatives, the Senate, in fact, has an equal power.[1] As a matter of practice, the Senate usually increases the House appropriations, thus violating in another respect the ancient principle that burdens should be laid by those who are nearest to the taxpayers. The technical skill of the Senators, their long experience, and their superior legal talents enable them to overshadow the House in law-making and in national politics.

There was a time, shortly after the opening of the twentieth century, when political leadership, especially in the Republican party, was mainly in the hands of Senators who were masters of

[1] Below, p. 368.

the party machinery in their respective states. Among these powerful captains of politics were Hanna, of Ohio; Platt, of New York; Quay, of Pennsylvania; Aldrich, of Rhode Island; and Lodge, of Massachusetts. They made and unmade governors and minor officers at home, controlled legislation at Washington, and were powerful figures at the national conventions of their party. They were to be found among the influential members of the platform committee and the national committee. It seemed for a time as if senatorial leadership was an established institution, but appearances were deceptive. The old directors of policy, as they withdrew or died, left no successors able to wield such high authority. It is not possible now to find three Senators comparable in political power to Hanna, Platt, and Quay. By the irony of fortune, La Follette of Wisconsin, who in the old days so bitterly assailed the dominion of these men, comes nearer now than any other Senator to asserting their high prerogatives in the councils of his state.

What has been and will be the effect of the popular election of Senators upon the composition and authority of that body? Senator Lodge who, during long service under the old system and the new, has had an opportunity to observe the operations of both warns us that popular election is too recent an innovation to permit a solemn judgment.[1] That is true, but still some facts pertinent to the matter may be brought under review. It is certain that candidates for the Senate under the new system must perforce make a state-wide campaign, and the type of man who is most efficient in formulating programs which arouse public interest and in making speeches which evoke popular enthusiasm will have the advantage over the more reserved and less resourceful leader. The quiet and thoughtful man of larger intellectual powers is likely to be overborne by a whirlwind campaigner or an astute manipulator of federal patronage. On the other hand the man with mere money or mere talent for slipping softly around and winning state legislators by one method or another probably has less chance under the system of popular election. He may by the use of money buy huge publicity for himself and perhaps win an election, but he cannot escape altogether the necessity of making some statement as to his political ideas and opinions. There is also another point worthy of note, to which

[1] Lodge, *The Senate of the United States*, p. 13.

Senator Lodge has adverted, namely, that under the system of popular election the Senator who desires reëlection must take more time away from legislative business for the purpose of "nursing" his state — keeping his supporters in line and preventing someone from stealing a march on him while he is far off at the national capital. That has its good side as well as its bad side. It compels the Senator to keep more closely in touch with his state and to inform the people in it about his policies and measures at Washington.

On other phases of the subject we can speak with less assurance. There was a time when the Senate was, with a good deal of warrant, dubbed by journalists "a millionaires' club." That is no longer the case, but can we ascribe the change solely or even principally to popular election? The Senate was once regarded as the stronghold of great capitalistic interests representing railways, express companies, and protected manufacturers and blocking the more democratic and progressive House of Representatives.[1] The great Senators who spoke for those interests have nearly all passed from the scene, and their bitterest foeman, Robert M. La Follette, rivals in authority the most powerful bosses of the old order. Is the direct election responsible for this, or have other forces brought the change?

The Senate was once looked upon as the bulwark of conservatism, but a comparison of the votes of the House and Senate on those measures which may be called radical or progressive makes the former, as often as the latter, the seat of conservatism. It was only in the Senate that an effective protest was made in the name of American traditions of liberty against the harsh and unnecessary Sedition Bill of 1918, which flagrantly violated the spirit if not the letter of that liberty. There is more independence in the Senate. More Senators are willing to snap the chains of party bondage and speak their minds and hearts freely upon party measures.

It was prophesied that the system of popular election would make reëlection more difficult and that the practice of retaining Senators for long terms and drawing benefits from their experience would be abandoned; but events have hardly borne out the prophecy. Changes come with variations in public sentiment, in the personal fortunes of individuals, and in the policies of parties;

[1] Reinsch, *American Legislatures*, p. 124.

it takes a keen eye to discern the causes of reëlections to the Senate. Finally it was prophesied by Senator Hoar, who stood like Horatius at the bridge fighting for the old system, that popular election would in the end overthrow "the whole scheme of the national Constitution as designed by the framers." For the present at least that Constitution still stands.

It was once said that popular election, calling for expensive campaigns, would make money a prominent factor in senatorial contests, but for every case of this kind during the past decade a match can be found during the decade just previous to the adoption of the Seventeenth Amendment. Indeed the most flagrant instances of barter and sale in connection with elections were in the old days when state legislatures were sometimes bought outright by senatorial aspirants. If anyone is shocked by the size of the expenditures made by and for Truman Newberry of Michigan in his famous contest with Henry Ford in 1918, let him remember the equally shocking cases of Clark in Montana, Lorimer in Illinois, and Stephenson in Wisconsin, all of which arose in the days when state legislatures elected Senators. The evidence against Lorimer was so conclusive that the Senate had to expel him. Newberry was permitted to retain his seat, but later felt moved by criticism to resign.

Indeed, the use of money in politics is inseparable from elections of any kind, legislative or popular. The amount used, unless there are legal restraints, will depend upon circumstances — the wealth of the aspirant, his eagerness for office, and the nature of the political leaders in his state. But legal restraints more or less effective may be imposed on the use of money. Congress by an act passed in 1907 forbade corporations to contribute to campaign funds to be used in connection with the election of President, Vice President, or Congressmen. By two Corrupt Practices Acts, one of June 25, 1910, and another of August 19, 1911, Congress provided that no candidate for the House of Representatives could spend or cause to be spent in securing his nomination or election more than $5000 in addition to his personal expenses, and fixed the amount at $10,000 in the case of Senators. At the same time it forbade candidates to promise offices, appointments, and political favors in return for support and required them to make public through official and

sworn returns the amount and nature of their expenditures. A fourth law, of October 16, 1918, imposes penalties on any person who promises to give anything of value to anyone to secure his vote at a congressional election and on any person who accepts such gifts in return for his support. Federal laws are supplemented by state legislation limiting the use of money in elections.[1]

There is a fatal defect in the federal legislation on the use of money in campaigns; that is the latitude which it gives to friends of a candidate in spending money on his behalf, with or without his knowledge. It is doubtful whether this can be cured by law. Certainly it is difficult to prove either the existence or absence of collusion between a candidate and his supporters. Moreover it is not clear just how far Congress can go in regulating expenses in nominating campaigns because in dealing with a legal aspect of the famous Newberry case [2] the Supreme Court of the United States held that Article I, section 4, of the Constitution merely authorized Congress to regulate "the manner of holding elections," and not the methods of making nominations. One of the judges, however, opened the way for a possible revision of the Corrupt Practices Acts in this respect. He pointed out that the Acts in question had been passed before the adoption of the Seventeenth Amendment establishing popular election of Senators, and indicated that the Amendment, therefore, could not be used to sustain the constitutionality of the Acts. The Court was divided five to four, and perhaps a new law extending the provisions to cover nominations as well as elections might now be sustained.

[1] See below, chap. xxv.
[2] Newberry *v.* the United States, 256 U. S. 232 (1921).

CHAPTER XI

THE GENERAL POWERS OF CONGRESS

The Congress of the United States is limited to the exercise of the powers enumerated in the Constitution and the use of the means necessary and proper to carry them into execution. In this regard, it stands in sharp contrast to the English Parliament — King, Lords, and Commons. The power and jurisdiction of that great assembly, as Blackstone firmly puts it, "is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. . . . It hath sovereign and uncontrolled authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding laws concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal. . . . It can regulate or new model the succession to the crown, as was done in the reign of Henry VIII and William III. It can alter the established religion of the land, as was done in a variety of instances in the reigns of Henry VIII and his three children. It can change and create afresh even the constitution of the kingdom and of Parliaments themselves, as was done by the act of Union and the several statutes for triennial and septennial elections. It can in short do everything that is not naturally impossible, and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what Parliament doth, no authority upon earth can undo."

Compared with this omnipotence, the powers conferred upon Congress by the Constitution seem few indeed. As a matter of fact, most of the great questions which agitated Great Britain during the past hundred years — the regulation of factories and labor, the provision of popular education, the establishment of old-age pensions — do not come within the range of the Federal Government at all, or at least only by some indirect process. They are left to state legislatures and constitutional conventions. Nevertheless, Congress has many significant powers, and the

swiftly multiplying interstate relations, over which it has a wide authority, are rapidly extending its control to social and economic matters of the most fundamental character.[1]

The restriction of legislative power by written law has a profound influence on the debates and deliberations in Congress, because every important controverted measure before that body is sure to be declared unconstitutional by someone. A measure may be wise, expedient, and even necessary, but if it is clearly outside the powers of the legislature, it is useless to discuss it. If there is any doubt at all as to the constitutionality of a measure, it will certainly be the subject of searching inquiry and exposition on the part of the skilled lawyers in Congress. Some of the greatest legislative discussions in our national history, including the celebrated Webster-Hayne debate on Foote's Resolution, have been over questions of constitutionality. It often happens that the original proposal itself is lost to sight in the tortuous windings of historico-legal speculations, as was indeed the case in the controversy just mentioned. The tendency to long constitutional disquisition is especially marked in the Senate, where debate is less restricted and where there are more lawyers of distinction than in the House.

These discussions are often of a high order and of undoubted value in expounding the terms of the Constitution, but they are also quite as often mere displays of black-letter lore or personal vanity. More than once the country has been impatient at these diffuse lucubrations, rightly suspecting that many opposing members had first come to their conclusions on the merits of the bills under consideration, and then sought constitutional objections to them. More than once, also, these debates have only added confusion to what seemed perfectly clear and simple. "If we must wait until the great constitutional lawyers agree upon any subject," exclaimed Bourke Cockran in the House, "it is plain that we would never take a step in any direction. We would stand paralyzed at the threshold of every legislative enterprise, amazed and bewildered — puzzled to distinguish amid the din of their vociferation how much of it is advice to us and how much of it is denunciation of each other. I defy any man to define Congress itself according to the constitutional lawyers, after he has read three of their speeches." [2]

[1] See below, chap. xviii.

[2] Reinsch, *Readings*, p. 256.

Theories of Constitutional Interpretation

Broadly speaking, there are three views of the Constitution which have been taken by members of Congress in deciding controverted constitutional questions. The first of these is known as "strict construction" — a view which would restrict the powers of Congress to the bare letter of the written instrument, and confine the means of carrying its powers into execution to those absolutely and imperatively necessary. This theory of interpretation was applied by Jefferson in his opinion on the constitutionality of a federal bank,[1] and was later used with great acumen by his party as the moral justification for its opposition to the Federalists.[2] During the long controversy over slavery, it was the chief reliance of Southern statesmen while resisting Northern pressure on Congress to use its powers as fully as possible in restricting the spread of slavery to the territories. Since the disappearance of the slavery question, there have not been many occasions to call the strict construction view into party service. The Democratic party, it is true, occasionally appears to oppose the encroachments of federal authority, but its concrete legislative proposals can hardly be regarded as consonant with a narrow conception of the Constitution.[3]

The second view of the powers of Congress, originally taken by the Federalist party and held on various occasions by all parties, as their interests have required, is that of "liberal construction." The adherents to this doctrine deny that there is any warrant in the Constitution for taking the narrow view, and they lay great stress on that clause of the Constitution which authorizes Congress to make all laws necessary and proper for carrying into execution the powers expressly enumerated. They accordingly take a generous view of the enumerated powers, and then interpret the words "necessary and proper" to mean "highly useful and expedient."[4] Under this construction, a national bank was created, paper money issued, American industries have been protected, national highways built, provisions made for lending money to farmers, subsidies granted from the federal treasury to the states, and irrigation, reclamation, and

[1] *Readings*, p. 237.
[2] *Ibid.*, p. 93.
[3] See below, chap. xxi.
[4] *Readings*, p. 240.

other large schemes of public improvement undertaken.[1] Only under this conception of the Constitution has the authority of the Federal Government been made adequate to the exigencies of a national system of economy.

The third view of the proper attitude to be taken by Congress in considering the constitutionality of any legislative proposition, and one which has been quite generally taken, consciously or unconsciously, by the liberal constructionists, was thus formulated by Bourke Cockran, during a debate in the House: "It seems to me that the duty of Congress is to examine closely the condition of the country and keep itself constantly informed of everything affecting the common welfare. Wherever a wrong is found to exist with which the nation can deal more effectively than a state, it is the business of Congress to suggest a remedy. . . . Our first step must be in the direction of legislation. The only way we can ascertain definitely whether a law which we believe will prove effective is constitutional or unconstitutional is not by abandoning ourselves to a maelstrom of speculations about what the Court may hold or has held on subjects more or less kindred, but to legislate, and thus take the judgment of the Court on that specific proposal. We can tell whether it is constitutional or unconstitutional when the Court pronounces upon it and not before. Even if the Court declares it unconstitutional, its decision will not reduce us to helplessness. When it drives us from establishing a remedy by legislation, it will, by that very act, direct us to propose a remedy by constitutional amendment. Having framed a suitable amendment and proposed it to the legislatures of the states, our duty will have been accomplished. The final step toward full redress will then be with the bodies most directly representative of the people affected by the wrong."[2]

The Powers of Congress

Although the important functions of Congress will be treated more in detail in the chapters which follow, it seems desirable to give here, even at the risk of some repetition, a general survey of all the powers vested in our national legislature. Such a presentation does more than satisfy the theoretical requirements of an academic treatment of the subject. A general view of all the

[1] *Readings*, pp. 66 and 241.

[2] Reinsch, *Readings*, p. 256.

powers of Congress is indispensable to a correct understanding of current politics, for questions of constitutionality underlie all our political controversies over the powers of the federal and state governments, over centralization and state rights, over national and local reforms. Such a survey is rendered especially necessary by the altogether too widespread confusion which exists among citizens as to the nature of the federal system. Every student of American government should have definitely and clearly fixed in mind the various powers conferred upon Congress — not as mere rules of law, but as great principles of political practice controlling the national legislature in its manifold relations to the life of the people in every territory and commonwealth of the American empire.[1]

I. In relation to revenue and expenditures, Congress has the power to lay and collect taxes, duties, imposts, and excises, and to appropriate money, in order to pay the debts and provide for the common defense and general welfare of the United States.[2] This power is not unlimited. Indirect taxes, duties, imposts, and excises must be uniform throughout the United States — that is, must be imposed at the same rate on the same article wherever found.[3] Poll taxes, taxes on real and personal property, and other direct taxes,[4] except income taxes from all sources, must be apportioned among the states according to population. Congress cannot tax exports from a state, and under an interpretation by the Supreme Court cannot tax the "necessary instrumentalities" of a state government, such as the salaries of state and local officers, and state and municipal bonds.

The power of Congress to appropriate money seems to be substantially unlimited, except that appropriations for the army must not be made for a period to exceed two years. Congress may give money by the millions to starving Russians or to famine-stricken Chinese. It can lend money to foreign powers with a slight chance of ever getting it back. It may grant subsidies and bonuses to private capitalists to encourage industrial and shipping enterprises. It may make huge "grants-in-aid" to the states for educational and social purposes apparently without limit save the patience of the tax-payers. Through its power to appropriate it may gather unto itself powers of administrative control

[1] The account given here is based largely on Burgess, *Political Science and Constitutional Law*, Vol. II, chap. vii. [2] See below, chap. xvii. [3] *Readings*, p. 323. [4] *Ibid.*, pp. 327, 328.

undreamed of by the Fathers. Of this fact there is abundant evidence below.[1] Indeed through its appropriating power Congress has begun a revolution in the American system of private economy established in the course of three centuries of development. It taxes the incomes and inheritances of the rich and employs the funds to aid those not so fortunate in this world's goods. Thus it denies the major premise of the capitalist system which assumes that through the private ownership of property and competition each person receives the portion of the annual national income to which his labors and talents entitle him.

II. In respect to national defense,[2] the powers of Congress are practically unlimited, except by the provision that the President shall be commander-in-chief and that military appropriations shall not be made for a greater period than two years. Congress can raise and support armies, create and maintain a navy, and provide for the organization and use of the state militia. Congress also declares war, grants letters of marque and reprisal[3] authorizing officers or private parties to capture property and persons subject to a foreign power; and makes rules concerning captures on land and sea.

The question of adequate military defense was raised and carefully discussed at the time of the adoption of the federal Constitution. Numbers 2–5 of *The Federalist* are devoted to the "dangers from foreign force and influence." The Constitution was framed with such dangers in view. Accordingly Congress can call every able-bodied man into the national service. This power was demonstrated by the passage of the draft acts of 1917 and 1918. When the constitutional question was raised in the Supreme Court, the answer was clear: such measures are within the scope of the authority conferred upon Congress.[4] There also is no limit to the amount of money which can be appropriated for military purposes. Moreover, the states are subject to the Federal Government in the military sphere, for they can keep no standing army or ships of war in time of peace without the consent of Congress. In answer to the charge that such an unlimited power might lead to despotism, the

[1] See below, chap. xxi.
[2] Below, chap. xvi.
[3] "Privateering" (among the powers concerned) was abolished by the Declaration of Paris in 1856. While the United States did not sign that Declaration, it no longer grants letters of marque and reprisal.
[4] 245 U. S. 366.

defenders of the Constitution urged: "With what color of propriety could the force necessary for defence be limited by those who cannot limit the force of offence? If a federal constitution could chain the ambition, or set bounds to the exertions of all other nations, then, indeed, it might prudently chain the discretion of its own government and set bounds to the exertions for its own safety." [1]

III. In respect to commerce and business,[2] Congress may regulate commerce with foreign countries, among the several states, and with the Indian tribes; make uniform laws on the subject of bankruptcy throughout the United States; fix the standards of weights and measures; protect authors and inventors by a system of patents and copyrights; and establish post-offices and post-roads. Commerce not only includes the transportation of commodities; it embraces traffic and intercourse in all important branches, such as the transportation of passengers, the transmission of telegraph messages, and the carrying of oil through pipe lines.[3] It is sometimes stated that the power of regulating interstate and foreign commerce is vested exclusively in Congress, but the difficulty of determining when a state law constitutes such a regulation is so great that the mere statement does not carry any very concise information.[4] The power of Congress over bankruptcy is not exclusive; the states may legislate on the subject. The federal law, however, takes precedence in case of a conflict with the provisions of a commonwealth law; Congress by an act of 1898 and subsequent amendments has covered the entire domain of bankruptcy.[5]

With regard to weights and measures Congress could, if it saw fit, establish a uniform metric system throughout the United States, but it has only gone so far as to make the use of this system lawful, not obligatory.[6] Meanwhile the regulations of the various states prevail, although the Federal Government aids

[1] *The Federalist*, No. XLI.
[2] See below, chap. xviii.
[3] *Readings*, p. 343.
[4] *Ibid.*, p. 348.
[5] A bankrupt is a person who is heavily in debt and apparently cannot meet his liabilities. He may or may not have assets greater than his liabilities; he may be brought into court on petition of his creditors or he may place himself voluntarily in the hands of the court with a view to straightening out his affairs. It is the duty of the court in a bankruptcy case to inquire carefully into the property, business, and debts of the bankrupt and to make a disposition of his affairs that will be just to his creditors as well as to himself. It may work out that each creditor will receive only a few cents on each dollar owed him; even in this case the bankrupt, after he has surrendered his property, is discharged from his obligations and may start with a clean slate as far as the law is concerned.
[6] Electric measures have been made uniform, however.

in securing scientific exactness by maintaining in the Department of Commerce the important bureau of standards. The functions of the bureau are the custody of the standards, the comparison of standards used in scientific investigations, engineering, manufacturing, commerce, and educational institutions, with standards adopted or recognized by the government; the testing and calibration of standard measuring apparatus; the solution of problems arising in connection with standards; the determination of physical constants, and the properties of materials which are of particular importance in science and manufacture. To facilitate the spread of uniform systems throughout the United States, the bureau is authorized to assist not only the Federal Government, but also state and municipal governments, educational institutions, and private concerns engaged in manufacturing or other pursuits requiring the use of standards.

The protection of authors and inventors by a system of copyrights and patents is entrusted to Congress; but it is contended by some publicists that this power is concurrent and may be exercised by any state so long as its laws do not contravene the express provisions of the federal law. This point, however, has not been authoritatively adjudicated.[1]

For administrative purposes Congress has created a bureau of patents in the Department of the Interior, headed by a commissioner, who administers the patent laws, issues patents for new inventions and improvements, and registers trade-marks, prints, labels, and the like.[2] The working staff of the patent office is divided into a number of separate groups, each one of which has charge of some particular class of devices or inventions. Every application is recorded and referred to the appropriate group, which makes a search to see whether the claim is for a new invention and does not interfere with a prior patent. Nearly every inventor employs an attorney, although he is not required to do so, to assist him in prosecuting his claim. If an application is rejected, the applicant may appeal to the commissioner of patents and from his decision he may prosecute an appeal to the courts. If a patent is granted, it runs for a period of seventeen years, and extensions are sometimes made.

[1] The power of Congress over trade-marks extends only so far as they are involved in interstate and foreign commerce.

[2] The first patent law was passed in 1790; in 1836 the office of commissioner of patents was created; and in 1849 the patent bureau was transferred to the Department of the Interior.

The copyright law has been steadily extended to new devices, until it now covers not only books, but also objects of art, maps, charts, musical compositions and the like.[1] For more than a century Congress extended copyright protection only to citizens and residents of the United States, and during that time American publishers, with a few honorable exceptions, regularly "pirated" the works of foreign authors, that is, published them in the United States without paying any royalty or other compensation. Under the act of March 3, 1891, it was at last provided that the citizens of any foreign state which gives to citizens of the United States copyright benefits may enjoy the privileges of our copyright laws. As a result, citizens of the United States may claim the protection of foreign countries coming under the terms of the act, and citizens of foreign countries in turn may obtain the protection of our laws. The administration of the copyright law is in the hands of the registrar of copyrights, who works under the direction of the librarian of Congress. Every applicant receives his copyright, for no attempt is made by the division of copyrights to examine into questions of infringement as in the case of patents.

Although the power to establish post-offices and post-roads is separately conferred upon Congress, it may be regarded, for practical purposes, in connection with the power to regulate commerce. The establishment of post-offices and post-roads is exclusively a federal matter, and it must be noted that the power of the Federal Government covers the whole domain of mail transportation, within each state as well as among the states.[2]

IV. The regulation of the monetary system is vested exclusively in the federal legislature.[3] Congress has power to coin money, regulate its value, and fix the value of foreign coin. States are forbidden to coin money, emit bills of credit, or make anything but the gold and silver coin of the United States a tender in the payment of debts. There is nothing in the Constitution expressly authorizing Congress to create paper money, but it has exercised this power and has been sustained by a decision of the Supreme Court.[4]

[1] The term of a copyright is twenty-eight years with a possible renewal for twenty-eight years. Rights are secured not only to authors and inventors, but also to their heirs and assigns. Law of March 4, 1909.

[2] See below, p. 409.

[3] See below, p. 376.

[4] See *Readings*, p. 241.

V. The power of Congress to define crimes and provide punishments for them is narrowly limited. The high crime of treason, as indicated above,[1] is expressly defined in the Constitution: it consists only in levying war against the United States, adhering to its enemies, or giving them aid and comfort. Congress cannot therefore make any offense which it chooses treason. Congress may provide for punishing counterfeiters and persons committing crimes on the high seas or offenses against the laws of nations.[2] "These are the only crimes committed within the commonwealths," says Professor Burgess, "concerning which Congress has the power to legislate"; but it should not be forgotten that in the exercise of its express powers, Congress may define certain crimes against federal laws and provide penalties. For example, it has provided punishment for theft and other offenses connected with the transportation of mail matter. If Congress did not have this power of penalizing offenders against federal law, the authority of the United States government would be nullified.[3] Hence we may say that Congress may define crimes against federal laws duly passed under the terms of the Constitution, although it has no power to define crime in general. This power is left to the states; it is for them to determine what particular classes of actions shall be deemed crimes, and as a result we have the greatest divergences — certain actions being crimes in one state and innocent in others. In this respect the American federal system differs fundamentally from the German plan, for the German national legislature has the power to regulate the whole domain of civil and criminal law and judicial organization and procedure.

VI. The government of the territories and districts belonging to the United States is vested in the federal authorities. Congress has the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, to exercise exclusive legislation in all cases whatsoever over the District of Columbia, and over all places purchased by the Federal Government (with the consent of the state legislatures concerned) for the erection of forts, maga-

[1] Above, p. 109.

[2] Congress may of course define crimes in the territories and districts directly under the government of the United States.

[3] *Readings*, p. 244. The distinction should be noted, however, between a code of criminal law and ordinary laws with penal sanctions attached.

zines, arsenals, dockyards, and other public structures. In the exercise of this authority over territories and districts, Congress combines the power of the Federal Government with that of a state government, subject to the fundamental limitations in the Constitution which forbid it to do some things that states are not forbidden to do — for example, establish a press censorship or official religion.[1] The right to admit new states and supervise the organization of territories into states is also vested in Congress; and the process to be followed in the admission or organization of a new state is left to the determination of that body.[2]

VII. The direct power of Congress, as a body, over foreign relations is slight, because the President and Senate have the treaty-making power, and the President is our official spokesman in the conduct of all business with foreign countries. Congress, however, may, as we have seen, regulate foreign commerce, including the important branch of immigration; create consular and diplomatic posts abroad and provide the emoluments thereunto attached; define and punish piracies and felonies committed on the high seas and offenses against the law of nations. Congress may also establish a uniform rule by which the subjects of foreign powers may become citizens of the United States. While this power of prescribing the conditions for naturalization is regarded as being vested exclusively in Congress, it must be remembered that the states may, and some of them do, confer on aliens the right to vote.[3]

VIII. Notwithstanding the theory of the separation of powers, Congress may to some extent control the various executive departments by statutes regulating even the minutest duties of the Cabinet officers. As we have seen, the Constitution merely hints at the existence of the executive departments; but the power to determine the number of such departments and to provide for the internal organization of each is, nevertheless, exercised by Congress. How far it may use this authority to control the President's high personal advisers is a matter of dispute that cannot be settled by any abstract definitions;[4] but it may exercise a substantial dominion over executive departments under its power to fix salaries, define duties, and appropriate money for designated purposes.

[1] See above, p. 106.
[2] Below, chap. xxiii.
[3] See *Readings*, p. 144.
[4] See above, p. 193.

IX. Congress may also exercise in practice a large power over the federal judiciary, notwithstanding the theoretical independence of that branch of the government; because it may determine the number of Supreme Court judges, fix their salaries, subject to certain limits, and define their appellate jurisdiction. The creation of inferior federal courts is subject to its power; it may define the jurisdiction and procedure of these courts and provide the methods by which cases may be drawn from the state courts into the federal courts. A notable example of the exercise of the power of Congress over our federal judicial system is afforded by the Judiciary Act of 1789, providing, among other things, the way in which state statutes could be brought into the federal courts, and their validity could be tested.[1]

Another important power vested in Congress is that of providing the precise manner in which the acts, records, and judicial proceedings of each state shall be given full faith and credit in every other state and the manner in which accused persons shall be returned from one state to another.[2]

X. In addition to controlling, to a limited extent, the federal judicial system, Congress itself enjoys the power of removing the civil officers of the United States by the process of impeachment,[3] but in practice this power is of slight importance. In trying cases of impeachment, the Senate acts as the high court.[4] When the President of the United States is being tried, the Chief Justice of the Supreme Court presides. It requires a two thirds vote of the members present to convict.

The power of preferring and prosecuting charges against offenders is vested in the House of Representatives. In practice, whenever the House decides to bring any federal officer before the bar of the Senate, it adopts, by resolution, articles of impeachment charging the particular offender with certain high crimes and misdemeanors and enumerating with more or less detail his particular offenses. It thereupon chooses leaders to direct the prosecution before the Senate, and the case is then conducted very much in the form of a trial in an ordinary court. The prosecution states its case; witnesses for and against the accused are

[1] On the power of Congress over the judiciary, see below, p. 284.

[2] See above, p. 119.

[3] On this subject see the careful survey, "The Law of Impeachment in the United States," by Professor D. Y. Thomas, *Political Science Review* for May, 1908, pp. 378 ff.

[4] Technically, however, it only sits as the Senate. In 1868 it ceased to call itself "a bigh court of impeachment."

heard; and attorneys on both sides make their arguments. When the case is fully presented the Senators vote, and if two thirds of the members present concur in holding the accused guilty, he stands convicted; but in case of failure to secure the requisite two thirds, he is acquitted.

The penalties which the Senate can impose upon any person convicted in case of impeachment are strictly limited to the removal of the offender from office and the imposition of a disqualification to hold and enjoy any office of honor, trust, or profit under the United States. Any person convicted, however, is still liable, after his removal from office, to indictment, trial, judgment, and punishment for his offense according to law. It is not obligatory upon the Senate to disqualify the convicted person for entering the federal service in the future, but in any case he must be immediately removed from office.

The jurisdiction of the Senate as a court of impeachment extends only over the President, Vice President, and the civil officers of the United States, and over the offenses of treason, bribery, and other high crimes and misdemeanors. Treason is, of course, defined in the Constitution; and the meaning of the term "bribery" is clear to all. The phrase "other high crimes and misdemeanors," however, is somewhat vague, and Congress might give a loose interpretation to it, even going so far as to treat the neglect of official duty as a ground for impeachment. Nevertheless, a conservative interpretation has generally been placed upon this phrase, so as to limit the offenses, which render an officer liable to impeachment, to crimes and misdemeanors as understood in the ordinary law of the land.[1]

[1] The Senate has sat as a Court of Impeachment in the cases of the following accused officials, with the result stated and for the periods named:

WILLIAM BLOUNT, a Senator of the United States from Tennessee; charges dismissed for want of jurisdiction, he having previously resigned; Monday, December 17, 1798, to Monday, January 14, 1799.

JOHN PICKERING, judge of the United States district court for the district of New Hampshire; removed from office; Thursday, March 3, 1803, to Monday, March 12, 1804.

SAMUEL CHASE, Associate Justice of the Supreme Court of the United States; acquitted; Friday, November 30, 1804, to March 1, 1805.

JAMES H. PECK, judge of the United States district court for the district of Missouri; acquitted; Monday, April 26, 1830, to Monday, January 31, 1831.

WEST H. HUMPHREYS, judge of the United States district court for the middle, eastern, and western districts of Tennessee; removed from office; Wednesday, May 7, 1862, to Thursday, June 26, 1862.

ANDREW JOHNSON, President of the United States; acquitted; Tuesday, February 25, 1868, to Tuesday, May 26, 1868.

WILLIAM W. BELKNAP, Secretary of War; acquitted; Friday, March 3, 1876, to Tuesday, August 1, 1876.

CHARLES SWAYNE, judge of the United States district court for the northern district of Florida; acquitted; Wednesday, December 14, 1904, to Monday, February 27, 1905.

ROBERT W. ARCHBALD, associate judge, United States Commerce Court, removed from office, Saturday, July 13, 1912, to Monday, January 13, 1913. *Congressional Directory* (1913), p. 160.

Federal military officers are exempt from this jurisdiction, being subject to courts-martial. Members of Congress are also exempt, for they are not technically "civil officers," and furthermore they are under the control of their respective houses — each house having the power to determine its rules and proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

XI. In carrying into execution the powers vested by the Constitution in the Government of the United States or in any department or office thereof, Congress may make all laws which shall be deemed "necessary and proper." The courts have, in general, given a liberal interpretation to this phrase. The Supreme Court has repeatedly declared that Congress possesses the right to use any means which it deems conducive to the exercise of any express power. Said the Court in the case of Juilliard *v.* Greenman:[1] "The words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all the proper means which are conducive or adapted to the end to be accomplished and which, in the judgment of Congress, will most advantageously effect it."

[1] 110 U. S. 421; *Readings*, p. 245.

CHAPTER XII

CONGRESS AT WORK

To the average observer, Congress is a vast and complicated legislative organ, with rules, committees, and methods, beyond the ken of ordinary mortals; but a somewhat careful examination of the procedure of that body from day to day reveals certain principles and practices which, when properly grasped, make the working scheme of the organization fairly clear — at least clear enough for the citizen who does not intend to become a legislator but merely wishes to watch the operations of the national law-makers with a reasonable degree of understanding.

The Mass of Business before Congress

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

In sheer bulk the business is immense. Each Congress in the course of its two years' life is confronted by about thirty thousand bills, joint resolutions, concurrent resolutions, simple resolutions, and reports. Any member may introduce as many bills as he likes by handing them to the clerk if they are of a private nature (such as a bill conferring a pension on some person) or to the presiding officer if they are public in character. He does not have to secure the permission of anyone in advance or assume any responsibility for them even if they carry a

charge upon the treasury. Many of them are introduced "by request" just to please this or that group of voters and without any thought of enactment into law.

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

The public bills usually affect vital economic interests throughout the country such as railways, manufacturing, shipping, and farming; they concern the whole nation as well as special groups. It is over them that the more serious party divisions occur; it is to carry their public bills through Congress that the leaders of the majority party must bring pressure to bear on the rank and file. It is in this connection that cleavages between the right and left wing of each party appear and threaten the disruption of the regular organization. Illustrations abound in the debates and votes on railway bills and ship subsidies.

Great as may be the interest of the ordinary member in the fate of the public bills, his own political fortunes are likely to be bound up with obscure special bills making appropriations for post-office buildings, river and harbor improvements, and pensions in his district. The local party machine and active citizens among his constituents expect him to get all he can out of the federal treasury for his section. The member of Congress on seeking reëlection must be in a position to "point with pride" to the amount and importance of the favors he has secured for "his people." If he fails to obtain advantages for his constituents, they will turn against him and support some more energetic and pushing person. Legislation of this character is called "pork-barrel legislation," a term reminiscent of plantation days. It was the old custom on Southern estates to allot periodically a certain amount of pork to the slaves; at the appointed time the pork-barrel was rolled into view, the head knocked in, and the contents distributed among eager beneficiaries. The applicability of the figure of speech to the legislative process above described needs no elucidation.[1]

[1] C. C. Maxey, "A Little History of Pork," *National Municipal Review*, December, 1919.

If the member does not "get his pork" from the treasury, he is generally regarded as a failure by his constituents. In order to get it he must do two things. In the first place, he must secure the consent of his party leaders who control legislation, and to obtain that consent he must usually vote as he is told on public bills. Thus he may have to sell his birthright for a "mess of pork." In the second place he must coöperate with other members bent on the same enterprise. Such coöperation is called "log-rolling." In olden times pioneers on the frontier helped one another to cut trees and roll up logs for their cabins. This process was known as "log-rolling"; like the term "pork-barrel," the phrase affords a homely but accurate characterization of the legislative procedure to which it is applied. So when the member of Congress with his eager eye on the pork-barrel is not busy placating his party leaders, he is likely to be engaged in log-rolling with his friends.

If thirty thousand bills, resolutions, and reports were taken up in order by one of the houses and ten minutes were devoted to each of the measures, five thousand hours would be spent in the process, that is, about eight hours every week day during the life of the Congress. Obviously, therefore, every measure cannot be brought before Congress. There must be a selection from the enormous mass of business. It follows that some person or group of persons must be made responsible for choosing the measures to be debated and passed upon. Since the time is limited, methods must be devised for putting an end to debates. The power to select measures and to control proceedings is, of course, a fundamental power; it is in effect the power to decide what laws shall be passed and how they shall be passed. Since the laws go deep into the pocketbooks of the citizens or otherwise affect their property and liberty, control over the procedure of Congress touches the most vital interests in the country.

Party Organization and Leadership in Congress

II. The second fact to be grasped is that the working methods of Congress are largely determined by the existence of two political parties — one, a majority in control of one or both houses and regarding itself as responsible for the principal legislative policies; the other, a minority, in opposition, bound under

ordinary circumstances to criticize and often vote against the measures introduced and advanced by the majority. In England, party organization is carried frankly into the House of Commons, where the majority and minority sit facing each other, and where the government is avowedly that of the predominant party — a government of men, not even theoretically of constitutional law. In the United States, the party rules none the less, but its organization and operations are, as we have seen,[1] unknown to the formal law of the federal Constitution. It is true that the votes on measures in Congress are by no means always cast according to party divisions, but it is likewise true that the principal legislative work of a session is the work of the majority party, formulated by its leaders, and carried through under their direction.[2]

This is not all. Each party in the Senate and the House has a separate caucus for each chamber,[3] in which is frequently determined the line of party action with regard to important legislative questions. It is in a party caucus held before the opening of each Congress, that the majority in the House chooses the Speaker and the minority decides upon its leader whom it formally presents as a candidate for Speaker, knowing full well that he cannot by any chance be elected. At the same meeting provision is made for selecting the committees.[4] It is in the caucus that the majority decides whether it will adopt the rules of the preceding Congress or modify them ; and it is seldom that the decision is overthrown. It is in the caucus that bills and resolutions of high importance are discussed and decided upon before they are formally presented for final vote in the House or Senate.

The exact weight of the caucus in determining party policies and the extent to which the rank and file influence its decisions are difficult to ascertain. Its powers and methods vary from decade to decade. There are periods of concentration when the leadership of the houses is centralized in the hands of a few forceful men and the proceedings of the caucus become formal. Such was the state of affairs during the opening years of the twentieth century. The operation of the system in those days is tersely described by Robert M. La Follette, in a speech delivered

[1] Above, chap. vii.
[2] For the part of the President as political leader, see above, chap. ix.
[3] *Readings*, p. 247.
[4] See below, p. 267.

in the Senate in 1908: "I attended a caucus at the beginning of this Congress. I happened to look at my watch when we went into that caucus. We were in session three minutes and a half. Do you know what happened? Well, I will tell you. A motion was made that somebody preside. Then a motion was made that whoever presided should appoint a committee on committees; and a motion was then made that we adjourn. Nobody said anything but the Senator who made the motion. Then and there the fate of all the legislation of this session was decided. . . . Mr. President, if you will scan the committees of this Senate, you will find that a little handful of men are in domination and control of the great legislative committees of this body, and that they are a very limited number." [1]

Then there are periods of laxity and dispersion when the caucus re-asserts itself and the members, high and low, are heard at length and have weight in party councils. Such a period opened in 1910 when discontented Republicans of progressive leanings united with the opposition Democrats in a war on concentrated leadership. The Democrats on coming to power shortly afterward sought to give vitality to the caucus. Henceforward, they said, speakers and committees will be chosen in a full and free council of party members in each house. The Speaker of the House sank into the background; power and responsibility were diffused among the rank and file; decisions were difficult to secure; and legislative leadership was transferred to President Wilson.

When Wilson passed from the political scene and Harding came to the presidency, stern and dominant executive control over legislation was relaxed. As a matter of principle the new President restored liberty of action to both houses of Congress. Thus concentrated leadership, executive and congressional, was lost; the theory of diffusion was applied. The caucus became more important and the voice of the rank and file, uncertain and discordant, was heard again in party councils. So the pendulum swings forward and back, and it is difficult to say just where it is at any particular moment. Even in a period of decentralization, the caucus acts quickly and without serious dissension on matters referred to it by party leaders. Bills and amendments to bills laid before it by party committeemen

[1] Reinsch, *Readings*, pp. 168–169.

are usually approved. But party members of the left wing often insist on asserting their independence.

Whatever the methods followed by the caucus, it is always accused of being tyrannical. The party member is usually bound to obey the decision of the caucus and vote in the legislative chamber for any measure it approves;[1] to refuse would be an act of party treason, subject to the penalties imposed for such heresy. The meetings of the caucus are secret; attempts of insurgents to throw them open to the public have been without avail. Important decisions are sometimes made by only a fraction of the party members, and this means that laws are sometimes enacted by a minority. Again and again it happens that the minority in a party caucus, united with the opposition party, could defeat a measure, but refrains from action through party loyalty. Moreover, the attendance at the caucus is often small, and thus the principle of majority rule is still more flagrantly violated.

An interesting attempt to cut across caucus and party lines was made in 1921 when the so-called "Farm Bloc" was formed. This was the outgrowth of conferences attended by Representatives and Senators of both parties who were united by common interests and principles. Especially did they speak for the farmers. After discussing the issues before Congress, they agreed to act together on all measures of common concern to the agricultural interests of the country. Whether this is an incident or the beginning of a new congressional institution remains to be seen.

Leadership in the House of Representatives

III. The caucus works only a partial concentration of power in the houses of Congress in the matter of selecting the propositions to be considered and passed. It is too large and miscellaneous in membership to act on all measures or even to discuss critically very many of them. Most of the technical decisions and recommendations presented to it by experienced committee chairmen it must accept on faith; it cannot pretend to expertness. Moreover if the caucus did in fact frequently reverse the decisions of committee chairmen, it would force their resignation and break down the working party organization.

[1] The member is not bound to vote against definite pledges given to his constituents or against the pledges of the local party organization.

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

In the United States neither law nor custom vests the open and avowed leadership in the House of Representatives or the Senate in any small body of men known to the public and held accountable for the measures debated and the laws passed. In fact, however, there is and must be leadership and a certain degree of concentration in power. As the authority of the rank and file of the members in the party caucus expands and contracts, so the leadership varies in extent. With political changes, too, the leadership shifts from one center to another. Now it is the Speaker and the rules committee in the House that direct policies; now the chairman of the ways and means committee occupies the dominant position. Wherever the leadership is, it is certain to be attacked by those members who feel their interests neglected or their sense of importance offended. Attacks long continued are sure to work a dispersion of prerogative and a new localization of it.

At the opening of the twentieth century, the directing power in the House was unquestionably concentrating in the Speaker, the majority members of the rules committee (of whom the Speaker was one), and the chairmen of the important committees. The positive leadership of these men and their responsibility were definitely recognized throughout the country. They were working toward something like an inner council of government; they formulated policies and brought the other party members into line under a régime of severe discipline. In fact, the Speaker was the outstanding figure in this little group of dominant leaders.

As a writer at the time observed: "The Speaker's control over legislation is now, under the rules and practices of the House, almost absolute. The people know this now. The time has passed when the Speaker could exercise his vast power unsuspected. Nor can he shirk his responsibility. No bill can pass the House without his passive approval, and that in effect is the same thing as active advocacy." He appointed all the members of all the committees and named the chairman of each; he and two of his party colleagues formed a majority in the committee on rules which could in fact (with the approval of the House, that was always given) decide what measures should be debated, when and how long they should be debated, and when the vote on them should be taken.

Against this system, the Democrats protested as a matter of course, for it destroyed their influence in the House; but their objections would have availed naught if there had not arisen discontent among the newer Republican members, particularly among the more radical Representatives from the West. They disliked many measures which their own party leaders forced through Congress and they failed to get a hearing for their own plans. Moreover, the Speaker, Joseph G. Cannon, was harsh in his rulings and unconciliatory in conducting proceedings. At length, in 1910, the Democrats, aided by disgruntled Republicans, overthrew the Speaker; they carried a resolution enlarging the rules committee, provided that it should be elected, and ousted the Speaker from membership. When the Democrats, victorious in the election of that year, took possession of the House, they provided that all committees should be elected by the House. Thus the Speaker was shorn of all his power over the appointment of committees and their selection was transferred in fact to the party caucus — which indeed had always enjoyed more or less authority in the matter. Amid cheers for "the fall of the Czar" and the end of "despotism," a dissipation of leadership was effected.

The "revolution" did not, however, make the rank and file of the members equal or destroy leadership. Through all such changes a certain concentration of power has remained. As the shots at a target, wild though some of them may be, tend to group around the center, so attempts to build up directing leadership in the House are found grouped around five sources

of influence: the Speaker, the rules committee, the chairmen of the important committees, the floor leader, and the "steering committee." This has long been true and is true to-day.

The Speaker of the House of Representatives, a party man chosen by a party caucus, cannot be simply a presiding officer, like the Speaker of the House of Commons in England. There the prime minister assumes responsibility for his party measures, but at Washington the position of the Speaker is entirely different. In the beginning of our history, he was regarded as a mere moderator, but as the House grew in size and the business to be transacted increased to enormous proportions, it became impossible for him to sit passively and see the measures advocated by his party delayed indefinitely or defeated by dilatory tactics on the part of the minority. Though he can no longer appoint party committees, his powers over procedure are great. He may refuse to put motions which he thinks designed merely to delay business; he may recognize or refuse to recognize anyone who wishes to debate a question or call up a measure for consideration; he may rule members out of order and decide questions of parliamentary law — subject, of course, to appeals from the decision of the chair. In spite of recent changes these powers yet remain. The Speaker, therefore, inevitably holds a sector in the line of influence. He is not as imperial in his sway as were Cannon and Reed in the old days, but he is no mere figurehead.

Closely associated with the Speaker, no more dominant than he, is the rules committee composed of twelve members of whom eight speak for the party that has a majority in the House. It has a right to be heard at almost any moment in the House. It may bring in resolutions stating what measures shall be considered, how long they shall be debated, and when the vote shall be taken. Members of the party for which the rules committee speaks may revolt and refuse to vote for such resolutions, but if they do they incur all the risks inherent in party "treason."

The third element in leadership in the House of Representatives is composed of the chairmen of the important committees in charge of the weightiest measures brought up for debate and action. The premier among them is the chairman of the ways and means committee which prepares tariff and tax bills. Indeed when the Speaker was stripped of his regal authority, his influence and prestige temporarily went to the head of this powerful com-

mittee. Next in order of precedence may be placed the chairman of the appropriations committee, which, under the budget law of 1921 and the rules associated with it, exercises great weight in decisions as to how much money shall be spent and what purposes it shall be devoted to. Then follow in uncertain order the heads of other great committees, ten or fifteen in all, with the minor men swinging off loosely on the edges of power.

Finally in considering leadership in the House we must take account of the floor leader chosen by the party caucus. Each party has such an agent. It is his duty to keep in close touch with the rank and file of his party colleagues, to learn their opinions, to understand their prejudices and ambitions, and whenever necessary to "line them all up" in support of some measure on which the party leaders have reached a decision. The floor leader is influential in determining who shall speak on bills, because by conferences with party members he helps to make up the list of members whom the Speaker will recognize. On important matters the majority leader will take counsel with the minority leader and reach an agreement as to when the vote shall be taken on measures and who is to speak for the minority. In short, the floor leader has succeeded to many of the prerogatives formerly exercised by the Speaker; in terms of power he ranks next to the Speaker; and if he is clever in management he may hope to rise to the honor of presiding over the House. But he must be circumspect. His power is uncertain. He is subject more or less to the direction of a "steering committee" chosen by the caucus for the purpose of exercising general supervisory powers — a committee which may be the majority members of one of the regular committees of the House or an independent organ, according to party practice and changes wrought by time and circumstances. He must deal gently with independent members, especially if their votes are needed to carry party measures.

In the Senate, the problems of leadership are not so difficult to work out. The number of members is small. The majority in control seldom consists of more than fifty or sixty members. Among them are always several men of experience derived from long service and thus marked for leadership. The presiding officer, under constitutional provision, is the Vice President of the United States, who though himself a partisan is more of a

moderator than a director. Often indeed he represents the minority, not the majority in the Senate. In such circumstances leadership falls to a few committee chairmen, among whom the chairman of the finance committee takes first rank. There is a party caucus, of course; and its power, like that of the House caucus, expands and contracts with passing events. Floor leaders and steering committees are to be found also in the Senate; their function, however, is not dictation; their business is to secure party harmony by informal methods. The individual Senator enjoys more weight in party councils and more independence of action on the floor than the member of the House.

There are in addition many practices and customs which work for a concentration of power and direction in Congress. The President, as we have seen, may, through his prestige, his party leadership, and his control over appointments to office, exercise an immense influence on the work of Congress. In times of party crises, there may be informal conferences of the leaders in both houses and party officers and workers on the outside. But here we pass from the known to the unknown, out into the realm of complex social forces which press in upon Congress from every part of the country.

Leadership, once secured, thrives upon the meat with which it is fed. Every member of Congress, as we have seen, has schemes of his own relating to his district and demanded by the constituents who elected him. He must get a hearing and favorable action. Otherwise he becomes a nonentity and fails to satisfy the clamor of his constituents. His political career depends upon "getting what he is sent there for." In the press of things he cannot get it without the consent of one or more powerful committee chairmen. What can he give in return? His vote on the measures recommended by party leaders, his loyal support to the program as formulated by the party leaders. So the net is drawn tightly and power concentrates — until accumulated discontent dissipates it again. Thus centripetal and centrifugal forces alternate, but, whenever business is to be transacted, leadership must come into play. A Senator recently put the matter at the opening of Congress in a crude parody on Kipling's "Recessional":

> "The tumult and the shouting dies,
> The captains and the kings depart.
> And the steam roller is about to start."

What after all is the cause of the continual uproar over the organization of Congress? Why are there always insurgents raging against established leadership and demanding a redistribution of power? What is it that they want? The answers are difficult to formulate, but an attempt may be made. Whenever any party has a long tenure of office such as the Republicans enjoyed between 1897 and 1911, two things happen. The older men of longer service gather in all the power they can, for men thirst after it for its own sake and for the loaves and fishes connected with it. In the meantime new men appear and there is discontent on the left wing of the triumphant party. That is natural and inevitable also.

Now the new men will receive little or no recognition unless they obey orders; that means they will get no power and no spoils; their measures will be smothered in committee and never see the floor of the house. They want, therefore, two reforms: (1) the dispersion of the committee assignments and the party authority among all the members of the majority, and (2) some kind of rule which will permit a certain number, let us say one hundred members, to call up any bill from the recesses of any committee and force a vote on it. Some even go beyond this, and demand that every bill introduced in the house shall be automatically brought out from committee and put to a vote. In this way they hope to get a consideration of their measures and to put all the members on record for or against their propositions. Indeed there are a few reformers who would like to destroy the party machine in Congress, give all bills and measures introduced a fair and automatic hearing, and allow all members an equal share of authority in controlling procedure. It is not likely that such a utopian reform will take place soon; it is more probable that we shall witness the continuance of the old struggle with changes only in emphasis.

The Committees of Congress

IV. A very important and fundamental element in congressional leadership is found in the standing committees. As the bills brought into Congress become more and more technical with the advance of the industrial age, so the power of those who have special knowledge and experience in various fields must increase. This is inevitable. It is highly desirable. Therefore, the legis-

lative work of each house is done mainly by committees composed of men more or less expert in the several branches of legislation. Each committee is dominated by a majority of members representing the party which is supreme for the time being. The chairman of the committee is nearly always a prominent leader in the majority party. The number of committees varies from time to time, but at the present there are about thirty in the Senate and sixty in the House.

Each committee has a well furnished office and many perquisites which are not despised by members of Congress; that is, it has an allowance for clerk hire, stationery, and other purposes. Often members employ their wives or relatives as clerks and assistants. A great deal of money is wasted in useless activities, but criticisms of the system fall on deaf ears. Not long ago when a member from Massachusetts, shocked by the careless expenditures for committees that never met, resigned his post by way of protest, his action met merely with indifference or laughter.

The committees vary greatly in importance.[1] In the lower house, the leading committees are on ways and means, appropriations, rules, banking and currency, interstate and foreign commerce, rivers and harbors, military affairs, naval affairs, post-offices and post-roads, public lands, labor, and pensions. In the Senate, the committees on appropriations, finance, foreign relations, judiciary, military affairs, naval affairs, interstate commerce, and pensions take high rank.

Formerly all standing committees of the House of Representatives were appointed by the Speaker, but this system was changed in 1910–11 in favor of election by the House itself. The difference in practice made by this change in the rules is more apparent than real. Since the beginning of the party system in the United States, the selection of the members of committees in each house has really been in the hands of the party caucus, under the leadership, and perhaps dominance, of a few men experienced in the arts of management. To borrow a term from economics, we may say that the committee assignments are determined by a "higgling in the market" and that the various posts fall to members roughly according to seniority, their abilities, their power as leaders, their skill in management. This "higgling" begins long before a new Congress meets; most of the

[1] Sometimes select committees are appointed to deal with specific matters.

important assignments are determined probably before the party caucus assembles, and the caucus only ratifies the work of the pre-caucuses as the houses ratify the work of the caucuses. The minority party chooses representatives on each committee, somewhat in the same manner, but they seldom count for much in the determination of policies.

After the "revolution of 1910," the Democrats adopted a new plan; they named the Democratic members of the ways and means committee at a caucus and authorized that group to act as a "committee on committees" and to nominate for approval at another caucus the members of the other committees. When the Republicans came back to power in 1919, there was an attempt to make the dispersion of authority mechanical; the party caucus created a committee on committees composed of one member from each state having one or more Republicans in the House — each member to have as many votes in choosing the other committeemen as there were Republicans in the delegation from his state. In short, an effort was made to mirror the entire Republican majority in the agency formed to select the Republican members of committees. The recommendations of "committees on committees," no matter how composed, are always submitted to the party caucuses for approval, and then laid before the House for formal ratification.

It is usually the custom of party leaders in both houses to assign all the important committee positions to members who have seen long service, in accord with the "seniority rule." It is only natural that the direction of affairs should fall to the most experienced. However, on the occasion of the Democratic victory in 1910, after a long season out of power, the new incoming members made a great outcry against allowing the older congressmen to monopolize all the choice committee assignments on the principle of seniority. The progressives in both the parties, looking upon old age as a sign of inherent and irremedial conservatism, protested against the time-honored practice, but the principle, in the main, is still applied — with exceptions. Another line of attack on concentrated leadership and experience takes the form of preventing any member from serving on many committees. Indeed the Senate has a rule to the effect that no Senator can serve on more than two powerful committees.[1]

[1] See articles by Professor Lindsay Rogers on American Government and Politics, *American Political Science Review*, Vol. XIV, p. 75; Vol. XVI, p. 42.

It is in the committee room usually behind closed doors and secure from public scrutiny that the real legislative work is done.[1] Every bill, important or unimportant, is sent to the committee having jurisdiction over the subject matter to which it relates. The recommendations contained in the President's message are distributed in the same manner. But a committee is not limited to suggestions from the outside; it may and does itself originate bills relating to the matters placed under its authority.

Thousands of bills which go to committees are not considered at all. Only measures to be reported to the house for action receive a more or less severe scrutiny. In such cases papers and documents may be secured from the President or high officials; department heads may be requested to appear personally and answer questions propounded by committee members. Friends and opponents of propositions in the hands of a committee are frequently admitted to state their views; witnesses may be summoned to appear and give testimony; the committee may travel about the country, hold hearings, and gather evidence.

In almost every case the measures in charge of a particular committee are considered or formulated by a sub-committee (in which the minority receives scant recognition), and the whole committee generally accepts its report. When it comes to a strict party question, such as the tariff, the majority members of the committee draft the bill; and after the measure is completed, they may invite the minority members in to vote on it as a matter of form; they may even overlook that courtesy. With regard to action on any measure in hand, a committee may recommend its adoption, amend it, report adversely, delay the report indefinitely, or ignore it altogether. In the House it rarely happens that a member is able to secure the consideration of a bill which the committee in charge opposes;[2] but in the Senate a greater freedom is enjoyed in this respect.

Owing to the pressure of business in the House, it is impossible to consider each bill on its merits and arrive at a vote after searching debate and mature deliberation; it often happens, therefore, that very important measures are forced through as they come from the committee without any serious discussion or

[1] Only bills which are reported favorably from committees have much chance of being acted upon, and when a bill is once favorably reported by a committee, its chances of passage are very high.

[2] According to a rule adopted in 1924, a bill must be brought out of a committee and laid before the House whenever 150 members sign a petition calling for that action.

a single amendment. This, of course, places an enormous power in the hands of committees and changes the House at times from a deliberative into a ratifying assembly.

Naturally there has been a great deal of criticism directed against the committee system. As early as 1880, the Independent National, or Greenback, party demanded "absolutely democratic rules" for the government of Congress and advocated taking away from the committees "a veto power greater than that of the President." Complaints are constantly made in the House itself, especially by members of the minority. "You send important questions to a committee," once lamented a member, "you put into the hands of a few men the power to bring in bills, and then they are brought in with an ironclad rule, and rammed down the throats of members; and then those measures are sent out as being the deliberate judgment of the Congress of the United States when no deliberate judgment has been expressed by any man."

The division of each house of Congress into a large number of separate committees, no doubt, does lead to many deplorable results. These committees work with little or no reference to one another, each preparing its own bills with slight regard to the measures in other committees. As a result there is a great deal of ill-adjusted and conflicting legislation, even on matters of fundamental importance. But it is easier to criticize than to find better methods for conducting business.

Only two outstanding remedies are offered for the evils of the committee system. One is the creation of the kind of unofficial leadership and direction which was built up by the Republicans in the early part of this century. The other is the adoption of the English cabinet system which openly vests control in the hands of a responsible group, the cabinet. The first has been tried and rejected as a form of "invisible government." The second, striking as it does at the very root of the congressional system, receives little consideration outside academic circles. Indeed there are signs that the House of Commons is looking with favor on the adoption of the standing committee system.

After this survey of the methods by which the majority in the House of Representatives may control reports of committees and the discussion and passage of measures, it might be assumed that the minority party is without power to influence in any

effective manner the course of legislative procedure. This view, however, is not strictly correct. By exercising certain constitutional privileges, the minority may block proceedings and go a long way toward forcing the majority to adopt policies which it would not initiate on its own motion. The Constitution provides that on the request of one fifth of the members present, the roll of the House must be called on any question and the yeas and nays of the members entered upon the journal. The Constitution furthermore provides that no business shall be done unless a quorum is present. The minority, in the House or Senate, may therefore raise at will the question of the presence of a quorum and force one roll-call after another, thus consuming time and making endless delays. Finally a great deal of the legislative business is done under the rule of unanimous consent, which, of course, may be steadily refused by the minority members.

More than once the leader of the minority party has thrown down the gage to the majority leaders and frankly informed them that unless certain policies were adopted the minority would exercise all its privileges under the rules for the purpose of obstructing business. In this way the minority may defeat bills by threats or by delays continuing until the end of the session. It sometimes even forces action on its own measures by threatening to refuse unanimous consent on all propositions and to call for the yeas and nays on every bill and resolution until the majority leaders capitulate and bring in the propositions which the minority demands.

Rules of the Houses of Congress

V. Whatever may be the nature of the leadership in Congress, there must be rules governing the daily procedure of the respective houses, which make it possible for leadership to direct, limit, and in a measure dictate action. The rules are a part of the system of control and their changes reflect the periods of concentration and expansion of power noted above. At all times, however, certain principles remain fairly fixed.

1. In the first place, the Speaker of the House may refuse to put motions which he regards as dilatory — that is, designed merely to delay business.

The immediate cause of the adoption of this principle was the

practice of filibustering[1] by the minority or by small groups. In the Fiftieth Congress, on one occasion, the "House remained in continuous session eight days and nights, during which time there were over one hundred roll-calls on the iterated and reiterated motions to adjourn and to take a recess, and their amendments. On this occasion the reading clerks became so exhausted that they could no longer act, and certain members, possessed of large voices and strenuous lungs, took their places. If this was not child's play, it would be difficult to define it. Then, again, when a measure to which the minority objected was likely to pass, the yeas and nays would be ordered."[2]

In the succeeding Congress, in which Thomas B. Reed was the Speaker, the Republicans had only a narrow majority, and it soon became clear that the opposing party, by making dilatory motions and refusing to answer to the roll-call on a quorum, could prevent the majority from doing any business at all. It was under these circumstances that Speaker Reed, in January, 1890, refused to put motions which he regarded as purely dilatory, and was sustained by the House. Mr. Reed defended his ruling as follows:

> The object of a parliamentary body is action, and not stoppage of action. Hence if any member or set of members undertakes to oppose the orderly progress of business even by the use of the ordinarily recognized parliamentary motions, it is the right of the majority to refuse to have those motions entertained and to cause the public business to proceed. Primarily, the organ of the House is the man elected to the speakership; it is his duty in a clear case, recognizing the situation, to endeavor to carry out the wishes and desires of the majority of the body which he represents. Whenever it becomes apparent that the ordinary and proper parliamentary motions are being used solely for the purposes of delay and obstruction; . . . when a gentleman steps down to the front amid the applause of his associates on the floor and announces that it is his intention to make opposition in every direction, it then becomes apparent to the House and the community what the purpose is. It is then the duty of the occupant of the Speaker's chair to take, under parliamentary law, the proper course with regard to such matters.

This principle was shortly afterward (1890) embodied in the rules, and the Speaker now has regular sanction for refusing to en-

[1] In ordinary use, the word "filibuster" means to act as a freebooter or buccaneer, but in parliamentary practice it means "to obstruct legislation by undue use of the technicalities of parliamentary law or privileges, as when a minority, in order to prevent the passage of some measure obnoxious to them, endeavor to tire out their opponents by useless motions, speeches, and objections." Frequently, the purpose of a filibuster is to call the attention of the country in an emphatic way to the policy of the majority.

[2] Reinsch, *Readings*, p. 238.

tertain purely dilatory motions. However, the constitutional right of a member to demand the yeas and nays cannot be denied even if the purpose is dilatory.[1]

2. In the second place the Speaker may count as present those members who are physically present but refuse to answer to their names on a roll-call for the purpose of compelling an adjournment in the absence of a quorum. This principle was established by Speaker Reed about the same time as the ruling on dilatory motions, and also embodied in the revision of the rules.[2]

3. In the third place, the rules of the House provide for automatically shortening debate; they prescribe that the time occupied by any member in discussing a legislative proposition shall not exceed one hour. This limit was imposed in 1841, and at the time Senator Benton declared that it was "the largest limitation upon the freedom of debate which any deliberative assembly ever imposed upon itself, and presents an eminent instance of permanent injury done to free institutions in order to get rid of a temporary annoyance." It is difficult to see, however, in what way the House could meet the enormous pressure upon it, if any member from among the 435 could talk as long as he pleased on any measure.

A member may, if he chooses, yield a portion of his time to some other member or members wishing to speak on a measure, but he may occupy no more than one hour, except by obtaining unanimous consent. Neither may he speak twice upon the same measure unless he introduced it, or is the member reporting it from committee. When going into the committee of the whole,[3] the House fixes the time of debate, which cannot be extended by the committee; and in many other ways freedom of debate is arbitrarily limited. Moreover it is in order to move "the previous question" and shut off debate automatically.

4. In the fourth place, to enable party leaders to force the consideration of certain measures whenever they see fit, several important committees may report on specified subjects practically at any time in the course of the procedure of the House, no matter what may be under discussion.[4]

[1] On this important subject, see Hinds, *Precedents of the House of Representatives*, Vol. V, pp. 353 ff.

[2] See above, p. 234.

[3] The committee of the whole forms a convenient body for discussion and provisional voting on measures. In it, 100 constitute a quorum and the Speaker's chair is taken by some other member. Measures approved in it are reported to the House for formal adoption.

[4] It is always in order to call up for consideration a report of the committee on rules. Above, p. 263.

The Senate also has its code of rules, but it has not adopted any of the drastic restraints obtaining in the House. When the Senate rules were revised in 1806, the right to move the previous question, and thus close debate summarily, was omitted, and all attempts to restore control failed until 1917. At the session convened in March of that year, the Senate found all business blocked by an apparently endless debate. By a certain irony of fate the Democrats, who had always been the most ardent champions of free debate, were forced to insist upon some method of cutting it off. Acting on the recommendation of a committee composed of an equal number of members from both parties, the Senate adopted a new rule providing that: (1) on petition of sixteen Senators a motion to cut off discussion on any bill can be served on the Senate and (2) if approved two days later by a two thirds vote debate will come to an end, after each member has enjoyed the right to speak for not more than one hour on the pending measure. After such a closure is adopted amendments to the bill under consideration can be made only by unanimous consent.

The new rule, however, is not often called into play, though it is always ready for use. Debate is still more prolix in the Senate than in the House, the Senators preferring to rely upon a sense of propriety, rather than upon harsh measures, to bring discussion within the bounds of reason. Knowledge that there is a closure rule acts as a partial check upon filibustering tactics. The provision requiring a two thirds vote to put the rule into effect is calculated to prevent any drastic and unfair use of the instrument. The long debate on the treaty of peace in 1919 is proof that the new rule does not seriously hamper the right of members to a free and full expression of their opinions.

The Ordinary Course of Procedure in Congress[1]

VI. With this preliminary survey of some of the institutions and practices of Congress, we are better able to understand the procedure of that body from day to day. The principles governing this procedure are to be sought in Jefferson's *Manual of Parliamentary Practice*, the standing rules of each house, and the vast number of precedents established during the history of Congress.

[1] The standard treatise on this subject is Luce, *Legislative Procedure* (1922).

Whoever finds sheer enjoyment in unraveling complicated problems of parliamentary custom has an unlimited field for self-indulgence in the eight bulky volumes of a thousand pages each, compiled by A. C. Hinds, former Clerk of the Speaker's Table, bearing the title of *Parliamentary Precedents of the House of Representatives*.[1] Fortunately, however, the principles, or rather lack of principles, governing the conduct of business in either house may be understood by the mastery of a few fundamental points.

At the opening of a new Congress the House of Representatives is brought to order by the clerk of the last House, who calls the roll, and, finding a quorum present, announces that they are ready for nominations for Speaker. The majority and minority put forward their candidates, and after the former's nominee is duly ratified, he takes the oath of office administered by the member longest in continuous service of the House. The roll is called by the clerk, and the Representatives go forward to be sworn in. The other officers are chosen, and the President of the United States and the Senate are informed that the House is ready for business. The question of the adoption of the rules of the preceding House is then threshed out, and usually carried in the face of the traditional protests of the minority. In due time the names of the committeemen nominated by the caucuses of the parties are read, and approved by the House.

The Senate differs from the House in being a continuous body. At each new Congress only one third of the membership is renewed. The presiding officer, the Vice President, as required by the Constitution, takes the chair. In case of his absence, his duties are performed by a president *pro tempore*. The newly elected Senators are called in alphabetical order by the secretary of the Senate; each Senator in turn is escorted to the presiding officer's desk, usually by the colleague from his state, and there takes the oath of office. The President and House are duly notified, and then the Senate is also ready for work.

Bills are introduced in the House in several ways. Any member may introduce any measure he likes by depositing it on the clerk's table or handing it to the Speaker if it is a public bill; or he may introduce a petition for a bill which will be referred to an appropriate committee for drafting. All really

[1] Copies of the rules of both houses may be secured by writing to a Senator or Representative.

important bills, however, such as tariff bills, currency measures, and the like are drafted by the majority members of the committees in charge of the subject matter. Sometimes, the committee of the House coöperates with the committee of the Senate having charge of similar business, in preparing a bill. If the question is very significant, the President of the United States may join some of the committee members in drawing up the bill; prominent party leaders not in office may be consulted. A caucus of party members may be held on the bill even before it is brought up for consideration.

On its introduction, each public bill is referred by the Speaker to the appropriate committee, which may hold hearings and give the matter any amount of attention it sees fit. The committee may report the bill to the House favorably unamended, or it may amend it and report it in such form, or it may report unfavorably, or it may neglect it altogether.

Debates in Congress are often perfunctory, seldom animated, and very rarely have any effect upon the decisions taken. As to important bills reported from committees, decisions have already been made by party leaders; accordingly there is little to be said on such measures by members of the dominant party. The opposition is allotted a certain amount of time as a matter of form, but no one expects arguments from that quarter to produce any results of significance. In the Senate, where, as we have noted, debate is more free than in the House, speeches may really change opinions and votes.

A great many speeches that appear in the pages of the *Congressional Record* are delivered to empty benches during sessions of the committee of the whole, or not delivered at all. Frequently they are not directed to members of Congress, but to the constituents of the orator. The "leave to print" is rather freely granted so that members have complete liberty to address the voters of their districts through printed speeches supposed to have been delivered in Congress. Even such entries as "Cheers," "Laughter," and "Prolonged Applause" may be inserted by the member in preparing his copy for the printer of the *Record*.

When a bill has passed either house, it is transmitted to the other body for consideration. For example, when the Senate has passed a bill, it thereupon dispatches the measure to the House. If the House passes the bill thus brought in, the Senate

is notified; the measure is then signed by the President of the Senate and the Speaker of the House, and is sent to the President of the United States for his signature. If he approves the bill, he notifies the House in which it originated of his action, and sends it to the Secretary of State for official publication. If he vetoes the measure, he returns the bill to the house in which it originated, with a statement of the reasons for his action, unless that body has adjourned. If a bill originates in the House, it is sent to the Senate and goes through a similar process.[1]

Whenever a bill originating in one house is amended in the other, it must be returned to the first for reconsideration, and for adoption or rejection as amended. If, at last, the houses are unable to agree upon a measure — a regular occurrence in the case of important bills — it is the practice for the presiding officer of each body to appoint representatives to a conference committee, as it is called, authorized to discuss the differences, to come to some agreement upon the disputed points, and report back to the respective houses their agreement, or their inability to come to terms. As a general principle the conference committee, in coming to an agreement, should introduce no new matter into the measure which it has under consideration — that is, no provision that has not been already adopted by either the Senate or the House. It is, of course, not easy to determine whether new matter has been introduced into a long and complicated measure. Certainly the conferees are not limited in their action to the adoption of the provisions as actually passed by one house or the other. They may, and often do, draft a compromise proposition, perhaps midway between the extremes demanded by the two houses, and in drafting it they may, in fact, change the language of the bill. When a conference committee report is submitted, each house adopts it, or rejects it as a whole; it does not amend.

[1] Although the provisions of the Constitution are explicit to the effect that every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President, Congress has devised a measure known as the "concurrent resolution," which, although it clearly has the effect of law, is not submitted to the President for approval. The form of this resolution is as follows: *Resolved*, by the House of Representatives (the Senate concurring) that, etc.; or, *Resolved*, by the Senate (the House of Representatives concurring) that, etc. From the beginning of the government it has been the uniform practice of Congress not to present concurrent resolutions to the President and to avoid incorporating in such resolutions any matter in the nature of legislation. The concurrent resolution is frequently used in ordering the publication of documents, in paying therefor, and in incurring and paying other expenses, the money for which has been appropriated and set apart by law for the use of the two houses.

Securing Information for Legislative Action

In the exercise of its legislative functions, Congress frequently makes use of a special committee of investigation. For example, it instituted by an act of June 18, 1898, an industrial commission consisting of five members of the House of Representatives, five Senators, and nine persons appointed by the President — the last to be paid salaries. This commission was instructed to investigate questions appertaining to immigration, labor, agriculture, and business, to report to Congress, and to suggest desirable legislation on these subjects. The commission made a long and exhaustive investigation and reported to Congress a voluminous mass of testimony and many proposals for legislative action. A few years later, namely, in February, 1907, Congress created a joint commission on immigration, consisting of three Senators, three members of the House of Representatives, and three persons appointed by the President — charged with the duty of making a full investigation into the subject of immigration. In 1913 Congress established an industrial relations commission which conducted an elaborate inquiry into labor and agricultural problems and startled the whole country by the radical character of its findings.

Sometimes, in conducting investigations, Congress, by a joint resolution, authorizes executive officers of the Government to make inquiries and report on specific matters subject to legislation. For example, on one occasion, by joint resolution, Congress instructed the Interstate Commerce Commission to make examinations into the subject of railroad discriminations and monopolies, and to report on the same from time to time. Congress has even required certain federal courts to compel witnesses to testify before the Interstate Commerce Commission, and the Supreme Court has held this law constitutional. The Court declared that it was clearly competent for Congress to invest the Commission with an authority to require the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter legally committed to that body for investigation.

Whatever may be the theory as to the power of Congress to investigate the working of executive departments,[1] there is as a

[1] See above, p. 192.

matter of fact a long line of precedents showing that both houses from time to time assume the right of inquiring into the conduct of executive business. For example, in 1818, the House of Representatives appointed a committee to find out whether any clerks or other officers in any of the departments or in any office at the seat of the general government had conducted themselves improperly in their official duties, and authorized the committee to send for persons and papers. When it was contended that this resolution assumed a power over executive departments that belonged to the President alone, and would thus impair executive responsibility, it was answered that the House was like a grand jury to the nation and that it was its duty to inquire into the conduct of public officers. A year later the House asserted that, having the constitutional right to concur in the appropriation of public moneys, it also had the right to examine into the application of appropriations for the purpose of discovering whether they had gone into the proper channels. From that day to this, it has been a frequent practice for both houses to make investigations into the various branches of the public service.

Notwithstanding these and other precedents, it is still an open question how far Congress or either house may go in compelling the executive branch of the Government to yield any information demanded. For example, in 1909, the Senate, by a resolution, directed the Attorney-General to inform that body whether he had instituted proceedings against the United States Steel Trust for absorbing the Tennessee Coal and Iron Company in violation of the Sherman anti-trust law, and if not, why not; and whether he had rendered an opinion as to the legality of the said absorption. President Roosevelt directed the Attorney-General not to respond to the demand. The President further declared that "heads of departments are subject to the Constitution and laws passed by the Congress in pursuance of the Constitution, and to the direction of the President of the United States and to no other direction whatever."

The chief sources of information for legislative purposes are, of course, the hearings and investigations conducted by the various standing committees to which all the bills introduced into Congress are referred for study and action. Each of the important standing committees has commodious and well-equipped quarters in one of the magnificent office buildings con-

structed for the Senate and the House. Every leading committee has a library of materials bearing on the subjects referred to it and also has at its command the extensive resources of the Congressional Library. Committees may also call upon the Legislative Drafting Service, of which there are two branches, one for the Senate and another for the House. The Library of Congress maintains a division of Legislative Reference charged with the duty of furnishing information on questions pending before the houses.

The student may naturally inquire whether debates in Congress do not afford information on legislative questions. In the Senate, it frequently happens that speeches, particularly on constitutional law, really illuminate problems before that body; but it cannot be said that the House derives much information from the desultory and partisan speeches delivered there. Mr. Bryce attributes this absence of informing debates to the committee system itself.

In fact, the average member of the House is absorbed in his own affairs and the work of the committees to which he is assigned. He is, therefore, not strongly inclined, as a rule, to question the wisdom of the results reported by the committees. He assumes that the members of the other committees know more about their business than he does, and furthermore he does not like to stir up trouble for himself by criticisms of their work.[1]

The Lobby

When we pass outside the realm of official inquiry and debate into spheres of influence associated with congressional action we have to deal with more or less elusive forces. Yet certain facts lie on the surface of things. Washington is the headquarters of many powerful organizations which concentrate their energies on advancing or blocking legislation. Without attempting to take them in the order of importance, there is first the National Chamber of Commerce, a federation of the local chambers throughout the United States, with an elaborate organization and machinery for taking the opinion of American business men on issues arising in Congress. Not far away stands the large building which houses the American Federation of Labor, always

[1] For observations on the character of congressional legislation and comparisons with the British system, see Bryce, *American Commonwealth*, Vol. I, pp. 167–75; 278–97.

indefatigable in its support of friendly legislation and its warfare on measures deemed inimical to labor interests. Equally active are the three nation-wide farmers' associations. Ever on watch and ever busy disseminating its views on legislation is the American Association of Railway Executives which speaks for the combined railway interests of America. Then descending to details we find each one of the leading manufacturing and mercantile interests organized and prepared to bring powerful influences to bear on Senators and Representatives in season and out.

It is estimated that there are in all about 150 economic organizations (to say nothing of moral reformers) represented in the lobbies of Congress.[1] Among them are the Standard Oil Company, the Farm Bureau (the conservative farmers' organization), and the spokesmen of the coal, leather, beef, railway, silk, glove, fertilizer, cotton, banking, wire, steel, express, drug, advertising, lime, beet sugar, and other interests. The capitalistic and the conservative farming groups are organized into a loose cooperative society known as "the Monday Lunch Club." All these interests have skillful and astute agents, paid large salaries, and granted generous expense accounts for entertainment and other purposes; one of the agents is said to be paid as much as the President of the United States. Sometimes former members of Congress are found among them; often "lame ducks" or members defeated for reëlection are offered retainers' fees from concerns whose interests are involved in legislation. All the legislative agents are expert in the ways of Congress and keep an eagle eye on every bill that affects their respective spheres. They know every Congressman, his past record, his mistakes, his weakness, his debts, the skeletons in his family closet. They work as quietly as mice sometimes and thunder through the newspapers at other times. They have their thousand cords of influence stretching away from Washington to every home, shop, farm, and office; they can set in motion potent forces which no Senator or Representative can ignore. They can drench or deluge Congressmen with letters, telegrams, and phone calls.

Here is a vast and tangled network of agencies, having large sums at their disposal to spend in agitation and publicity, maintaining research bureaus to accumulate facts favorable to their

[1] F. R. Kent, *The Great Game of Politics*, pp. 270 ff.

special interests, and equipped with all the mechanisms of modern society for bringing "pressure" to bear on members of both houses. Under the burning spot-light of their scrutiny, constantly bombarded by their pleas, threats, and promises, "gassed" by their publicity, the legislator who tries to see things as they are and as a whole and to do his full duty in the midst of clamor and perplexity, must have poise, discrimination, and courage. As we have noted above, there are students of government who boldly advocate giving up the fiction of political equality and frankly incorporating manufacturing, labor, agricultural, and professional interests into the government itself.[1] Whether these interests are inside or outside the government they are potent influences in shaping the opinions of Congressmen.

[1] See above, p. 26.

CHAPTER XIII

THE NATIONAL JUDICIARY

The Constitution of the United States, in the brief article relative to the judiciary, makes only a slight reference to the structure of the federal courts. It merely provides that the judicial power shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish. Congress can determine the number of judges appropriate for the Supreme Court and create any additional tribunals which appear necessary for the transaction of federal business. Still, the Constitution seeks to establish a high degree of independence for the judges of all federal courts; it assures them permanence of tenure during good behavior and a compensation for their services which cannot be diminished during their continuance in office.

While the constitutional provisions respecting the judiciary are not self-executing, an imperative mandate is certainly laid upon Congress to organize the Supreme Court and to create inferior courts. As a Senator once observed, it would be revolutionary for Congress to omit the organization of the Supreme Court and the establishment of inferior courts. Indeed, another Senator went so far as to say that the inferior courts are established as a public necessity and in pursuance of a public policy outlined in the Constitution, and cannot be arbitrarily abolished. "Congress has power to create," he declared, "but has no power to destroy. Congress cannot destroy the judiciary any more than the judiciary can destroy Congress. . . . If to-day Congress should pass an act abolishing all the circuit and district courts of the United States without substituting other tribunals in their stead, can there be any doubt that the Supreme Court would declare the act to be unconstitutional and void?" It is difficult to see, however, what the Court could accomplish by declaring such a law void.

In reality, the federal courts are to some extent at the mercy of Congress. While it is true that Congress cannot abolish the Supreme Court at one stroke, reduce the salaries of the judges,

or remove any of them except by the process of impeachment, it may by a circuitous route effect a revolution in the composition of the Court. It may reduce the number of judges by providing that on the death or resignation of any of them the vacant post shall be abolished; then at the proper moment it may increase the number of judges to secure the appointment of men known to entertain certain views on the constitutionality of particular measures. As to the inferior courts, Congress has gone even further. In 1802, during Jefferson's administration, it repealed the law of the preceding year creating sixteen circuit judgeships which President Adams had filled with Federalists at the close of his term. Moreover, Congress can prevent certain classes of cases from coming before the Supreme Court by refusing to provide a system of appeals; this has been done on one occasion. It has been suggested that Congress might require a vote of more than a mere majority of the judges to declare an act of Congress unconstitutional; but this idea has been bitterly assailed by lawyers as unconstitutional in itself. In the main we may say that the federal judiciary enjoys a high degree of independence from legislative interference.

The Federal Courts

All federal judges are nominated by the President and appointed by and with the advice and consent of the Senate. With regard to the inferior courts, this mode of appointment is a matter of practice rather than of constitutional law. The Constitution provides that the President and Senate are to appoint the judges of the Supreme Court; but authorizes Congress to vest the appointment of such "inferior officers" as it thinks proper in the President alone, in the courts of law, or in the heads of departments. By uniform practice, however, it is settled that the judges of the lower federal courts are not "inferior officers" whose appointment should be taken from the President and Senate and vested in some other authority. The judges of the Supreme and inferior courts hold office during good behavior, and therefore cannot be removed except by impeachment.

Under these constitutional provisions Congress has created the following scheme of courts:

1. At the head of the system stands the Supreme Court composed of nine judges.[1] This Court holds its sessions usually from October until May in the chamber of the Capitol formerly occupied by the United States Senate. The most important business that comes before it involves questions of constitutional law brought up from lower federal courts or from state courts on appeal or by writ of error.[2]

A case as presented to the Court contains a statement of the facts involved in the controversy and the arguments of the attorneys on the law and facts. When a case is submitted, it is the duty of each justice to examine the facts and the arguments and to apply the law. After each judge has looked at the case independently, a conference is held at which the various points are discussed at length and a decision is reached. Thereupon, the Chief Justice either prepares, or requests one of his colleagues to prepare, what is called "the opinion of the court," which contains the conclusion reached by the majority and the final order in the disposition of the case. This "opinion" is subjected to the scrutiny of the judges and after a careful revision, which then represents the solemn and final ruling of the Court, it is printed and placed on record. Any judge, who agrees with the decision of the majority, but bases his reasoning on other grounds than those put forward in the opinion, may prepare what is called a "concurring opinion," in which he sets forth the processes by which he reaches the same end. In some instances, therefore, a majority of the Court may agree that a particular case shall be decided in favor of the plaintiff (or defendant), but each justice may assign different reasons for his own action.

It is also the practice, in all important cases, for the minority of the judges who do not accept the conclusion reached by the majority to file a "dissenting opinion," setting forth their reasons for believing that the case should have been decided otherwise. Sometimes each of the dissenting judges prepares his own opinion; sometimes one of them writes an opinion which is concurred in by the other dissenting colleagues. As a matter of fact, many

[1] A Chief Justice and eight Associate Justices. Six judges must be present at each trial and a majority is necessary for a decision. The salary of the Chief Justice is $15,000 and of the Associate Justices $14,500.

[2] It is not very often that the Supreme Court is called upon to try an original case affecting ambassadors, public ministers, and consuls, but there have been several cases of disputes between states over boundaries and other matters which have been brought before that tribunal as a court of first instance.

crucial cases involving constitutional law have been decided by the narrow majority of one.

The opinions thus rendered are officially published as the *United States Reports*, and at the present time the opinions for a single term of the Court may fill three or four volumes. They form the great authoritative source of information on the historical development and present status of constitutional law.

2. Immediately under the Supreme Court is a Circuit Court of Appeals in each of the nine great circuits into which the United States is divided. In those circuits which have a large amount of business there are four or five judges and in the smaller circuits there are three judges, all appointed by the President and Senate. Each of the justices of the Supreme Court is assigned to one of the nine circuits, but none of them "rides the circuit" now as in former times.

The Circuit Court of Appeals has the right to review, on appeal or on writ of error, decisions in the lower District Courts, and its decision is final in a large number of cases, such as controversies between aliens and citizens, suits between citizens of different states, and cases arising under patent, revenue, and criminal laws. However, the Circuit Court of Appeals may ask the Supreme Court for instructions on any point of law; and the Supreme Court may call a case up and decide it, or may inquire by writ of certiorari into final causes pending in the Circuit Court of Appeals. Appealed cases from the lower federal courts within a circuit go to the Circuit Court of Appeals, unless they involve the jurisdiction of the lower court, final sentences and decrees in prize cases, or the Constitution, or the constitutionality of laws or treaties of the United States, or the constitutionality of an act of any state — in which instances appeals may be taken directly from the lower courts to the Supreme Court of the United States. This reserves, therefore, to the Supreme Court the decision of cases involving constitutionality, and gives to the Circuit Court of Appeals the final decision in nearly all other cases involving merely the application of ordinary law. As a matter of fact, however, it is relatively easy to raise the question of constitutionality, so that the appellate court has not been able to render the expected services in relieving the great tribunal at Washington.

3. The lowest federal court is the District Court. Formerly

there was a Circuit Court between the Circuit Court of Appeals and the District Court, but that court was abolished by the law of March 3, 1911, and its business transferred to District Courts. The whole country is laid out into some eighty or ninety districts; in each of these there are appointed by the President and Senate from one to six district judges, according to the amount of business to be transacted. Each of the more sparsely populated states constitutes a single district; other states have two or more districts; the great state of New York has four.

The large districts are usually divided into "divisions" and the law provides the dates and places for holding terms of the District Court within each division. By turning to the law, anyone can find in what district he resides and the date and place for the term of court in his district or division, as the case may be. For example, the law of 1911 runs, "the state of New Hampshire shall constitute one judicial district to be known as the district of New Hampshire. The terms of the District Court shall be held at Portsmouth on the third Tuesdays in March and September; at Concord on the third Tuesdays in June and December; and at Littleton on the last Tuesday in August."

The matters which may be brought to trial in a federal District Court are so various in character and so numerous that they need to be studied only by the practicing lawyer whose business it is to discover the proper forum into which his clients' business may be taken.[1] The jurisdiction of the District Court embraces (among other things) all crimes and offenses cognizable under the authority of the United States, cases arising under the internal revenue, postal, and copyright laws, proceedings in bankruptcy, all suits and proceedings arising under any law regulating the immigration of aliens or under the contract labor laws, and also all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

[1] In addition to this regular hierarchy of courts, Congress has created from time to time special courts. There is a Court of Claims composed of a chief justice and four associate judges whose duty it is to hear claims against the Federal Government. If it decides that a certain amount of money is due from the United States to any party, it cannot order payment, but must depend upon appropriations made by Congress. This Court partially relieves Congress of the great political pressure brought on behalf of private claims. Congress has also created a judicial system for the District of Columbia comprising a court of appeals, a supreme court, and minor courts of the justices of the peace, a police court, and a juvenile court. The Payne-Aldrich tariff law of 1909 created a Customs Court, consisting of a presiding judge and four associates, to which court appeals may be taken from the decisions of the Board of General Appraisers on questions of jurisdiction and law.

The Law Officers

In close relation to the judiciary is the Department of Justice with its great army of United States attorneys and marshals in the judicial districts in the states and territories.[1] The head of the Department of Justice is the Attorney-General of the United States, who is the chief law officer of the Federal Government. "He represents the United States in matters involving legal questions; he gives his advice and opinion when they are required by the President or by the heads of the other executive departments on questions of law arising in the administration of their respective departments; he appears in the Supreme Court of the United States in cases of especial gravity and importance; he exercises a general superintendence and direction over the United States attorneys and marshals in all the judicial districts in the states and territories; and he provides special counsel for the United States whenever required by any department of the government." The enforcement of important federal laws, therefore, depends largely upon the activity of the Attorney-General, or rather upon the policy of the President expressed by him.

In each of the judicial districts there are a United States district attorney and one or more assistants who represent the Government in the prosecution and defense of causes arising within the district. There are also in each district a marshal and deputy marshals whose duty it is to enforce the orders of the federal courts, to arrest offenders against federal law, and otherwise to assist in the execution of that law. United States district attorneys and marshals are appointed by the President and Senate.

The National Judicial Power

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

1. In the first place, the jurisdiction of the federal courts covers cases affecting ambassadors, other public ministers and consuls; controversies to which the United States is a party; controversies between two or more states, between a state and citizens of

[1] See above, p. 194.

another state, between citizens of different states,[1] and between a state or the citizens thereof and foreign states, citizens or subjects — with the provision that the judicial power shall not extend to any suit in law or equity commenced or prosecuted against one of the United States by American citizens or by citizens of foreign states. When any of these parties are involved in controversies, the case may come under federal judicial power, even though the Constitution and laws of the United States are not at all drawn into the controversy. So much for the jurisdiction of the federal courts over parties.

2. In the next place, the federal judicial power extends to certain *matters*, regardless of the character of the parties involved in the dispute; that is, to all cases in law and equity[2] arising under the Constitution, the statutes, and the treaties of the United States and to all admiralty and maritime cases.

A case, according to Story,[3] arises "when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law." In other words, a case in law or equity comes within the federal judicial power whenever a correct decision of the controversy involves in any way the interpretation of the Constitution or federal laws or treaties; but it need not always be taken into a federal court. State courts hear many cases involving federal law.

With the exception of two classes of cases, the Constitution does not say which of the federal courts shall have jurisdiction over any particular matter; it leaves the distribution of the judicial powers to Congress. The two exceptions are cases affecting ambassadors, other public ministers, and consuls and cases in which a state may be a party. Over such cases the Supreme Court, under the Constitution, has original, but not exclusive, jurisdiction; that is to say, whenever any such case arises, it may be taken into the Supreme Court in the very beginning, without having been previously tried in any lower court. Since, however, the Constitution does not confer exclusive jurisdiction in such matters, Congress may decide whether any other

[1] Also between citizens of the same state claiming lands under grants of different states. For the purposes of suing in federal courts corporations are regarded as "citizens," but for other purposes they are regarded as "persons."

[2] For a definition of "equity," see below, chap. xxix.

[3] *Commentaries*, Vol. II, section 1646.

federal court or courts shall try these cases and under what limitations. Over all other cases falling within the scope of the federal judicial power, the Supreme Court has only *appellate* jurisdiction as to law and fact, subject to such exceptions and under such regulations as Congress may make.

In connection with the exercise of their authority, the federal courts, in common with courts in general, have the power to punish private parties for "contempt."[1] According to one theory that power extends only to the right to punish persons for acts which are committed in the presence of the court or have the effect of interfering with the proper conduct of judicial proceedings. Such, indeed, seems to be the spirit of the federal law relative to the exercise of this power by the courts. In practice, however, judges do fine and imprison private persons for spoken or written criticisms uttered outside the court room and merely casting some reflection on the judge himself. For example, upon one occasion, Charles L. Craig, the comptroller of the City of New York, wrote a public letter passing certain more or less severe strictures on the conduct of a federal judge in that city in a particular case and was promptly sentenced to prison by the irate judge. Mr. Craig was only saved from jail by a timely pardon issued by President Coolidge. Such cases, which are rather numerous, are responsible for a demand for the curtailment of the power of judges to act as accusers, judges, and jurors in cases of contempt against themselves committed outside the court room, especially cases involving criticisms of the policies and decisions of judges, which in no way interfere with the course of justice. It must be remembered that judges, like other persons, have the right to sue people who slander them.

The Great Writs

In the exercise of their judicial functions the federal courts have the power of issuing certain writs which affect very fundamentally the rights of citizens.

1. The first and most famous of these writs is that of habeas corpus. This writ is designed to secure to any imprisoned person the right to have an immediate preliminary hearing for the purpose of discovering the reason for his detention. For example,

[1] For labor cases involving contempt, see below, p. 399.

a United States marshal in the execution of the revenue laws kills a citizen of a state and is arrested and imprisoned by the state authorities. His attorney applies to some near-by federal court for a writ of habeas corpus, which writ will require the state officer having charge of the prisoner to produce him in the federal court where the reasons for his arrest and detention are to be examined.

The several justices and judges of federal courts within their respective jurisdictions have the power of granting the writ for making inquiries into the cause of arrest. This does not mean, however, that a federal judge may issue the writ indiscriminately. It can only be issued when a prisoner is in jail under federal authority or for some act done or omitted in pursuance of a law of the United States or the order, process, or decree of some federal court or judge; or is in prison in violation of the Constitution or some law or treaty of the United States; or is a citizen of a foreign country claiming to be imprisoned for some act committed with the sanction of his government.[1] In other words, a federal judge cannot issue a writ of habeas corpus in behalf of some person who merely claims that he is detained in violation of the law of a state. The petitioner must be a prisoner held either under federal authority, or by state authority presumably in violation of some law of the United States.

The application for a writ of habeas corpus is made to the proper court by a complaint in writing, signed by the prisoner, setting forth the facts concerning his detention and the reasons for his imprisonment, if they are known to him, and stating in whose custody he is held. It is the duty of the judge upon application to grant the writ, unless it is evident from the application itself that the prisoner is not entitled to it under the law. Within a certain time the officer to whom the writ is directed must make due return, bringing the prisoner before the judge and certifying as to the cause of his detention. The court or judge, thereupon, must proceed in a summary way to examine the facts, hear the testimony and arguments, and either release the prisoner (if he is detained in violation of the law), or remand him for trial if there is no warrant for interfering.

2. The second writ is the writ of mandamus which is used against public officials, private persons, and corporations for

[1] Rose, *Jurisdiction and Procedure of the Federal Courts* (1922), p. 377.

the purpose of forcing them to perform some duty required of them by law.[1] The mandamus is properly used against executive officers to compel them to perform some ministerial duty.[2] Where the duty is purely discretionary and its performance depends upon the pleasure of the official or upon his own interpretation of the law, the court will not intervene. "It is elementary law that mandamus will only issue to enforce a ministerial duty as contradistinguished from a duty that is merely discretionary. This doctrine was clearly and fully set forth by Chief Justice Marshall in Marbury *v.* Madison and has since been many times reasserted by this Court."[3] In general, anyone seeking the writ of mandamus to compel a federal officer to perform an act must show that he has no other adequate legal remedy and that he has a clear legal right to have the action in question performed by the officer. The writ of mandamus is also often used to compel an inferior court to pass upon some matter within its jurisdiction which it has refused to hear or act upon.[4]

3. The third great writ is the writ (or bill) of injunction. This writ may be used for many purposes. Sometimes it takes the form of a mandatory decree ordering some person or corporation to maintain a *status quo* by performing certain acts. Thus, for example, the employees of a railway may be ordered to continue handling the cars of some company which they wish to boycott; in other words, may be ordered to continue to perform their regular and customary duties while remaining in the service of their employer.[5] Frequently the injunction takes the form of a temporary restraining order forbidding a party to alter the existing condition of things in question until the merits of the case may be decided. Sometimes the writ is in the form of a permanent injunction ordering a party not to perform some act the results of which cannot be remedied by any proceeding in law. The question of injunctions has been brought into national politics owing to the frequency with which federal courts have issued them in labor disputes.[6]

[1] It was early settled by judicial decision that no federal court (except the Supreme Court of the District of Columbia) could issue the writ of mandamus except in aid of the exercise of jurisdiction acquired in some other way.

[2] An excellent example of the use of mandamus is afforded by the case of Postmaster-General Kendall, who was ordered by the Supreme Court to obey the provisions of an act of Congress directing him to pay certain sums due to mail-carriers under government contract (1837).

[3] The United States, etc., *v.* Lamont, 155 U. S. 308.

[4] Taylor, *Jurisdiction and Procedure of the United States Supreme Court*, pp. 512 ff.

[5] Judson, *The Law of Interstate Commerce* (1905), p. 127, note 3.

[6] See below, p. 400.

The Power of Passing upon the Constitutionality of Statutes

The jurisdiction of the federal courts extends not only to cases in law and equity in the strict sense of the word; it extends to cases involving the constitutionality of state and federal laws. It is nowhere expressly provided in the Constitution that the federal courts shall have the power to declare a statute of Congress or of a state legislature invalid on the ground that it conflicts with the Constitution. Indeed, it is contended by some writers that it was not the purpose of the framers to confer such a power over federal statutes upon the courts of the United States. For example, the Honorable Walter Clark, of North Carolina, has declared that the federal judiciary clearly usurped authority in this regard.[1] Long ago, President Jefferson held that it was the design of the framers to establish three coördinate and independent departments of government, and that to give the judiciary the power of passing upon the acts of the other departments would be to make that branch of the government supreme over the other two branches.

It is not possible to discover exactly what was the opinion of all the members of the convention at Philadelphia on this point. The issue was not laid before that body in the form of a definite proposition and therefore was not the subject of a vote. Undoubtedly a few of the delegates were opposed to the idea of judicial control, for they expressed this conviction incidentally while discussing other topics.

On the other hand many members of the convention,[2] either before or after the adoption of the Constitution, indicated their belief that the federal judiciary should exercise the power to pass upon the constitutionality of laws. This side of the case was very plainly put by Hamilton in *The Federalist:* "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of

[1] *The Independent*, Sept. 26, 1907.
[2] Beard, *The Supreme Court and the Constitution.*

course, to be preferred; in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." [1]

Whatever may have been the intention of the framers, Chief Justice Marshall, in the famous case of Marbury *v.* Madison, demonstrated with imperious logic that the Court under the Constitution possesses the power of declaring federal statutes void when they conflict with fundamental law.[2]

The power of the Court to pass upon the acts of state governments was early resisted by Jefferson and the stanch defenders of states' rights. They admitted the supremacy of the Federal Government within its domain, but they contended that to give the federal judiciary the right to determine the validity of state laws would enable the Federal Government to define its own sphere of power and thus reduce the states to mere administrative subdivisions. However, the leaders of the states' rights party did not offer any adequate plan for settling amicably disputes between the federal and state governments over their respective limits of power and for obviating the endless complications that would arise from conflicting decisions in the state courts if there were no final tribunal of appeal to give uniformity to them. The logic by which the federal judiciary secures its authority to pass upon the validity of state acts is as inexorable as the logic of Marshall's opinion in Marbury *v.* Madison.

Congress has provided by law the precise way in which the constitutionality of the statutes and acts of states may be tested in the Supreme Court of the United States. A case may be taken to that Court from the highest court of a state having jurisdiction over the cause, whenever the latter denies the validity of a federal treaty or statute or of an authority exercised under the United States. A case may also be taken to the Supreme Court whenever a state court declares that a state law or an act done under state authority does or does not violate the Constitution or laws of the United States. In former times there was no appeal if a state court declared a state law invalid as violating the Constitution of the United States, but that rule no longer obtains.

To make the process of testing the constitutionality of a state

[1] For colonial precedents, see the full and critical review by C. G. Haines, *The American Doctrine of Judicial Supremacy*, chaps. iv and v.

[2] For this important opinion, rendered in 1803, see *Readings*, p. 274.

statute clear, let us examine a concrete case. The legislature of New York passed a law providing that no employees should be required or permitted to work in bakeries more than sixty hours a week, or ten hours a day. One Lochner, an employing baker of New York, claimed that this statute infringed the rights which he enjoyed as a citizen under the Constitution of the United States, and resisted its enforcement. The case was carried to the highest court in the state of New York, which upheld the statute. The decision having been against the right which he claimed under the federal Constitution, Lochner thereupon carried his case to the Supreme Court of the United States, which decided in his favor, declaring the law of New York null and void as being in conflict with certain provisions of the federal Constitution.[1]

In deciding against the validity of a statute, the Supreme Court does not officially annul that statute; it merely refuses to enforce it in the particular case in hand. Thereupon, the executive department of the Federal Government, or of the state government, as the case may be, simply drops the enforcement of the law; all officials and courts take cognizance of the fact in due course.

It must be noted that the federal court will take no notice of the constitutionality of a statute except when the latter is brought to its attention in the form of a case involving the rights of parties to a suit. In no instance will federal judges consider the constitutionality of any law in the abstract or render any opinion either to Congress or to the President on the validity of a proposed statute. This practice of the court was adopted early. In 1793, Washington sought the advice of the Supreme Court by proposing to that body twenty-nine different questions, which the Court respectfully declined to answer on the ground that it could give opinions only in regular cases properly brought before it in the course of ordinary judicial proceedings.[2] Federal practice in this regard, therefore, differs from that in some of the states.[3]

[1] See *Readings*, p. 617.

[2] The Supreme Court has not declared very many acts of Congress invalid. From its foundation to 1903 it had pronounced void only twenty-one acts of Congress. In considering the constitutionality of federal statutes the Court has laid down the rule that it will not declare a law void except when there is no doubt in the mind of the Court as to its unconstitutionality. For a valuable treatment of the whole subject of judicial control over statutes, see B. F. Moore, *The Supreme Court and Unconstitutional Legislation*.

[3] See below, chap. xxix.

Political Controversies over Judicial Authority

In exercising the power to declare acts of Congress and laws of the states unconstitutional, the federal courts inevitably become involved more or less in political controversies.[1] An important statute usually reflects the policies of a political party; often it is the fruit of a long and ardent agitation. If it is set aside by the courts, political feelings are naturally aroused. Although the courts, in declaring a law void, seldom depart from the serene and austere logic of the law, they do in fact pass judgment upon the political wisdom of the measure under scrutiny. Theoretically, they do not say what the law ought to be; they merely proclaim the Constitution as it is. Practically the matter is not so simple, for the language of the federal Constitution in some particulars is very general. Phrases such as "necessary and proper," "due process of law," and "privileges and immunities" may be interpreted in many ways according to the theories, prejudices, and preconceptions of the judges. When a chemist resolves a substance into its elements, he performs an act about which there can be only one opinion; when judges look into the Constitution of the United States and try to find out whether it authorizes a state legislature to fix the hours of labor in a bakeshop at sixty per week, they find something about which the good and wise may rightly differ. In such cases the judges themselves often disagree; five think the Constitution means one thing and four think it means something else. What the judges really do in most cases, leaving all quibbling aside, is to say whether they believe a particular act of Congress or state law is wise or not — that is, wise according to their notion of wisdom. No doubt the courts are a great conservative force in our government, and their decisions may be defended on conservative grounds; but the exercise of their powers necessarily raises political controversies.

Broadly speaking these controversies fall into two classes. The first includes those arising out of cases in which the Supreme Court invalidates state laws on the ground that they violate the federal Constitution. In the early years of our history there were numerous decisions of this kind and they were bitterly

[1] C. G. Haines, "Histories of the Supreme Court of the United States," *Southwestern Political Science Quarterly*, Vol. IV, pp. 1 ff. C. W. Warren, *The Supreme Court in United States History*.

criticized by advocates of states' rights; but in the course of time the Supreme Court was vindicated in upholding the supremacy of the Union as against the sovereignty of the states. All citizens now agree that there must be one supreme authority in the country to pass upon the acts of the states and decide when they invade the sphere reserved to the Federal Government. More recently controversies respecting cases of this character have arisen over social and labor legislation enacted by state legislatures and invalidated by the Supreme Court, particularly under the "due process" clause of the Fourteenth Amendment.[1] In such disputes, it is the wisdom of the Court, rather than its power, which is usually drawn in question.

A second group of controversies has grown out of the action of the Supreme Court in setting aside acts of Congress.[2] The exercise of this authority involves large national questions, and on several momentous occasions it has thrown the Supreme Court into partisan conflicts. The most famous of all these disputes occurred in connection with the celebrated case of Dred Scott (1857), in which Chief Justice Taney, of Southern origin, sought to accomplish the impossible feat of settling the slavery issue by a judicial discourse. The central principle of Taney's opinion was that Congress had no power to prevent slavery in the territories of the United States, whereas the new Republican party was then staking its hopes and gaining its strength on the assumption that Congress could and should exercise that very power.

The response which this remarkable decision met was widespread and decided. The Southern states accepted Chief Justice Taney's opinion as final. In the North, however, it aroused a storm of protest. The legislatures of Connecticut, Maine, Ohio, New Hampshire, Vermont, and Massachusetts passed resolutions condemning the decision.

> Whereas [run the Maine resolutions], such extra-judicial opinion subordinates the political power and interests of the American people to the cupidity and ambition of a few thousand slaveholders, who are thereby enabled to carry the odious institution of slavery wherever the national power extends, and predooms all territory which the United States may hereafter acquire by purchase or otherwise to a law of slavery as irrepealable as the organic constitution of the country; and

[1] See below, p. 487.

[2] See Professor Haines's temperate review of this contentious topic in his *American Doctrine of Judicial Supremacy*.

Whereas, such extra-judicial opinion of a geographical majority of the Supreme Court is conclusive proof of the determination of the slaveholding states to subvert all the principles upon which the American union was formed, and degrade it into an engine for the extension and perpetuation of the barbarous and detestable system of chattel slavery: Therefore —

Resolved, that the extra-judicial opinion of the Supreme Court in the case of Dred Scott is not binding in law or conscience upon the government or citizens of the United States and that it is of an import so alarming and dangerous as to demand the instant and emphatic reprobation of the country.

Resolved, that the Supreme Court of the United States should, by peaceful and constitutional measures, be so reconstituted as to relieve it from the domination of a sectional faction. . . .[1]

Lincoln, who afterward waged war and sacrificed slavery to save the Constitution, viewed this epoch-opening decision with more calm, but he refused to accept it as the final word on slavery in the territories. Two or three months after it was rendered, he declared his belief in, and respect for, the judicial department of the Government, saying that its decisions should control the policy of the country until reversed by some lawful process. "We think the Dred Scott decision is erroneous," he said to his neighbors at Springfield. "We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it."[2] But in the heat of the fray he grew less temperate in his views. A year later, in a speech at Edwardsville, he exclaimed: "Familiarize yourselves with the chains of bondage and you prepare your own limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you. And let me tell you, that all these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people."[3]

Undoubtedly Lincoln accepted without reserve the declaration of the Republican platform on which he was elected in 1860: "That the new dogma that the Constitution, of its own force, carries slavery into any or all of the Territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contempora-

[1] *Senate Mis. Doc.*, No. 14, 35th Cong., 1st Sess., 1857–58.
[2] Nicolay and Hay, *Complete Works*, Vol. II, p. 321.
[3] *Ibid.*, Vol. XI, p. 110.

neous exposition, and with legislative and judicial precedent; is revolutionary in its tendency and subversive of the peace and harmony of the country."

In his first inaugural address, Lincoln gave a temperate and reasoned view of the place of the Supreme Court in our system:

> I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties in personal actions, the people have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them and it is no fault of theirs if others seek to turn their decisions to political purposes.[1]

It was the Democratic party that was to raise the next serious controversy, forty years after the Dred Scott decision. In 1895, the Supreme Court, by a narrow vote of five to four, declared unconstitutional the federal income-tax law passed by a Democratic Congress the preceding year. When the Democratic national convention assembled in 1896, there was a great deal of feeling among the radical elements against what they deemed an unwarranted act of the Court in reversing a previous opinion upholding a federal income-tax law.[2] This feeling was intensified by controversies over the use of injunctions in labor disputes.[3] Leaders in the Democratic party, such as Governor Altgeld of Illinois, protested vehemently against the income-tax decision as well as the injunction, and they carried their protests to the convention.

Accordingly Senator James K. Jones, as chairman of the com-

[1] *Works*, Vol. VI, pp. 179–180.

[2] For an insight into the political feeling involved in this controversy, see Joseph H. Choate's celebrated argument in the Income-Tax Case, *Readings*, p. 283.

[3] See below, p. 400.

mittee on resolutions, brought in a platform containing two sharp attacks on the federal judiciary. "We declare that it is the duty of Congress to use all the constitutional power which remains after that decision, or which may come from its reversal by the Court as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of the government." The platform furthermore declared, with special reference to the recent Chicago strike: "We denounce arbitrary interference by federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which federal judges, in contempt of the laws of the states and rights of citizens, become at once legislators, judges, and executioners."

In vain did Senator Hill of New York protest against these clauses, denouncing them as foolish, ridiculous, unnecessary, revolutionary, and unprecedented in the history of the party. Bryan, in his "crown of thorns and cross of gold" appeal, replied to Hill with vehement directness: "They criticise us for our criticism of the Supreme Court of the United States. My friends, we have made no criticism. We have simply called attention to what you know. If you want criticism, read the dissenting opinions of the court. That will give you criticisms. They say we passed an unconstitutional law. I deny it. The income-tax was not unconstitutional when it was passed. It was not unconstitutional when it went before the Supreme Court for the first time. It did not become unconstitutional until one judge changed his mind; and we cannot be expected to know when a judge will change his mind." [1]

Some obvious conclusions come from a dispassionate review of the judicial conflicts which have occurred in our history. Criticism of the federal judiciary is not foreign to political contests; no party, when it finds its fundamental interests adversely affected by judicial decisions, seems to hesitate to express derogatory opinions; the wisest of our statesmen have agreed on the impossibility of keeping out of politics decisions of the Supreme Court which are political in their nature; finally, in spite of the attacks of its critics and the fears of its friends, the Supreme

[1] *Official Proceedings of the Democratic National Convention*, 1896, pp. 190 ff.

Court yet abides with us as the very strong tower defending the American political system.

Still, the exercise of the "judicial veto" continues to furnish topics for political debate, especially as the judges of the Supreme Court are so often divided in their opinions. It has been stated by the Hon. Albert J. Beveridge that there have been more five-to-four decisions by the Supreme Court in this century than during the entire previous history of that great tribunal. This condition of affairs has produced various proposals of reform, all of which are violently opposed in influential quarters. The most radical scheme proposes to abolish the power of the courts to pass upon the validity of acts of Congress — a suggestion that calls for an amendment to the Constitution. A second plan is to provide by act of Congress that the vote of at least seven out of nine judges be required to invalidate a law. It is highly probable that if Congress should pass such a law, the Court would declare it void; hence a constitutional amendment might be necessary in this case also. A third proposal, often discussed in Congress and outside, is a constitutional amendment, permitting Congress to repass a law declared void by the Court and give effect to it in spite of the decision of the Court. Thus a "judicial veto" would be treated very much as a presidential veto. It is not probable that any of these schemes will be carried out, at least in the near future, but the student of politics always finds judicial controversies among the staple issues of politics and should be prepared to understand them in their historic setting.

CHAPTER XIV

ADMINISTRATIVE ORGANIZATION AND CIVIL SERVICE

In the previous chapters, we have dealt with the great organs of the Federal Government — executive, legislative, and judicial — created under the Constitution as agencies for focusing national opinion and national interests and formulating them into law, policy, and program. And we have now come to a consideration of the administrative machinery established to carry federal law and policy into effect, or rather that part of law and policy not directly executed through the courts of law. Then we shall proceed, in later chapters, to a discussion of the great functions undertaken by the National Government.

Curiously enough the Constitution makes no direct provision for departments and branches of national administration. This fortunate omission, revealing the wisdom of the Fathers, leaves Congress free to create from time to time the agencies which seem appropriate to the discharge of specific functions undertaken by the Government. The framers of the Constitution assumed that this would be done in due course, for the Constitution authorizes the President to require in writing the opinion of the heads of the executive departments, and also gives Congress power to vest in them the appointment of inferior officers. It is on this constitutional basis, therefore, that Congress assumes the right to create departments by law, regulate the duties of their respective heads sometimes down to the minutest details, prescribe their internal organization, and set forth the powers and duties of the chiefs even in the minor subdivisions. Only under the stress of the World War did Congress in 1918 pass the Overman Act authorizing the President temporarily to create, abolish, and transfer offices, bureaus, and other agencies of the Government at his own discretion.

The Heads of Departments

The head of a federal department occupies a position radically different from that of a cabinet officer in any other country. He is appointed by the President (with the consent of the Senate), and may be removed by him or by impeachment. His duties, however, are not prescribed minutely in presidential orders, save in certain instances; they are defined by acts of Congress. He is responsible to the President for the faithful execution of the law; but the President cannot alter or diminish any of the duties laid down by Congress, and cannot hamper Congress in imposing or taking away duties or prescribing such minute details as amount to a practical direction of the officer. "The President," says John Sherman, "is intrusted by the Constitution and laws with important powers, and so by law are the heads of departments. The President has no more right to control or exercise the powers conferred by law upon them than they have to control him in the discharge of his duties. It is especially the custom of Congress to intrust to the Secretary of the Treasury specific powers over the currency, the public debt, and the collection of the revenue. If he violates or neglects his duty, he is subject to removal by the President or impeachment, . . . but the President cannot exercise or control the discretion reposed by law in the Secretary of the Treasury, or in any head or subordinate of a department of the government." [1]

The President, however, as we have seen, has the power of removal, and may exercise it for the purpose of directing his subordinates. In actual practice, therefore, there are many variations from Sherman's apparently convincing legal theory, especially when a strong-willed President has a firm policy of his own which he is determined to carry out.[2] Indeed, the logical application of his doctrine would amount to a complete decentralization of the administrative organization and a destruction of the President's responsibility.

While it is impossible to give here a full account of the duties of each secretary, it seems desirable to consider some matters which are common to them all.

1. In the first place, a large appointing power to minor offices is conferred by law upon the departmental head, but this is now

[1] J. Sherman, *Recollections*, Vol. I, p. 449; *Readings*, p. 200.

[2] See above, p. 193.

exercised under civil service rules which restrict his choice, in all except the important positions, to the candidates who have qualified by examination.[1] The power of removal generally accompanies the power of appointment, although there are some important exceptions by law and by executive order.

2. In the second place, the head of a department enjoys a certain range of freedom in issuing departmental orders, for, by act of Congress, he may "prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." [2]

3. Every departmental chief maintains a more or less definite relation to Congress. He must prepare annually a report of his department, but this is largely a formal compilation, for the matters of policy or detail covered in it have little or no influence in directing legislation. Though Cabinet officers cannot be members of Congress, there is, as we have seen, nothing in the Constitution excluding them from the right to sit and speak there. Custom has decreed, however, that they must bring their influence to bear in circuitous ways. They often appear before Senate or House committees to explain measures or to answer inquiries about some legislation relating to their respective departments.[3] There are many instances of heads of departments transmitting to Congress, on their own motion, elaborate drafts of bills which they would like to see enacted into law.[4] They sometimes establish friendly relations with the chairmen of prominent committees, and thus obtain a hearing for their policies which would otherwise be denied to them.

4. The head of every department is subjected to constant interruptions from outside parties such as can come to the chief of no great business organization. "Washington wishes to see evidence of democracy about the departments," says a former Secretary of the Treasury, Frank Vanderlip. "Neither Senator nor Congressman is satisfied to cool his heels in an ante-room for any length of time, nor are political leaders who come to the capi-

[1] Below, p. 313.
[2] For important illustrations see below p. 408 and p. 413; also Young, *The New American Government*, p. 59.
[3] Reinsch, *Readings*, p. 371.
[4] *Readings*, p. 267.

tol on a mission likely to be pleased if the Secretary's engagements are such that an appointment cannot be made without notice or delay. . . . The Secretary of this great department must give heed to innumerable trifles such as would never reach the head of even a comparatively small business organization. Requests come from people of importance, and they must be taken up with the care which the position of such persons demands rather than with any thought of their importance in relation to the administration of departmental affairs." [1]

5. With the multiplication of the official duties connected with immigration, commerce, transmission of mails, and taxation, it has been found necessary to give to the heads of certain departments the high authority of deciding finally upon cases appealed from lower administrative officials.[2] For example, the immigration law provides "that in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Labor"; in such cases the decision of the Secretary is conclusive unless it can be made apparent that he has exceeded his jurisdiction or violated the law. Customs officers also are given large powers in appraising the value of imported goods. The Postmaster-General may issue fraud orders denying the use of the mails to persons and concerns that in his opinion are engaged in fraudulent transactions;[3] and those affected have no right to appeal to the courts for a review of the facts on which he bases his decisions.[4] In sustaining this conclusion, the Supreme Court said: "If the ordinary daily transactions of the departments which involve an interference with private rights were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of government. . . . It would practically arrest the executive arm of the government, if the heads of departments were required to obtain the sanction of the courts upon the multifarious questions arising in their

[1] Reinsch, *Readings*, p. 366.
[2] *Readings*, p. 202.
[3] See below, chap. xviii; *Readings*, p. 204.
[4] They may appeal on questions involving construction of the law; School of Magnetic Healing *v.* McNulty, 187 U. S. R. 94.

departments, before action were taken in any matter which might involve the temporary disposition of private property. Each executive department has certain public functions and duties, the performance of which is absolutely necessary to the existence of the government, and it may temporarily at least operate with seeming harshness upon individuals. But it is wisely indicated that the rights of the public must, in these particulars, override the rights of individuals, provided there be reserved to them an ultimate recourse to the judiciary." [1]

The Great Agencies of National Administration

The rise and growth of our National Government — the history of the great public policies adopted by it — may be traced to a large extent in the records of the departments, bureaus, divisions, commissions, and other agencies created by Congress to carry into effect the laws enacted by it. In the first year of its existence, namely, 1789, Congress created three departments: State, War (including naval administration), and Treasury. As new functions were undertaken, new agencies were established in the regular departments; from time to time certain offices were given departmental dignity and their incumbents admitted to the Cabinet. For example, the Navy Department was established in 1798; the post-office service became a department in 1829, in that its head was given a seat in the Cabinet; the Attorney-General's office was transformed into the Department of Justice in 1870. As functions of a similar nature accumulated, they were grouped in one organization, perhaps supplemented by new functions, and collectively transformed into a department. In this way the Department of the Interior was erected in 1849 and the Department of Agriculture in 1889. The Department of Commerce and Labor was established in 1903 by the fusion of older agencies and ten years later it was divided into two departments. Thus by segregation and new creations, the great departments and agencies of the federal administration have been called into being.

For almost a hundred years, Congress in creating new agencies placed them within existing departments. It thus followed somewhat closely the principle set forth in Chapter III to the effect

[1] See *Readings*, pp. 202 ff.

that similar functions should be grouped in one department headed by a single responsible officer who in turn is accountable to the chief executive. Except in some minor matters, the principle was well observed until 1883, when civil service reform was adopted and an independent Civil Service Commission of three members was set up to administer the Act. This precedent was followed four years later by the establishment of the Interstate Commerce Commission charged with the regulation of railways. In the course of time other agencies were erected outside the great departments until to-day we have twenty or more commissions, boards, and other offices which are independent of departmental heads and responsible directly to the President or to Congress. The major portion of the independent establishments, it should be noted, either have regulatory functions, such as those vested in the Federal Trade Commission, or they have duties which are not readily assignable to any one of the regular departments.

In order that the student may have a bird's-eye view of the immense complex of departments and agencies of the Federal Government a tabular chart is included here. Even this bare outline is in itself illuminating and deserves careful examination. It gives a clue to the vast and complicated work undertaken by the national administration. When it is remembered that about half a million men and women are employed in these various agencies and that every science and art known to mankind is used by them in the service of the public, it dawns upon the mind that here is one of the most marvelous organisms in the history of human society. Here is work for the financier who knows how to handle billions of dollars, the chemist with his test tube, the expert in poisonous gases who goes down into the depths of the earth to safeguard the lives of miners, the postman who keeps his rounds in summer and winter, and a hundred other varieties of specialists all contributing their share in a vast agency created for the common good. If in the reign of King John, of Magna Carta fame, some prophet had foretold an immense democracy, without king or aristocracy, spread across three thousand miles of territory, governing itself and undertaking such complex services for the public good, he would have been laughed out of court as a jester. Perfection, of course, or anything like it, is not to be ascribed to this organism; while

			Chairman's Special Committee and Wolcott).
			Veterans Bureau.
			Geological Survey.
			Bureau of Mines (Commerce).
			Supply, Independent).
			War Materials Relief Commission.

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marveling at the extent and variety of its functions, we must take account of its shortcomings.

Indeed for nearly twenty years rather severe criticisms have been advanced against the exact form given to the departments and agencies of national administration. President Roosevelt made that matter a subject of special consideration and created a commission to make a study of the business methods of the government. President Taft followed this example by the appointment of a Commission on Economy and Efficiency, under the direction of Frederick A. Cleveland, which carefully analyzed the structure of the national administration and recommended the regrouping of many activities, the elimination of duplications, the integration of nearly all functions in certain departments, and the establishment of clear lines of responsibility from the President of the United States to the lowest subordinate. Again, in 1920, a Congressional Joint Commission on Reclassification of Salaries rather sharply criticized the "complex, indefinite, poorly designed organization; inadequate provisions for administrative control and supervision; apparent duplication between departments and within departments; conflicts of authority and overlapping of functions; overmanning; unstandardized procedure; unnecessary records; and other unbusinesslike methods." The following year a Congressional Joint Committee on the Reorganization of Government Departments was established under the chairmanship of Walter F. Brown, representing the President; it prepared and published in 1923 a scheme for the reorganization of the federal administration. A number of bureaus and agencies were to be consolidated or removed from their former places in departments to new positions; the Departments of War and Navy were to be consolidated in one Department of National Defense; and a new Department of Education and Welfare was to be created to discharge federal functions relating to education, public health, social service, and veteran relief. The main features of this plan, except that providing for the union of the War and Navy Departments, were endorsed by President Coolidge in his first message in December, 1923, when the whole project was laid before Congress for debate and action. As the movement for reforms of this nature has already produced marked effects in states[1] and cities and the

[1] See below, chap. xxvii.

interest in the matter is keen in Washington, there is no doubt that in the course of time there will be a more or less thoroughgoing remodeling of the federal administration.

The task of effecting a satisfactory organization of the various agencies of the federal administration is exceedingly difficult. It seems easy at first glance to make a logical classification of the several offices according to their respective functions, but in fact many functions are closely related to the work of two or more departments. For example, the management of the national forests is connected with mineral-land administration, the control of navigable rivers, water power rights, the sale of lumber; in other words, it touches upon many phases of commerce and industry. Thus it becomes impossible to divide federal functions among several "water-tight" compartments. Whether a function belongs in one division or another often depends upon the emphasis given to one or another of its phases. No solution of this problem is offered except the creation of inter-departmental or coördinating committees and agencies.

There are other factors which make it difficult to bring about a logical classification of the functions of government. Occasionally, bureaus and agencies are created in order to satisfy the demands of some group or section of the country. There is always some outside interest, such as labor, commerce, or agriculture, vitally concerned in the organization of various branches of the federal administration. It is impossible to ignore these influences in making new adjustments. There are also inside factors which must be considered. Each agency, especially if it has a large number of employees and important work to do, is a sort of vested interest. The head of a department in which it is placed does not like to lose it because his prestige and patronage are thereby diminished. So for many reasons rearrangements demanded in the name of economy and efficiency are resisted and long delayed.

Extent of the Merit System

The Federal Government, as often remarked, is the largest employer of labor in the United States. The conduct of its executive business calls for more than half a million civil officers and employees ranging from highly skilled technicians to casual laborers — 548,000 in all, to use the returns of 1924. Considered

from the point of view of geographical distribution, they may be divided into two groups: those residing in Washington and those scattered throughout the states and territories — indeed, as consular and diplomatic officers to the ends of the earth. If the method of their appointment be taken into account, they likewise fall into two divisions: those who are appointed without undergoing the necessity of passing an examination or test of any kind and those who are appointed from among candidates that have passed appropriate examinations.

If the nature of their work is used as the basis of an analysis, then it is difficult to make a classification, for no grouping of the employees according to scientific principles has ever been made. It is now in process of development. If we take the names of positions indicated by official titles in the acts of Congress, then we find more than five hundred different kinds of employments. If we take the act of March 4, 1923, providing for a reclassification of civil employees, then we have five large groups of services: professional and scientific; subprofessional; clerical, administrative, and fiscal; custodial (in charge of public buildings and institutions); and clerical-mechanical. Perhaps more illuminating is the broad classification made by an able student of the federal service, Dr. Lewis Mayers, as follows: directing, technical or professional, specialized, clerical, mechanical, and labor.[1]

As we have seen above, there was a time when all positions in the federal service were theoretically and to a large extent practically subject to the spoils system — that is, they were given to party workers without special consideration for their fitness and without any test of abilities.[2] After some tentative experiments at reforming the system,[3] Congress at length passed, in 1883, the Civil Service Act,[4] which is still the fundamental law governing the federal service. This Act provides for a Civil Service Commission [5] composed of three persons, no more than two of whom

[1] *The Federal Service*, p. 7.

[2] See above, p. 134.

[3] Among these tentative measures were (1) the law of March 22, 1853, providing for the classification of certain clerks in Washington and requiring heads of offices to examine clerks before appointment — a law which proved to be little more than a farce; (2) the law of 1864, providing examination for thirteen consular clerks in the Department of State, and (3) the law of March 3, 1871, authorizing the President to prescribe regulations for admission into the civil service and to provide methods for ascertaining the fitness of candidates — a law which promised well under the administration of the great champion of civil service reform, George William Curtis, but fell to the ground in 1873, when Congress refused to make the necessary appropriations for its execution.

[4] *Readings*, p. 208.

[5] Every library should have copies of the annual report of the Civil Service Commission, which may be secured free of charge by addressing the Commission at Washington, D. C.

shall be adherents of the same party, appointed by the President and Senate. They are charged with the duty of aiding the President, at his request, in preparing suitable rules for competitive examinations designed to test the fitness of applicants for offices in the public service, already classified or to be classified by executive order under the Act, or by further legislation of Congress. The Commission aids the President generally in the execution of the Act.

The Act itself ordered the Secretary of the Treasury and the Postmaster-General to make classifications of certain employees within their respective jurisdictions, and at the same time provided that the heads of certain departments and offices should, on the direction of the President, revise any existing classification or arrangement of their employees and include in one or more such classes subordinate officers not hitherto classified. In other words, the Act itself brought a few offices under the "merit system," and left the extension of the principle largely to the discretion of the President and future acts of Congress.

When the law went into force it applied to only about 14,000 places which were then included in the classified service. The number has been steadily increased, principally by executive decree. During his administration, Roosevelt issued a number of orders extending the merit system. In 1901–02, he extended the application of the rules to the rural free delivery service; in 1902, at the suggestion of the President, the employees in the census office were classified by act of Congress; in 1904 the positions in the forestry service were made competitive; and in 1905 the special agents of the immigration bureau on duty in foreign countries were included within the classified service.[1] In 1908 he placed all the fourth class postmasters in fourteen states north of the Ohio and east of the Mississippi — more than 14,000 in all — in the competitive class. This list of Roosevelt's extensions is by no means complete; it merely illustrates the way in which the President may steadily widen the range of the "merit system" by applying it to one group of government employees after another.

There were also significant extensions under President Taft, notably, the inclusion of all the fourth class postmasters who had been left under the spoils system after President Roosevelt's

[1] Reinsch, *Readings*, p. 698.

famous order of 1908 mentioned above. President Wilson then carried the process forward in 1917 by placing the first, second, and third class postmasterships on a competitive basis even though they were formally filled on presidential nomination with senatorial approval. These postmasterships are still in a somewhat precarious position because Congress has not yet changed the rule requiring the confirmation of appointments by the Senate; in other words it has not put them definitely within the classified and competitive service. However, the presidential orders above referred to made a revolution in the status of postmasters and opened careers to efficient workers in the postal service.[1]

As a result of legislative and executive action, more than three fifths of the executive civil service is under the competitive system, but numerous and important groups of officials are yet without the pale. The words "without the pale" are vague; practically speaking they mean that members of such groups are not subject to competitive examinations. In a technical sense, persons exempt from competitive examinations fall into two divisions: (1) those who are in the classified service but for one reason or another are not put on the competitive list and (2) those who are entirely outside the classified service and may be called "political appointees." It is thus evident that there is nothing very systematic about the structure of the federal service.

There is indeed no uniformity of practice in the case of the so-called political offices. In some instances new incumbents are chosen for political reasons whenever there is a change of administration and in other instances the incumbents really enjoy what amounts to permanent tenure by virtue of tradition. This is due to the fact that we have never divided federal offices on any logical theory into positions that are political in character and those that are professional and technical. Some high posts are under the merit system and some low positions are under the spoils system.

The exemption of a large number of purely administrative and technical positions from the operation of the competitive principle produces many unfortunate results, as Dr. Mayers points out in his study of the federal service.[2] When the head of a bureau or

[1] There was, it must be remembered, a large increase in the number of government employees during this period.

[2] *The Federal Service*, pp. 20 ff.

division is a political appointee selected on account of his party zeal, it is almost impossible to exclude political considerations from the assignment of employees to their duties, promotions, increases in salary, and other matters of prime importance to efficient administration. Even though the head sincerely desires to enhance the good of the service his actions in the matter of salaries and promotion are always open to the charge that he is controlled by political motives. Being a political appointee he must of necessity give a certain amount of time to partisan affairs to the neglect of his official duties, and he is always liable to be drafted into partisan work by his political superior. Even more significant than these evils is the fact that the appointment of political workers to purely administrative and technical offices limits the career of faithful and ambitious subordinates who enter the service by the merit route; no matter how hard and intelligently they work, they cannot hope to rise to the position of director of their division. Political appointments also exclude outside experts who are not politicians.

Such facts are matters of common knowledge to those who have studied the federal service at first hand, and there is a constant demand that thousands of offices of the higher grade now within the spoils system be placed on the merit basis—including many in the "political group," and many in the classified service which are now "exempt." Advocates of such a reform lay great emphasis on the practice of England in this respect. In that country some of the most important offices ranking close to that of cabinet member are filled by competitive examination and promotion so that able young men who enter the service know that an attractive career lies before them. The examinations for the English service are more difficult and more general, as a rule, than examinations for American service and are designed to secure persons of broad knowledge rather than those trained for some narrow specialty. As Dr. Kimball points out, the English system lays more stress on education and general ability and attracts university graduates of the highest caliber, whereas in America the federal civil service is not as a rule viewed with favor by college and university students.[1] However, we should also take note of the fact that young people in England have fewer opportunities for careers in the professions and business than in America.

[1] Kimball, *National Government in the United States*, p. 229.

Employment Methods

In applying the competitive idea to those positions brought under its jurisdiction, the Civil Service Commission, at the direction of the President, prepares the large variety of examinations required to test the fitness of candidates for the multitude of different offices. There is a chief examiner at Washington, and there are several hundred local boards of examiners scattered among the states and territories.[1] The Act orders that boards shall be erected at such points as will make it reasonably convenient and inexpensive for applicants to attend examinations.

The Act requires that examinations shall be practical in their character, and, as far as may be, relate to those matters which will fairly test the relative capacity and fitness of persons examined to discharge the duties of that branch of the government service to which they seek to be admitted. In preparing the examination papers it is the custom of the Commission to seek the coöperation of the various departments; if a technical position is to be filled, the department concerned usually notifies the Commission, and very probably prepares the technical questions.

Any citizen of the United States may apply for an examination admitting him to the federal service.[2] For a long time, owing to the lax methods prevailing, aliens were often admitted to government employment, but within recent years the requirement of citizenship has been rigidly enforced. Applicants for examination are not even charged a fee, in spite of the fact that the Civil Service Commission has several times recommended the establishment of a nominal charge for the purpose of excluding many thousand ill-prepared persons who take the examinations in a gambling spirit — nothing to lose and possibly something to gain.

Through these examinations the Civil Service Commission must keep its registers of eligibles full, so that it can supply men of the most diverse training and experience when called upon by the several departments. On the same day, there may be demands for clerks, stenographers, expert chemists, patent examiners,

[1] These local boards are composed of federal officers detailed for this occasional work.

[2] Full information may be secured by directing a request to the Civil Service Commission, Washington, D. C. Citizens are excluded on the following grounds: mental or physical incapacity, excessive use of intoxicants, service in the army or navy, dismissal from public service for delinquency during the preceding year, and criminal or disgraceful conduct.

draftsmen, interpreters, and postal clerks; and the Commission must be ready at once with a list of persons duly qualified for such positions.

When notified of a vacancy by an appointing officer, the Commission selects from the proper register and transmits to the officer in question the names of three candidates at the head of the list, who are (if possible) residents of the state to which the appointment falls.[1] From this list of three any one may be selected by the appointing officer; the other names are then returned to the Commission to be replaced upon the register. If the appointing officer refuses to accept any one of the three, he must give satisfactory reasons for his action. Every successful candidate is put on probation for a period of six months; then if his record is good his appointment is made permanent.

It should be noted, however, that there are two exceptions to the operation of the rules in the matter of making appointments. (1) Preference is given to persons honorably discharged from the military or naval service. (2) Appointments to the public service in the departments at Washington shall be apportioned among the several states and territories and the District of Columbia on the basis of population — a principle which cannot be strictly carried out in practice but affords a pretext for constant clamoring on the part of candidates and Congressmen from states that do not happen to secure their quotas.

Promotions in, as well as appointments to, the federal service are to some extent based upon the competitive principle. Examinations are held to test the fitness of candidates for advancement and a list of eligibles is kept. In fact, however, no logical and reasoned system of promotion has yet been worked out to inspire the employees in the lower ranges to work harder and develop their latent powers with a view to rising higher in the scale.[2] It is left to the appointing officer to decide whether he will fill a vacancy by open competition or by selection from within the service. In several states and cities the civil service commission itself may prescribe the method to be used and develop machinery for facilitating the transfer of competent persons from lower to higher positions. The Joint Commission on

[1] It will be noted that "inferior" officers, under the Constitution, may be appointed by the President alone, the heads of departments, or the courts, as Congress may determine. As a matter of fact the majority of inferior officers are appointed by heads of departments under civil service rules.

[2] Mayers, *The Federal Service*, pp. 215 ff.

Reclassification, referred to below, even went so far as to recommend that open competition should be adopted only when it is impossible to secure three eligibles from among persons already in the service. The salutary effect of an orderly system of promotion upon the rank and file of the service is beyond question, and there is no doubt that such a system will be evolved under the influence of the new forces at work in civil service reform.

The process of removal from the federal service after appointment is a relatively simple matter. The rules require that no person shall be removed from a competitive position, "except for such causes as will promote the efficiency of the service." When the President or head of an executive department[1] is convinced that any person in the classified service is incapable or inefficient, he may remove such employee after giving due notice to him. The Civil Service Commission[2] contends that the complaint frequently made to the effect that unfit men are protected against removal by the rules is groundless. "On the contrary," says the Commission, "the power of removal for unfitness is with the head of the office. The appointing officer being responsible for the efficient performance of the work of his office, it rests with him to determine whether such cause exists as to require the removal of an employee in order to promote the efficiency or discipline of his office."

The courts do not interfere in cases of removal, on the ground that the right of appointment involves the right of removal and that the Civil Service Act limits the power of removal in only one instance — an employee cannot be ousted merely because he has refused to give money or service to a political party. In practice, however, when a large number of employees of the same political faith are discharged at the same time, it is presumed that the removal was for political reasons and the officer responsible for the action is required to show that a just cause exists in each case; but even here the courts will not interfere.

The adoption of the principle of tenure during good behavior naturally raised the question as to what should be done with government employees who had passed the age of usefulness and merely stood in the way of able men and women in the prime of life. For many years the subject was discussed in

[1] With regard to his own subordinates, of course.
[2] *Twenty-fourth Annual Report*, p. 87.

Congress and at length in 1920 a federal pension system was established to provide compensation for employees in the classified service who on account of age or disability are unfit for "useful and efficient service." The age of retirement in the normal course of advancing years is fixed at various points according to the nature of the work done by the several classes of employees. All who benefit from the system must contribute a small percentage of their salaries to the pension fund, and annual pensions are allotted to retiring employees on the basis of term of service and amount of salary. This law, in addition to being an act of tardy justice to old and faithful public servants, is also a contribution to efficiency in service. Previous to its passage hundreds of old people were kept on the federal pay-rolls by warm-hearted department heads because their discharge would be an act of cruelty. Work was thus committed to the care of employees whose usefulness had departed, while young and ambitious subordinates, finding their careers blocked, left the service. Obviously a pension scheme removes many of the evils inherent in the old order and perhaps it may "prove as beneficial as did the establishment of the merit system."[1]

Notwithstanding all the efforts made after 1883 to put the civil service upon the "merit" basis, many abuses grew up in practice in spite of the spirit of the law. It was found by an official inquiry (1) that employees of substantially the same experience and length of service and doing the same work were paid very unequal salaries; (2) that employees doing work calling for widely different qualities and experience were paid the same salary; (3) that discriminations were often made against women in the government service; (4) that the same title was frequently given to positions utterly unlike as to the work required of the incumbents; and (5) that wage and salary schedules, in addition to being inconsistent and inequitable in themselves, were far below the same schedules outside the government service. The discovery of such conditions led to the appointment, in 1919, of a Congressional Joint Commission on Salaries and Grades which studied the problems in several important departments and made constructive recommendations on employment policies to Congress.

[1] L. Meriam, *Principles Governing the Retirement of Public Employees* (1918); M. Conover, "Pensions for Public Employees," *American Political Science Review*, Vol. XV, pp. 350 ff. (1921).

After many months of acrimonious debate among experts and politicians Congress passed in 1923 the most important constructive measure of civil service reform enacted since the great law forty years before. The new measure, known as the Classification Act, created a Personnel Classification Board composed of one representative each from the Civil Service Commission, the Efficiency Bureau (an independent agency of inquiry), and the Budget Bureau established by the notable budget law of 1921. It instructed the Board to make a logical classification of civil servants, employed in the District of Columbia (except certain skilled workmen), according to their duties, responsibilities, and titles. It swept away the tangle of irregular and unequal salary schedules established by many acts of Congress and prescribed, within the general terms of the Act, the establishment of a consistent, uniform salary plan designed to prevent favoritism and to do justice to employees of equal talents and similar employments. It prescribed equal pay for equal work for both sexes. The Board was also instructed to survey the federal service in the field, that is, outside the District of Columbia, and report to Congress a scheme of classification along similar lines for that portion of the service.

This law, defective as it may be in details, ought to mark the significant beginning of a new era in national administration. This is true, even though elements of discord appeared at the first sessions of the Classification Board. It represents the determined effort of many citizens to check the operations of the spoils system and at the same time apply sound principles of employment administration to the government service. As John M. Gaus truly points out,[1] it also represents a new force in American life, "the growing spirit of the dignity of the service, of a corporate life centered in the service of the nation, a changing attitude on the part of the finest citizens toward the service of the state." Furthermore, as Charles E. Merriam maintains in his important work, *The American Party System*, the development of an efficient technical administration, by reducing the potency of "spoils" in politics, tends to concentrate the attention of political parties on their true function of bringing popular will to a focus on issues and ideas and also tends to diminish the power of machine workers.

[1] *The New Republic*, August 1, 1923.

Partisanship and Political Activities

In making promotions, removals, and reductions in rank it is very difficult to exclude partisan politics from consideration, but attempts have been made by act of Congress and presidential order to protect employees in the classified service against political influence, and also to withdraw them from undue activity in partisan politics. The original Civil Service Act provides that no person in the public service is for that reason under any obligations to contribute to any political fund or to render any political service, and that he shall not be removed or otherwise prejudiced for refusing to do so. Furthermore, no one in the public service has a right to use his authority to control the political action of any person. No recommendation by a Senator or a member of the House of Representatives, except as to the character or residence of an applicant, can be lawfully received or considered by any person concerned in making examinations or appointments under the Civil Service Act. Members of Congress and executive, judicial, military, and naval officers are forbidden to be involved in soliciting or receiving political assistance or contributions from any person employed by the United States.[1] The practice of soliciting campaign contributions in the buildings occupied by branches of the Federal Government is likewise prohibited by law. However, it should be noted that employees in the classified service are not forbidden to make contributions to persons or committees of persons not in the employment of the United States Government.

Other forms of political activity were left by the Act to the control of the heads of departments. From time to time executive and departmental orders were issued for the purpose of eliminating abuses arising from the active participation of inferior office-holders in party affairs. At length, in 1907, political activity in the broadest sense was placed under the supervision of the Civil Service Commission by an amendment to the rules, adopted by the President, providing that "all persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns."

[1] There is, no doubt, more or less violation in practice.

This rule has been construed by the Commission to forbid the use of official positions for the benefit of any political party; and since its adoption it has been interpreted to prohibit the following types of political activity: "Service on political committees, service as delegates to county, state, or district conventions of a political party, although it was understood that they were not 'to take or use any political activity in going to these conventions or otherwise violate the civil service rules'; continued political activity and leadership; the publication of a newspaper in the interest of a political party; membership in a club taking an active part in political campaigns and management; the circulation of petitions having a political object; service as a commissioner of elections in a community where it was notorious that a commissioner of elections must be an active politician."

There is another phase of activity among federal employees, which must not be overlooked, namely, the formation of unions, the federation of unions, and the participation of such organizations in politics to secure higher wages and better employment conditions. On this matter President Roosevelt took a decided stand by flatly forbidding federal employees either individually or through organizations to solicit an increase of pay or favorable legislation before Congress or any of its committees. Roosevelt's executive orders were reversed, however, in 1912 by an act of Congress expressly proclaiming the right of federal employees and their associations to appeal to Congress and forbidding any interference with the exercise of that right.

As may be imagined the controversy had then become acrimonious. Skilled workmen in federal employment had long been members of trade unions affiliated with the American Federation of Labor and had often brought pressure to bear on Congress through regular channels. There had also existed in the Post-Office Department, for many years, an association of clerks, which was not connected with organized labor and merely cooperated in a friendly way with the Postmaster-General. In 1905, however, there appeared a new union of postal clerks which joined the American Federation of Labor.[1] Some time later there sprang up in various large cities local unions of federal employees. By 1916 there were at least fifty such associations; and in that year they were brought together in the National

[1] Spero, *The Labor Movement in a Government Industry* (1924).

Federation of Federal Employees which is now associated with the American Federation of Labor. Thus through direct organization and through affiliation with organized labor outside the service, federal employees can bring heavy pressure upon Congress to secure favorable legislation. The National Federation of Federal Employees boasts that it has been able to defeat unfriendly Representatives seeking reëlection to the House, to secure the passage of important laws, and to obtain the presidential veto of other measures. It tells federal employees that the way "to get on is to get together."[1] Undoubtedly it was the most potent force behind the Reclassification Bill of 1923, which was a tardy act of justice and reform.

The extent of the influence enjoyed by regular unions in the federal service raises many vital questions. They do not proclaim the right to strike and tie up the Government service; indeed their charters of affiliation with the American Federation of Labor expressly recognize their special obligations to the public. But their political activities are wide-reaching and may seriously interfere with the course of legislation and administration. Thus far, they have been able to remedy many evils, for it is notorious that in some respects the Federal Government has not been a "model employer." If, on the other hand, they exert their power selfishly and come into open collision with the Government they may do a great damage to the public service. Their very existence raises a question whether there should not be instituted some formal system of coöperation between the Government and organizations of employees with a view to an intelligent and sympathetic adjustment of all controversies as they arise.[2]

This leads inevitably into the larger aspects of personnel administration or employment policies. The movement for a scientific treatment of this question, which has already produced considerable effect in states and cities, has reached Washington. Traces of it are now to be found in the reports of the Civil Service Commission, the proceeding of committees of Congress, and debates on civil service measures. The technique of this science, still in a formative stage, is most highly developed in private industry, but its influence is now widely felt in governmental circles.[3]

[1] *The Federal Employee*, December, 1923.
[2] See Mayers, *The Federal Service*, pp. 544 ff.
[3] See above, chap. iii, for a general consideration of this topic.

CHAPTER XV

FOREIGN AFFAIRS

There is no function of the Federal Government more closely interwoven with national destiny than that of conducting foreign affairs. This has been true from the beginning of our history. It was the skillful work of Franklin at the court of Louis XVI which drew the arms of France to the support of Washington on the field of battle and made certain the outcome of the War of Independence. The diplomacy of Charles Francis Adams, our ambassador to Great Britain during the Civil War, frustrated the designs of the English and French politicians who were bent on helping the Southern Confederacy to dissolve the American Union. It was the action of President McKinley that precipitated the crisis with Spain in 1898 and made America for the first time an imperial power ruling subject races in distant seas. The great rôle played by President Wilson in the World War and the outcome of his policies are matters of such recent history that they call for no comment here.

Diplomacy may work for war or for peace. It may order events in such a fashion as to make war inevitable. It may dissipate enmities that threaten to eventuate in armed conflicts. If America avoids taking part in the world conflagrations that arise in the future, it will be diplomacy that accomplishes the consummation devoutly to be wished. If, in the long flow of time, America becomes involved in a terrible conflict with a combination of foreign foes and is brought face to face with ruin on land and sea, that circumstance, too, will be laid at the door of diplomacy.

The General Direction of Foreign Affairs

The Constitution of the United States makes no express provision for a Department of Foreign Affairs, and says very little about the method by which our foreign relations are to be managed. However, by implication it designates the President as

the official spokesman of the nation by giving him the power to appoint our representatives abroad and to negotiate treaties with the approval of the Senate.[1]

Not only is the President the official representative in communicating the will of the United States to other countries; he is the sole official agent through whom the ministers of other countries can communicate with the United States. This has been the rule since the foundation of our government. The Attorney-General pronounced the opinion, in 1797, that foreign ministers had no authority to communicate their official opinions to the American people by publications in the newspapers, for that would be considered contempt of this Government.

While the President of the United States is our official spokesman in dealing with other nations, the formal conduct of foreign affairs is vested in the Secretary of State. The Department of State, of which the Secretary is the head, was organized in 1789 by Congress.[2] The act provided that the Secretary of State should perform such duties as the President may entrust to him, relative to correspondence, commissions, and instructions to the public ministers and consuls sent out from the United States, and also pertaining to negotiations with the public ministers from foreign states or princes.[3] In short, the Secretary is to transact all business respecting foreign affairs which the President may assign to his Department, and pursue the policies laid down by the President.

The Department of State is thus the legal organ of communication between the President and foreign countries, and is so recognized by foreign powers, for it is to the Secretary of State that they ordinarily address their formal notes to our Government. When the French minister, in 1793, directed a letter to the President of the United States, the Secretary replied that it was not proper for diplomatic representatives residing here to institute correspondence with the chief executive. It is through the State Department also that the President formally communicates with foreign powers. Of course, in actual practice, this strict official routine is not always observed; many questions of foreign policy are taken up by the President with the ministers

[1] *Readings*, p. 183.
[2] It was first called the Department of Foreign Affairs, but the name was soon changed.
[3] *Readings*, p. 291.

of other countries. In final analysis, the practice depends on the nature of the business and the personality of the President.

For both of these reasons the administrations of President Wilson are unique in our history. The nature of foreign relations during that period involved policies that ran deep into national life. The World War and the peace which marked its conclusion raised international problems more serious than any hitherto confronted by a President. Moreover, Wilson had a unique concept of his duties as the leader of his party as well as national spokesman, and he was unwilling to share his gravest responsibilities with any subordinate in his Cabinet. It happened also that he had slight confidence in the capacity of Bryan, whom he appointed Secretary of State for political reasons. Temperamentally the two men were as far apart as the poles. On questions of principle they never agreed and on Bryan's resignation as Secretary in 1915, President Wilson elevated to the post, Robert Lansing, a former counselor in the Department of State, who enjoyed no political prestige and thus could command no party support against his superior, even if he had desired to oppose him.

In these circumstances the conduct of foreign affairs really passed from the State Department to the White House. By his notes directed to foreign governments, especially the Central Powers, President Wilson announced American foreign policies and steered the Government in a course which inevitably led to war. He communicated personally with our ambassadors abroad without even informing the State Department of his actions. Indeed our Ambassador in England, Walter Hines Page, in his illuminating letters, tells how he grew so angry with the negligence and "leaks" of the State Department that he felt compelled to take up important business directly with the President himself. After America entered the war, Wilson received official missions from the powers associated with the United States and settled matters of vital concern by personal negotiations. At the close of the war, he went personally to the Peace Conference at Paris, over the protests of his Secretary, and assumed full responsibility for American policies and measures there. He visited England, France, and Italy, made public addresses on delicate questions, and in fact appealed to the people of those countries for support in realizing the great principles

which he had laid down — especially the Fourteen Points in which he had defined American war aims. The Secretary of State sank into the background; he tells us that the President failed to answer many of his communications and neglected to inform him about matters of vital significance. On one occasion the Secretary was placed under the embarrassing necessity of asking Chinese delegates at the Conference to inform him as to the President's decisions on a certain point. Shortly after his return to the United States, President Wilson rather curtly dismissed Lansing as wanting in loyalty and the spirit of harmonious coöperation.

Under President Harding the situation was radically different. There were, no doubt, foreign problems of prime concern to be solved, but he did not choose to solve them himself. He appointed as Secretary of State Charles E. Hughes, one of the most powerful personalities in the Republican party, whose opinions could not be ignored on any ground. He gave his Secretary empire over his own department. When he called the Washington conference of great powers in 1921, he contented himself at the opening of its first session with a few appropriate generalities and left the serious business of leadership with his Secretary of State. In doing this, of course, he did not abdicate; he chose to work with his Secretary rather than to become the master of ceremonies and realities.

Yet in final analysis the responsibility for negotiations with other countries rests entirely with the President. He may keep his own counsel. Many momentous communications from our ambassadors abroad and from foreign governments come to him directly either in written or oral form. He may make no official record of them. It has been said that "secret diplomacy" is impossible under our form of government. Many writers congratulate America on escaping from the evils of the European system which are illustrated by the secret treaties, agreements, and military and naval "conversations" between the Central Powers on the one hand and England, France, and Russia on the other — the system of intrigue and plotting which precipitated the World War in 1914.[1] It is true that the President cannot make solemn treaties with foreign powers and keep them under lock and key in his office, but a large part of the corre-

[1] See Reinsch, *Secret Diplomacy;* and Beard, *Cross Currents in Europe To-day.*

spondence relative to foreign affairs is closely guarded by him among his personal and private papers and never laid before the general public. When President McKinley called upon Congress to declare war on Spain in 1898, few there were who knew that he had received from Spain only a few hours before a dispatch conceding practically all the demands which our Government had made. The fundamental documents connected with the Paris negotiations of 1918–19 were placed in President Wilson's private strong box and only certain writers in his confidence were permitted to make use of them. The treaties of the Washington conference of 1921–22 were of course made public, but the negotiations that produced them were for the most part secret. Undoubtedly a certain amount of secrecy in diplomacy is both necessary and desirable; but it cannot be denied that the President's powers to make commitments in foreign relations, fraught with tragic consequences, are immense and are unrestrained save by his sense of responsibility and his conscience. Neither house of Congress, not even his Cabinet, can question him or compel him to render an account of his negotiations.

Official Representatives of the United States in Foreign Countries

The representatives of the United States abroad charged with conducting our relations with other countries fall into two general groups: diplomatic and consular.

I. The first of these groups is divided according to ceremonial ranking into four classes: (1) ambassadors; (2) envoys and special commissioners; (3) ministers resident; and (4) *chargés d'affaires*.

For over a century the United States did not send ambassadors; it was represented abroad only by agents falling within the second, third, and fourth classes. It thus came about sometimes that a minister of the United States was compelled, on public occasions, at receptions, and in interviews with foreign officers, to step aside in favor of the representative of some small nation, who happened to bear the title of ambassador. Though all European courts did not follow this rigid system, American ministers often received treatment which they deemed humiliating to the spokesmen of so great a nation. Accordingly, in 1893, Congress provided that our representative to any foreign

country should have the same rank as the representative of that country to the United States.[1] Therefore, whenever a nation sends an ambassador to us, we return the honor.

All diplomatic representatives of the United States are nominated by the President and appointed by and with the advice and consent of the Senate. In spite of the special knowledge and experience which are required of those who enter the diplomatic service, our representatives have been too often selected without regard to such qualifications. Diplomatic appointments are frequently made as rewards for political service. Secretary Hay once remarked, "A quiet legation is a stuffed mattress which the political acrobat wants always to see ready under him, in case of a slip." The term of office is uncertain and liable to be brief, for, whenever a change of party occurs at Washington, there is a general change in our representation abroad. There is no arrangement for prolonged tenure of office, beginning with the lower grades of the diplomatic service and ending with a position at the foremost capital of Europe.[2]

In nominating ministers, the President always ascertains in advance whether any particular appointee is personally acceptable to the government to which it is proposed to send him.[3] After his appointment, a minister is given a formal letter of credence, and on his arrival at his foreign post he at once enters into communication with the representative of that government in charge of foreign affairs. It is customary for the minister to be received in audience by the head of the government to which he is accredited; and the ceremonials at that audience are conducted in accordance with the custom of the country in which it is held.

The necessity of mastering the somewhat intricate ceremonies of foreign courts has been at times a source of trepidation to American representatives. John W. Foster relates an amusing incident of his reception years ago at the court of Russia in the great hall of the Anitchkoff Palace. He was required after the interview to retire backward, down the long hall, with his

[1] Sometimes, however, we take the initiative in raising the rank by making overtures to other countries, as in the case of Turkey.

[2] President Roosevelt, however, in 1905, issued an order that the important office of secretary to embassies and legations should be filled by transfer or promotion from some branch of our foreign service, or by the appointment of persons whose qualifications had been determined by an examination. Moreover, within recent years, there has been a tendency toward the elimination of the grosser forms of politics from diplomatic appointments.

[3] Foster, *Practice of Diplomacy*, p. 40.

face fixed upon the Grand Ducal party, and make his farewell bow on reaching the door. He states that he succeeded in getting to the entrance without knocking over any furniture, but that his hand fell unfortunately upon one of the two knobs which did not open the door but merely turned round and round, much to his vexation and embarrassment. In the midst of his perplexity, the Tsarevitch, seeing his predicament, cried out in excellent English: "Mr. Foster, take the other knob!" He at once heeded this advice and bowed himself out of the imperial presence.[1]

A diplomatic mission abroad may be closed by one of two methods. A minister may exercise his constitutional right of resigning at pleasure, or he may be recalled by the President, perhaps at the request of the foreign government. In an extreme case, he might be summarily dismissed by the government to which he is accredited.

A diplomatic representative enjoys abroad, under the rules of international law, several special privileges and immunities.[2] Any injury or affront to him is an offense against the country which he represents and the principle of international comity. The house in which he resides is under the particular protection of the law; it may not be entered or disturbed by anyone against his will. A minister is entitled to special protection while traveling on land or sea. He and his official family, including even his domestic servants, are exempt from arrest — in short, from all criminal and civil processes at all times.

The functions of our diplomatic agents may be given in the language of a report made by the Department of State some years ago.[3] According to this report the duties of ministers are not confined to the transmission of instructions from their government. Official communications, indeed, constitute a relatively unimportant part of the minister's business. He should cultivate friendly personal relations with the officers of the government to which he is accredited, so that on proper occasions he may have easy access to them and, having thus gained their confidence in advance, may converse freely with them; it is, therefore, necessary for the ambassador to adapt himself to the mode of life of the official class of the country in which he is stationed. To do

[1] Foster, *The Practice of Diplomacy*, p. 60.
[2] Moore, *International Law Digest*, Vol. IV, p. 622.
[3] *Executive Documents*, No. 146, p. 17; 48th Cong., 1st Sess.

this, he must study the sensibilities, prejudices, form of government, and spirit of public life there. When issues arise between his country and the foreign government, he must endeavor to adjust matters as informally and genially as possible, without resorting to any official representations or discussions. Thus, the real successes of diplomacy are usually not heralded far and wide, and are unknown save to the few immediately involved in them. As the report concludes, a diplomat does his duty by discharging innumerable daily obligations that attract no attention; and he may be regarded as successful just in proportion to the constant tranquillity which he is able to maintain in the relations of his government with the foreign country.

Anyone who wishes an intimate view of an ambassador at work can find it in the remarkable letters of Walter Hines Page, written during his service as ambassador in England. In them one can trace the serious as well as the lighter labors of an ambassador from day to day. In one of his letters, he makes the following summary somewhat in a humorous vein:

London, Dec. 22, 1913

If you think it's all play, you fool yourself; I mean this job. There's no end of the work. It consists of these parts: Receiving people for two hours every day, some on some sort of business, some merely to "pay respects," attending to a large (and exceedingly miscellaneous) mail; going to the Foreign Office on all sorts of errands; looking up the oddest sort of information that you ever heard of; making reports to Washington on all sorts of things; then the so-called social duties — giving dinners, receptions, etc., and attending them. I hear the most important news I get at so-called social functions. Then the court functions; and the meetings and speeches! The American Ambassador must go all over England and explain every American thing. You'd never recover from the shock if you could hear me speaking about Education, Agriculture, the observance of Christmas, the Navy, the Anglo-Saxon, Mexico, the Monroe Doctrine, Co-education, Woman Suffrage, Medicine, Law, Radio-Activity, Flying, the Supreme Court, the President as a Man of Letters, the Hookworm, the Negro — just get down the Encyclopædia and continue the list! I've done this every week-night for a month, hand running, with a few afternoon performances thrown in. I have missed only one engagement in these seven months; and that was merely a private luncheon. I have been late only once. I have the best chauffeur in the world — he deserves credit for much of that. Of course, I don't get time to read a book. In fact, I can't get time to keep up with what goes on at home. To read a newspaper eight or ten days old, when they come in bundles of three or four — is impossible. What isn't telegraphed here, I miss; and that means I miss most things.

I forgot, there are a dozen other kinds of activities, such as American marriages, which they always want the Ambassador to attend; getting them out of jail when they are jugged (I have an American woman on my hands now, whose four children come to see me every day); looking after the American insane; helping Americans move the bones of their ancestors; interpreting the income-tax law; receiving medals for Americans; hearing American fiddlers, pianists, players; sitting for American sculptors and photographers; sending telegrams for property owners in Mexico; reading letters from thousands of people who have shares in estates here; writing letters of introduction; getting tickets to the House Gallery; getting seats in the Abbey; going with people to this, that and t'other; getting tickets to the races, the art-galleries, the House of Lords; answering fool questions about the United States put by Englishmen. With a military attaché, a naval attaché, three secretaries, a private secretary, two automobiles, Alice's private secretary, a veterinarian, an immigration agent, consuls everywhere, a despatch agent, lawyers, doctors, messengers — they keep us all busy. A woman turned up dying the other day. I sent for a big doctor. She got well. As if that wasn't enough, both the woman and the doctor had to come and thank me (fifteen minutes each). Then each wrote a letter! Then there are people who are going to have a Fair here; others who have a Fair coming on at San Francisco; others at San Diego; secretaries and returning and outgoing diplomats come and go (lunch for 'em all); niggers come up from Liberia; Rhodes Scholars from Oxford; Presidential candidates to succeed Huerta; people who present books; women who wish to go to court; Jews who are excited about Rumania; passports, passports to sign; peace committees about the hundred years of peace; opera singers going to the United States; artists who have painted some American portraits, — don't you see? [1]

Long practice has established certain rules for the general guidance of the minister. He ought not to act as the agent for the collection of private claims against private persons and companies abroad, but as a matter of fact he does often on instructions from the Department of State press the claims of American creditors against the government to which he is accredited. This is the essence of so-called "dollar diplomacy." While he is not supposed to be primarily concerned with the advancement of American commercial interests, in practice more than one ambassador has devoted himself largely to that undertaking.[2] It is the duty of a minister scrupulously to abstain from interfering in the political controversies of the countries to which he is accredited. It is not deemed advisable for ambassadors to make public addresses, except on ceremonial occasions,

[1] *Life and Letters of Walter Hines Page*, Vol. I, p. 159.
[2] Reinsch, *An American Diplomat in China*, p. 65.

and even then they should be extremely cautious in referring to politics in any form. This principle was asserted by the House of Representatives, in 1896, in a resolution censuring our ambassador to Great Britain, for a speech made in Edinburgh in which he criticized the protective tariff in the United States rather severely.

In addition to the regular diplomatic agents, the United States has often employed special missions for the purpose of carrying on negotiations with foreign countries. Such missions are commonly used to conduct peace negotiations — the most recent example being the commission, headed by President Wilson, that went to Paris in 1918 to conclude with Germany and Austria the details of the treaty which closed the Great War. Another noteworthy mission was that headed by Commodore Perry as a special plenipotentiary, with orders to open relations with the Emperor of Japan.[1]

II. The United States is also represented abroad by consuls,[2] who are primarily our commercial agents and perform a large number of routine duties. Consuls of all grades,[3] like ambassadors, are appointed by the President with the approval of the Senate.

Our consuls are divided into three groups: (1) consuls-general-at-large — traveling representatives who inspect the consulates of the United States throughout the world; (2) consuls-general, who supervise the entire consular systems of particular countries;[4] and (3) consuls,[5] stationed at innumerable points in every civilized country of the globe. To these three groups may be added vice consuls and consular agents who act as representatives within any particular consular district under the direction of the regular consul.

Inasmuch as the consular service is of special importance to the

[1] Every American diplomatic representative abroad has a staff of assistants, varying in number according to the quantity of business in the country to which he is accredited. The first secretary of an embassy or legation should be a man of long diplomatic experience, well acquainted with the officials and the customs of the country in which he resides. Owing to his special qualifications, he assumes, as *chargé d'affaires ad interim*, all of the duties of a minister in case of the absence of that official. He enjoys also the privileges and immunities of a diplomatic representative in international law. There is a tendency to attach more importance to the office of secretary to legations, and to make that branch of the public service more attractive. There are usually two or three additional secretaries and a number of clerks and interpreters.

[2] Moore, *International Law Digest*, Vol. V, chap. xvi.

[3] Except vice consuls and consular agents whose appointments are not ratified by the Senate. United States *v.* Eaton, 169 U. S. 331.

[4] In some countries more than one consul-general is appointed.

[5] Consuls in extraterritorial countries have a peculiar position. Below, p. 334.

commercial and industrial interests of the country, there has been growing up within recent years a demand for higher standards of efficiency in that branch. As long as the consular offices were regarded as the legitimate spoils of the politician, little attention was paid to real qualifications, and the service was constantly disturbed by rapid changes in the personnel. It is clear that long experience is a most important qualification for a consul. He should be ordinarily a thorough master of the language of the country in which he is stationed, and a careful student of the markets, the conditions of the export and import trade, and the opportunities for commerce in that country. Finally, inasmuch as his varied and complicated duties must be conducted under an elaborate code of laws, he needs some legal training. It is evident, therefore, that service to a political organization in some inland town or congressional district does not qualify a man to act as the consular representative of the United States.

On his appointment as Secretary of State, the Hon. Elihu Root took immediate steps toward the reorganization of the American consular system,[1] and, largely on his initiative, Congress passed, in 1906, a law entitled "An Act to provide for the Reorganization of the Consular Service of the United States." This law classified and graded the consuls in such a way as to enable the President to extend the merit system to that branch of the public service. Under this Act, appropriate rules were issued in 1906 and amended in 1919. At the present time, important vacancies are filled either by promotions of men whose ability has been tested in the service, or by the appointment of candidates who have passed oral and written examinations showing their fitness for the work.[2]

The specific powers and duties of consular officers[3] are found in the "Consular Regulations of the United States." First and foremost, the consular officer is a commercial representative. He must certify the invoices of goods intended for exportation to the United States; and to do this correctly he must have a wide knowledge of the cha cter and value of the goods produced for export within his particular district. He must, furthermore, be a master of every detail of our tariff system in order that he may

[1] Reinsch, *Readings*, p. 658. [2] *Ibid.*, pp. 671 and 674.
[3] Foster, *The Practice of Diplomacy*, pp. 222 ff.; Moore, *International Law Digest*, Vol. V, pp. 93 ff.

coöperate with our customs officials at home in securing a correct valuation of all imports and in preventing smuggling and violations of the customs law.

An equally important commercial responsibility placed upon the consul is that of aiding in the extension and increase of American trade abroad. It is his duty "to make a deep and special study of the industrial and mercantile conditions existing in his district. He must know what the country needs or would take in raw materials, in commodities, and in manufactured articles. He should learn how these needs are being supplied with particular attention to those of them which the American producer — farmer, miner, manufacturer, or merchant — might supply. He should investigate and report as to whether the American import could not, by a change in form or by variation in manufacture, by a different method in packing, by a more convenient accommodation in payment, or in any other way be brought into greater demand, and American trade be thus increased. . . . Also in some countries government contracts are an important item in the competition for import orders." [1]

In connection with our shipping and seamen the consul has many duties. When an American vessel touches at a foreign port, the master must deposit his register with the consul of the United States, and before clearing he must secure the return of his papers. The consul has some jurisdiction over disputes between the masters, officers, and men of American vessels; he may discharge seamen from their contracts; it is his duty to hear the complaints of American seamen in foreign ports and also to give relief to the seamen of an American vessel when in distress. The consul is expected to make innumerable reports to the State Department in Washington, some of which are edited and transmitted to the Department of Commerce for publication.

The miscellaneous functions of the consul are manifold. He is called upon to intervene with local authorities in behalf of his countrymen whenever they get into trouble in his district. He administers oaths, takes depositions, authenticates public documents, acknowledges deeds and other instruments, acts as a witness to marriages which occur in the consulate, administers, under certain circumstances, the estates of citizens of the United States dying abroad. In some states, notably China, Siam,

[1] Reinsch, *Readings*, p. 652.

and Persia, our consuls exercise, to a greater or less extent, legal jurisdiction over American citizens within their respective districts.[1]

The Treaty-making Power[2]

The Constitution of the United States provides that the President, by and with the advice and consent of the Senate, two thirds of the Senators present concurring, may make treaties; and that treaties so made under the authority of the United States shall stand with the Constitution and the acts of Congress as the supreme law of the land. No express limitations whatever are placed on the treaty-making power; and the question has been raised whether the Federal Government may make treaties with foreign countries relating to other than purely federal matters.

Jefferson laid down four rules with respect to this point. He said: (1) a treaty must concern foreign nations; (2) the treaty-making power is intended to comprehend only those subjects which are usually regulated by treaty and cannot be otherwise regulated; (3) the rights reserved to the states must be excluded from the scope of the treaty-making power, for the President and Senate ought not to be allowed to do, by way of treaty, what the whole Federal Government is forbidden to do in any way; and finally (4) the President and Senate should not negotiate treaties on subjects of legislation in which participation is given by the Constitution to the House of Representatives. The application of the principles laid down by Jefferson would, of course, greatly restrict the treaty-making power. Nevertheless it was once said by the Supreme Court that whenever an act of Congress would be unconstitutional as invading the reserved rights of the states, a treaty to the same effect would be unconstitutional.[3]

However, in practice these limitations are not recognized. Indeed, the courts have held valid a number of treaties relative to matters which are ordinarily regulated by state governments

[1] This custom of giving consuls jurisdiction over American citizens originated in the great differences which existed between the law and procedure of many non-European countries and those of the United States — differences which made the citizens of the United States unwilling to submit to the jurisdiction of native tribunals. Such jurisdiction was once possessed by our consuls in Japan, but the law of that country took on more and more the form of the Western law, and our consular jurisdiction was abolished in 1899.

[2] For executive agreements, see above, p. 204.

[3] Prevost *v.* Greneaux, 19 Howard, 7.

and are entirely outside the scope of federal legislative power. For example, some years ago a Russian died in Cambridge, Massachusetts, leaving personal property, and according to the law of that commonwealth a local officer undertook the settlement of the estate of the deceased. The Russian consul for the district, however, showed that, by a treaty between his country and the United States, he had the right to administer the estates of his deceased countrymen there, and his claim was upheld.[1]

It is also maintained on good authority that the Federal Government can intervene in the administration of the criminal law of a state, where the treaty rights of foreigners residing in the United States are involved. President Harrison in a message in 1891 said: "It would, I believe, be entirely competent for Congress to make offences against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts. This has not, however, been done, and the federal officers and courts have no power in such cases to intervene, either for the protection of a foreign citizen or for the punishment of his slayers."[2] Congress, notwithstanding the suggestion, has not yet seen fit to confer such jurisdiction on the courts.

This right of the Federal Government to make treaties pertaining to matters which are clearly within the sphere of state legislation raises many very practical questions, and will require far more serious consideration as our relations with other peoples increase. An excellent example of the importance of this problem is afforded by the long dispute over the exclusion of Japanese children from the regular public schools of San Francisco, which, it was claimed by Japan, was a violation of treaty rights. There is no doubt that the Federal Government ordinarily has no power whatever to interfere with the public schools of a state, for a state may abolish its schools if it pleases or prescribe such conditions of admission as it sees fit. President Roosevelt, however, declared that the action of San Francisco did violate the treaty rights of the Japanese in America and by a firm stand in dealing with California authorities arrived at a compromise. Several years later a similar issue was raised by a California law designed to prevent all aliens "not eligible for American citizenship" from owning or leasing land in that state. Japan took the

[1] Moore, *International Law Digest*, Vol. V, p. 125.
[2] *Messages and Papers of the Presidents*, Vol. IX, p. 183.

position that this law also violated the treaty rights of her citizens, but the Supreme Court of the United States placed an opposite interpretation on the act in question, without making an issue of the treaty-making power itself.

About the same time, another phase of the subject was examined by the Court in a case involving a treaty with Great Britain designed to protect against slaughter, by local hunters, migratory birds which make regular flights between Canada and the United States. In this instance it was a state, Missouri, which protested against a treaty, claiming that the control over wild game within its borders belonged to the state legislature and not to the President and Senate in the exercise of their treaty-making power. In the case of Missouri *v.* Holland[1] the Supreme Court sustained the validity of the law carrying out the treaty against the contentions of the state.

The Negotiation of Treaties

In the negotiation of treaties, the President has a choice of many devices. He may go abroad and take part in negotiations himself as did President Wilson when, in 1918–19, he participated in the formulation of the treaty that concluded the World War. He may commit the undertaking to the Secretary of State; he may employ an ambassador, minister, or *chargé d'affaires*, or, if he likes, he may select some private person who, in his opinion, is peculiarly fitted for the work by his skill or acquaintance with the language and customs of the country with which the negotiations are to be carried on.

The extent to which the Senate under its right to advise and consent may participate in the actual negotiation of treaties is by no means settled. On the one hand, it has been maintained that it is the constitutional right of the President to negotiate treaties without any interference from the Senate, and that he needs merely to submit the final document to that body for action.[2] On the other hand, it is claimed by eminent authorities that the Senate may share in treaty-making at any stage, and may even advise the President to negotiate a particular treaty.

Certainly the framers of the Constitution believed that the President should consult the Senate in the negotiation of treaties.

[1] 252 U. S. 416.

[2] On this matter, see *Readings*, p. 297.

President Washington stated to a committee of that body that in all such affairs even oral communications were necessary. He argued that in negotiations there are many matters requiring not only consideration, but sometimes an extended discussion which would make written communications tedious and unsatisfactory. Accordingly, he visited the Senate in 1789 to lay before it papers relating to the negotiation of a treaty with an Indian tribe. He made a brief statement and then put several questions to the Senate, asking its advice in the form of affirmation or negation. The Senate postponed action on these questions, but finally prepared answers to them.

Although Washington later ceased to make personal visits to the Senate, he constantly sought its advice on the negotiation of treaties, by means of written communications. For example, in 1790, he sent to the Senate three questions relative to the negotiation and terms of a certain treaty. However, he did not always follow this practice,[1] and his successors have seen fit to do so only under exceptional circumstances.

For instance, President Polk, in 1846, laid before the Senate a draft of a treaty presented to the Secretary of State by the British envoy proposing an adjustment of the Oregon question, and asked the advice of the Senators as to what action, in their judgment, was proper to take in reference to the treaty. There were, of course, peculiar political reasons[2] which actuated the President on this occasion, but he justified his conduct by a reference to the practice of President Washington. This example was likewise followed occasionally by other Presidents.

In more recent times it has been the custom of the Secretary of State to consult influential Senators[3] with reference not only to treaties already negotiated, but also as to the advisability of opening conferences with the representatives of foreign powers on particular matters. John Hay, when Secretary of State, frequently asked the Senators what they thought of various propositions, whether the subject matter was a proper one for negotiation, and whether other provisions should be incorporated. Senator Bacon expressed the belief that Secretary Hay conferred with many Senators either in writing, or in person, as to the

[1] For example, note the history of the Jay treaty with Great Britain.
[2] Reeves, *Diplomacy of Tyler and Polk*, p. 263.
[3] Especially the members of the important Senate committee on foreign relations.

general arbitration treaty while it was in process of negotiation. Mr. Bacon further said: "I recollect distinctly the Alaskan treaty. Time after time and time after time Mr. Hay, then Secretary of State, conferred with Senators, and, I presume, with all the Senators, as to the propriety of endeavoring to make that treaty and as to the various provisions which should be incorporated in it, recognizing the delicacy of the situation; and the provisions of that treaty were well understood by members of the Senate and approved by members of the Senate before it was ever formulated and submitted to Sir Michael Herbert." [1]

Undoubtedly it is wise for a President to be sure of senatorial approval before he commits himself to a proposed treaty vitally affecting American life and policy. The constitutional rule requiring the approval of two thirds of the Senators present for ratification nearly always makes it necessary for him to go outside his own party for support. If the opposition can make an issue out of a treaty, it will almost certainly do so. This rule has been the despair of more than one Secretary of State and often makes it impossible for an administration to carry out its policies in the foreign sphere. As President Wilson, in his *Congressional Government*, published many years before his entrance into public life, remarked on this point: "The President really has no voice at all in the conclusions of the Senate with reference to his diplomatic transactions. . . . His only power of compelling compliance on the part of the Senate lies in his initiative in negotiation, which affords him a chance to get the country into such scrapes, so pledged in view of the world to certain courses of action, that the Senate hesitates to bring about the appearance of dishonor which would follow its refusal to ratify the rash promises or to support the indiscreet threats of the Department of State."

Long after he wrote these lines, President Wilson faced the great crisis of his life in a conflict with the Senate over the treaty of Versailles. In the negotiation of that treaty he assumed full responsibility. He did not take with him to Paris any Senators, either of his own or the opposition party. On his return with the document, he merely called a conference of Senators and explained to them in more or less detail the various sections of the historic paper. Had he limited the treaty to the mere terms of peace, his Republican opponents might have hesitated to block

[1] *Congressional Record*, Vol. XL, Part 3, pp. 2129–30.

the formal ending of the war, but he insisted on including in it the Covenant of the League of Nations, involving important changes in future international relations. Even if the Covenant had been acceptable in all respects, the opportunity would have been too good for the opposition to neglect. At all events, the treaty went down to defeat in the Senate.

In practice, therefore, we may say that the Senate insists upon being consulted during the course of treaty negotiation as the price of its approval. It does more. It sometimes seeks to initiate, by way of resolution, negotiations with foreign countries. Furthermore, a claim to the right of sharing in the initiation is sometimes made by the House of Representatives. For example, the Senate and the House once adopted a resolution requesting the President to open negotiations with other powers, with a view to making arbitration treaties providing for the peaceful settlement of international disputes. The President later complied with this suggestion. Congress even passed, in 1902, an act advising the President as to the terms which should be incorporated in a treaty.[1]

When the terms of a treaty are all adjusted with the foreign power, the final draft is laid before the Senate, and it may be approved, amended, or rejected. Like nominations to federal offices, treaties are acted upon in an "executive session," which is supposed to be secret. In practice, however, its transactions are invariably reported in more or less accurate detail in the press, and indeed sessions for the general discussion of treaties may be open. A treaty rejected by the Senate may be returned by the President to that body for reconsideration.

When the Senate approves a treaty, it is sent to the President, who ordinarily completes the process by the formal exchange of ratifications with the representative of the foreign country. If he sees fit, he may refuse to take this final step, and thus prevent a duly signed and approved treaty from going into effect. This power of holding up a treaty rests on the assumption that, through the agents of the Federal Government abroad, the Presi-

[1] Even the House of Representatives alone has gone so far as to attempt to participate indirectly in the negotiations of treaties. It can with perfect propriety request the President to submit to it papers relating to the work of the executive department; and in 1796 it asked the President, by resolution, to lay before it a copy of the instructions to the minister of the United States who negotiated the treaty with Great Britain, together with other documents relating to the treaty, excepting such papers as the President might deem improper to disclose. Washington responded that the House had no share in the treaty-making power and declined to transmit the papers.

dent has access to sources of information closed to the Senate, and may discover at a late hour satisfactory reasons for not exchanging the ratifications.

If a treaty is amended by the Senate, the President may decide to abandon it altogether or he may secure the acceptance of the proposed change by the foreign power concerned and bring about the concluding ceremonies of ratification. Often the Senate approves a treaty with "reservations" more or less serious in character. On some occasions such reservations really amount to changes in the treaty, changes which call for renewed negotiations with the foreign country or countries involved in the transaction; at other times reservations merely exclude certain American rights from the operation of the treaty or interpret its provisions with more precision or make some high-sounding declaration pleasing to American ears. The President and the foreign powers engaged in the negotiations must decide whether reservations and declarations are serious enough in character to call for a reopening of the whole business. When the treaty is at last completed, it is made a part of the law of the land by an official proclamation. It is enforced by the appropriate authorities and applied by the courts in concrete cases in the same way as any other law.

World Politics

There is an American tradition to the effect that the United States enjoys a splendid isolation from the rest of the world — especially from Europe. Accordingly, the entrance of the United States into "world politics" after the Spanish War was commonly regarded as a violation of our historic policy. This tradition of isolation runs back to the beginning of our history as an independent nation. It was voiced by Washington in his Farewell Address, in which he advised his countrymen to extend their commercial relations, but warned them to have as little political connection with Europe as possible. "Europe," he said, "has a set of primary interests which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence it would be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or en-

mities. . . . It is our true policy to steer clear of permanent alliances with any portion of the foreign world."

However, the very commercial interests which Washington urged his countrymen to develop in the world's markets have been, from the beginning, drawing us more and more into the current of world politics. From time to time the United States has vigorously defended American commercial enterprise in various parts of the globe. When the Pasha of Tripoli, discontented with the tribute paid him, chopped down the American flag, President Jefferson immediately ordered a fleet to the Mediterranean. Commodore Preble, who was sent over in 1803, bombarded the city of Tripoli and forced the Pasha to come to terms. Again, in 1812, the Dey of Algiers grew restive on hearing of the war between the United States and Great Britain, complained of the small amount of tribute which he received, and expelled the American consul-general and American citizens from his territory. At the close of the war, Congress passed an act for the protection of American commerce against Algerian cruisers; Bainbridge and Decatur, with two squadrons, were speedily dispatched to the Mediterranean, and in a short time the Dey of Algiers came to terms, agreeing not to levy any more tribute on the United States. Thus by our vigorous action we helped to rid the Mediterranean of the Barbary freebooters.

Again, in 1843, immediately after Great Britain had battered down the Chinese wall of exclusion, the President sent Caleb Cushing to China to obtain for the United States those commercial privileges which had been so recently extended to the British. It was due to the initiative of the United States that Japan was opened to Western trade. In 1853 Commodore Matthew C. Perry, in command of a squadron of four vessels, and bearing a special message from the United States, demanded as a right, not as a favor, "those acts of courtesy which are due from one civilized nation to another"; and by a firm policy he was able to make a treaty with the Japanese imperial government in 1854.

The Civil War and reconstruction, arousing as they did such terrible passions at home, obscured foreign affairs for a time in the public mind, but not in the mind of the Government. The thunder of American guns mingled with the roar of British cannon in the bombardment of Kagoshima, undertaken in 1865, to punish

the Japanese for firing on a small American steamer the year before. Six years later American power was established in the Samoan Islands on the strength of a mere commercial arrangement concluded by a commander in the United States navy. General Grant negotiated a treaty for the annexation of Santo Domingo as early as 1869 and, though the Senate rejected it, he maintained his advocacy of the idea until the last day of his second administration. Long before the Civil War, the Department of State had warned European powers that the United States would not permit any of them to seize the Hawaiian Islands; concessions for a naval station there were obtained in 1884; and the first attempt at direct annexation was made in 1893 — five years before the Spanish War was supposed to have made the United States a "world power." That war therefore was merely an incident in a long chain of events which were widening the commercial power of America.

After the Spanish War, as before, America participated in world affairs. It joined England, Germany, Japan, and Russia in sending troops to China in 1900 to suppress the Boxer Revolt. It sent representatives to the Algeciras conference held in Spain in 1906, where a futile attempt was made to adjust the conflicts among European countries over Morocco. It took a prominent part in the Hague conferences of 1897 and 1907, when the great powers considered but did not adopt plans for the reduction of armaments. President Roosevelt sent a fleet around the world to remind all nations, if they needed a reminder, that America was not unaware of the nature and uses of the sea power.

In a few years the World War broke in upon the peace of both hemispheres. America was drawn into the vortex as it had been a hundred years before when Europe was devastated by the Napoleonic wars; and at the conclusion President Wilson sought to commit our country to a League of Nations. Then a great cry against European entanglements arose; the treaty providing for the League was defeated in the Senate; and the country swung over to a violent opposition to European "involvements." Under President Harding, separate treaties were made with Germany and Austria, and invitations to take part in the numerous conferences held with a view to composing the affairs of Europe were all declined. American troops were withdrawn from the Rhine and the Old World was left to adjust its own fortunes.

Nevertheless the same administration, soon after its installation, called a conference of nine leading powers at Washington in 1921. It helped to devise and then entered what amounts to a league of the Pacific nations, with a view to maintaining the *status quo* in that great theater of commercial enterprise. It bound the United States to England, France, and Japan in the "four-power treaty" which pledged the contracting parties to respect the insular possessions of one another in the Pacific and to take counsel whenever the possessions of any one of them are threatened. It concerted with the powers for a settlement of the troubled estate of China. It agreed to a reduction of naval armaments and the maintenance of a fixed ratio with the chief rivals, England and Japan. These things accomplished, President Harding presented to the country a proposal to join the other nations in a plan for submitting disputes to the World Court formed under the League of Nations. In his view, this was the supreme issue when death cut short his work.

In the past decade the economic ties binding America to the world have grown more numerous and stronger. Americans now play the rôle of bankers to all nations; the bonds of every country are bought and sold on the New York stock exchange. The American merchant marine and navy have risen from third or fourth rank to rival that of the Mistress of the Seas. American commerce increases. American capitalists hunt and obtain concessions in all the backward places of the earth. American battleships lie in the harbor of Constantinople waiting on events. American gunboats steam through the muddy current of the Yangste as far as Hankow and serve notice to all and sundry that the Government at Washington never sleeps.[1]

The Monroe Doctrine

No description of the foreign policy of the United States is complete which does not take into account the Monroe Doctrine as applied to the Latin-American countries in their several relations with the European powers. It would be misleading, however, to attempt a definition of the Monroe Doctrine in the abstract; for it was enunciated under peculiar historical circumstances and has taken various forms from time to time.

[1] J. M. Callahan, *American Relations in the Pacific and the Far East*, 1784–1900; Paul H. Clements, *The Boxer Rebellion*.

It originated during the first quarter of the nineteenth century, partly because the United States really feared the growth of despotism in Europe after 1815, and particularly because American traders and merchants were actively seeking a share of the economic advantages to be derived from the independence of the former Spanish colonies. Spain had systematically endeavored to monopolize the trade of her American possessions; thus the United States and England — the two great trading nations especially eager to develop their interests in Latin-America — were legally excluded from a rich field of enterprise.[1] When in 1808 the Spanish-American colonies began their long struggle for independence they tasted the sweets of commercial freedom. American and English merchants were quick to seize the opportunity of opening up profitable trade relations with these new states.

Spain, of course, was loath to surrender her colonies and the lucrative business with them; but when, in 1820, she was preparing an expedition to put down the independence movement in America, a serious revolution broke out within her own borders and quickly spread over into Italy. At once, Metternich, the astute Austrian diplomat, invited Russia, Prussia, France, and England to unite in suppressing the development of "revolt and crime." In 1822, the representatives of these powers met at Verona to discuss their common interests and decide what should be done with Spain. At this congress, all the powers, except England, sought to devise a plan by which they might aid Spain in reconquering her rebellious colonies, although as a matter of fact they were really in no position to afford the necessary military support. England, however, refused to coöperate, partly because of the more liberal spirit prevailing among her people, but more especially because her economic interests were certainly on the side of the revolutionary Spanish colonists with whom she had developed a paying trade.

The United States occupied about the same economic position; and, in view of what seemed a serious intervention in American affairs by the great despotic European powers, President Monroe, in his message to Congress of December, 1823, called attention to the impending dangers, adding these significant words: "We

[1] Smuggling had been going on, however, for more than two centuries in spite of Spain's protests.

owe it therefore to candor and to the amicable relations existing between the United States and these powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principles acknowledged, we could not view any interposition for the purpose of oppressing them or controlling in any other manner their destiny by any European power in any other light than a manifestation of an unfriendly disposition toward the United States." In the same message in which this doctrine was announced there was another significant declaration, called forth by a decree of 1821 issued by the Tsar of Russia, claiming the northwest shore of North America down to the 51st parallel. With regard to this claim President Monroe declared, "that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers."

In the course of time the principle announced in this famous message came to mean, practically, that the United States, while respecting the existing rights of European nations in this hemisphere, would oppose any intervention interfering with the rights of self-government in any country whose inhabitants had cast off European rule. When a dispute arose between Great Britain and Venezuela over the boundaries of their respective territories, Richard Olney, then Secretary of State under Cleveland, declared in 1895, that the United States did not intend to help relieve any Latin-American state of its obligations under international law and did not intend in any event to prevent any European government directly interested from enforcing such obligations or inflicting punishment for a breach of them; but he added that the United States would not permit any European country or combination of countries "forcibly to deprive an American state of the right and power of self-government and of shaping for itself its own political fortunes and destinies." The strong stand taken by President Cleveland on this interpretation of the Monroe Doctrine kindled the war spirit; but fortunately

the dispute was finally settled by arbitration. Again, in 1901, when Germany was about to bring force to bear upon Venezuela for the satisfaction of claims, President Roosevelt stated: "The Monroe Doctrine is a declaration that there must be no territorial aggrandizement by any non-American power at the expense of any American power on American soil. . . . We do not guarantee any state against punishment, if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power."

Along with this interpretation of the Monroe Doctrine as "the principle of the limitation of European power and influence in the western hemisphere" has come a correlative doctrine that the United States must accept, to some degree, responsibility for the conduct of the Latin-American countries which are to be defended against European aggrandizement. This correlative principle President Roosevelt announced in 1904: "If a nation shows that it knows how to act with decency in industrial and political matters, if it keeps order and pays its obligations, then it need fear no interference from the United States. Brutal wrong-doing or impotence which results in the general loosening of the ties of civilized society may finally require intervention by some civilized nation, and in the western hemisphere the United States cannot ignore its duty."

It is proper to add, however, that Latin-American states look upon the Monroe Doctrine with mixed feelings. In time of a controversy with some first-class European power, they are usually happy to seek security under the cover of that historic protection. But many of their leaders ordinarily regard the doctrine as a mere device which excludes European powers from territorial aggression in the western hemisphere while permitting the United States to buy or annex or assume a protectorate over any desirable territory, such as the Virgin Islands, the Panama Canal Zone, Haiti, Santo Domingo, and Nicaragua. Naturally the statesmen of the United States and those of Latin-American countries do not always see eye to eye on matters of policy involving the Monroe Doctrine. There is no doubt, however, about the significance of the doctrine in American politics. Even the League of Nations is under obligations to respect it.

If we put aside all rhetoric and get down to the meat of the matter, we find that the Monroe Doctrine in fact, as Professor

David Y. Thomas[1] points out, covers the following elements: (1) European powers are forbidden to take any territory in the western hemisphere; (2) the smaller states in Latin-America, especially in the Caribbean region, must pay all debts owed to foreign bankers, not overlooking, of course, American creditors; the Government of the United States is likely to intervene in one form or another to secure the payment of such debts; (3) the protection of the Panama Canal and American islands in the West Indies brings the entire Caribbean region within the sphere of our national supremacy; (4) the extensive commercial and industrial interests of American capitalists in Mexico and Central America will be protected by our Government; and (5) "Pan-Americanism will be favored," that is, there will be friendly coöperation between the United States and the powers to the southward as far as that is compatible with the safety and interests of the United States. Indeed it is probable that in the long run a policy of coöperation will offer a better guarantee to our security and economic interests than the policy of dominance and dictation.

[1] David Y. Thomas, *One Hundred Years of the Monroe Doctrine*, a critical analysis of the Monroe Doctrine which should be read by all students of the subject. J. M. Callahan, *Cuba and International Relations* (1899). C. E. Martin, *The Policy of the United States as Regards Intervention.*

CHAPTER XVI

NATIONAL DEFENSE

War and Foreign Policy

War is one of the terrible phenomena of social evolution. Its history reaches from the dawn of the world when cave men fought with clubs and stones down to the latest hour when the echoes of the most awful conflict ever waged are still ringing throughout the earth. The United States, traditionally the land of peace, was born in a revolutionary war of independence and has been four times engaged in armed conflicts with foreign powers, to say nothing of the four years of internecine war and the minor clashes with Indians, Mexicans, Filipinos, Dominicans, Haitians, Chinese, and Russians.

In the presence of the dreadful phenomenon of war, minds react in different ways. There are those who regard war as a noble occupation, productive of idealism and good. Thus said Treitschke, the German political philosopher: "Without war no state could be. All those we know of arose through war, and protection of their members by armed force remains their primary and essential task. War, therefore, will endure until the end of history, as long as there is a multiplicity of states. The laws of human thought and human nature forbid any alternative; neither is one to be wished for. . . . It is war that fosters the political idealism which the materialist rejects. What a disaster for civilization it would be if mankind blotted its heroes from memory. . . . To appeal from this judgment to Christianity would be sheer perversity, for does not the Bible say that the ruler shall rule by the sword and again that greater love hath no man than to lay down his life for his friend? . . . God above us will see to it that war shall return again, a terrible medicine for mankind diseased." [1]

At the other extreme are the pacifists, who contend that war is a stupid, brutal, and degrading way of disposing of international

[1] Treitschke, *Politics*, Vol. I, pp. 65 ff.

disputes, that it never settles any question on the basis of right, and that it leaves in its wake nothing but hatred, suffering, debts, and disorder. Between the extremes are those who believe in defending our country against aggression, but think vaguely about the subject, hope that war will never occur again, fear that it may, and insist on a certain degree of preparation for it without reference to any particular exigency.

Where is the truth to be found? What are the standards by which to measure the military and naval needs of the country — the material equipment necessary merely to defend it against armed assault? These questions, though vital to the whole issue, are seldom asked, much less discussed. Certainly they can only be answered by reference to national ideals and national foreign policies. The degree of military preparedness needed by a nation is determined by its geographical location, the power of its potential enemies, and by the character of the foreign policy which it pursues. Separation of preparedness and foreign policy is a fatal error. The terrible truth of this statement is illustrated by the experience of Great Britain between 1906 and 1914. During that period her Foreign Office was carrying on secret negotiations with France and Russia which bound the British nation by ties of honor to come to the aid of those two countries in case of a war with Germany; and yet the British nation knew nothing of these negotiations and no adequate military preparations were made by responsible statesmen to support the commitments of the diplomats. Arrangements were made to land English troops on the Continent, but only a handful of soldiers were organized for the undertaking.

If it is true that the degree of our preparedness should depend upon the character of our foreign policy, it is obviously impossible for military and naval officers to claim any special authority on the subject. It is their business to determine, as well as they can, what engines of war are necessary for defense and offense under certain circumstances. It is the business of the American people to decide what kind of foreign policy is to be pursued. Unfortunately there has never been and is not now a coördination of armed forces with diplomacy. Whether we have one, two, or three hundred thousand men in the national army or a small or large navy is determined by sentiment, tradition, and guesswork. It is true that the War and Navy Departments

conduct their studies and preparations on certain assumptions as to possible wars with certain foreign powers, but they do not know just how the diplomatic operations of the Government will turn out in the long run. Neither does Congress.

It is fortunate that in these circumstances we have no powerful and hereditary enemies touching our land boundaries. Still America is a great power with commercial and imperial interests all over the world, and the foreign policies of the United States carry with them significant military implications. Do we intend to retain the Philippines and take an active part in the quarrels and unrest of the Orient? Then one military and naval policy is appropriate. Do we intend to draw back upon the Hawaiian base? Then another is appropriate. Do we intend to support our capitalists and merchants through thick and thin in their search for foreign markets? If so the nature of the military requirements is apparent. It is not necessary to give more illustrations of the fundamental fact that the character and strength of our military and naval forces should be determined with reference to the foreign policy which we intend to pursue.

On the whole it can hardly be said that we have ever had a consistent theory of national defense. Rather have we followed the easy course of drift. Having no formidable neighbors along our land boundaries we have been content with a small standing army. Until the Spanish War gave us widespread imperial domains and the growth of our industries brought a high pressure for foreign markets, little attention was given to the upbuilding of the navy. Previous to that conflict our territory was nearly all compact and on the North American continent, and it was thought that good coast defenses would suffice. The acquisition of the insular possessions from Spain, however, changed the whole face of things. It then became clear that it would be necessary to have a large navy to defend the territories in two oceans in case of a war with a first-rate European or Asiatic power. Thereupon our naval appropriations began to increase rapidly. By 1912 the United States stood next to Great Britain in the amount spent annually for defense on the high seas. The destruction of Germany's fleet in the World War left American the second naval power in the world. Moreover, the construction of battleships between 1914 and 1921 and the

adoption of an elaborate program for new ships indicated that the United States would soon have the greatest navy on earth and would snatch from Great Britain the scepter of supremacy wrung by her from Spain in the defeat of the *Armada* more than three hundred years ago. Then came the Washington conference which halted the race for naval supremacy, gave Great Britain and America equality in capital ships, and placed Japan next in rank. What lies beyond depends upon our foreign policy.

The Peace Footing

The powers of Congress to provide for national defense are practically unlimited. There are no restrictions of any moment on the power to declare war, call citizens to the colors, incur debts, build ships, spend money, and commandeer the economic resources of the country. The scope of the President's war power as commander in chief under the Constitution and under acts of Congress is without any practical limits so far as the exigencies of war are concerned.

At the present time under the Army Organization Act of June 4, 1920, the military forces on a peace footing comprise three branches: (1) the army of the United States, known as the regular or standing army, to consist of not more than 280,000 enlisted men, in 1924 about 125,000 men in fact; (2) the national guard organized in each of the states and territories and the District of Columbia; and (3) the organized reserves.

The Act above cited determines the number and character of the officers, the various divisions of infantry, cavalry, and artillery; it fixes the term of service for enlisted men at one or three years at the option of the soldier. It provides for a general staff and for a war council composed of the Secretary of War, the Assistant Secretary, the General of the Army, and the Chief of Staff. It creates a reserve corps of enlisted men and also an officers' reserve corps to be called upon in emergency. It establishes a system for training reserve officers at colleges and educational institutions and at camps held annually under the supervision of the War Department. The regular army of the United States in time of peace is recruited from volunteers and it is officered mainly by graduates of the National Military Academy at West Point.

The national guard as organized in the several states and territories consists of volunteers enlisted for a term of three years. They are drilled and disciplined by local officers under the supervision of federal authorities.[1] They are paid out of the Treasury of the United States, and are liable to be called at any time into the national service just as the regular army. Associated with the national guard is a national guard reserve.

The navy of the United States consists of the battleships, cruisers, submarines, and various auxiliary vessels provided for by acts of Congress subject to the agreement of the Washington conference which fixes the ratio of American, English, Japanese, French, and Italian battleships. The enlisted men of the navy are volunteers and the officers are mainly graduates of the Naval Academy at Annapolis. There is a supplementary force known as the marine corps which is used for land fighting and shore duty in connection with the navy.

The distribution and movement of the land forces in time of peace are determined partly by the law which divides the country into several military departments and divisions; the distribution of the naval forces is likewise subject to acts of Congress; but the President has a large discretion in that relation. He may order troops, battleships, and various war craft to ports in any quarter of the globe or, as did President Roosevelt in 1909, send a fleet around the world. The exercise of this discretion is of great significance both in respect to precipitating hostilities and preparing for eventualities.

The army and navy of the United States are under the control of the Departments of War and Navy respectively, subject always to the President of the United States, who in peace and war is commander in chief of the armed forces of the country. The secretaries of these departments are nearly always civilians without practical military or naval experience. They are political officers, men of the President's party, appointed by him with the consent of the Senate. They form a connecting link between the technical men on the one side and the civil government on the other. In addition to the administrative supervision of the armed forces committed to their charge, they must prepare estimates of expenditures and lay before Congress plans for main-

[1] See below, p. 445.

taining and improving the efficiency of the army and navy. Civilian supremacy is guaranteed, however, by the constitutional safeguards which forbid them to enlarge the forces or make any outlays of money except in accordance with acts of Congress.

The United States on a War Footing

No idea of the military potentialities of the American Government can be gained, however, from a mere survey of the Constitution and the laws designed for times of peace. American military power in action can only be understood in terms of the measures taken in an actual conflict — the war with the Central Powers in 1917–18. That titanic conflict gave a new aspect to war, its requirements, and its dreadful possibilities. In previous wars, the armies in the field and the number of civilians employed in making munitions and supplies for them included only a part — usually a small part — of the total populations concerned. In the World War whole nations were involved. It was estimated that from three to twenty adults were required to keep a single man on the firing line. If we take the most conservative figure and recall that the grand total of men in the United States army (including the marines) at the time of greatest strength, November 11, 1918, the day of the armistice, was 3,703,273, we see what a modern war involves in terms of civilian strength to sustain it. Modern war means practically the whole nation in arms or at work in support of the armed forces on land and sea. President Wilson said: "In the sense in which we have been wont to think of armies there are no armies in this struggle. There are entire nations armed. . . . It is not an army that we must shape and train for war; it is a nation."

The American nation at war in 1917–18 resorted to the following measures in order to put its full economic and military power into operation:

The Selective Draft Laws. By an act approved on May 18, 1917, it was provided that the great national army should be impartially chosen from among males between the ages of 21 and 30 inclusive. The President was authorized to apply as necessary the terms of the selective draft, based on the liability of all male citizens and male persons (not alien enemies) who had declared their intention to become citizens, between the ages

indicated. Quotas for the several states were to be determined according to population. Federal and state officers, ministers, and a few others were exempted. All persons liable to service were registered and from them were selected by lot the men needed for the army. In August, 1918, Congress by law extended the term of years to include men between 18 and 45; the war was at an end before this measure could be applied.

THE INSURANCE ACT. By a law approved October 6, 1917, Congress made large appropriations for: (1) military and naval allowances to be paid under appropriate regulations to the families of soldiers and sailors and those relying in whole or in part upon their earnings, (2) compensation for enlisted men or their families in case of death or disability, and (3) a relatively inexpensive system of insurance for the benefit of soldiers and sailors, such insurance payments to be in addition, of course, to the regular allowances made by the Government.

LIBERTY LOAN LAWS. During the course of the war the Government floated four great national loans. The first loan under the law of April 24, 1917, had 4,500,000 subscribers and the fourth loan in October, 1918, over 20,000,000 subscribers. The popularity of the loans was enhanced by the issuance of bonds of denominations as small as $50. In order that still smaller amounts might be subscribed War Savings Stamps were devised.

MEASURES OF TAXATION. After the declaration of war, the cry was raised that "wealth as well as men should be conscripted"; in some quarters it was urged that the entire cost of war should be laid upon large fortunes and incomes. Congress adopted a middle course and provided enormous revenues from: (1) progressive income taxes rising steadily in percentage with the amount of the income, (2) graduated inheritance taxes based on similar principles, and (3) excess profits taxes upon all incorporations and partnerships. "This," says Professor Seligman, "is the high-water mark thus far reached in the history of taxation. Never before in the annals of civilization has an attempt been made to take as much as two thirds of a man's income by taxation."

NATIONAL FOOD AND FUEL CONTROL LAW, August 10, 1917. Among other things this law forbade: (1) willful destroying of the necessaries of life for the purpose of enhancing prices; (2) restricting supplies or knowingly committing waste; (3) attempting to monopolize supplies or to limit the facilities for producing or transporting supplies; (4) limiting the manufacture of necessities in order to exact excessive prices. The President was

authorized: (1) to requisition food and other supplies for the support of the army and navy; (2) to prescribe regulations governing marketing; (3) to fix the price of wheat; (4) to take over and operate, if necessary, factories, mines, packing houses, and other plants; (5) to fix the prices of supplies requisitioned for military purposes; and (6) to control the prices of supplies of coal and coke.

Railways and Means of Communication. By a proclamation of December 26, 1917, the President placed the railways under government control and operation, and the Secretary of the Treasury was made director-general. In March, 1918, Congress passed the railroad control bill, providing the terms and conditions under which the Government was to operate the railroads for the period of the war and not to exceed twenty-one months after the proclamation of peace. In the summer of the same year, the express, telephone, and telegraph systems were taken over by the Government. Coastwise and high-seas shipping was likewise placed entirely at the disposition of the Government, and an Emergency Fleet Corporation was created to mobilize the resources of the country to build ships.

The Espionage and Sedition Acts. An espionage law, approved June 15, 1917, provided heavy penalties for: (1) those who attempted to communicate to any foreign nation any information to the injury of the United States; (2) those who willfully made or conveyed false statements with the intent to interfere with the operations of American forces or promote the success of the enemies of the United States; (3) those who willfully attempted to cause disloyalty, insubordination, mutiny, or refusal of duty among the military and naval forces of the United States. The Sedition Act, approved May 16, 1918, as an amendment to the Espionage Act, imposed a heavy fine or imprisonment upon persons "who use abusive language about the Government or institutions of the country, who advocate or incite any curtailment in the production of war materials, and who by word or act favor the cause of an enemy country." The Postmaster-General was empowered to close the mails to anyone who in his belief was using the postal service in violation of the Sedition Act. The Sabotage Act of April 20, 1918, laid penalties upon those who willfully destroyed war materials or interfered with the production of war materials.

In pursuance of the legislation which we have just reviewed the following important agencies were created to carry on the administration of the functions necessary to keep the country on

a war footing and to support adequately our land and naval forces:

WAR INDUSTRIES BOARD. This board, organized in July, 1917, as a planning board for industries, was empowered to bring all of them under government control, to speed up the production of necessary materials, to distribute the orders for supplies from all war divisions to the industries best fitted to meet them expeditiously, and to coördinate all work in such a fashion as to prevent waste, duplication, and delay.

PRIORITIES BOARD, in the War Industries Board, charged with the duty of guiding industries and governmental agencies in "the production, supply, and distribution of raw materials, finished products, electrical energy, fuel, and transportation," and of laying down rules for giving priority or preference to those materials and activities necessary to meet the war needs of the Government in the order of their importance.

UNITED STATES RAILWAY ADMINISTRATION, under the direction of the Secretary of the Treasury; in charge of the administration of the railways taken over by the Federal Government.

EMERGENCY FLEET CORPORATION, created to secure the cooperation of all the shipbuilding interests in the country and to organize new shipbuilding forces with a view to the immediate enlargement of the fighting forces and merchant marine of the United States.

FOOD ADMINISTRATION, charged with enforcing the provisions of the law of August 10, 1917, and additional rules laid down from time to time in furtherance of the principles therein contained. Federal food administrators were also established in every state.

FUEL ADMINISTRATION, authorized to carry into effect the fuel provisions of the law of August 10, 1917, and rules and regulations relative to the mining, distribution, and price of coal for war, industrial, and domestic uses.

AIRCRAFT BOARD, an independent organization which supervised the purchase, production, and manufacture of aircraft and aircraft materials.

WAR LABOR BOARD, created in April, 1918, to adjust, by mediation and conciliation, disputes arising between employers and employees in war industries. The Board had no power to force capitalists and workmen to accept its decisions, but the President of the United States "commandeered factories of recalcitrant employers and threatened with exclusion from industry and with the withdrawal from immunity from the draft striking em-

ployees who refused to return to work after the governmental award." [1]

War Labor Policies Board, in the Department of Labor, dealt with principles involved in the determination of wages, hours, conditions of labor, government labor policies, and the distribution of labor.

United States Employment Service, in the Department of Labor, managed employment offices throughout the country and aided in the distribution of labor, especially to war industries.

Bureau of Housing, in the Department of Labor, in charge of providing suitable housing conditions in war industries and shipbuilding centers.

War Trade Board, charged with the functions of: (1) conserving for the United States and the Allies the commodities necessary to their economic life and the prosecution of the war, through the control of trade with neutrals as well as the Allied powers and (2) controlling American merchants in their transactions with foreigners by the publication of the names of enemy corporations or those allied to enemy interests.

Board for Vocational Education, created before the war, in charge of the education of disabled soldiers and sailors so as to fit them for remunerative and congenial employment in civilian life. Funds were provided to support the student in training, to assist him in securing desirable employment, and to safeguard his interests after he secured regular employment.

Bureau of War Risk Insurance, in the Treasury Department, with branches throughout the country, charged with the function of executing the provisions of the law relative to allotments to the families of soldiers and sailors and to war risk insurance.

Council of National Defense, created under act of Congress approved August 29, 1916, and composed of the six Cabinet officers: the Secretaries of War, Navy, Interior, Agriculture, Commerce, and Labor. Its functions were to investigate and to advise Congress and the President as to the best ways in which to mobilize the industrial, transportation, and agricultural interests of the country for immediate concentration and use in national defense. It embraced innumerable committees and subcommittees, which acted in an advisory and consulting relation to the war agencies of the Government. It endeavored to assist state committees in the prosecution of their work. Much

[1] *The Nation*, October 26, 1918.

of the planning work of the Council was taken over by the executive boards herein described.

CENSORSHIP BOARD, created under the Trading with the Enemy Act, designed to control mail, telegrams, messages, and other communications to neutral countries, which might be intended for enemy countries.

COMMITTEE ON PUBLIC INFORMATION served as a channel of communication between the Government and the people relative to war aims, activities, and accomplishments, and disseminated in neutral and Allied countries information about the ideals and war aims of the United States.

AMERICAN NATIONAL RED CROSS, under the chairmanship of the President of the United States, a relief organization with government sanction, assisted the army and the navy in caring for the wounded and suffering.

ALIEN PROPERTY CUSTODIAN, empowered to take possession of, manage, and sell the property of enemy aliens and to act as custodian of the funds accumulated.

WAR FINANCE CORPORATION, supplied with an immense capital for the purpose of helping banks to make advances to essential war industries, aiding savings banks which might be in distress through the competition of federal bonds or otherwise, and lending money to war enterprises.

CAPITAL ISSUES COMMITTEE, connected with the War Finance Corporation, charged with the duty of supervising the issue of bonds by states, cities, counties, and private corporations with a view to keeping their expenditures down to the minimum, thus securing to the Federal Government money and materials and labor which otherwise might go to local improvements or business extensions not necessary to winning the war.

Although the duty of preparing for and waging war is laid primarily upon Congress and the President, it should be noted that the coöperation of the state governments is a factor in the actual conduct of war. During the conflict with the Central Powers, the states created councils of defense to aid in carrying out federal laws; they enacted laws touching military education, aid to soldiers and their dependents, and espionage. They promoted the formation of local organizations to coöperate with federal officials in administering the draft laws, food conservation, and other vital matters.

It is clear from even this incomplete review of America's legislative preparation for war, that no power over the lives or

property of citizens deemed necessary for the successful prosecution of the armed conflict was withheld from the duly constituted public authorities. The farmer's wheat, the housewife's sugar, coal at the mines, labor in the factories, ships at the wharves and on the high seas, trade with friendly countries, the vast national railway system, the banks and stores, private riches, lands and houses — all were mobilized and laid under whatever obligations the requirements of war made imperative. Never before were labor and capital, industrial and natural resources so completely subjected to governmental authority in a common enterprise.

Still we should not pass from this subject without taking note of the fact that in the World War, as in previous wars, enormous fortunes were made by manufacturers and merchants out of the necessities of the nation. Many thousand millionaires were created from "war profits"; wealth, far from being conscripted, was really augmented by immense gains in every direction. Some of the "profiteers" lost a portion of their pelf in the collapse that followed the war, but on the whole the earnings of private capital were prodigious. This is a sad commentary on our patriotism; "profiteering" transgresses the principle formulated by President Harding to the effect that no person should make one penny of extra profit out of the exigencies of war; but it is more easy to announce the doctrine of self-denial than to apply it.

War Finance — Bonuses and Pension

War and preparations for war are costly. They were costly in the old days of small armies and simple engines of destruction. They are many times more expensive in these days of embattled nations and massed economic power. Before the World War revealed the financial significance of armed conflicts under the direction of modern technology, the Government of the United States spent seventy-two per cent of its total annual outlay in preparing for war and in discharging the obligations arising out of past wars and approximately twenty-eight per cent on civil functions. Our participation in that holocaust cost more than $22,000,000,000 besides more than $9,000,000,000 advanced to the Allied and associated nations. During the fiscal year ending

June 30, 1920, ninety-three per cent of the $5,687,712,848 expended from the federal treasury went for army and navy maintenance, pensions, interest on the debt, and other obligations connected with past wars or preparations for future wars. The significance of this will be appreciated when it is noted that only one per cent was spent for what Dr. E. B. Rosa, of the Bureau of Standards, classified as scientific and educational purposes unrelated to warfare.[1]

Among the high costs of warfare must be reckoned pensions and bonuses to soldiers and their dependents. No country in the world has been more liberal in its pension policies than the United States. A pension system was established as early as 1776, and following every war there has been a series of pension laws providing for those who took part in it. Soldiers and sailors whose services terminated previous to October 5, 1917, and their dependents are paid pensions under various laws administered by the Bureau of Pensions. Other soldiers and sailors and their dependents derive compensation under the special system of insurance provided during the World War and administered by the Bureau of War Risk Insurance in the Treasury Department, now a part of the Veterans' Bureau, an independent establishment. In addition to the pensions and compensation granted under war risk insurance, amounting to more than $200,000,000 a year, the national and state governments maintain many homes and institutions for soldiers and sailors, their widows, and their orphans.[2]

At the close of the World War there appeared a widespread agitation in favor of paying a bonus or "adjusted compensation" to all soldiers and sailors in the service whether they saw fighting or not, whether they were injured or not. A majority of the states, some by statute and others by constitutional amendment, approved the idea and granted to their service men either a lump sum or an amount based upon the number of days or months in service or provided assistance to them in completing their education. The issue was carried into Congress and a bill was passed in 1923 providing for a national bonus, but it was vetoed by President Harding on the ground that the state of national finances did not permit so large an outlay and that it should not

[1] *Annals of the American Academy of Political and Social Science*, Vol. XCV, p. 4.
[2] W. H. Glasson, *Federal Military Pensions in the United States* (1918).

be granted until provision was made for the funds required by it.

The claim to the bonus is based on the fact that those who stayed at home were either paid high wages or made large profits while the men in the service risked their lives, received only a soldier's allowance, and often lost their jobs on their return home. The opposition maintains that the bonus is simply "a raid on the treasury," and when paid to men who suffered no injury or disability is merely a gift of the tax-payers' money to men who owed to their country military duty in time of war. No one denies the obligation of the Government to care for those permanently disabled and to rehabilitate those temporarily incapacitated for a normal life; but on the bonus itself there is a lively difference of opinion.

CHAPTER XVII

TAXATION AND FINANCE

The power to lay taxes on the people, to coin money, to make appropriations, and to regulate currency and banking is, next to waging war, the most tremendous engine in the hands of governments. Its exercise involves the whole range of economy — every branch of commerce, industry, and economic intercourse. On what principles should taxes be laid? Should every person be taxed on the basis of his ability to pay, namely, the amount of his property or his income? Or should the masses without property be taxed indirectly on the goods they consume or the amusements they enjoy? Should the power to tax be employed to protect manufacturers against foreign competition? These and other perplexing questions confront the student at the threshold of his inquiries.

In exercising the taxing power the Government may impose a burden on one class of the people for the advantage of another. In making appropriations it may use the money taken from one class or section for the benefit of another class or section. In regulating currency and banking, it controls the very life blood of modern industry and commerce and may in this sphere, as in that of taxation and appropriation, enrich one group and impoverish another. The correct treatment of taxation and finance, therefore, involves every fundamental principle of political economy; this fact we should bear in mind while we sketch here a mere outline of the subject.

The Power of Congress to Tax[1]

Under the Constitution Congress has a general power to lay and collect taxes, duties, imposts, and excises. Subject to certain rules, which we shall consider later, there is apparently no limit to the rate of any tax which Congress may impose. On

[1] For the social implications of this power, see *Readings*, pp. 283 and 331.

one occasion, it put a tax of ten per cent on state bank notes and drove them entirely out of circulation. In speaking of this tax, the Supreme Court said that it was not within the province of the judiciary to prescribe to the legislative department limitations on the exercise of its acknowledged powers.[1] If the power to tax is exercised oppressively, the Court declared, the remedy for the wrong rests with the people who choose the legislature. From this and other judicial decisions it follows that within limits Congress may use the taxing power not only to raise revenues, but also to regulate and prohibit certain kinds of business.[2] Those limits are to be found in the Constitution and the decisions of the Supreme Court.

1. The Constitution expressly provides that all duties, imposts, and excises shall be uniform throughout the United States; under an interpretation of the Supreme Court, a uniform tax is one which falls with the same weight upon the same object wherever found within the United States. For example, Congress once laid a duty of fifty cents on every passenger coming from foreign countries into the United States, and this tax was held to be uniform, although it was levied principally at a few ports. Again, an inheritance tax is uniform [3] when it is imposed equally upon all inheritances of the same amount and character, though it may so happen that taxable inheritances of a given amount may occur in only a few states of the Union.

2. The second express limitation on the taxing power of Congress is that direct taxes (except income taxes) shall be apportioned among the states according to their respective numbers.[4]

3. The Constitution also provides that Congress shall not lay a duty or tax on articles exported from any state, and that, in the regulation of commerce and revenue, no preference shall be given to the ports of one state over those of another. To prevent discrimination between states, it is further stipulated that vessels bound to or from one state shall not be obliged to enter, clear, or pay duties in the ports of another.

4. In addition to the express limitations laid down in the Constitution, there is an important implied restriction on the taxing power. Congress cannot tax the instrumentalities or the

[1] Veazie Bank *v.* Fenno, 8 Wallace, 533.
[2] See below, p. 402.
[3] *Readings*, p. 323.
[4] For an example, *Readings*, p. 327.

property of any state.[1] This doctrine has been applied in a number of cases. For example, during the Civil War, Congress levied a tax on the gains, profits, and income of every person residing in the United States; a judge in Massachusetts refused to pay the tax on his income which was derived from the commonwealth, and the Supreme Court of the United States upheld him in his refusal, declaring that the Federal Government was thus taxing an instrumentality of a state.

According to this principle state and local governmental bonds are exempt from all federal taxes except those on inheritances. When federal taxation was light and mainly indirect in character, this condition of affairs called for little consideration, but it has become a vital concern now that federal expenses have mounted into the billions annually, and the income tax is used to bring enormous revenues into the treasury. The operation of the principle tends to induce wealthy people to invest their money in tax-exempt bonds and thus escape a part of the federal burden. Especially is this true of persons enjoying large incomes on which heavy and progressive surtaxes fall with great weight. Owing to these circumstances there has grown up a strong movement in favor of an amendment to the federal Constitution authorizing Congress to tax incomes from all future issues of state and local bonds; that is, prohibiting the issue of tax-exempt bonds by state and local authorities.

In the constitutional sense, there are two classes of taxes: direct and indirect. If we want to know whether any particular tax falls in one or the other of these two categories we must examine the decisions of the Supreme Court; Congress, in considering any revenue measure, must always take them into account. The principles applied by the Court are not those used by the economists; indeed there is no exact agreement anywhere as to the dividing line between direct and indirect taxes. However, in the decisions of the Court many precise rulings have been made.

1. During the early years of the Federal Government it was generally understood that there were two kinds of direct taxes — a capitation or poll tax and a tax on land.[2] In 1895 the term was

[1] McCulloch *v.* Maryland, 4 Wheaton, 316.

[2] In practice the Federal Government has imposed, as avowedly direct, taxes on real estate and slaves. For example, in 1789, a direct tax was imposed on real estate, and a capitation tax was laid on slaves; and in a few other instances this precedent was followed. In 1861, under the necessity of

widened; the Supreme Court held that taxes on *income* from real and personal property were direct and therefore constitutional only when apportioned among the states according to their respective populations. As taxable incomes were concentrated mainly in a few states, it was obviously impossible to make an apportionment of an income tax; hence the decision of the Court amounted to a prohibition.[1] In 1913, after a long agitation over the matter, a constitutional amendment was adopted authorizing Congress to lay taxes upon private incomes from all sources without reference to any census or enumeration.

2. Indirect taxes, which are subject only to the rule of uniformity, are, generally speaking, taxes on the transfer, sale, or transportation of commodities and on business transactions. In this class fall customs or tariff duties imposed on goods imported into the United States from foreign countries, excise taxes on whisky and tobacco, taxes on inheritances, taxes on occupations, on the sale of commodities, and on theater tickets, stamp taxes on checks, mortgages, and other documents, and apparently taxes on incomes not derived from real or personal property.

Revenues and Revenue Bills

Except in case of war or shortage of revenue it was for a long time the practice of the Federal Government to rely upon indirect taxation as its prime source of revenue. It was evidently the intention of the Fathers that indirect taxes should be the chief resort of the central government. In common with all statesmen they recognized the natural dislike of the people for any form of tax which must be paid directly out of their own pockets in lump sums to the government. Not only is a direct tax difficult to collect on account of this natural opposition to it; it is

raising funds to carry on the Civil War, the Federal Government voted a tax of twenty million dollars to fall on lands and improvements, and divided this amount among the states in proportion to their respective populations as shown by the census. Some of the states assumed the entire quota allotted to them. After the war the amounts collected were refunded to the states. For this law, see *Readings*, p. 327.

[1] During the Civil War a federal tax was laid upon incomes, gains, and profits by the year, and in Springer *v.* United States (102 U. S. 586) the Supreme Court held that this was an indirect tax, and therefore did not have to be apportioned according to population. The Court said in this case: "Our conclusions are that direct taxes within the meaning of the Constitution are only capitation taxes as expressed in that instrument and taxes on real estate; and that the tax, of which the plaintiff in error complains, is within the category of an excise or duty." Upon a reëxamination of the question in connection with the income tax law of 1894, the Court maintained that a tax upon income from land is as much a direct tax as if levied upon the land itself at so much an acre, or according to its valuation. *Readings*, p. 328. See above, p. 92.

expensive to administer, owing to the necessity of repeated valuations of the property on which it falls and to the numerous operations required in laying and collecting it.

An indirect tax, on the other hand, has the advantage of great simplicity. It falls in a definite amount upon each article or object, and it is easy to lay because it is imposed upon the same articles or objects wherever they are found.

Accordingly, until 1917 the Government, in ordinary times, derived its revenues from two prime sources: duties on imports coming from foreign countries, and internal revenue or excise taxes laid on spirits and tobacco. A slight departure from almost complete reliance on customs and excises was made in 1909 when a tax was laid on the incomes of corporations, and a still greater departure was made in 1913 when a Democratic Congress laid a tax of one per cent upon personal incomes, with certain exemptions.

A revolution in our traditional revenue methods was wrought during the World War when enormous expenditures became necessary. The radicals in Congress and outside demanded, as we have noted, "the conscription of wealth as well as of men," and the payment of war bills out of profits and incomes instead of the sale of interest-bearing bonds.[1] Congress did not go to the extremes demanded by the radicals, but it so far yielded to their importunities as to overthrow well-established principles of American finance. It shifted the emphasis from indirect taxes on articles of consumption to heavy taxes on inheritances and incomes and the excess profits of industrial and business concerns. Since the close of the war, minor reductions have been made here and there, but the results of the great revolution still stand as the following table showing the income of the Federal Government from all sources (except post-office receipts) for the fiscal year ending June 30, 1923, demonstrates:

1. Income and profits taxes	$1,678,607,428.22
2. Miscellaneous internal revenue	945,865,332.61
3. Customs receipts	561,928,866.66
4. General miscellaneous	655,525,099.13
Total receipts	$3,841,926,726.62

The Constitution definitely provides that all bills for raising revenue shall originate in the House of Representatives, but au-

[1] Above, p. 355.

thorizes the Senate to propose or concur in amendments as in the case of other bills. It was the purpose of the framers of the Constitution to vest the power of initiating taxes in the hands of that branch of the national legislature which was nearer the people on whom the burden must fall. "This power over the purse," says *The Federalist*, "may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance and for carrying into effect every just and salutary measure."

In spite of this confident assertion the Senate has steadily gained in its influence over revenue legislation until it now frankly assumes, under its power to make amendments, what is for practical purposes the right of initiating revenue measures. For example, in 1871 the House passed an act repealing the existing duties on tea and coffee — a brief measure only a few lines long; and the Senate substituted for this proposal of a slight change, "an act to decrease existing taxes," designed to bring about a general revision of the tax laws — in all a measure of some twenty printed pages. The House protested against this action on the part of the Senate, declaring it to be in conflict with the true intention and purpose of the clause which requires revenue bills to originate in the lower branch of the legislature. During the debate on the subject in the House, James A. Garfield said: "It is clear to my mind that the Senate's power to amend is limited to the subject-matter of the bill. . . . To admit that the Senate can take a House bill consisting of two lines, relating specifically and solely to a single article, and can graft upon that bill in the name of an amendment a whole system of tariff and internal taxation, is to say that they may exploit all the meaning out of the clause of the Constitution which we are considering, and may rob the House of the last vestige of its rights under that clause." In spite of the protest on the part of the House, the Senate was able to force the adoption of a considerable portion of its plan of revision.

Again in 1894 the Wilson tariff bill as it came from the House of Representatives was badly mutilated in the Senate. In fact, "its revenue reform principles were hardly recognizable"; and in the conference committee the House of Representatives was forced to yield on almost all the points. Again, in 1909, when

the Payne tariff bill came from the House of Representatives, it was referred to the finance committee of the Senate, and when reported back from that committee it was in many important respects a new bill.[1] As it finally passed the Senate it contained a number of radical departures from the provisions of the House bill and in spite of the intervention of President Taft many of them were adopted during the sessions of the conference committee. It is generally believed that the Senate exerted far less influence in the drafting of the tariff measure of 1913 than it had exerted in forming previous revenue measures; but in 1921 it exercised its prerogative as in earlier times.

The actual work of preparing revenue bills in the House is assigned to the committee on ways and means. Tariff measures are drawn up by the members of the committee representing the party which has a majority in the House. When it becomes apparent that the temper of the country is demanding a revision of the tariff, the House of Representatives generally authorizes the committee to gather information preparatory to the adoption of the new schedules. Sometimes the committee on ways and means is authorized to sit during the recess of Congress, hold hearings, and collect information upon which to base a revision of the tariff; the Senate on its part may authorize its finance committee to secure expert assistance in making investigations both before and after the introduction of the tariff bill in the House of Representatives.

It is a common practice for the ways and means committee to hold many sessions which are attended by the representatives of the various industries of the nation as well as by consumers and other persons interested in the tariff, who advance their respective claims for protection or for reduction.[2] When the majority members of the committee have taken all the evidence that they desire and thoroughly considered the issues involved, they draw up a complete bill. Inasmuch as a revenue bill is always a political measure, the minority members on the committee are generally not consulted at all, and may in fact know nothing about the exact provisions of the bill until it is reported

[1] In fact the Senate committee had virtually prepared its own bill before the House bill was referred to it.

[2] See *Readings*, p. 333, for the interesting extract from Mr. Dingley's *Memoirs*, describing the preparations of the Dingley bill. The hearings are nearly always one-sided. It is the "interests" that prosecute their case with great zeal. Few consumers have the personal interest or knowledge necessary to make their appearance before the committee effective.

to the House. The minority, of course, may present a report of their own by way of protest, but it seldom amounts to anything.

When a revenue bill is reported to the House by the chairman of the committee on ways and means, it is debated in the committee of the whole on the state of the Union. The discussion at first is quite general, so that practically every member who has anything to say about the proposed measure is given an opportunity. The general debate is then followed by a debate on details under the five-minute rule. From time to time as the discussion proceeds, the committee on ways and means will report changes, the chairman of that committee as an astute party leader being quick to perceive the points on which it is expedient and necessary to yield.

When the measure reaches the Senate, it is promptly referred to the committee on finance, which has, as a matter of fact, been busy on its own bill and has watched with close scrutiny the progress of the discussion in the House. After making amendments or substituting practically a new bill, the committee makes its report to the Senate. The debate in that body, as we have seen, is almost unlimited; and a revenue measure usually receives far more penetrating criticism there than in the House.

After its passage, the bill purporting to be the original measure with Senate amendments is returned to the House, which promptly votes not to concur in the Senate amendments and asks for a conference. The Speaker, thereupon, appoints the chairman of the committee on ways and means and some other members to represent the House, and the presiding officer of the Senate selects the chairman of the committee on finance and certain other members to represent that body. The conference committee immediately begins a series of sessions which always end in a compromise, the Senate receding from some of its amendments and the House yielding on others. Sometimes the conference committee takes into its confidence the President, whose views as party leader with regard to taxation cannot be neglected. As is well known, President Wilson exerted a considerable influence in the conference committee discussions in 1913 which led to an adjustment of the differences between the two houses. Throughout the various operations on the bill, it must be remembered, many provisions are framed with a certain knowledge

that a compromise will ultimately result. A compromise, therefore, is frequently no compromise. When the conference committee has come to an agreement, its report is immediately submitted to the House, where it is passed without amendment and then sent to the Senate, where it is likewise quickly accepted. Thereupon the bill goes to the President for his signature.

This method of drafting a revenue measure is attended by some serious drawbacks. In the first place, no man or group of men can assume full responsibility for it. The President, who may have been elected on a platform favoring the reduction of taxes, can do nothing more than exert such influence as his position and party leadership may give him. His veto of a tax bill would be an extremely drastic measure of control, resulting in great confusion among the business interests awaiting a settlement. In the House, the chairman of the committee on ways and means might be held at least partially responsible, were it not for the fact that the Senate has such an unlimited amending power.

In actual practice the most important points of contention are settled in the conference committee; so it may be said that the final word on tariff and revenue policies is pronounced by a committee unknown to the Constitution. This is especially true because both houses are in practice constrained to accept the measure as reported from this committee, fearing to reopen a long and tedious debate and thus delay indefinitely the conclusion of the matter. The complete bill is, therefore, not a measure which has received in every point careful consideration by a responsible legislature; it is a series of compromises rushed through in its final form without deliberation. The great defects of this system are two: absence of precise responsibility, and a tendency to cause the prolongation of an outworn taxation policy on account of serious obstacles in the way of a rapid and effective revision.

Until the declaration of war on Germany in April, 1917, the United States was one of the few fortunate countries in the world that was not staggering under the burden of accumulating debts. In 1916 the total interest-bearing federal debt was only $971,562,590 or $9.88 per capita. Three years later the figure stood at more than $25,000,000,000, or $203.06 per capita, not including about ten billion dollars due from Great Britain,

France, Italy, and other European powers. Of this huge sum only the amount of $4,704,654,465 owed by Great Britain is in process of gradual repayment under an agreement reached in 1923.

The collection of the revenue is entrusted to two branches of the Treasury Department — one having charge of the customs duties and the other the internal revenue. For the collection of import duties the country is divided into customs districts, each having a port of entry and a set of officials, including the collector, appraisers, special agents, inspectors, etc. The internal revenue, including the revenue from the income taxes, is under direct charge of the commissioner of internal revenue; for the purposes of administration the country is divided into a large number of districts, each of which is in charge of a collector. The collector has under him a corps of officers and agents, some engaged in the routine work and others acting as detectives to prevent frauds.

The revenues collected from various sources are kept in the Treasury at Washington or deposited in national banks and federal reserve banks designated by the Secretary of the Treasury. Such funds are secured by the deposit of government bonds and high-grade securities and they are paid out by the banks on warrants issued under acts of appropriation. The power of the Secretary to distribute funds is highly significant in the realm of private finance, for it allows him to give or withhold aid to banks in time of stringency. The advantage of this policy not only to the banks but to the borrowers of money is evident even to the superficial observer; but the intimate connection which it establishes between the Government and private interests obviously opens the way to favoritism.

Appropriation Methods — the Budget System

No money can be paid out of the Treasury of the United States except in accordance with some act of Congress. In the beginning of our history all appropriation bills laid before the House of Representatives were prepared by the ways and means committee, which also had charge of the revenue bills. Thus there was effected some coördination between the taxing and spending functions of the Government. In the course of time,

however, appropriation measures were taken away from that committee and distributed among at least fourteen different committees which reported as many separate bills. The Secretary of the Treasury instead of presenting a balanced budget merely laid before Congress each year a *Book of Estimates* which served as a starting point for the two houses.

Under this time-honored system neither house ever had before it, while passing any one of the appropriation bills, a complete program of probable revenues and expenditures as a whole. Department heads and others seeking appropriations constantly besieged the doors of the committees. Every government interest was represented in the pressure on the committees for larger appropriations. A new bureau or agency was created and it immediately began to lobby for increased funds. Army and navy officers, loyal to their branch of the service, always presented insistent claims for additional money. Then there was the interminable list of appropriations forced upon Congress through log-rolling — appropriations for post-offices, river and harbor improvements, naval stations, docks, and other local public works. An appropriation bill would be reported out of committee, debated, perhaps amended, sent to the other house, debated and amended, adjusted in a conference committee representing the two houses, and finally sent to the President for his signature. Other bills followed at irregular intervals and not until the very end of the session did anyone have any accurate idea of how much money was being voted away. Instead of having a balance sheet before them all the time and considering the entire revenue and expenditure program as one program (just as any well-managed business concern or household would do), the two houses did their work in a piecemeal fashion.

Protests against extravagance and "raids on the treasury" for local benefits were early heard in Congress but not until about 1910 were they taken seriously. In that year, Congress granted to President Taft a large appropriation for an inquiry into the methods of transacting public business; and a "President's Commission on Economy and Efficiency" was organized under the direction of Frederick A. Cleveland, of the New York Bureau of Municipal Research. Among other proposals this Commission recommended the establishment of a national budget system. This may be said to mark the beginning of the

widespread agitation of the question that finally resulted in the Budget and Accounting Act of 1921, which may eventually work a revolution in federal appropriation methods.

This Act created a Budget Bureau in the Treasury Department, headed by a director appointed by the President without the necessity of senatorial approval. It imposes upon the President the duty of laying before Congress at the opening of each regular session a consolidated budget statement showing, among other things, the revenues and expenditures for the previous fiscal year, proposed revenues and expenditures for the coming fiscal period, and the condition of the public debt. If the proposed budget shows a deficit, then the President must recommend revenue measures to meet the difference; if it shows a surplus, then he may make recommendations with respect to reductions in taxation. The data for the President's budget are assembled by the director of the Budget Bureau, who collects them from the various departments and spending agencies.

Although this law met with a chorus of approval on the part of the press, it did not in itself make any important changes in the authority of the President. The preparation of estimates had always been required by law; under an act of 1909 the President had been requested to review the estimates and make recommendations with respect to revenue measures for meeting a deficit or reducing a surplus according to circumstances. Without any warrant from Congress the President under his general powers could have done exactly what he is now authorized to do by the Budget Act. The point is that he did not and Congress was not yet prepared for executive leadership.

What the Budget Act really did, therefore, was openly to invite the President to assume leadership in preparing the budget, provide him with expert assistance from the Budget Bureau, and prepare Congress and the country to expect and accept executive responsibility in shaping the fiscal program of the Government. Moreover, it enabled the President to dramatize the budget and concentrate the attention of the nation upon fiscal policies and appropriation methods. President Harding took his responsibility seriously, appointed a man of strong language and vigorous action, General Charles G. Dawes, as the first head of the new Budget Bureau, supported him in forcing economies on the chiefs of departments, and in December, 1921, laid before

Congress a balanced budget in accord with the terms of the law. Thus in the public mind the responsibility of the President was clearly established.

Of equal importance, but less spectacular in effect, is a second part of the Budget Act, which created a General Accounting Office under a comptroller-general appointed by the President and Senate for a term of fifteen years. It is his duty to prescribe the forms for accounting in the several departments, to scrutinize all expenditures, and to report his findings to Congress. Of course this work may be done in a perfunctory fashion, but if all the possibilities of the office are exploited by the comptroller-general he may become a far more important agent than the director of the Budget Bureau.

During the period that saw the institution of budget reform, significant changes in the committee system of Congress with reference to appropriations were proposed. In 1920 the House of Representatives made a gesture in the direction of consolidating the appropriation bills in the hands of one committee on appropriations; it provided for assigning all such bills to that committee, but immediately impaired the unity of responsibility by arranging for the distribution of bills to several subcommittees. The Senate took action along the same line in 1922, after much discussion. In actual practice, the first test of the new budget system in 1921–22 worked a number of economies, but it did not materially reduce the amount of log-rolling or the size of the "pork-barrel."

The general character of the expenditures of the Federal Government is shown by the following table giving the outlays for the fiscal year ending June 30, 1923:

1. General expenditures for the various departments of government, including $32,673,850.39 for postal deficiencies and $454,488,337.81 for veterans' relief	$2,038,541,086.00
2. Interest on the public debt	1,055,923,689.61
3. Reduction of the debt	402,850,491.10
4. Insurance and pension fund	34,953,999.61
Grand total expenditures	$3,532,269,266.32

The supervision of the collection and disbursement of federal funds is vested in the Secretary of the Treasury. He must scrutinize the receipt and expenditure of billions of dollars every year — a huge bookkeeping undertaking in itself. He

must secure a fair and impartial administration of the customs which are irritating to importers in the best of circumstances and doubly irritating when administered in an arbitrary fashion. He must supervise the minting of coins and the printing of paper money, the issue of bonds, and the payment of the interest on the debt. He is head of the Farm Loan Bureau and must wrestle with baffling problems of agricultural economics. He must master theoretical and practical questions of finance in order to make recommendations to Congress and meet the demands of that body for expert advice. He is a big policeman, because he has under his jurisdiction the revenue cutter service and the bureau of internal revenue collection which, under the Eighteenth Amendment and the Volstead Act, must assist in enforcing prohibition throughout the length and breadth of the United States. By an historical accident he is also head of the public health service and has charge of the coast guard service.

Money and Banking

Modern civilization rests upon money economy. Primitive and backward communities can live by bartering goods for goods, but all great nations depend for their prosperity upon the exchange of goods for money and credits upon a world stage. Theoretically money is merely a medium, a token of exchange, but practically the stability of industry and commerce and the distribution of wealth throughout the various classes of society depend in a large measure upon the exercise of the power to issue coin and paper money. Hence there is a difference of opinion as to the best methods of establishing and maintaining the currency. Some oppose the issue of paper money by private banks on the ground that it enriches those who enjoy the privilege; men who take this view contend that the government alone should exercise the power. Others maintain with good reason that the temptation to inflate and manipulate the currency is irresistible and that the function cannot be entrusted to politicians who are subject to various interested influences and are not conversant with the rules of business; they therefore favor vesting control over paper money in private banks under public supervision.

Whether the issue of notes is in private or public hands, the pressure for reducing or increasing the amount of money in cir-

culation is constant and powerful. Those who are in debt are prone to favor "easy" money, that is, inflation, for it makes the payment of interest and principal easier. If, for example, a farmer borrows $1000 when wheat is one dollar a bushel, he can repay with 1000 bushels. If, however, there is an immense issue of paper money which raises the price of wheat to two dollars he can repay with 500 bushels. By unrestrained inflation public and private debts may be wiped out as in Germany, Russia, and other European countries after the World War. On the other hand the holders of bonds and other fixed investments profit from a contraction of the currency which enhances the buying power of the dollar. In the case of extreme contraction the bond-holders may multiply their fortunes without work. In other words, control of the currency may be used to enrich one class and impoverish another, to transfer by unseen and devious methods money from the pocket of one man or class to another. Moreover it may be employed in such a way as to render impossible the regular transactions of commerce and industry and thus ruin all classes.

Obviously a power so vital in its nature readily becomes an object of heated political controversy. Indeed a large part of the political history of the United States may be written in terms of the currency question. It was so troublesome in colonial times that Great Britain had to forbid the colonies to issue paper money. During the period of the Revolution the whole monetary system was thrown into chaos by huge issues of paper by the states and the Continental Congress. There was no term of contempt greater than "not worth a Continental." Among the many forces which led to the formation of the Constitution there was none more potent than the deranged state of the currency. Having suffered from the baneful results of inflated and instable currency, the framers of the Constitution sought to put an end to it by depriving the states of the right to emit paper money and by vesting control over the monetary system in the Congress of the United States.

After the adoption of the Constitution the currency question was one of the issues which split the country into two parties, and from that day to this there have been broadly speaking two policies. The founders of our Federal Government were not opposed to paper money, but they did not want to have it issued

under state auspices where debt-burdened farmers were likely to be dominant. They preferred to give the power to issue notes to a private corporation organized under federal auspices, known as the Bank of the United States. The opponents of this policy preferred either to confine the currency to gold and silver coins or to permit the states to issue notes if they were to be issued at all.

Here are the roots of centralized finance and decentralized finance. Under the former policy a few great centers of finance dominate and reap the rewards; under the latter the advantages and profits are more widely distributed. From 1791 to 1836, except for a brief period, the party of centralized finance was supreme and operated through the first and second United States banks. From 1836 to 1863 the party of decentralized finance was uppermost and, owing to a curious interpretation of the Constitution by a friendly Supreme Court, the states, although themselves forbidden to issue notes, were able to charter state banks with ample powers to emit bills of credit.

From 1863 to 1913, centralized finance was again dominant, functioning through the National Banking system established in the former year. State banks of issue were taxed out of existence by a federal law passed in 1866, and private banks, known as national banks, chartered under federal authority, were given a monopoly of bank note issues. During this period the coinage of silver dollars was stopped, gold was made the basis of all currency, the inflated paper issued in the stress of the Civil War was placed on a specie basis, and the policy of contraction rather than of inflation was followed. For fifty years the currency question and the free silver issue filled the political arena with the tumult of debate. The fortunes of men and parties hung upon the outcome. At last the debate culminated in the Federal Reserve Law of 1913 enacted by the party of Thomas Jefferson which, facing an embattled opposition, was forced to compromise — to combine centralized with localized finance.

At the present time our monetary system rests upon certain fundamental principles. In the first place, by the Gold Standard Act of 1900, all American money is national and in theory rests upon a gold basis, that is, in theory every paper dollar is worth as much as a gold dollar. Even the paper money known as "Greenbacks" issued during the Civil War without any specie basis stands now on the foundation of gold.

In the second place the banking system as far as it includes the power to issue notes has been placed in the hands of private banking corporations under strict federal control. The Federal Reserve Act, alluded to above, as amended, vests general supervision over all banks of issue in the hands of a Federal Reserve Board composed of the Secretary of the Treasury, the Comptroller of the Currency, and six persons appointed by the President and the Senate, the sixth being added in 1922 to make room for a "dirt farmer" on the Board as demanded by the agricultural group in Congress. States may charter banks to receive deposits and do a general banking business, but all banks exercising the right to issue notes are brought within the scope of the federal law. All national banks created under the act of 1863 are practically required to join the federal reserve system and state banks may join on certain conditions. Each bank within the system is known as a "member bank" and shares in the administration of the law.

To assure a certain amount of local autonomy the country is laid out into twelve great districts. In each district there is designated a Federal Reserve Bank controlled by six directors chosen by the member banks and three appointed by the Federal Reserve Board. Thus the conflicting principles of centralization and localism are combined.

Control over the issuance of notes — that supremacy so full of economic power and political significance — is vested in the Federal Reserve Board. It issues Federal Reserve Bank notes on the basis of commercial paper and other prime securities. In exercising its power it operates mainly through the Federal Reserve Banks of the twelve districts and through the member banks. Any member bank by depositing approved commercial paper with its superior Federal Reserve Bank may secure a given quantity of notes and issue them as paper money. Theoretically all bank notes rest on gold, but practically on gold, bonds, and other paper representing credit and wealth in various forms.

In this system we see signs of the century-old partisan conflict. The federal control so dear to Alexander Hamilton is secured in the Federal Reserve Board. The local autonomy cherished by Jefferson is represented in the districting of the country, the vesting of management in part in the member

banks, and the distribution of the "money power" throughout the country. The claims of the easy money party are in a measure embodied in the provisions for the issue of notes partly on the basis of general wealth instead of gold alone. The requirements of stability are met by the theoretical application of the gold standard principle.

Still the conflict goes on. The debates over the Federal Reserve Act, the amendments proposed and defeated, and continued protests against the operations of the system reveal discontent with it. After the collapse of war prosperity in 1920 this discontent flamed out among the farmers of the West as it had in the days of the free silver battle. The price of wheat fell below a dollar per bushel and the debt burdened farmers could not meet their obligations. They concentrated their attacks on the federal reserve system. They alleged that it had enriched the bankers and that business men, not farmers, had benefited from the inflation of the currency under it. They accused the Reserve Board of favoring business instead of agriculture; they demanded and secured the appointment of at least one agricultural member on the Board. So the endless conflict over the currency goes on, and must go on while civilization rests, as it must rest, upon money economy.

There is general agreement that gold is too narrow a basis for any currency system but that issues of notes in large quantities unsecured by gold are ruinous to all classes and all interests. To find the right mean is always a fundamental problem of government, calling for talents of the highest order, an impregnable sense of honor, and a firm devotion to fair play. How difficult to find all these qualities combined in any man or any party! How difficult to apply general principles in concrete cases!

Indeed there are many statesmen who believe with Jefferson that the landed interest rather than the business interest is the most secure foundation for a republic and who make the advancement of agriculture their first care. As a concession to the agrarian groups and on principle, Congress established in 1916, during the administration of President Wilson, an agency to facilitate the making of loans to farmers, known as the Farm Loan Bureau, composed of the Secretary of the Treasury and four additional members appointed by the President with the consent of the Senate. An inquiry made a few years previously revealed

the fact that farmers, especially in the Southwest, were paying eight, ten, and even twelve per cent for money lent to them on farm mortgages; in other words, that they were paying far higher rates of interest than merchants and manufacturers for accommodations at the hands of banks and money lenders. It was to meet this situation that Congress created the Farm Loan Bureau, laid the whole country out into twelve districts, authorized the establishment of a Federal Land Bank in each district, and made provision for lending money to organized groups of farmers, known as farm loan associations. At first the law provided merely for lending money to owners of land on the basis of farm mortgages, but in 1923 it was supplemented by the Agricultural Credits Act which authorized loans on live-stock and farm commodities on the way to the market. As an additional aid to agriculture, Congress exempted from state and national taxes the bonds issued under these laws for the purpose of obtaining money to lend to farmers. It declared them to be instrumentalities of the Government of the United States. The effect of the Government's activities in this field has been a material reduction in the rate of interest charged on farm loans, especially in the South and West.

Somewhat in line with the policy of lending aid to persons of small means is the maintenance of a postal savings bank system designed to encourage thrift and afford absolute safety to small depositors who are often the victims of fraudulent stock selling concerns and irresponsible private bankers. This institution was established in the Post Office Department in a tentative way in 1911. At the present time all post offices receive deposits ranging from $1 to $2500, paying a low rate of interest on ordinary deposits and a slightly higher rate on long-term savings bonds. The post offices also handle war savings stamps and savings certificates of the Treasury Department — devices created during the World War to raise money and continued after the war to promote thrift and secure funds for the Government at a moderate rate of interest.

CHAPTER XVIII

COMMERCE, INDUSTRY, LABOR, AND COMMUNICATIONS

Under a brief but significant clause of the Constitution giving Congress power to regulate interstate and foreign commerce there has grown an immense body of federal legislation transcending in its scope and nature the wildest imagination of the Fathers. When that clause, the subject of a long and bitter controversy, was written into the Constitution the wretched state of the roads made travel hazardous and the transport of freight by land almost prohibitive. Industry was in the hands of small proprietors who usually manufactured for the local market and shipped only a portion of their output to neighboring states by slow sailing vessels. Foreign commerce embraced mainly the export of farm produce and the import of manufactured goods from Europe.

Since that day what a revolution has been wrought in American economic life! Railways, automobiles, improved roads, and airplanes have obliterated state boundaries. Staple industries have grown to mammoth proportions to supply national and international markets, and they have passed largely from individual into corporate ownership. Not a single important industry manufactures for a purely local market. Thus while the Constitution remains unchanged, the number of matters within the scope of foreign and interstate commerce has been increased, and the very nature of that commerce revolutionized. By sheer economic development the powers of Congress have in fact been magnified beyond all plans of the framers. Moreover the Fourteenth Amendment has given the federal courts jurisdiction over all state laws affecting industry and trade, so that in a positive and negative sense the powers of the National Government over American economic life have become immense. They are increasing; they will inevitably increase.

Strictly speaking, the power of Congress in this sphere is lim-

ited to the *regulation* of interstate and foreign *commerce*.[1] In the minds of the framers who wrote the clause in question, transportation, not manufacture, was the fundamental matter to be brought under federal control. In accordance with this concept the term "interstate commerce" has been interpreted in a long line of judicial decisions to include the carriage of passengers, the transportation of commodities, the transmission of ideas, orders, and information by telegraph, telephone, or wireless, and the transmission of oil by pipe lines from a point in one state to a point in another. In short it covers traffic and intercourse in a general sense, regardless of the changes which time and ingenuity have wrought. The term "foreign commerce" is even broader in its connotations, for it embraces the whole domain of foreign trade. Its scope is enlarged by virtue of the fact that the Federal Government has a complete and exclusive jurisdiction over all relations with foreign countries, including the right to tax imports, regulate immigration, and make treaties dealing among other things with commerce and industry.

As noted above Congress is not authorized to regulate production as such; still the fact that an article in process of manufacture is destined to interstate or foreign trade brings it to some extent under federal regulatory power. The Supreme Court finds it difficult to discover the exact point in the process of collecting materials, manufacturing, and shipping at which production ceases and commerce begins. One issue however is settled: interstate commerce does not include life, fire, or marine insurance and ordinary contractual relations even though they are incidental to transaction of interstate business.

Regulation of Common Carriers — the Railway Problem

The most important group of federal laws respecting interstate commerce relates to the regulation of railways, sleeping car companies, and other concerns engaged in transporting passengers and commodities or transmitting communications by telegraph, telephone, and wireless. In the beginning of the railway era in

[1] The power of Congress to regulate commerce with the Indians is no longer of any importance. Its power to regulate in general is subject to the limitation that it cannot lay duties on exports from any state, give preference to the ports of one commonwealth over those of another, or compel vessels bound from one state to another to enter, clear, or pay duties in any state.

the United States, Congress made no attempt to devise any comprehensive and far-sighted plan of public control. The large-scale operations involved were novel, and no one foresaw their significance. Moreover, Congress, bent upon the swift development of the country, devoted its attention rather to bestowing generous favors on railway corporations. As a result all the early legislation dealt with grants of public lands, concessions of "rights of way," assistance from the national treasury, the remission of duties on railway materials imported from abroad, and kindred measures. Scandals and frauds, as well as high and romantic adventure, marked the path of congressional procedure as huge railway systems were flung out under government patronage, now to the Great Lakes, now to the Gulf of Mexico, now to the Pacific.

In the operation of the railways all kinds of abuses appeared. Stocks and bonds were issued in enormous amounts often without any proper basis in material values; bankruptcies were frequent, ruining thousands of innocent investors and enriching inside speculators; in some cases it was more profitable to "wreck" companies than to operate railways. The highest possible rates were charged on the theory that the companies should collect "what the traffic will bear." There were also discriminations in many forms. Freight rates were made high to one shipper and low to another, enabling the beneficiary to ruin his competitor. Frequently the money paid in freight rates by favored shippers was returned to them in whole or in part in the shape of "rebates." Some shippers found it easy to obtain freight cars when they needed them; others met with delays and reports of "car shortages." There were discriminations in terminal charges for switching, storage, lighterage, and similar services. As the "long haul" was more profitable than the short one, railway companies sometimes charged less for carrying freight to distant cities than to those nearer at hand. There was constant complaint, often not well founded, that the railways favored certain ports or sections at the expense of others. The companies were competing and fighting among themselves, by no means always for the permanent good of the communities they were supposed to serve. Hence there arose abuses and problems of great magnitude which demanded public consideration.

These abuses were widely known and advertised, but Congress did not act until the states began to close in on the railways by stringent legislation fixing rates and charges. It was not until 1885, when the demand for reform forced it, that the Senate appointed a committee to investigate the whole railway situation. The report of this committee produced such a furor that two years later Congress enacted the first great interstate commerce law and created the Interstate Commerce Commission charged with definite regulatory duties. The original act, the amendatory and supplementary acts, the Esch-Cummins Transportation law of 1920, the decisions of the courts touching the subject, and the orders of the Commission constitute a formidable body of law which can only be briefly sketched here.

The administration of the law is vested in the Interstate Commerce Commission which is entirely independent of the Department of Commerce and all other branches of the Federal Government. The Commission consists of eleven members appointed by the President and Senate for terms of seven years and paid an annual salary of $12,000 each. The Commission is a quasi-judicial body in that it hears complaints, issues orders, and makes decisions. It has a large staff of accountants, engineers, and experts to carry on investigations under its direction.

The law respecting common carriers now applies to concerns engaged in transporting passengers and freight, or pumping oil through pipe lines, and to sleeping car companies, telephone, telegraph, cable, and wireless companies. All their business which is interstate in its nature comes within the purview of the law.

A part of the law is negative in character and a part is positive. Common carriers are forbidden to issue free passes except under certain restrictions; they cannot grant rebates, drawbacks, and special rates, thus making lower charges to some persons than to others for the same service; competing lines are forbidden to combine, pool their receipts, and distribute among themselves the profits of such an operation — except under the strict supervision of the Commission as provided in the Act of 1920. They cannot give any undue or unreasonable preference to any person, company, corporation, or locality. They are forbidden to transport any commodity in which they have a direct property in-

terest, except timber and its products — a provision intended to prevent a combination of railways with manufacturing or mining corporations.

On the positive side the law requires all rates charged for services to be just and reasonable. The accounts of the concerns must be kept according to uniform principles prescribed by the Commission. Companies must print and keep open for public inspection schedules showing rates, fares, and charges for transportation and they cannot change such rates without notice to the Commission. They must comply with the terms of the law respecting safety provisions, hours of labor for employees, and compensation for employees injured in the course of duty. Finally they must render annual reports to the Commission showing their exact financial status and the nature of their operations.

The specific powers and duties vested in the Interstate Commerce Commission are numerous and extensive. The Commission is required to investigate the manner in which business is conducted by those carriers to whom the law applies; and on the request of the Commission any district attorney of the United States must prosecute, in the proper court, offenders against the law. The Commission is empowered to summon witnesses and compel the production of books, papers, and other documents relating to any matter under investigation. Any person, corporation, body politic, or municipal organization complaining of anything done or omitted by any common carrier, contrary to the provisions of the law, may apply to the Commission by a petition stating the facts, and the Commission must thereupon make an investigation into the alleged violations. The Commission is empowered, after full hearing upon such a complaint or upon complaint of any common carrier, to determine and prescribe just and reasonable maximum rates and charges, as well as fair and proper regulations and practices. Railroads cannot issue long-term securities, purchase or build extensions, or abandon old lines without the Commission's approval. The Commission may furthermore award damages to persons injured by a violation of the law on the part of any common carrier. Its orders are subject to review, however, by federal courts.

The problems confronting the Commission are made all the

more perplexing by the operations of the state governments. As pointed out below in Chapter xxxi each state has the power to regulate railway rates and services *within* its borders. All the states have enacted elaborate laws pertaining to railways and set up commissions with more or less drastic powers over intrastate business. But it is not easy to say when shipments are wholly within a state and when they affect interstate commerce. For example, can a state, through its railway commission, lower the rates on freight to some cities within its borders and raise them to other points still within its borders but adjoining cities in another state or on the banks of a river opposite cities in another state? A case of this character came up in 1914 involving the attempt of Texas to discriminate against Shreveport, Louisiana, and in favor of Dallas and Houston; in an important decision the Supreme Court of the United States declared that the federal Interstate Commerce Commission had the right to regulate even intrastate rates when such rates clearly caused discrimination in interstate commerce.[1]

Still more noteworthy was the Wisconsin case of 1922, dealing with the action of the Interstate Commerce Commission in raising railway rates with a view to securing a "fair return" to the companies under the federal Transportation Act of 1920. Wisconsin declined to raise rates on intrastate business as ordered by the federal Commission. Clearly the purpose of the Act would be defeated if each state insisted on keeping rates down because interstate travelers could buy new tickets on crossing state boundaries and many shippers could avoid higher federal rates by a careful routing of goods. Moreover, low intrastate rates would reduce the revenues of the railway companies and make necessary higher interstate rates to offset the loss. Under orders of the Commission and a decision of the Supreme Court of the United States, states were compelled to make their local rates conform to the schedule of rates fixed under federal authority. In short, Congress can regulate local or intrastate rates in so far as they affect interstate rates.[2] Where is the boundary line? Questions of this kind, constant controversies between state and national authorities, the conflicting and confused regulations of states, and the increasingly national character of the railway busi-

[1] Houston Railway *v.* United States, 234 U. S. 342.

[2] Wisconsin *v.* C. B. & Q. RR., 257 U. S. 563; sometimes called the "Burlington case"; forty-two states joined Wisconsin in fighting this test case.

ness have led to the demand that the railway system of America be made national in operation and control.

Although the railway question has been in politics for half a century and law after law has been passed with a view to controlling railway companies, it cannot be said that anything like a satisfactory solution of the transportation problem has been reached. The question is continually agitated. Some railway companies are earning a large return on a generous capitalization; others are bankrupt and in the hands of receivers. Great lines, such as the Chicago, Milwaukee, & St. Paul and the New York, New Haven, & Hartford, have paid no dividends on their stocks for years and have a hard time to meet their bare operating costs and fixed charges. Still farmers and shippers clamor for lower freight rates, and from time to time labor makes an appeal for higher wages. Many small lines, especially feeders for trunk railways, find it increasingly difficult to meet the competition of the automobile and motor truck.

In this state of affairs there is much difference of opinion among railway managers and their critics. Some of the strong railways that are making money want to be let alone. Some of the weaker lines want increased rates or financial support of some kind either from the Government or from the larger companies which they feed. Critics, on the other hand, assert that the "water" should be squeezed out of railway stocks and bonds, that is, their capitalization should be reduced to an actual physical value; then, it is claimed, they could all earn a reasonable income without any change in rates. Indeed, with a view to ascertaining the amount of capital invested in the railways, Congress ordered the Interstate Commerce Commission in 1913 to make a physical valuation of them; but owing to fluctuations in prices and the confusion in the accounts of many companies the outcome of the effort is still uncertain.

Broadly speaking, two solutions of the railway problem are before the country. There is, in the first place, the remedy of Government ownership; whether desirable or not, it is at present outside the sphere of practical politics. In the second place, there is the proposal to consolidate the various and conflicting lines into a few great systems subject to Government control and regulation. Indeed the Transportation Act of 1920 took long steps in this direction. It permitted companies to combine and

pool their earnings from freight and divide the proceeds under the supervision of the Commission. It authorized the companies themselves to effect certain consolidations with the approval of the Commission, and it instructed the Commission to work out a plan for the union of all the railways into a limited number of systems. Even more significant was the so-called "recapture clause," which provided that one half the earnings of any company in excess of six per cent on its capital should be put into a revolving fund to be used by the Interstate Commerce Commission in making loans to railway lines and otherwise lending financial assistance to them. In short, the strong must support the weak. This revolutionary departure from previous concepts of railway policy was attacked in the courts and finally sustained by the Supreme Court at Washington.[1] According to all signs, consolidation under federal supervision seems to be the coming stage in railway development.

Control of Industrial Corporations

More than three fourths of the industry in the United States is carried on by corporations. Individual ownership of a great enterprise is seldom found in any part of the country. At the close of the nineteenth century all the important staple industries — iron, oil, tobacco, copper, etc. — had been consolidated into a few giant enterprises which in fact constituted monopolies or at least were able to determine prices, within limits. Moreover, they were closely knit together in a vast financial network through the ownership of stocks and bonds by identical groups of financiers and banks. Indeed most of them were formed under the auspices of certain banking syndicates which financed their operations. As the consolidation was often effected by placing the stocks of the constituent concerns in the hands of a board of trustees, it was the fashion to speak of all combinations as "trusts."

So vast did these corporations become that they threatened to secure a complete mastery over American industrial life. By crushing competitors and charging high prices, they brought down upon themselves a merciless fire of criticism. According to

[1] Dayton-Goose Creek Railway Company *v.* the United States. No. 333 October Term, Supreme Court of the United States, 1923.

one school of reformers they should be dissolved, broken into small parts, and made to compete with one another. Other publicists would distinguish between what they are pleased to call "good" and "bad" trusts, placing in the former category those business concerns which do not attempt an unreasonable enhancement of prices and in the latter category those corporations which are constantly endeavoring to maintain a monopoly. Finally, there are the socialists who contend that monopoly is the inevitable result of competition; that competition is a crude and wasteful method of doing business; and that the ultimate outcome will be the assumption of the ownership of the great monopolies by the Government.

The agitation over the "trusts," which has bulked large in American politics for a generation, has produced three famous acts of Congress designed to break up monopolistic business concerns. The first of these is the Sherman Anti-trust Act of 1890, which declared illegal every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states and territories and with foreign nations; and prescribed appropriate penalties for violations. Under an interpretation of the Supreme Court, the law was at first held to forbid all combinations among common carriers in restraint of trade, whether reasonable or unreasonable; but in the Standard Oil and Tobacco Trust cases in 1911, the Court laid down the rule that only those combinations which "unduly" restrained trade were guilty of violating the law. At the same time, the Court ordered the dissolution of these two great combinations into many parts.

Three years later the Clayton Anti-trust law of 1914 supplemented the Sherman law by provisions still more sharp and drastic, which specifically defined and forbade a number of acts in restraint of trade.[1] It also attempted to tear the network of trust finance apart by forbidding interlocking directorates — devices by which the same persons acting as directors of several concerns can actually control them all without in fact uniting them.

While seeking the destruction of monopolistic concerns, Congress, in the same year that it passed the Clayton Act, provided

[1] Notably price discrimination between localities, "tying agreements," and the formation of holding companies, tending to create monopolies.

for regulating business methods generally. It created the Federal Trade Commission, composed of five members appointed by the President and Senate for a term of seven years at a salary of $10,000 each. The fundamental duty of the Commission is to supervise all corporations and persons engaged in interstate and foreign commerce, except those under the control of the Interstate Commerce Commission, and to prevent unfair and monopolistic practices by any of them. The Federal Trade Commission Act expressly declares "unfair methods of competition" to be illegal. The Commission has the power to make investigations into corporate affairs, hear charges against concerns accused of wrongful methods, and issue orders restraining them. An appeal may be taken to the federal courts against a decree of the Commission, but if the order is sustained on any such appeal the parties affected must obey it.

The creation of the Trade Commission marks, perhaps, a new stage in the relation of government to industry. The spirit of the Sherman and Clayton anti-trust laws was negative, drastic, and penal. Capitalists who formed large business undertakings never knew exactly whether any particular act or policy would be held by the courts as a violation of the law. Only when they were prosecuted by the Government or brought into court by a competitor with a grievance, real or alleged, and received a judicial ruling could they tell just where they stood. Occasionally they were fined heavily and threatened with prison.

The Trade Commission Act on the other hand looks to cooperation between government and business rather than prosecutions and lawsuits. Penalties are still imposed for violations of the law, but it is possible to discover by simpler proceedings before the Trade Commission whether any particular action is "unfair." Moreover orders issued by the Commission forbidding specific practices are often invited and gladly followed by business men. By conferences between members of the Commission and manufacturing interests, standards of "fair play" in trade are being worked out. As the manufacturers in all lines are now organized in national associations — loose guilds in fact — the Trade Commission is able to deal with responsible representatives and get a consensus of expert opinion on matters involving fair and unfair dealings. Indeed it looks as if through private associations and federal regulation national trade standards

analogous to the principles applied by medieval guilds would be worked out for the whole area of great industry.[1]

In accord with the tendency towards nationalism it has been proposed that the power to charter manufacturing corporations should be vested in the National Government.[2] The right to issue such charters is now enjoyed by the states and in practice they apply various and confusing standards — often low standards which permit notorious abuses. Some of them let loose upon the country dishonest corporations, while others penalize and hamper reputable concerns which attempt to do a legitimate business within their borders. This is the source of the demand for a federal system of incorporation. As the power of Congress is limited, however, to the regulation of interstate and foreign commerce, it is probable that a constitutional amendment would be necessary before the National Government could take over the function of chartering ordinary industrial corporations. Otherwise the interstate-and-foreign-commerce clause would have to be "stretched."

The Protection and Promotion of American Industry

The history of tariff legislation runs back to the revenue act passed by the first federal Congress of 1789; for that law, in imposing duties on foreign goods coming into the United States, contained some protective features. Washington, in his message of January, 1790, recommended the promotion of such industries as would make the United States "independent of others for essential, particularly for military, supplies," and Hamilton, in his famous *Report* of the following year, declared that the real interests of the country would be advanced by "the due encouragement of manufacturers." This notion steadily gained ground, especially because the country was practically dependent upon England for manufactured goods.

The protective policy, however, soon became involved in politics and has remained there until the latest hour. Naturally the manufacturing sections of the country were most zealous in support of high tariffs while the opposition came from

[1] For illustrations of the work of the Federal Trade Commission, see Young, *The New American Government*, pp. 195 ff.; also *Trade Association Activities* (United States Bureau of Foreign and Domestic Commerce Publication).

[2] For federal *v.* state regulation, see Young, pp. 207–209 and 231–239. For state regulation of trusts, see below, Chapter xxxi.

the planting and grain-raising states that produced raw materials to be sent abroad in exchange for manufactured goods. Generally speaking, the party alignments in our history have borne a close relation to the tariff question. The Federalists, Whigs, and Republicans are historically associated with protection; the Jeffersonians and the Democrats have stood in the main for low tariffs designed to produce revenues only, not to afford protection to manufactures.

It is true that the latter have not always been steadfast opponents of the tariff. They supported the protective tariff of 1816 for instance, but in the interest of the farmers—to develop for them a home market for agricultural produce which lay at the docks and rotted whenever a European war swept free shipping from the seas. In the course of time, however, the Democrats became very bitter in their opposition to the tariff which they said merely forced the planting states to pay tribute to the North. Indeed, this was one of the leading factors in the dispute that culminated in the Civil War. The Republican party, which helped to bring on that conflict, was a protectionist party. In the days of their triumph, between 1861 and 1884, the Republicans raised the tariff rates by sweeping laws to the highest point in the history of the country. The Democratic party, on the other hand, shattered by the Civil War and its aftermath, was a long time in reforming its ranks. In the meanwhile manufacturing spread throughout the country, even into the South; it is now no longer confined to the Northeast. Moreover, farmers are interested in protection against Canadian and South American competition in farm produce.

Hence it has been difficult for many years to secure an exact alignment of the parties on the tariff question. When the Democrats were returned to power in Congress under President Cleveland in 1894 and undertook to lower the rates, they found themselves unable to agree on any very drastic reductions. Their measure, as it came from the hands of Congress, would have been regarded by Hamilton as an astounding tariff. Moreover it failed to please any section of the country. When the Republicans returned to control in 1897, they again raised customs duties by means of the Dingley bill, which was another milestone in the history of high protection. This law remained in force until 1909 when the Republicans on their own motion

undertook a revision of the rates. During the passage of their bill it became evident again that there was no very distinct line of division between the Republicans and the Democrats on the tariff, for the latter on particular matters affecting their several localities were as strongly protectionist as the former. Indeed, the cleavage was within the Republican party, for a number of Republicans, especially from the agricultural states of the Middle West, refused to vote for the bill in its final form.

Discontent with the tariff of 1909 was immediate and widespread, and at the election of the following year the Democrats captured the House of Representatives largely on a tariff reform program. The next election gave the Democrats the presidency as well as both houses of Congress, and at an extra session in 1913 they enacted a tariff law which, for the first time since the Civil War, made substantial reductions and greatly increased the free list. This measure stood on the statute books for nine years until the return of the Republicans in 1921 was followed by the restoration of high protection in the tariff bill of the next year.

Thus the tide of opinion ebbed and flowed without producing any startling departures from historic policies. Only one sign of a new method for dealing with the vexatious question appeared during a hundred years, namely, the creation of an expert tariff commission in 1909, which lapsed in 1913, was revived three years later, and now promises to become a permanent fixture. The idea underlying this institution is that the tariff schedules should be fixed with reference to the costs of manufacturing in America and abroad and with reference to the amount of protection needed to keep the American market for home industries without permitting undue profits. The theory represents a departure from the old method of fixing rates under the influence of powerful industrial interests without regard to the facts in the case. Still it must be said that the reports of the commission, although interesting repositories of data, are not the determining factors in fixing rates of duty.[1]

[1] In connection with federal control over commerce, it should be noted that foreign commerce may also be regulated by the President and the Senate under their treaty-making power. They might, for instance, arrange with a foreign country a treaty waiving some of the provisions of the tariff act, or adding to the terms of the immigration law. There is no doubt that a treaty, duly ratified, is as much a part of the law of the land as is a statute, and, as the later expression of the lawgiver always replaces any preceding law that is inconsistent or repugnant, a treaty affecting foreign commerce supersedes any preceding act of Congress, in so far as there may be a conflict.

While Congress has been making and unmaking tariff schedules, a complete revolution has been wrought in the economic position of the United States among the world powers. Once an almost purely agricultural country, it has now become the premier manufacturing nation of the earth. Once a debtor nation dependent upon European capitalists for money with which to finance its railways, mills, mines, and public undertakings, it has now become itself banker to the world at large, lending money to promote enterprises in Europe, Asia, and South America. Once struggling to obtain a mastery over the domestic market for manufactured products, it now strains every nerve to conquer foreign markets under all flags and all governments. As the Federal Government has for more than a hundred years aided American capitalists in winning the home market now it lends its powerful support to them in their efforts to extend their empire of trade into every nook and cranny of the globe. By laws of Congress and executive actions it aids them with some of the most powerful engines of modern statecraft; still they complain that they are not yet adequately sustained.

By the Webb Act of 1918 Congress has authorized the formation of great combinations to carry on commerce with foreign countries. It relaxes the anti-trust laws by declaring that no association for the prosecution of foreign trade, no matter how large, shall be deemed illegal, providing that it does not restrain the trade of any American competitor. Thus American business men are permitted and encouraged to establish huge associations capable of meeting foreign competitors.

Akin to this project in spirit is the Foreign Banking Act of 1919, known as the Edge Law. This measure provides for the federal incorporation of associations formed for the purpose of engaging in foreign and international banking. It authorizes them to transact a banking business in any part of the world and to acquire the ownership and control of local banking institutions. It even permits them to buy the stocks of foreign industrial and commercial concerns and to buy and sell goods if in the judgment of the Federal Reserve Board such transactions are incidental to their international or foreign business. American banking houses are now to be found in the principal streets of European and Oriental cities, and even in Hankow, a distant inland center of China.

In the normal course of things a merchant marine follows or accompanies the growth of foreign business. In this sphere the trend of American economic development is true to form. Previous to the outbreak of the World War, America stood below England, Germany, and Norway in the tonnage of ships engaged in oceanic trade, although her coastwise and inland marine, thanks to a monopoly of business, had grown to immense proportions. When the great European war broke out, the United States found itself in the presence of a crisis — a dearth of ships to carry its produce to foreign markets. Thus it happened that the farmers as well as manufacturers felt the pinch. The Democratic party, which more than half a century before had swept the American flag from the high seas by withdrawing all subsidies, laid aside its theories and in 1916 created the Shipping Board with enormous powers, including the authority to purchase, construct, operate, and lease merchant ships. After America entered the war, the Emergency Fleet Corporation was established under the supervision of the Shipping Board and with the aid of lavish grants from the public treasury ships were built with a speed that astonished the world. In 1920 the merchant marine of the United States rivaled in tonnage that of Great Britain, the mistress of the seas. By the Merchant Marine Act of that year, the Shipping Board was given jurisdiction over the entire business, empowered to lend money to shipbuilding companies, to provide merchant service for the Hawaiian Islands and the Philippines, as well as for foreign trade, to operate, lease, or sell ships and to establish new lines.[1] The experiment was costly, for billions of dollars had been spent in constructing ships when labor and materials were at a high mark, and the operating expenses far exceeded the income. President Harding and other Republican leaders recommended the discontinuance of government ownership and operation and the transfer of the ships by sale to private concerns, to be facilitated by an annual ship subsidy to the latter amounting to about fifty million dollars. The proposal was defeated by a filibuster in the Senate in 1923, and the Government was left with the task of operating under the terms of the Merchant Marine Act.

The executive branch of the Federal Government is constantly

[1] The duty of the Board was to sell the ships as rapidly as possible, but to operate in the meantime.

engaged in promoting American enterprise in foreign markets. The Department of Commerce is mainly concerned with the advancement of trade abroad. It collects statistics, makes investigations, and publishes reports on foreign markets showing opportunities open to American business men. The Department of State finds the major part of its work economic in character. The army of American consuls in all parts of the world and the commercial attachés associated with all American embassies abroad are busy studying local markets and sending home their findings as to the possibilities of selling American goods. The Secretary of State is constantly called upon to aid American bankers and business men who have lent money or sold goods to foreign governments and have failed to collect what is due them. His aid is also constantly solicited by business men who have made contracts with or secured concessions from foreign governments and find themselves hindered or blocked by foreign competitors. "Dollar diplomacy," once a term of opprobrium, has become an accepted fact.

Federal Labor Legislation

Although the general field of labor legislation is left to the states under the Constitution, Congress, through its power to regulate foreign and interstate commerce, and control labor conditions in government service has enacted an important body of labor laws. It has provided a system of workmen's compensation for persons employed by interstate carriers and by the Federal Government. It has established the hours of labor for train dispatchers and certain classes of railway employees. By the famous La Follette Seamen's Act of 1915 it regulated the conditions of employment for seamen and the food and quarters furnished them on shipboard. By the equally famous Adamson law of the next year, passed under the stress of a threatened strike, it fixed the normal working day for conductors, engineers, and other trainmen employed on interstate railways at eight hours. To promote security to life in mines it maintains a Bureau of Mines charged with the duty of investigating problems of safety, coöperating with state authorities in the discovery and application of safety devices, and maintaining mobile rescue crews.

In 1916, Congress attempted to establish a national age limit for children employed in industry by the enactment of a child labor law. This measure excluded from interstate commerce goods made by children under a certain age limit. It came before the Supreme Court in 1918 and was declared unconstitutional by a vote of five to four judges.[1] The Court took the view that the law really regulated not commerce but manufacturing conditions within the states. It also declared that the law usurped powers reserved to the states by the Tenth Amendment.

An attempt was then made to prevent child labor by the exercise of the taxing power. In the revenue act of 1919 a heavy tax was laid on the profits of companies using child labor, thus indirectly accomplishing the original result. Again Congress was foiled, for the Supreme Court declared that the measure was not a legitimate use of the taxing power and therefore unconstitutional.[2] Thereupon a proposal was brought into Congress for an amendment to the Constitution authorizing a child labor law. It was endorsed by President Coolidge in his first message and made the subject of a widespread agitation.

Strikes and various practices of labor organizations come within the scope of the Federal Government in three ways. If they arise in the field of interstate and foreign commerce they are clearly within the jurisdiction of Congress, which has legislative power over that sphere. Indeed, in the Transportation Act of 1920, Congress sought to provide for the arbitration of labor disputes on the railways by creating a Railroad Labor Board of nine members appointed by the President and Senate — three from nominees of the labor group, three from nominees of the employing group, and three representing the general public.[3] Although attempts were made to establish the compulsory arbitration of labor controversies, they were defeated; Congress

[1] Hammer *v.* Dagenhart, 247 U. S. 251.

[2] Bailey *v.* Drexel Furniture Co., 259 U. S. 20 (1922). According to the last census, there were more than a million children between the ages of ten and fifteen engaged in gainful occupations. The number between ten and thirteen was nearly four hundred thousand. The proportion of children between ten and fifteen employed in gainful occupations ranged from three per cent on the Pacific Coast to about twenty-five per cent in Mississippi, Alabama, and South Carolina. The sponsors of federal child labor legislation seek to apply uniform minimum standards throughout the United States.

[3] This was merely a development of earlier legislation. The first federal law dealing with arbitration in railway disputes was enacted in 1888 but no cases were settled under it. Ten years later the principles of the act were enlarged and extended in the Erdman Act under which sixty-two cases were adjusted by mediation and arbitration before it was superseded by the Newlands Act of 1913 which was in turn superseded by the Transportation Act of 1920.

merely provided for hearings and recommendations. In practice, the findings of the Board have been ignored by the contesting parties on more than one occasion.

To deal with labor disputes in ordinary industry, even when interstate commerce is not involved, there has been created the Division of Conciliation in the Department of Labor. It handles several hundred cases of strikes and threatened strikes every year. Its agents are traveling mediators who visit scenes of disturbance and, on a strictly voluntary basis, seek to effect a settlement.

Strikes and other practices of organized labor, which arise outside the range of interstate and foreign commerce, also may come within the federal sphere through the exercise of the judicial power. The federal judiciary has jurisdiction over suits arising between citizens of different states; as industrial corporations often have their seat at some point outside the state in which their plants and striking workmen are located, they can apply to the federal courts for help on the ground of diversity of citizenship.[1] Moreover state legislation respecting trade unions may and frequently is declared unconstitutional as violating the due process clause of the Fourteenth Amendment. Thus the whole question of labor disputes is brought within the purview of the federal power and made an issue in national politics.

The injunction in labor controversies first forged into prominence in the celebrated railway strikes of 1877. It became a stirring political question in 1896. During the great Chicago railway strike two years before, the federal district court in that city issued a general injunction to all persons concerned, ordering them not to interfere with the transmission of the mails or with interstate commerce in any form. Eugene V. Debs, director of the strike which was tying up interstate commerce, was arrested, fined, and imprisoned for refusing to obey the injunction. Debs, thereupon, through his counsel, claimed the right to jury trial, asserting that the court could not impose a penalty which was not provided by statute. On appeal, the Supreme Court affirmed the right of the lower court to grant an order enjoining any person from interfering with interstate commerce, and held that imprisonment for contempt of court did not violate the principle of due process of law.

[1] See above, p. 289.

Accordingly, the power of the federal courts to issue injunctions was brought into politics by workingmen who claimed that those courts, in many instances, issued writs hastily, arbitrarily, and with prejudice to their legal rights. In 1908 the question was taken up by both of the great political parties. The Democratic party said in its platform: "We deem that the parties to all judicial proceedings should be treated with rigid impartiality and that injunctions should not be issued in any cases in which injunctions would not issue if no industrial dispute were involved;" and furthermore reiterated the pledge of 1896 and 1904 — trial by jury in all cases of persons arrested for indirect contempt; that is, contempt committed out of the presence of the court. On account of the stand taken by the Democratic party, Samuel Gompers, president of the American Federation of Labor, came out openly in support of Bryan in 1908 and of Wilson four years later, and attempted to "swing" the labor vote throughout the United States.

After the Democrats came to power in 1913, they took up the whole question of the relations of the Government to organized labor. By an unexpected interpretation of the Supreme Court, the Sherman Anti-trust Act had been held to apply to trade unions which undertook to restrain trade as well as to trusts and other combinations.[1] In the Clayton Anti-trust Act passed in 1914 Congress expressly exempted trade unions as well as farmers' organizations from the operations of the anti-trust laws. In the Clayton law several clauses were also incorporated limiting the use of the injunction in labor disputes. The law expressly provides that no injunction shall issue to restrain any person or persons from ceasing work, persuading others peaceably to do the same, advising others not to patronize any employer who is a party to a labor dispute, or "from doing anything which might be lawfully done in the absence of such dispute by any party thereto."

This law, which Gompers hailed as the "Magna Charta of Labor," made little change in the injunction process, for during the strike of the railway shopmen in 1922, the federal Attorney-General, H. M. Daugherty, obtained from the district court of Chicago the most sweeping injunction in the history of labor disputes. The judicial order forbade strikers and their leaders

[1] Loewe v. Lawlor ("Danbury hatters' case"), 208 U. S. 274.

to engage in picketing, or to encourage any person to leave his employment or refrain from entering employment, by "letters, printed or other circulars, telegrams, telephones, word of mouth, oral persuasion, or suggestion, or by interviews to be published in the newspapers, or otherwise in any manner whatsoever." The union leaders were thus absolutely forbidden to issue any statement ordering the members of their organizations to leave their work, or to persuade others to do so. This injunction, which was later sustained on appeal, in effect made the strike in all of its manifestations unlawful. The reply of organized labor was a lively participation in the congressional elections of that autumn, the defeat of several Republican candidates for the House of Representatives, and another call for a militant campaign to put an end to "the abuse of injunctions." On the other hand the leading conservative newspapers, with some exceptions, hailed Mr. Daugherty's injunction as freeing the country from "the menace of organized labor." So the injunction is still an issue.

In fact, under repeated decisions by the Supreme Court of the United States, the labor clauses of the Clayton Act have been whittled down to mean next to nothing. Unions are not exempt from the law whenever they commit any "unlawful" act; the injunction may be issued whenever any material damage is being done to an employer by his striking employees; trade unionists may not agitate among non-union employees who have an agreement with their employer for the maintenance of an open shop; only that kind of picketing is lawful which is carried on by individual unionists stationed at or near plants; trade union leaders and agitators from the outside cannot lawfully interfere in a controversy between an employer and his workmen; the "secondary boycott" is unlawful, that is, trade unionists cannot strike merely for the purpose of bringing pressure through their own employer on some other employer engaged in a labor dispute with their fellow unionists; and a trade union may be sued under the Sherman Act for damages done to an employer in a strike.[1]

Although organized labor was not able to get its way in the matter of injunctions, it succeeded in 1913 in securing the

[1] See Young, *The New American Government*, pp. 205–7, and Douglas, Hitchcock, and Atkins, *The Worker in Modern Economic Society*, pp. 874–76.

establishment of a separate Department of Labor. To this Department are assigned the bureaus of immigration, naturalization, and labor statistics and also the children's bureau, the women's bureau, and the bureau of industrial housing. Its duties comprise among other things "the gathering and publication of information regarding labor interests and labor controversies in this and other countries; the supervision of the immigration of aliens, and the enforcement of the laws relating thereto and to the exclusion of Chinese; the direction of the administration of the naturalization laws; the direction of the work of investigating all matters pertaining to the welfare of children."

Miscellaneous Regulations — Consumers and Farmers

While in a broad sense all legislation relative to trusts and railways affects consumers directly or indirectly, there are several laws framed especially in the interest of the general public. Among these measures must be reckoned the Pure Food and Drug Act of 1906 which is designed to guarantee that foodstuffs and drugs sold through the channels of interstate trade comply with certain standards of quality, purity, and composition. Laws enacted in 1906–7 extended strict federal control over the production and shipment of meat. The Sherley Act of 1913 lays penalties upon those who make misleading statements relative to the curative effects of medicines. The Net Weight Act of the following year requires manufacturers to indicate on every package passing into interstate commerce just how much of a given commodity the said package contains. In the same class of legislation belong the Standard Barrel and Basket Acts of 1912–16.

Special consideration is given to farmers and stock raisers in a long series of laws. Under the influence of the farmer vote, Congress, in 1886, struck at imitations of butter by imposing a heavy tax on oleomargarine treated in such a way as to pass for butter; the act was sustained by the Supreme Court although it was an exercise of the taxing power for regulatory, not revenue, purposes.[1] The National Bill of Lading and Warehouse Acts of 1916 were framed to protect shippers of all classes, par-

[1] See also the Filled Milk Act of 1923.

ticularly grain raisers, by standardizing and regularizing practices in shipping and storing commodities.[1] The Packers and Stock Yards Act of 1921 was designed among other things to break the control of the great packing houses over stock yards and to give more freedom to stock raisers and shippers; it brings an immense and important business of vital concern to farmers immediately under the supervision of the Department of Agriculture. Farmers are protected against the spread of plant and animal diseases by many acts controlling the importation and transportation of commodities and stock likely to spread disease; this is in addition to the constant warfare waged by the bureaus in the Department of Agriculture against insects, pests, and plagues which assail farms from all quarters. Finally farmers are exempted from the provisions of the anti-trust laws; by the Capper-Volstead Act of 1922 they are not only permitted but encouraged to form coöperative marketing associations — under state laws but subject to the supervision of the Secretary of Agriculture to prevent them from "unduly" enhancing prices.

Legislation Affecting Morals — Prohibition

In the exercise of its regulatory power, Congress has entered the domain of morals. A number of laws, culminating in the Lottery Act of 1895, closed the mails and interstate commerce to lottery tickets and thus practically suppressed the lottery business. The Mann White Slave Act of 1910 lays a heavy penalty on any person who transports or causes to be transported from one state to another any girl or woman for immoral purposes — a law directed against commercialized vice. Four years later Congress, by the Harrison Act, laid a tax on the manufacture, importation, and sale of opium and derivative narcotics; coupled with the tax there is a provision making it illegal to make, sell, or give away such drugs without a license or to buy or obtain them without complying with certain requirements. The purpose of the Act was not to raise revenue but to control and reduce the consumption of narcotics.

For a long time traffic in intoxicating liquors was entirely outside jurisdiction of the Federal Government except in so far

[1] In this group may be placed the Grain Standards Act and the Cotton Futures Act of 1916, the Cotton Standards Act of 1923, the Grain Futures Act of 1922 (directed against speculation on produce exchanges).

as it involved interstate and foreign commerce or territorial administration. The adoption of the Eighteenth Amendment, which went into effect in January, 1920, however, put the burden of enforcing the prohibition of the manufacture, sale, and transportation of intoxicating liquors for beverage purposes mainly upon the Federal Government. It is true that the Amendment declares that both Congress and the states "shall have concurrent power" to enforce the article by appropriate legislation; still the principal responsibility is federal because states may, and some do, refuse to give hearty coöperation in the execution of the law.

The Amendment itself does not define "intoxicating liquor," that is, it does not say what percentage of alcohol is necessary to make a beverage intoxicating. It was urged that drinks, especially beer, which contained three per cent or even more alcohol, were not intoxicating, but Congress in the famous Volstead Act, which went into effect with the Amendment, fixed the limit at one half of one per cent. At the same time it established the office of prohibition commissioner in the internal revenue bureau of the Treasury Department, and supplied him with agents and funds to enforce the law. Although it is the duty of state authorities to uphold federal law, some of them refuse to make adequate provision for the enforcement of prohibition within their borders.

Naturally a law striking at the root of such age-long habits is the subject of much adverse criticism. It is repeatedly said that the Amendment was "forced upon the people"; but it must be remembered that three fourths of the states were already "dry" by popular vote and that forty-six out of forty-eight states ratified the Eighteenth Amendment. It is said that the law cannot be enforced; that is a matter of degree and of administration. As the agents chosen to enforce the act were selected in accordance with the letter and spirit of the spoils system, it is not surprising that there has been great inefficiency, to say the least. Still during the eighteen months ending December 31, 1922, there were more than 27,000 convictions under the Volstead Act and over $5,000,000 was collected in fines. It may be, as alleged, that the Volstead Act is unduly stringent in its definition of intoxicating liquor and that modifications of that ruling are forthcoming, but notwithstanding all the scandals

and excitement connected with "rum running" and "bootlegging," there are no signs of a return to the old days of the wide-open saloon.[1]

The Control of Foreign Immigration

Immigration has economic as well as humane and civic aspects. It has a vital bearing upon the labor supply for the staple industries, and upon the nature and quality of American civilization. For nearly a century Congress, which has full power over the admission of aliens to the United States, made no laws respecting the subject except those designed to encourage immigration and to promote the comfort and safety of immigrants on ships. Still, from time to time protests against "the alien menace" flamed out in the country, and at last in 1882 Congress was moved to exclude Chinese coolies, and lunatics, paupers, and idiots from all parts of the world. From that time forward every decade has seen new restrictive legislation until at present five important classes are excluded: the generally undesirable; laborers imported under contract; Chinese, Japanese, and Asiatic laborers generally; illiterates; and all nationalities beyond a certain number annually.

The first group embraces idiots, feeble-minded persons, epileptics, paupers, persons likely to become public charges, professional beggars, persons affected with tuberculosis or loathsome, dangerous, or contagious diseases, criminals, polygamists, anarchists, and prostitutes. It is especially provided, however, that foreigners who have been convicted of purely political offenses not involving moral turpitude will not be excluded if they are otherwise admissible.

The law also excludes contract laborers, that is, persons who have been induced to migrate to this country by offers or promises of employment or in consequence of an agreement to perform labor of any kind, skilled or unskilled.[2] The law provides, however, that skilled laborers may be imported, if unemployed laborers of the kind cannot be found in the country.

The third group of aliens consists of Asiatic laborers who are

[1] See *Annals of the American Academy of Political and Social Science*, Vol. CIX, No. 198, on "Prohibition and its Enforcement."

[2] It is a misdemeanor for any person or concern to assist or encourage the migration of such laborers to the United States. Actors, singers, and professional classes are not included in this group.

excluded under treaties, laws, and agreements.[1] However, Chinese, Japanese, and other Oriental teachers, students, travelers, merchants, and government officials, and their lawful wives are admitted under certain conditions.

The illiterates of all nations are now excluded by the act of 1917 which denies admission to aliens over sixteen years of age, physically capable of reading, who cannot read the English language or some other language or dialect including Hebrew and Yiddish. There are a few saving clauses, but on the whole the bar is very rigid. This measure, enacted mainly on the insistence of the American Federation of Labor, shuts the door against a large number of unskilled workmen who might come into competition with American labor. The Federation in insisting upon this law contended that American capitalists were protected by tariffs, but that with unrestricted immigration labor could derive no benefit from such protection.

The crowning act of exclusion is that of May 19, 1921, which restricts the number of aliens admissible to not more than three per cent of the respective nationalities in the United States in 1910. This act automatically cut the total for the ensuing year 1921–22 to 355,825 which was only about one third the highest annual total reached before the outbreak of the World War. This law works with deadly precision against immigrants from southern and southeastern Europe and in favor of those from Great Britain and northern Europe generally. At first the law was applied tentatively for one year and then it was extended, pending the enactment of still more drastic legislation.

In practice this measure and other restrictive laws work many pathetic hardships for foreign immigrants who are brought over only to find that they are lacking in qualifications or that the quota to which their nationality is entitled for the year is already filled. Such hardship and injustice can hardly be avoided until provisions are made for conducting examinations of immi-

[1] There is no special law or treaty excluding Korean or Japanese laborers from the United States; but the Japanese government, by an arrangement with the federal authorities, known as "the gentlemen's agreement," has undertaken to control the emigration of its laborers to the United States by refusing to issue passports to them. Under an act of Congress, approved February 20, 1907, whenever the President is satisfied that passports, issued by any foreign government to its citizens authorizing them to go to other countries than the United States, are really being used for the purpose of enabling the holders to enter the continental territory of the United States to the detriment of labor conditions therein, it is his duty to refuse admission to the citizens of the country issuing such passports. By virtue of the authority of this act, President Roosevelt, in March, 1907, issued an order that Japanese or Korean laborers, skilled and unskilled, who have received passports to Mexico, Canada, or Hawaii and who attempt to enter the United States, should be excluded from our continental territory.

grants abroad before their embarkation for America. One thing is certain however, namely, that America is firmly resolved to maintain its standard of life against the pressure of the ever multiplying populations of Europe and Asia. Even the strident clamor of manufacturers for more labor will hardly shake that resolve.

The cost of administering the immigration laws is partially met by a small "head tax" levied on all aliens entering the United States. Every immigrant is required to state whether married or single, whether able to read or write, whether intending to join a relative or friend, and if so, when and where, and to give his nationality, race, calling, or occupation, last residence, and final destination — in addition to answering a number of other questions. Thus, a complete record of each immigrant is secured, in order that the Government may keep a close scrutiny over the persons whom it admits. The Government has furthermore instituted a searching medical examination.

After running the gantlet of the medical inspectors, the immigrant is closely questioned by a general inspector with regard to his desirability as an inhabitant of the United States. "The modus operandi at all government stations," says a former New York commissioner of immigration, "is to place every individual applicant for admission to these shores on the defensive and to make it incumbent upon him . . . to show why he should be admitted; but to do it in a humane spirit and treat each applicant with becoming consideration, without for a moment losing sight of the object that Congress had in view in limiting admission to these shores to those who are sound in body and mind and who are without question likely to find support without depending in whole or in part on public or private charity."

Aliens about whose qualifications the examining inspector is doubtful are held for examination before the board of special inquiry at each port charged with hearing and deciding such cases. An appeal from an adverse decision of the board may be carried through the commissioner of the port and the commissioner-general of immigration to the Secretary of Labor. Excluded aliens must be returned to their homes by the steamship companies which brought them.

The general supervision of the whole system of immigration is vested in the commissioner-general of immigration in the Depart-

ment of Labor. He may establish rules, prescribe forms of reports, entries, and other papers, and he may issue orders and instructions which he may deem useful in carrying out the provisions of the immigration act and in protecting aliens from fraud and loss. It is his duty, from time to time, to detail officers from the immigration service to make investigations into the number of aliens detained in penal, reformatory, and charitable institutions throughout the United States, and to look after the deportation of aliens who have become public charges. At each port of entry, there is a commissioner of immigration who has under him a staff of inspectors and other officials.

The power of the commissioner-general to deport aliens is broad and sweeping in its scope. In 1918, Congress added to his authority by providing for the expulsion of alien revolutionists, anarchists, advocates of sabotage, violence, and assassination, and those aliens who aided and abetted them. His decision on the facts in any case is final (unless reversed, of course, by his chief, the Secretary of Labor), and the burden of proof is upon the alien arrested and held for deportation to show that he is not in the United States in violation of the law. The courts will not go behind the findings of the immigration authorities as to the facts constituting the charge against the alien.

There is no doubt that when the "anti-red" hysteria swept over the country during and after the late war, grave injustices were committed by federal officers in charge of deportations.[1] An army of detectives and secret service agents, always under the necessity of "doing something" to earn pay and promotion, seized hundreds of aliens, tore them from their homes, held them in prison, subjected them to inquisitorial processes, and hustled some of them on ships bound to their native lands. Often aliens were held in jails for weeks and then released when nothing could be found to incriminate them. While some undesirable characters and public nuisances were disposed of by this process, innocent persons suffered and the bitterness and hatred created by the methods pursued made the damages greater than the benefits. Indeed a number of prominent attorneys felt moved to file a public protest against the conduct of the government officials engaged in this work.

[1] Chafee, *Freedom of Speech*, pp. 229 ff., and *The Deportations Delirium of Nineteen Twenty*, by the former Assistant Secretary of Labor, Louis F. Post. See above, p. 109.

Communications — the National Postal Service

Post-offices and post-roads and the transmission of mail may be properly considered in relation to the power of the Federal Government to control commerce in general,[1] although a special warrant for this branch of administration is contained in a separate clause of the Constitution. Those who hold to a strict interpretation of the Constitution contend that the power to establish post-offices and post-roads means only the right to direct where post-offices shall be maintained and on what roads mails shall be carried: but in practice, it has been shown that the power includes the right to construct buildings. The learned jurist, Story, declares that there is no reason why Congress could not build and operate roads for the purpose of transmitting mails. "If it be the right and duty of Congress," he asks, "to provide adequate means for the transportation of the mails wherever the public good requires it, what limit is there to these means other than that they are appropriate to the end?" [2] Professor Burgess, on the other hand, holds that it is not settled law that the Government may build, buy, and own railroads, or make the telegraph business a governmental monopoly.

The transmission of mail matter is exclusively vested in the Federal Government — that is, Congress can prohibit its carriage by private companies. The question as to what can be properly regarded as mail matter has been answered by the Supreme Court to the effect that it is limited to letters, papers, and other things which were commonly reckoned as mail at the time when the Constitution was framed.[3] Under its power to regulate the transmission of mail matter, Congress may exclude from the mails obscene, lewd, and lascivious publications and papers relating to lotteries,[4] but it cannot prohibit the carriage, by private companies, of anything which it may so exclude.[5]

[1] Congress has full power to regulate commerce with the Indians, but until 1871 it was the policy to deal with them as tribes by means of treaties. Since that year federal relations with the Indians have been conducted by the President and Congress through agreements and contracts. Those Indians who have left their tribes and settled down like white inhabitants are recognized as citizens, but those who remain with their people are not citizens. The total Indian population according to the census of 1920 is 344,000. Most of these Indians reside in reservations, of which there are about 140. Supervision of the Indians is vested in the bureau of Indian affairs in the Department of the Interior.

[2] *Commentaries*, Vol. II, sec. 1141.

[3] *Ex parte* Jackson, 96 U. S. 727.

[4] *In re* Rapier, 143 U. S. 110.

[5] Except, of course, so far as interstate commerce is concerned; but here a question as to freedom of the press might arise.

Under its general power to establish post-offices and post-roads, the Federal Government has built up a vast and complicated system. We began in 1789 with 75 post-offices, or one for every 50,000 persons in round numbers, and at the close of the nineteenth century there were more than 70,000 post-offices,[1] or one for about every 1000 inhabitants. The postal charges in 1792 ranged from six cents for a single sheet transmitted thirty miles to twenty-five cents for the same carried more than 450 miles. To-day an ordinary letter may be sent from Maine to Manila for two cents.[2] Not being a profit-making but a public service agency, its expenses often exceed its income.

The post-office not only carries letters, papers, post-cards, and parcels limited in size; it transmits money also.[3] The registry service was established by Congress in 1855; and it is now possible for anyone, by the payment of ten cents in addition to the regular postage, to secure the registration of a letter at every point in its journey, a return receipt from the person to whom it is sent, and an insurance up to a certain amount — a routine practically guaranteeing delivery. In 1864, Congress established the money order system, by which payment to the addressee at the other end of the line is absolutely guaranteed and practically every possibility of loss obviated.

In order to encourage the establishment of newspapers and their circulation among the people, Congress at the very foundation of the Government made especially low rates for the transmission of printed matter. For a long time a bulk rate of one cent a pound was charged for periodicals entered at the post-office as second-class matter, a rate which, it was claimed, was far below the actual cost of the service rendered and responsible for the large deficits which frequently occurred in postal finances. An agitation therefore arose in favor of an increase in the postal rates on newspapers and periodicals, but naturally it was vigorously opposed by publishers. It was alleged that the cost of transportation was excessively high on account of the unbusinesslike contracts which the Government made with the railways.

The contest over increased rates for newspapers and periodicals culminated in 1917 in an amendment to the War Revenue

[1] Post-offices are graded into classes on a basis of receipts. This number has been reduced to about 50,000 by the rural free delivery system.

[2] The one-cent post-card was introduced in 1872.

[3] For the postal savings system, see above, p. 381.

Act raising the second-class mail charges. This law contained three significant provisions: (1) it increased the rates on second-class publications by a gradual process until by 1921 they ranged from two to ten cents per pound; (2) it based the carriage of second-class mail on the zone system prevailing in the parcel-post division, varying the rate according to the zone; (3) it laid a special postage rate on periodicals on the basis of the advertising carried when the advertisements exceed five per cent of the paper. Special rates are fixed for religious and educational publications not conducted for profit.

Although Congress early provided for sending books and small parcels by post, it imposed high rates on such mail matter and narrowly restricted its scope. As the business of the country increased, there came a demand for a special system for carrying parcels by mail at low rates. This reform was resisted by the express companies for obvious reasons and by country merchants who feared the competition of the great department stores of the cities. It was not until August, 1912, that Congress was induced to establish a parcel-post system of the modern type. The scheme was immediately successful and it has been steadily extended and improved from year to year.

While widening the range of the matter carried at low rates the post-office has brought its services to the very doors of the citizens in nearly every part of the country. In the old days, every person had to go to the post-office to get his mail. In 1863 a free delivery was instituted in cities of 50,000 inhabitants. Since then the figure has been reduced to cover cities of about 10,000. In 1885, the "special delivery" of mail was started. Twelve years later rural free delivery was initiated with an outlay of about $14,000 for the first year — a sum which grew to $34,000,000 annually within a decade. More than 400,000 miles are now covered by the service. In 1914, the usefulness of this enterprise was increased by instructing rural mail carriers to obtain from farmers lists of commodities which they are prepared to furnish consumers in the cities; such lists are available to prospective buyers at the city post-offices. Thus a direct channel has been cut between producer and consumer. Goods may be sent cheaply from country to town and from town to country.

The incidental effects of the rural delivery system, especially

since the appearance of the automobile, have been momentous; in addition to relieving the tedium of the country life and rendering prompt service to farmers along the routes, it is a powerful factor in bringing about the improvement of country roads. The Post-Office Department insists that the routes used for rural delivery shall be kept in good condition during all seasons of the year; under this pressure, coupled with federal aid in the form of subsidies, states and counties are steadily at work building modern highways.[1]

The Post-Office Department is a vast business concern charged with the supervision of an army of employees, some stationed in Washington and others scattered throughout the United States in the thousands of post-offices and on the railway trains and other vehicles for mail transmission. The direction of affairs is vested in the Postmaster-General, who appoints departmental employees under the civil service rules, manages postal finances, and hears appeals from subordinates. The Postmaster-General has four assistants, each of whom is responsible for one of the great branches of the postal service. The administration of the post-office is greatly hampered by the fact that Congress controls rates and locates buildings, under the pressure of "politics," often with slight regard for economy or efficiency; but by recent reforms[2] it has been emancipated from the worst features of the spoils system in the selection of postmasters.

The postal authorities possess the power to exclude from the mails the letters and papers of persons and corporations practicing fraud and deception, and also the power to prohibit the use of the mails for matter tending to encourage crime and immorality. When any person attempts, by fraudulent methods, to procure money or property through the mails, the postal authorities simply withdraw the privileges of the mails absolutely. This is done by instructing the postmaster at the place where the fraud is practiced to stamp on all letters addressed to the guilty person or concern the word "fraudulent"; and return them to the writers if there is a return address, or to the Dead Letter Office. The Post-Office Department employs inspectors to conduct investigations into the misuse of the mails, and make reports to the Postmaster-General. These reports are the principal evi-

[1] Below, p. 445.

[2] See above, p. 312.

dence upon which "fraud orders" are based. In practice the postal authorities serve notice on persons charged with abusing mail privileges, and inform them of the nature of the accusation. If the accused wishes to make defense, he must go to Washington and present his case. It has been uniformly held by the courts that the decision of the Postmaster-General on questions of fact in fraud order cases is not subject to judicial review.[1] The Court, however, will review the question as to whether a particular scheme is fraudulent.

The exercise of this large power has been severely criticized by many champions of individual liberty, who hold that it is not the business of the Government to act as the paternal guardian of the citizens, protecting them from their own folly against the machinations of patent medicine fakirs and "get-rich-quick" swindlers; or guiding them as to literature proper for them to read. On the other hand, it is asked, with a good deal of plausibility, whether the Government should permit the use of the mails by fraudulent concerns, and thus become a party to the deception of innocent persons.[2]

Under the provisions of the Espionage and Sedition laws enacted during the World War [3] the postal authorities were empowered to close the mails to newspapers suspected of "seditious" tendencies; the mail of any person whom the postal agents "distrusted" was opened and read. A strict censorship of the mails was created under a censorship board. Frequent and sweeping orders excluding newspapers and magazines from the mails were issued by the Post-Office Department and sustained by the decisions of the courts.[4]

[1] *Readings*, p. 204.

[2] For example, several years ago a company in New York began to advertise fountain pens at $2.50 apiece, and promised at the same time to employ every purchaser of a pen at $8 a week in letter-writing. "It was an endless chain scheme, growing constantly wider. All revenues were derived from the sale of the pens. This inverted financial pyramid was not thought stable by the post-office people, and the concern was put out of business by a fraud order in October, 1902, after having secured 19,000 patrons." Reinsch, *Readings*, p. 392.

[3] Above, p. 108.

[4] See Milwaukee Social Democratic Publishing Co. *v.* Burleson, 255 U. S. 106, decided in 1921.

CHAPTER XIX

CONSERVATION AND ADMINISTRATION OF NATURAL RESOURCES

Never in the history of the world has any nation, not even Rome when her dominion extended from Scotland to Arabia, possessed a more magnificent heritage of fertile soil, virgin forest, and mineral treasure than the United States of America. At the beginning of our career as an independent republic, the Government held a vast domain of unsettled lands in the territories beyond the Alleghenies and the Appalachians; from time to time great additions have been made by purchase and conquest. In the course of a century it has owned an estate of no less than 2,825,000 square miles — an empire more than ten times the size of Germany, more than twenty times the area of Great Britain and Ireland.[1]

No government in the world has been more lavish in disposing of its legacy, and no people more prodigal in the consumption of its material endowment. It took the people of eastern China more than three thousand years to strip forests and verdure from the mountains and hills and to transform great garden spots into barren wastes incapable of sustaining human life. Between 1860 and the present day the Federal Government has given away or sold more than 700,000,000 acres of land and we are now cutting every year three times as much timber as nature is producing. All over the earth there are immense areas which afford melancholy proof that reckless abuse of natural resources inevitably transforms fertile lands into arid wastes. What will be the state of affairs in America when the population reaches 300,000,000? Can we enlarge and develop on a national scale

[1] In addition to the lands already granted to private persons, there were large public domains in most of the territorial additions to the United States. Inasmuch as Texas had organized an independent government and had won recognition as an independent commonwealth before admission to the Union, it had already made provision for the public lands and was allowed to retain them. The acquisition of Hawaii, Porto Rico, and the Philippine Islands in 1898 brought very little additional public land to the Federal Government, as most of it had already been granted away to private persons.

the policies of conservation and judicious administration which have already appeared in rudimentary form in the sphere of national politics and to some extent in the more enlightened states?

The Historic Land Policy of the Government

The story of the way in which nearly all the national estate has been dispersed forms a striking and significant chapter in the history of our country. It opened with a decision on the part of Congress to sell the public domain as quickly as possible with a view to raising revenues and extinguishing the national debt. Acting on this principle, the Government threw upon the market large areas which were bought up by land companies, subdivided and sold to settlers. Not until 1800 did it begin the practice of offering lands directly to buyers in sections small enough to encourage development by home-seekers — a practice extended by later legislation to provide even greater facilities for the small purchaser. Still it insisted on selling, not giving the land to farmers, and the pioneers on the frontier were filled with discontent. They were impatient at what seemed to them a snail's pace in the development of the West.

As Congress controlled the public domain, inevitably the land question became an issue in politics. Should the land be sold or given away? Congress debated. Friends of an agrarian democracy agitated. And at length in 1860 the Republican party in its platform declared that all the remaining arable land should be given outright in small holdings to persons ready to bring it under cultivation. Two years later, Congress, under Republican leadership, enacted the famous Homestead law which provided that any bona fide farmer might secure the ownership of a quarter of a section, namely 160 acres, merely by paying a registry fee and working on the land for a period of five years.

The public lands not granted to land companies and to private persons were disposed of in several ways. Whenever a new state was admitted to the Union it received from the Federal Government a portion of the public domain within its area. Previous to 1850, it was the practice of the Government to give to each state one thirty-sixth of the public lands within its borders for school purposes; and after 1850 the amount was doubled. In 1862 Congress granted to each state a share of the federal land

proportioned to its representation in Congress, the proceeds of which were to be devoted to the support of an agricultural college. In addition to grants for educational purposes, Congress from time to time gave large areas to various states to be used in making internal improvements.

Finally there are the concessions made to railway corporations. It is estimated that under the various railway acts at least 155,504,992 acres have been granted to railways, and that more than one half this amount has been actually taken up by them. Much of this land, however, has found its way into the hands of homestead-seekers, for it has been the practice of the railways to sell arable holdings in small sections at reasonable prices in order to encourage settlement. It has been profitable for them to develop population and industries along their lines; and they have accordingly used their grants for the rapid upbuilding of the West.

By such methods the arable lands in the national domain were rapidly dispersed; at the end of the nineteenth century the era of free land for farmers had drawn to a close. During the same period great areas of forest, mineral, stone, and waste lands were sold at trivial prices under the Public Sale Act of 1871, the Timber and Stone Acts of 1877 and 1878, and the Desert Land Act of 1877. The policy of the Government, as far as its practice rested on any theory at all, assumed that the rapid transfer to individuals and corporations meant rapid development under the powerful stimulus of private initiative and private gain. The assumption was not always justified. As no restraints were made upon the use or sale of the land as granted away, there was nothing to prevent the reckless abuse of power by those into whose hands it fell or the accumulation of immense holdings by a few shrewd and dominant personalities.

Evils of the Land Policy — the Conservation Movement

In a large measure the land policy of the Government was justified by its fruits; the Great West was settled by hundreds of thousands of hardy pioneers who built prosperous homes on the broad acres sold or given to them by the Government. Nevertheless, in spite of the efforts to reserve the public lands for bona fide home-seekers, enormous areas of arable land were

obtained by single individuals and by corporations, either by buying up the small grants made to homesteaders or by fraud. In this way huge estates of millions of acres, outrivaling in size the feudal principalities of old Europe, were built up in all parts of the West and the system of tenant farming was introduced on a large scale. Speaking with some bitterness on this point, President Roosevelt said: "Our public lands whose highest use is to supply homes for our people have been and still are being taken in great quantites by large private owners to whom home-making is at the very best but a secondary motive, subordinate to the desire for profit. To allow the public lands to be worked by the tenants of rich men for the profit of the landlords, instead of by freeholders for the livelihood of their wives and children, is little less than a crime against our people and our institutions. The great central fact of the public land situation . . . is that the amount of public land patented by the Government to individuals is increasing out of all proportion to the number of new homesteads."

The same tendency towards concentration was to be observed in the case of forest and mineral lands sold directly by the Federal Government to persons and corporations, and also in the case of lands granted to the states. A careful survey made in 1920 showed a total of 78,000,000 acres of forest land owned in fee by 1694 holders. Other evils greater than that of a concentration in ownership sprang from the exploitation of the natural resources which passed into private hands. The initiative invoked by the Government to bring about a rapid development of the country led to the reckless cutting, slashing, and burning of forests in some places and to monopolies in others. Thus the policy of the Government contributed to the growth of large estates tilled by tenants, on the one hand, and to the heedless destruction of natural resources on the other hand.

The Government's land policy was early made the subject of criticism. In 1849 the Commissioner of Patents declared in his report: "The waste of valuable timber in the United States will hardly begin to be appreciated until our population reaches 50,000,000. Then the folly and short-sightedness of this age will meet with a degree of censure and reproach not pleasant to contemplate." Slowly through the years the voice of warning grew louder and louder, but it fell on deaf ears at Washington.

Not until President Cleveland's first administration was there a man in the White House who took "an active interest in the public lands and an uncompromising stand for the enforcement of the laws against land thieves." It was President Roosevelt, however, who dramatized the issue of conservation and aroused the country to its significance. He recommended laws, issued executive orders, reserved great forest areas, called a national conference on conservation, and with the aid of the Chief Forester, Gifford Pinchot, made conservation and the right use of our natural resources, public and private, the leading question of the time.

Out of a long and widespread discussion of the problem and ever-increasing knowledge of technical methods for dealing with it there was gradually formulated a new national policy with respect to natural resources. The first great landmark in this development was the Forest Reserve Act of 1891, which authorized the President to set aside and withhold from sale public lands covered wholly or in part with timber. It is just to say with a careful student of national forest policy, Dr. Ise, that "this law, definitely providing for national ownership of forest lands, a complete departure from the forest policy hitherto pursued, is by far the most important piece of timber legislation ever enacted in this country." [1] Indeed, there are few measures of the Federal Government which equal it in significance. Under this law Presidents Cleveland, Harrison, and Roosevelt withdrew from sale, and held as a national treasury of timber, forest lands equal in area to five times the total arable acreage of England. Next in importance to this famous Act are several laws mentioned below which provide for national ownership of mineral lands and water power sites and for leasing instead of selling them to private parties for development.[2] In the third place, as a part of the new policy of nationalism, Congress provided in 1911 for the purchase of certain forest lands in the Eastern states as the beginning of federal forestry in regions where there were no public lands to reserve — where the powers of Congress over natural resources are extremely limited.[3]

[1] Ise, *The United States Forest Policy*, p. 109.

[2] Some of the states, as Utah, also own mineral lands. They, too, are beginning to see the necessity of preserving them and are ceasing to sell them at ruinously low figures. The adoption of a leasing system by states owning mineral lands has also been advocated.

[3] See below, p. 444.

The National Forests

In the forests reserved to national ownership we have natural resources that are highly valuable not only for their direct contribution to the welfare of the nation, but also for their indirect bearing on the preservation of other resources.[1] The primary use made of the forests is, of course, to obtain lumber supplies, which are as indispensable to us in our daily life as the various metals and minerals. But more than that — the forests are necessary to preserve the fertility of the soil and to the maintenance of natural waterways. They help to conserve the soil by absorbing moisture and compelling it to percolate under the ground instead of running off the surface. Furthermore, they stop the water from rushing down in torrential streams, and thus prevent soil waste. They are essential for the preservation of water power and the development of waterways because they act as natural reservoirs and regulate the flow. By holding back moisture and giving it out gradually, they help to maintain a stable channel, thus preventing the drying up of streams in seasons of drought, and also checking floods during freshets.

The conservation of national forests received special attention in President Roosevelt's administration. The several steps in this development are set forth in his *Autobiography*. Shortly after taking office in 1901, an extensive examination of the needs and conditions of the forestry service was made. Experimental planting in the national forests was begun and studies were made with a view to developing the science of forestry. In 1905 the care of the national forests was transferred from the Interior Department to the Department of Agriculture and the United States Forest Service was created. By an act of the next year, all of the land found valuable for agriculture within the national forests was thrown open to settlement. The Forest Service established and enforced regulations favoring the settler as against the large stock raiser. In the summer of 1906 an order was issued compelling men who turned sheep and cattle to graze on the national forest land to pay for what they got. This order was bitterly opposed as infringing upon the old and established "rights" of the grazers who, from time immemorial, had freely used the public forest lands. Between 1906 and 1909 nearly

[1] *Readings*, p. 364.

half a million acres of agricultural lands within the national forests were opened to settlement.

In the meantime the area of forest lands was materially extended by presidential orders issued under the Forest Reserve Act. This area reached its maximum in 1910 when the forest domain in public ownership was in the neighborhood of 172,000,000 acres. For a number of years the area had been increased by presidential proclamations, for the most part on the basis of preliminary examinations. In 1909 a thorough revision of the boundaries was begun, and since that time there has been a reduction in the area. This has been mainly brought about as a result of the careful study of the national domain and the reclassification of lands on the basis of their actual character. In 1919 the National Forester put the area classified at approximately 150,000,000 acres.

Another phase of forest conservation was fire prevention. By 1908 the fire prevention work had become so successful that eighty-six per cent of the fires which did occur were held down to an area of five acres or less. In 1910, however, the area burnt was over four million acres and the loss was about $26,000,000. In 1911 an appropriation for fire protection was made on condition that the states duplicate the appropriation. The success of this plan is shown by the fact that in the year 1918–19 the Federal Government spent less than $100,000 while the coöperating states spent over $625,000. Still the fire losses are serious. The Federal Forester attributes them to: (1) inadequate trails and roads, (2) insufficient fire-fighting forces, (3) lack of motor equipment, and (4) lack of an aroused public sentiment in matters of fire precaution and prevention.

A most significant departure was made in the administration of President Taft by the Appalachian Forest Reserve law of 1911, mentioned above, which provided for a large appropriation of funds "for the purchase of land for national forests on the watersheds of navigable streams." This made possible federal conservation even in Eastern states where lands had never been owned by the Federal Government, and marked the beginning of a national forestry system, although the measure was only accepted by states' rights advocates on the theory that the system was to be limited to the protection of navigable streams over which Congress has a certain dominion under its interstate com-

merce power. Provision was also made by this law for coöperation between the federal and state governments in protecting forests from fires.[1]

Public forests, after all, are but a small part of the timber resources of the country. Most of the forest land is in the hands of private companies and individuals. As the Secretary of Agriculture reported in 1919, "the greater part of the lumber annually produced is cut from private lands on which the appearance of new growth is at best a matter of accident, is likely to be long delayed, or may never occur. Without concerted action under public coöperation and direction, the problem will not be solved. Private initiative cannot be depended upon to secure the requisite conservation."

In no other field is there more necessity for close coöperation between the National Government and the states than in that of forestry. One half of the standing timber in America is concentrated in three states — Washington, Oregon, and California. About ninety per cent of the lumber and wood-pulp business is concentrated in eight or ten states, while the people of the whole country as consumers are vitally interested in its operations. Naturally the states with great forests, being subject to the powerful influence of the timber companies, want to be left undisturbed in their interests and to obtain all federal forest lands that happen to be within their borders. On the other hand, the states in which dwell the major portion of the consumers, cannot be indifferent to the matter of developing and using such forests. So the issue is carried into Congress and a continual expansion of federal control is to be expected in the normal course of events.

The development of new forests is as important as the right use of existing resources. It takes time to grow trees, and private companies are in search of immediate profits. How can they be prevented, therefore, from stripping their lands, cutting down small trees, and leaving a wilderness of underbrush behind them? How can they be encouraged to cut only the mature trees and protect the new growth? What methods can be devised to induce those who own vast tracts of waste land to plant and cultivate forests? One of the most promising suggestions is that the taxing power be used to effect such designs. It is now proposed that taxes on land devoted to the growing of

[1] See below, p. 444.

young trees be reduced or abolished and that the owners of new forests be taxed only when they actually begin to reap financial rewards for their long waiting.

Broadly speaking, therefore, national forest policy now embraces the following elements: (1) the extension of public ownership to vast forest tracts now in private hands in the various states; (2) the purchase by the Federal Government of large tracts of denuded or cut-over land for the purpose of reforestation; (3) the creation of additional state and municipal reserves; (4) closer coöperation between the National Government and the states in fighting forest fires and conserving existing resources; and (5) a readjustment of taxing policies by states and perhaps the United States to encourage the growth of new forests.

Water Power

The Geological Survey of the United States recently estimated the water power of this country available for ultimate development at about 54,000,000 continuous horse power. At the same time it estimated that all the power which could be developed by all stationary, steam, and gas plants in the country is only about 30,000,000 horse power. The importance therefore of utilizing our water power resources hardly needs to be emphasized.

The policy to be applied, however, has been slow in its development. At first power sites went with lands sold by the Government. In 1906 a new principle was adopted in the case of sites yet remaining on the national domain. President Roosevelt took the position that they should not be sold outright, but should be leased by the Government on a rental basis. Under his inspiration, the Government made the experiment of renting a certain site to a private company for a period of forty years — thus departing from traditional methods. Four years later Congress authorized the President to withdraw from sale and entry public lands having water power sites on them. Acting under the authority of this law, President Taft made important reservations of land valuable for power development.

The policy of reservation undoubtedly checked the activities of private companies in the hydro-electric field, and for several years the disposal of power sites was the subject of political

strife. On the one hand there were those who believed that the Government should itself build and operate power plants or lease its sites to states and cities for that purpose. On the other hand there were those who advocated the immediate and outright sale of sites to private parties. Between the two stood a group of men who took a middle ground, namely, that ownership should be reserved to the nation, while private initiative should be invited to construct and operate plants under long-term leases.

For a decade or more members of Congress wrangled over the matter while millions of horse power went to waste in the rivers under federal jurisdiction. At last, in 1920, Congress enacted the Federal Water Power Law in order to put these waterfalls into service. The Act created the Federal Power Commission composed of the Secretaries of War, Interior, and Agriculture. Water power in the national domain and along navigable streams is placed under the control of this Commission. Power sites are not to be sold; they are to be leased for a term not exceeding fifty years. Private companies must pay a rental for sites and submit to the regulation and control of the Commission. Cities and states may lease sites free of charge if they use their rights for public purposes. Provisions are made for close coöperation between the Federal Commission and state commissions in the development of hydro-electric power on a national scale. The alacrity with which the states affected responded to the national appeal is full of encouragement for the future.

Indeed there is no phase of modern progress that deserves more serious consideration than that of developing and distributing such power. An immense amount now goes to waste and there is great lack of efficiency in operating hundreds of isolated plants. Some are overloaded at times and others are producing more electricity than they can dispose of close at hand. Moreover the cost of operating individual plants is unduly large owing to the necessity of maintaining separate overhead administrations.[1] Each company must have its offices, its officials, its financial supporters, and a complete managerial equipment.

A remedy for this state of affairs has been offered in the "superpower plan" — the union of water and steam plants throughout whole sections of the country and the creation of "great

[1] Milton Conover, in the *Political Science Review*, Vol. XVI, p. 647.

electric highways" into which all the power of many plants can be poured and from which it can be distributed as needed to consumers. Such a design, of course, could be effected only by coöperative effort among many states, private companies, and the National Government. It would raise problems of monopoly, government ownership, and public regulation. The difficulties involved in realizing the idea are enormous, but the governors of several states have already held conferences on the subject, and authorities at Washington, under the inspiration of the Secretary of Commerce, Mr. Herbert Hoover, have taken it under consideration. It is passing beyond the realm of engineering theory into the sphere of statesmanship.[1]

National Mineral Resources

Coal, iron, oil, and phosphates form the basis of industrial and agricultural prosperity. They may be used in such a way as to build up huge private fortunes or they may be regarded as a national heritage for the common good. In the beginning of our history the Federal Government sold millions of acres of valuable minerals to private persons as farming, timber, and waste lands. When the principle of national reservation was adopted in 1891, however, the remaining forest and waste lands containing mineral resources were withdrawn from sale. Agricultural lands, which passed to private owners under the Homestead Act, still carried with them the title to all mineral deposits found beneath the soil. Thus a national gift, intended to make an independent, home-owning farmer, often made a coal or oil baron instead! Finally this practice was discontinued by acts of Congress, passed in 1910 and 1912, which separated the surface of the land from the sub-surface and reserved to the Government mineral deposits found under the soil granted to farmers. By the policy of reservation the Federal Government found itself in possession of oil lands estimated at 6,700,000 acres, coal lands placed at a figure ranging from 30,000,000 to 70,000,000 acres, and phosphate lands of approximately 2,700,000 acres.

Reservation, however, merely withheld lands from sale; it did not provide for their development. The evils inherent in this state of affairs were recognized by Congress in 1914 when it

[1] See the "Giant Power" Number of *The Survey* for March, 1924.

passed the Alaska Coal Leasing Act, authorizing the Secretary of the Interior to lease coal lands to private concerns under certain restrictions as to rentals and labor conditions. Three years later, Congress applied similar principles in the Potash Leasing Act. The crowning act in this series was signed by the President on February 25, 1920, applying the principle of national ownership and leasing to millions of acres of coal, oil, and phosphate lands. Private enterprise is invited to develop these resources on a rental basis. No lease is to run for more than a specified period, but any lease may be renewed on the expiration of the term. The royalties and rentals to be paid are prescribed under the provisions of the law.

While giving attention to control over coal lands still owned by the public, the Federal Government is devoting more and more consideration to conservation in the use of coal. The Secretary of the Interior has stated that approximately ninety per cent of the coal consumed in the average steam plant is lost. In other words only about ten per cent of the heat in the coal is actually transformed into energy and harnessed for use. An experienced authority makes a conservative estimate of waste in the following picturesque language: "Every fifth shovel full of coal that the average fireman throws into his furnace serves no more useful purpose than to decorate the atmosphere with a long black stream of precious soot."

In 1919 the Secretary of the Interior reported that in one plant visited by the engineers of his department a preventable waste of 40,000 tons a year was discovered. By changes in the admission of air to the furnaces and other methods the engineers in the Bureau of Mines were able to increase the economy of coal in the ships operated by the Emergency Fleet Corporation by sixteen per cent, thus making six pounds of coal do the work of seven. Such an economy generally effected in the United States would produce an annual saving of coal equal to the annual consumption of France and Italy together. It is thus evident that by scientific research and experimentation, immense economies may be realized in fuel consumption. The United States Coal Commission in its reports of January, July, and September, 1923, points out serious wastes and abuses in the coal industry, which call for better management in that vital branch of national economy. Under the superpower plan mentioned

above huge savings in transportation could be effected by burning coal at the mouth of the mines instead of carrying it to isolated plants, sometimes hundreds of miles away.

Conservation and Use of the Soil

A basic resource of the nation is, of course, the soil. The whole country depends upon it. James J. Hill once said: "In the last analysis, commerce, manufactures, our home market, every form of activity, run back to the bounty of the earth by which every worker, skilled and unskilled, must be fed, and by which his wages are ultimately paid."[1]

While we had at our disposal vast areas of virgin soil, we took it for granted that agriculture could take care of itself and that manufacturing alone needed our best energies and skill. During the pioneer days, the frontiersmen cleared away forests for farms, and after getting what they could out of the land, abandoned it, moved forward, and repeated the process. That the application of science to the abandoned areas would have renewed the bounty of the soil seldom occurred to the pioneers; it was only natural that the refinements of agriculture should have been neglected amid the rough struggles of the frontier.

As the tide of land-hunting pioneers swept westward it left behind it neglected and abandoned farms. Throughout New England and the Eastern states there are deserted farmhouses falling into ruin, and vast areas once under cultivation are being overgrown with scrub. In many counties of the Middle West the rural population is steadily declining in numbers, and farming is either at a standstill or sinking lower in the scale of prosperity. There are, it is true, many causes for this, but the exhaustion of the primitive fertility is first among them.

It is not only the methods of tilling which account for the decline in fertility. The soil is also being depleted by natural causes, the principal one of which is erosion, or the sweeping away of the fertile surface into streams by means of torrential rains and floods. It is estimated that 1,000,000,000 or more tons of the richest soil are annually carried into the sea by the rivers. Millions of acres, particularly in the South, have been rendered bare and useless for agriculture largely by erosion. Until the

[1] *Proceedings of a Conference of Governors*, 1908, p. 72.

extension of scientific forestry throughout the country this wastage will go on practically unrestricted.

Fortunately, however, the federal and state governments give increasing attention to forestry and to the conservation and right use of the soil. The Department of Agriculture at Washington carries on continuous research in problems of fertilization and, through the county farm-extension agents,[1] makes demonstrations on the land. It wages war on injurious insects. It works at the problem of improving the quality and yield of all useful plants and stamping out plant diseases. The agricultural colleges and experiment stations in the states, sustained in part by federal funds, supplement and strengthen the work of the Federal Government and facilitate the distribution of practical information to those who till the soil.

While lending aid in the improvement of the methods of agriculture, the Federal Government is widening the area for cultivation by reclaiming arid and semi-arid lands through gigantic irrigation projects. The Newlands Act of 1902 authorized the Secretary of the Interior to undertake the work of reclamation on a large scale and provided funds from the sale of public lands. The construction work is done through the Reclamation Service, mainly by private contractors. Reservoirs, drains, and canals are built on favorable sites and water is distributed directly to ditches on the land to be reclaimed. This land is then sold in small plots to settlers who pay for it in installments, and so contribute to the fund for new undertakings. Within two decades about 1,600,000 acres were made fit for use and 1,120,000 acres were actually irrigated.

Some of the states in the West are also carrying on reclamation work. The Carey Act, passed by Congress in 1895, transferred large arid regions to those states on condition that they undertake irrigation projects. The Warren Act of 1911 provides for coöperation between the state and federal governments by making water from the federal reclamation systems available to state enterprises.

Waterways

In the early period of our history, previous to the development of the railways, water transportation was of special impor-

[1] See below, chap. xxxiv.

tance. Great attention was given by state and federal governments to improving facilities for navigation. Rivers and lakes were supplemented by canals built by public or by private enterprise. When the railway lines were laid out in every direction, many water routes were abandoned and attention was concentrated mainly on transportation by land.

Once more, however, the problem of water transportation comes to the front. During the past decade it has taken on a new aspect. Since our commerce is growing more rapidly than our railway facilities the development of water routes has become a pressing concern. Carriage by water, especially of bulky freight, is ordinarily cheaper than by rail and so it acts as a regulator of freight rates. When planned in relation to railroads, waterways admirably supplement them and play an interesting rôle in national economy. With a mileage of waterways in the United States equal to one fourth that of the railways and with only one half of that mileage now in use, the question of improving old routes and opening new routes naturally forms a subject worthy of statesmanship.

Congress has done much in the past in deepening rivers and harbors, but its work has been desultory and unsystematic, planned largely with a view to local and selfish interests. So far there has been a lack of definite and continuous planning. Many separate projects have been started and never carried to completion.

Indeed in this sphere of economic activity we find most of the difficulties inherent in planning and coöperating on a national scale. It is urged, and certainly not without justification, that government restraints and interference in the field of business enterprise tend to stifle individual initiative and bring about stagnation. On the other hand it is equally apparent that reliance on private persons and corporations to effect great collective purposes is reliance on a frail reed. If they remain isolated in a state of frenzied competition, obviously, no public policies demanding an intelligent concert of interested parties can be realized. If they draw together in great combinations they tend to become intolerable monopolies or make use of their power to prevent the execution of collective undertakings on the part of the Government. For example, there has been no material improvement in the freight terminal facilities on the

island of Manhattan, the heart of New York, for half a century, mainly on account of the rivalry between the New York Central and competing railway companies, the ineptitude of the municipal government, and the jealousy of state politicians. How to foster the ingenuity and energy of private enterprise, and at the same time bring about coöperation in effecting great public purposes is, indeed, one of the unsolved problems of politics.

CHAPTER XX

TERRITORIES AND EMPIRE

The founders of the American system, in giving the name "United States" to our country, contemplated a union of equal states, each inhabited by an English-speaking population, enjoying self-government, and sharing the benefits of the federation on the same terms. They did provide, of course, for territorial government, but they viewed territories as potential states held only in temporary tutelage. In the acquisition of Hawaii, Porto Rico, the Philippines, Guam, Tutuila, and the Virgin Islands, the Government of the United States made a break with its historic policy; it undertook to govern other races and nationalities that in some cases at least could not possibly be assimilated to the system founded by the Fathers. These acquisitions were made in the mere course of our commercial and military expansion without much thought as to consequences. When they were actually brought under the flag a fierce debate arose as to their destiny.

The types of opinion held on the subject may be roughly classified in the following fashion. There are some who maintain quite frankly that the United States can profit commercially by the ownership, development, and exploitation of imperial domains just as the powers of Europe have done for centuries. That motive is clear and calls for no explanation. At the other extreme are those who claim that the government of "subject races" violates the principles of the Declaration of Independence, involves the United States in imperialistic enterprises like those undertaken by European countries, and leads to grave international complications. There is still a third group who take a more sentimental and humane attitude toward the problem of governing the dependencies; they speak of "the white man's burden," meaning his duty to educate and civilize backward and primitive peoples. It was this view which President McKinley voiced when he said of the Philippines: "There was nothing left

for us to do but to take them all, and educate the Filipinos, and uplift and civilize them, and by God's grace do the very best we could by them as our fellow men for whom Christ also died." No doubt throughout colonial administration, all motives are mixed; the desire to do good is mingled with eagerness to make money out of colonies. We now have colonies. For weal or woe, the people of the United States, therefore, are confronted with the problem of administering imperial dominions scattered from the Caribbean to the Indian Ocean.

The Legal Powers of the National Government over Territorial Dominions

The Constitution of the United States makes no express provision for the acquisition of territory, and at the time of the Louisiana purchase the question was raised whether the Federal Government had the power to buy that domain. President Jefferson at first doubted the constitutionality of the purchase, and in the summer of 1803 he wrote to John C. Breckinridge concerning the subject: "The executive in seizing the fugitive occurrence which so much advances the good of their country have done an act beyond the Constitution. The legislature, in casting behind them metaphysical subtleties and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it."[1]

However, men who took a broader view of the matter claimed that there was full constitutional warrant for the action, inasmuch as the Federal Government enjoyed the undoubted right to acquire territory under the treaty-making power. Even Jefferson finally gave up the idea that it was necessary to amend the Constitution in order to purchase Louisiana, and later the Supreme Court held that, "the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory either by conquest or by treaty."[2]

Congress governs federal territory under that clause of the

[1] *Works* (Ford ed.), Vol. IV, p. 500.
[2] American Insurance Co. v. Canter, 1 Peters, 511.

Constitution giving it power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The conflict over the nature of the authority conferred on Congress by this provision furnishes a long and stirring chapter in the constitutional history of the United States. During the first half of the nineteenth century, the contest involved the question as to whether Congress could prohibit slavery in the territories. The pro-slavery wing of the Democratic party contended that the national legislature had no such power. Radical Republicans, on the other hand, maintained that it even had no right to permit slavery in the territories.

The issue was reopened in 1898, with the acquisition of our insular possessions, in the form of the somewhat striking question, "Does the Constitution follow the Flag?" The answer to this proposition is simple: the Federal Government cannot go anywhere or do anything except under some power conferred by the Constitution. But this leaves unsettled the problem of what clauses of the Constitution control the federal authorities in the government of territories. It requires no very subtle analysis to discover that certain constitutional provisions are designed to restrain the operations of the Federal Government within the states; but do all the limitations in behalf of private rights contained in the original Constitution, and especially in the first ten amendments,[1] run into the territories and control the Federal Government there? In his famous opinion in the Dred Scott case, Chief Justice Taney declared that they did, and hence that slavery could not be prohibited there because that would deprive the slave-owner of his property without due process of law — a gross violation of the private rights guaranteed under the Constitution. Many years later the Supreme Court held that the Seventh Amendment required a unanimous verdict in common law trials, and controlled both Congress and the territorial assemblies.[2]

A new aspect was given to this question when the Hawaiian Islands and the Philippines were acquired, because it was obviously impossible to apply there all the elaborate principles of Anglo-Saxon jurisprudence laid down in the first ten amendments to the federal Constitution. In a series of Supreme Court

[1] See *Readings*, pp. 134–137.
[2] Springville *v.* Thomas, 166 U. S. 707 (1897).

decisions,[1] known as the "Insular Cases," many technical points are involved, but the upshot of them all is that the Constitution may be divided into two parts, fundamental and formal; that only the fundamental parts control the federal authorities in the government of territories; and that the Supreme Court will determine, from time to time, as specific cases arise, what parts of the federal Constitution are fundamental and what parts are formal.[2] Thus we may say, with a judge of the United States circuit court of appeals for California, that, for practical purposes, "the territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the Constitution, nor subject to its complex distribution of powers of government as the organic law, but are the creation exclusively of the legislative department and subject to its supervision and control. The United States, having rightfully acquired the territory and having become the only government which can impose laws upon them, has the entire domain of sovereignty, national and municipal, federal and state. It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the circumstances of the people." [3] Under this liberal interpretation of the Constitution, Congress may establish and maintain practically any form of government in the insular territories which does not violate too grossly the political traditions of the American people.

I. With the admission of Arizona and New Mexico in 1912, the last of the continental domain of the United States was laid out into states, and the long history of conflicts over territorial and state organization brought to a close. There are, however, four territories which possess governments modeled on those which were traditionally established for the "organized" territories of the continental domain. These are Alaska, the Hawaiian Islands, Porto Rico, and the Philippines.[4]

The first of these, Alaska, secured from Russia by purchase in 1867, remained under direct government from Washington

[1] The following cases relate especially to the position of the new territories in our political system: Downs *v.* Bidwell, 182 U. S. 244 (1900); Dooley *v.* the United States, *ibid.*, 222; Dooley *v.* the United States, 183 U. S. 151 (1901); Pepke *v.* the United States, *ibid.*; Hawaii *v.* Mankichi, 190 U. S. 197; Dorr *v.* the United States, 195 U. S. 138; De Lima *v.* Bidwell, 182 U. S. 540 (1900).

[2] See *Readings*, p. 375, for a succinct statement by Justice Day of the Supreme Court of the United States.

[3] Willoughby, *Territories and Dependencies of the United States*, p. 22.

[4] Porto Rico, Alaska, and Hawaii each has a delegate in Congress who may speak but not vote. The Philippines have two "resident commissioners."

until 1912, when Congress enacted a law providing for a senate and house of representatives, both elected by popular vote. The powers of the legislature are defined by law and the executive authority is vested in a governor appointed by the President and Senate of the United States. Alaska, long regarded as a cold and barren waste of little political importance, has now come into considerable prominence on account of the discovery of immense coal areas, in addition to the precious metal regions. The proper treatment of the federal domain in that territory and the provision of railway facilities for opening up the natural resources are problems of first-rate importance at Washington. Advocates of the conservation of the resources seek to avoid the wastes which occurred in disposing of the continental domain; and to escape monopoly they have brought about government ownership of the important Alaskan railways.

The Hawaiian Islands were annexed by a joint resolution of Congress approved July 7, 1898; their administration is still based on the organic act of April 30, 1900, which erected them into a territory and created a complete system of government. The provisions of the Constitution and laws of the United States, applicable to local conditions, were extended to Hawaii; and American citizenship was conferred upon all persons who were "citizens of the republic of Hawaii on August 12, 1898." The governor, secretary, and judges are appointed by the President and Senate. The legislature consists of a senate and a house of representatives, and the members of each are elected by popular vote. Every voter must be a citizen of the United States, twenty-one years of age, and a resident of the territory of not less than one year's standing; he must be duly registered and must be able to read, write, and speak either the English or Hawaiian language.

The possession of Porto Rico by the United States dates from the raising of the American flag on that island in July, 1898. For almost two years the new domain was governed under military authority, but on May 1, 1900, the organic act of Congress erecting civil government in the island was approved by the President. This law provided for a governor and executive council appointed by the President with the consent of the Senate of the United States, for a lower house elected by popular vote, and for the exclusion of Porto Ricans from American citizenship. Under this act there were many long disputes between the gov-

ernor and the elected representatives in the legislature and persistent demands for more self-government. In response to popular sentiment Congress, during the administration of President Wilson, enacted in 1917 a new organic law for Porto Rico. Under this measure, the residents of Porto Rico are collectively admitted to American citizenship. The chief executive officer is the governor who is appointed by the President and Senate of the United States. There are six executive departments: justice, finance, interior, education, health, and agriculture and labor. The heads of the departments of justice and education are appointed from Washington in the same way as the governor, but the other chiefs of departments are chosen by the governor and senate of Porto Rico. There is a legislature of two houses. The senate, composed of nineteen members, and the lower house of thirty-nine members are elected by popular vote for four year terms. The suffrage is conferred upon all adults who have complied with certain residence requirements and literacy tests.

The problem of governing the Philippine Islands is infinitely more complicated than that of governing Porto Rico. The Philippine archipelago embraces no less than 3141 islands and islets, among which Luzon, Mindanao, Samar, Negros, Panay, and Mindoro are the most important. In March, 1903, the total population amounted to 7,635,426, of which 461,740 were classified as "wild"; fifteen years later the figure stood at 10,350,640.

There are representatives of about thirty different tribes, speaking as many different dialects. The civilized inhabitants of the islands are nearly all adherents of the Catholic faith, but they range in culture from educated and wealthy Spaniards to poor and wretched natives. It is small wonder, therefore, that Congress has had great difficulty in devising a system of government that will meet the needs and aspirations of the proud and independent elements of the population, and at the same time guarantee security of life and property throughout the whole archipelago.

The Philippines were acquired under the treaty with Spain. The protocol suspending hostilities with that country provided that the United States should hold Manila pending the conclusion of a treaty of peace which should determine the disposition and government of the islands. The treaty, duly signed at Paris on December 10, 1898, contained the definite transfer of the archi-

pelago to the United States, leaving the status of the islands to be determined by Congress.

The development of American government in the Philippines falls into five stages. (1) In the beginning, a considerable portion of the inhabitants were in revolt against American rule, and the islands were governed by the President under military authority. In January, 1899, a commission was appointed to act in conjunction with Admiral Dewey and General Otis in extending American authority throughout the Philippines, and to investigate the whole problem of government there.[1] (2) On receiving the recommendations of this first commission, the President appointed, in March, 1900, a civil commission, with William Howard Taft at the head, to continue the work of establishing civil government which had already been begun by the military officers; and, in 1901, the President transferred from the military governor to the president of this commission all civil powers of the executive branch of the government in the provinces in which tranquillity was restored. Under this order, Mr. Taft was made civil governor of the Philippine Islands. (3) In 1902, Congress passed the first organic act for the Philippines, providing, among other things, that after the completion of the census and the pacification of the islands a legislative assembly should be erected. The third stage in the construction of the Philippine government was reached on October 16, 1907, when the first representative assembly elected in the islands under the authority of the United States was opened at Manila. (4) During President Wilson's administrations the policy of granting larger autonomy looking toward independence was deliberately followed. Under an act of Congress passed in 1916, known as the Jones law, the commission was supplanted by a senate elected by popular vote, and the governor-general, Francis Burton Harrison, as rapidly as possible, turned over Philippine offices to the natives. (5) The accession of the Republicans to power in 1921 brought a reversal of the Wilson policy. General Leonard Wood and a former governor of the Philippines, W. Cameron Forbes, were sent out as commissioners to conduct an investigation, and they made a somewhat critical report on the conditions in the islands, especially on the mis-

[1] The two reports of this commission, November 2, 1899, and December 31, 1900, are a veritable mine of information on Philippine conditions.

management of the Philippine banking system. General Wood was appointed governor and, although he did not entirely reverse the policy of his Democratic predecessor, he did put a firm hand on all branches of administration. In doing this, he came into collision more than once with the advocates of autonomy and independence, but was consistently sustained by the Government at Washington.[1]

The executive branch of the Philippine government consists of the governor appointed by the President and Senate of the United States. The legislature consists of the senate, as mentioned above, and an assembly elected by the voters in those portions of the islands not inhabited by Moros or other non-Christian tribes. The franchise for voting is limited by somewhat complicated qualifications: every voter must take an oath of allegiance, and, among other things, he must be a property-owner, or a taxpayer, or able to read, write, and speak English or Spanish.

The question of the final disposal of the Philippine Islands has long been the subject of discussion. In 1900, the year following the ratification of the treaty with Spain, the Democratic party in its platform condemned and denounced the leaders of the Republican administration for having placed the United States, "previously known and applauded throughout the world as the champion of freedom, in the false and un-American position of crushing with military force the efforts of our former allies to achieve liberty and self-government." The platform then strongly urged "an immediate declaration of the nation's purpose to give to the Filipinos, first, a stable form of government; second, independence; and, third, protection from outside interference." Again, in 1912, the Democratic party favored an immediate declaration of the nation's purpose to recognize the independence of the Philippine Islands "as soon as stable government can be established." By the Jones Act of 1916 cited above, Congress declared that it was the purpose of the United States to withdraw from the Philippines and to recognize their independence "as soon as stable government can be established therein." The Democratic sponsors of this act did not, however, fix the time of American withdrawal, and the Republican administration which came to power in 1921 announced the postponement of that event into the indefinite future.

[1] See the valuable work by M. M. Kalaw, *Self-Government in the Philippines* (1919).

It is clear from the continued agitation in Porto Rico and the Philippines that there is a deep, if not widespread, discontent with the status now assigned to these two dependencies. Four alternatives are offered by those who are attempting to find a way out of the present difficulties. It has been suggested that these territories should be admitted to the Union and endowed with the autonomy allotted to states under the Constitution. A second proposal is to the effect that they should be given the position of a "dominion" — a position analogous to that enjoyed by Canada in the British Empire, for example; but there are constitutional barriers in the way of that solution of the problem. In the third place, they might be given virtual independence, under American protection; that is, they might be put in the same class as Cuba, which has complete self-government as long as it preserves law and order and pays its debts, subject to the right of the United States to intervene at any time to maintain domestic tranquillity. Finally, there is independence, either absolute or with an international guarantee.

Of course the issue is not merely one of political arrangement. There are business and strategic questions involved in the status of the dependencies. Large amounts of American capital are invested in them and there are great opportunities for economic development ahead. Porto Rico is an important element in the maintenance of American naval power in the Caribbean. The Philippines occupy a similar position in the Far East. They afford a base for the protection of American enterprise in China; notice is served on the powers of the world that the United States is not to be ignored in any partition of privileges and trade in the Orient. At the same time it must be admitted that they are an element of weakness in that their defense involves immense naval risks. At all events no discussion of the status to be given to the dependencies can proceed very far without a consideration of their relation to the promotion of American trade and the problems of national defense. Perhaps it is not an accident that federal supervision of the dependencies is vested in the Bureau of Insular Affairs in the War Department, not in an independent colonial office.

II. A second group of territories of the United States is composed of those governed directly by federal officers without the intervention of a legislative assembly in any form. It includes

Guam, secured by the Spanish treaty in 1898, Tutuila and islets, acquired by settlement with England and Germany in 1899, the Panama Canal Zone, obtained by a treaty with the republic of Panama in 1904, and the Virgin Islands, purchased from Denmark in 1917.[1]

The government of the Panama Canal Zone is vested in a governor appointed for four years by the President and Senate; all other persons in the zone government are appointed by the President or under his authority and hold office at his pleasure. Notwithstanding the agreement made by the United States in the Hay-Pauncefote treaty with Great Britain in 1902 to the effect that the canal should be open to all nations without discrimination, Congress, by a law passed in 1912 provided that ships owned by American citizens and engaged in the coastwise trade should be exempt from tolls. Great Britain protested against this discrimination, and in 1914 Congress repealed the tolls exemption clause.

The District of Columbia, in area about seventy square miles, was accepted, as the seat of the Federal Government, from Maryland by Congress in 1790.[2] Several experiments in the government of the municipality by mayor and council were tried, but none of them proved successful. At last, in 1874, Congress made a radical departure in the government of the city by passing an act destroying the last vestige of popular representation.[3] The legislative powers of the District are now assumed by Congress, which has by rule set aside certain days to be devoted to the business of the District. The executive authority is vested in a board of three commissioners — two civilians and one military officer — appointed by the President and Senate. This board enjoys not only large administrative powers, but also makes ordinances relating to public safety, health, and welfare.

[1] The Wake Island, Midway or Brooks Island, Howland and Baker Island, and the Guano Islands are not under any organized form of government.

The government of Samoa is in the hands of a naval officer stationed at Pago Pago on the island of Tutuila; this officer has full executive and legislative authority. Guam is likewise governed by a naval officer in charge of the naval station. The Virgin Islands under an act of 1917 are administered by a governor chosen by the President.

[2] The district was originally ten miles square, lying on both sides of the Potomac River and including a small area granted by Virginia, but in 1846 the Virginia portion was returned to that state. The Federal Government was moved to Washington in 1800.

[3] The problem of negro suffrage was prominent in the District politics under an elective government, and was largely responsible for the drastic action of Congress in abolishing the council altogether. As a result the entire population is now disfranchised.

Protectorates

The island of Cuba, although it may not be regarded as a dependency, is under the protection of the United States. In the joint resolution of Congress demanding the withdrawal of Spain in 1898,[1] it was specifically stated that the United States disclaimed any intention of exercising sovereignty, jurisdiction, or control over the island except for the pacification thereof; and it was furthermore asserted that when that task was accomplished the government of the island would be left to the people. However, in 1901, a provision, known as the "Platt Amendment," was incorporated in the army appropriation act, which directed the President to turn the control of Cuba over to the inhabitants as soon as they established a regular government and expressly recognized in their constitution the protection of the United States and the right of American intervention under certain circumstances.[2]

In the summer of 1906, an armed uprising was fomented by discontented natives, and after repeated appeals from American citizens in Cuba, the Federal Government decided to intervene. A division of the army was sent to the island, and the entire administration was assumed by Governor Magoon representing the authority of the United States. American occupation lasted until January, 1909, when the government was turned over to the native president and congress, duly elected in the preceding November.

With the growth of American predominance in the Caribbean, the island of Haiti comprising two republics, Haiti and Santo Domingo, was drawn within our "sphere of influence." During President Wilson's administration, American marines were landed on the island "to suppress disorders." Without any specific authorization on the part of Congress, the two republics were, at a considerable cost of native lives, brought under American sovereignty. Nominally they are independent and the State Department at Washington has announced that our troops will be withdrawn as soon as American interests are securely established, but the exact time of withdrawal has not yet been fixed. By a similar process, Nicaragua became an American protectorate in 1916. The somewhat anomalous situation thus created by

[1] *Readings*, p. 378.

[2] See *Readings*, p. 379, for the circumstances.

executive action has never been regularized by Congress. Indeed, the Government's policy in the Caribbean has been the subject of extensive protests on the part of the natives; and some American citizens have also called it into question. Although these protests produced a modification of policy, especially with reference to Santo Domingo, the three republics are for practical purposes still protectorates of the United States, dominated, if not governed, by the State Department under the military power of the President.[1]

[1] In 1924, Honduras was occupied by American forces.

CHAPTER XXI

NATIONAL STANDARDS AND STATE RELATIONS

There was a time in the history of American government when the writer on that subject could make a rather sharp transition from the sphere of national authority to that of the state. Though the original Constitution specified important powers which Congress could exercise, the functions left to the states were so extensive and fundamental that men could, with a show of propriety, speak of the states as sovereign and the National Government as their agent in dealing with foreign countries. By a steady movement, however, the National Government has encroached upon the sphere ascribed to the states; under the Fourteenth Amendment it has secured a judicial control over all acts of state and local authorities touching the fundamental rights of person and property.[1]

More recently and in a manner less direct and spectacular, the negative authority over the states, exercised by the judicial department of the Federal Government, has been supplemented by a positive administrative control over many important matters — matters not at all within the range of the specified subjects enumerated in the Constitution. Nominally most of this control over the states has been secured under the power to appropriate money, but practically that is only the starting point. Congress makes large annual grants of money to the states in aid of agricultural, educational, industrial, labor, and social enterprises which are solely within the competence of the states. Furthermore, it has created many branches of federal administration engaged in the promotion of interests left by the Constitution entirely to the care of the states and — what is more significant — it actually determines in some instances the nature of the state administrative system established to make use of the appropriations voted from the federal treasury. Since the opening of the twentieth century, this line of action, coupled with the taxation

[1] Below, p. 482.

of incomes, has been perhaps the most striking development in the American political system.

Federal Subsidies to the States[1]

The practice of granting subsidies to states from the federal treasury is not a new one. By numerous acts beginning with the Land Ordinance for the Northwest Territory in 1785 and running down to our own time Congress has made grants, particularly from the sale of public lands, to the states for schools, roads, and canals. The most outstanding of the earlier measures was, perhaps, the Morrill Act of 1862, which set aside for the benefit of each state in proportion to its representation in Congress an enormous block of the national land and provided that the proceeds were to be devoted to the maintenance of one or more colleges engaged principally, but not exclusively, in teaching branches of learning related to agriculture and the mechanical arts. This Act, attacked by a Senator from Virginia as "an unconstitutional robbery of the Treasury for the purpose of bribing the states," attempted to impose no federal control over the use of the money by the states. Congress made the gift and trusted the states. Later amendments to the Act, however, went into some detail as to the management of the land grant colleges, committed the administration of the law to the Bureau of Education, and, let it be noted, empowered the Secretary of the Interior to withhold the allotment of any state which did not comply with the terms of the grant, subject to an appeal to Congress.

In 1887 Congress made a lump sum appropriation to each state for the purpose of maintaining an agricultural experiment station in connection with its agricultural college. In 1907 it increased the appropriation and laid down additional rules for the use of the money. Eight years later it established in the Department of Agriculture a State Relations Service charged with the duty of supervising the agricultural colleges and experiment stations. At the present time the whole field of relationships created by these subsidies has been covered in minute regulations reached

[1] This important subject is treated by B. A. Arneson, in the *Political Science Review*, Vol. XVI, pp. 443 ff., and by Austin F. MacDonald in his work, *Federal Subsidies to the States: a Study in American Administration;* see also A. N. Holcombe, "The States as Agents of the Nation," *Southwestern Political Science Quarterly*, Vol. I, pp. 307.

by agreement between state and federal authorities. In fact the coöperation is close, continuous, and helpful to both parties. Federal control is absolute, because funds can be withheld if rules are not complied with, but resort to this drastic action is seldom if ever necessary.

Under the administration of President Wilson, leader of the historic party of states' rights, still more radical steps were taken. Subsidies for old purposes were continued and to the amazement of those whose memories ran back beyond the Civil War the most astounding new functions were added. It is not possible to give even the barest outline of all the laws that grant subsidies to states or sketch the activities of the agencies, state and federal, called into being to execute these measures. Dr. MacDonald has devoted a book to the subject and does not pretend to exhaust it. However, as an index to the range of legislation falling within this class the following table is itself illuminating.

1. The Weeks Act of 1911 made appropriations for the purpose of enabling the Forest Service in the Department of Agriculture to coöperate with any state or group of states, when requested, in protecting the forested watersheds of navigable streams against fire. Though falling nominally under the power of Congress to regulate interstate commerce and hence navigable waters between states, this Act in effect established a system of coöperative forest protection by a combination of federal and state administrative authorities.

2. The Smith-Lever Act of 1914 made appropriations for extension work in agriculture undertaken by the Department of Agriculture and the agricultural colleges of the states. A small lump sum was voted to each state and the remainder was apportioned among the states — each receiving a share fixed on the basis of its rural population as compared with the rural population of the rest of the Union; in other words, the agricultural population, not states as such, was the basis of distribution. Even more striking was the additional provision that federal funds should not be given to any state until it accepted the terms of the Act and appropriated or otherwise secured a sum equal to that allotted by the law. Under this Act the agricultural extension work of the entire country is conducted according to broad principles which are uniform throughout the Union, and the county

extension agents who carry the message to the men and women on the farm are paid in part from federal funds and in part from state or local funds.[1]

3. The Smith-Hughes Vocational Education Act of 1917 did for the cities what the Smith-Lever Act did for the country districts. It appropriated federal funds to aid the states in teaching trades, industrial subjects, and home economics. The Act is carried out under the direction of a Federal Board for Vocational Education composed of the Secretaries of Agriculture, Commerce, and Labor and three citizens representing manufacturing and commercial, agricultural, and labor interests.

4. The Federal Highway Act[2] of 1916 inaugurated the practice of granting immense sums of money to the states for public roads and exercising the closest scrutiny over the construction and maintenance of such roads. The Act provided for a careful apportionment of the money among the states on the basis of population, area, and postal route mileage. Under its terms, modified by later amendments, uniform scientific specifications have been forced upon state highway engineers, a coöperative agreement has been formulated by federal and state officers, a national conference of state highway officers has been held under federal auspices, and to cap the climax states which forbid their governments to appropriate money to public improvements of this sort are in effect ordered to change their constitutions! Under the control and stimulus of the Federal Government the highway legislation of the states has been multiplied many times in amount and raised to high standards in quality. And the fact must not be overlooked that several states and localities have been induced to incur enormous debts, in some cases out of proportion to their ability to pay as measured by customary standards.

5. The National Defense Act of 1916, extending principles laid down in the Militia Act of 1903, practically makes the militia of the states cogs in the national military machine. Federal aid is extended in this case, as in others, and federal standards as to equipment, drilling, officering, and service are rigidly applied. The very name "militia" has been dropped and the term "Na-

[1] See below, chap. xxxiv.

[2] This Act was based in theory at least on the clause of the Constitution giving Congress power over post-roads. It was extended in 1921; a proportion of the mileage of any road improved by federal aid must be used for mail-delivery purposes.

tional Guard" substituted for it. Thus that ancient badge of sovereignty, military authority, passes from the states to the nation.

It may be said that all these measures represent merely an extension of old practices authorized by the Constitution. From the beginning, it is true, Congress has disposed of federal lands by aiding the states in promoting education, constructing roads, and undertaking local improvements. It might seem also that the National Government, having immense forest domains of its own to protect, could enter into coöperative relations with the states in forestry affairs — without making a radical departure from established policy. As far as financial aid goes this seems sound enough, but the newer legislation listed here has advanced into the domain of state and local government and really creates a new organism of administration which is neither federal nor state in a strict sense. The end is not yet. There are in addition to the above measures three more laws which by no stretch of the imagination come within any of the enumerated powers of Congress as laid down in the Constitution.

1. The Industrial Rehabilitation Act of 1920 provides federal aid in restoring to civil employment persons injured in industry or any legitimate occupation. As Dr. MacDonald points out, "the number of workers disabled every year in the course of industry exceeds the total number of American soldiers incapacitated during the entire course of the World War." The above Act offers an incentive and monetary aid to the states to induce them to do justice by "the soldiers of the hammer and plowshare as well as the soldiers of the sword." Within a year thirty-five states had accepted the provisions of the law and begun work under federal supervision.

2. In 1918 Congress appropriated a large sum to assist the states in carrying on a campaign against venereal diseases. The states receiving aid under the law were required to appropriate dollar for dollar and to put into effect certain standard principles of legislation bearing on the subject. Federal officers were placed at the disposal of state boards of health and in some cases they carried out directly the provisions of state and federal law. Owing to the discontinuance of appropriations, most of this work ceased by 1924.

3. The Sheppard-Towner Act of 1921 went still more deeply

into social legislation — the reserved rights of the states — by appropriating federal money to states for the purpose of promoting the welfare of mothers and infants at the time of childbirth; nevertheless the law was sustained by the Supreme Court in the case of Massachusetts *v.* Mellon in 1923. The general administration of the law was placed in charge of the Children's Bureau in the Department of Labor subject to the supervision of a Board of Maternity and Infant Hygiene.

Under these laws about $200,000,000 a year is appropriated to the states in aid of functions which were once regarded as outside the domain of the National Government. This is perhaps not the most salient feature. Under these laws the states benefiting from federal aid must themselves make appropriations usually equal in amount and in some cases greater; hence the effect of federal action is to compel states to appropriate money for new functions or at least increase their appropriations for old functions. That is not all. Under these laws the states in question must enact a large and varied body of legislation conforming to federal standards. Moreover we now have the strange anomaly of state officers on federal pay-rolls and federal officers on state and local pay-rolls. We see state and federal officers in conference at Washington, not for a mere exchange of opinions, but for the purpose of formulating binding agreements as to the conduct of great branches of state and federal administration. Reviewing this strange situation, we are moved to inquire what has become of the "federal" system which presumably distributed the public functions between the national and state governments.

Federal Agencies and State Functions

According to the strict interpretation of the Constitution the business of the Federal Government should be limited to functions which are assigned to it by the Constitution. If this rule were rigidly followed what would become of the Departments of the Interior, Agriculture, Commerce, and Labor to say nothing of many bureaus, divisions, and minor agencies at Washington? If, as the strict constructionist claims, the federal lands within the borders of the states should be turned over to the states and if the National Government should refuse to have anything to do with functions which clearly belong to the states, then the General

Land Office, the Reclamation Service, the National Park Service, the Bureau of Mines, and the Bureau of Education would disappear from the Department of the Interior, or rather their jurisdiction would be confined merely to the territories. If the same strict rule were applied practically the whole department of Agriculture would be eliminated, and the functions of the Departments of Commerce and Labor would be so curtailed as to make their separate existence unnecessary.

What is the significance of the legislation creating federal agencies charged with duties relative to matters originally left to the competence of the states? In the first place it may be said that many of them were originally established, to use political slang, as "a sop" to some special interest such as agriculture or labor. But it is not right to give much weight to this motive. Most of the functions in question sprang from a desire to promote a more extensive and more scientific study of the problems falling within the jurisdiction of the states than any one state could make for itself. Such, for example, was the historic function of the Bureau of Education. Originally, it did not administer; it collected information, made special studies, issued publications, and gave advice and counsel to state and local educational authorities. Somewhat in the same way the original Bureau of Labor assembled statistics, analyzed laws, and spread abroad an understanding of modern labor policies. It is interesting to note also that the creation of new federal agencies follows somewhat closely in time the growth of interest among the states in the functions committed to the care of those agencies. States begin new lines of work, and when a number of them have advanced a certain distance they turn to the National Government for assistance.

There is a still deeper significance to the extension of federal functions. Modern science makes rapid strides in every field. It is expensive to make experiments. It is difficult to keep up with the sweep of events. So there arises the question: How can we make available to the humblest official in the most out-of-the-way place the results of the best thought, the greatest scientific achievements? Such results are beyond the reach of the local authorities, except in rare instances. If each of the forty-eight states makes its own researches, there will be an immense duplication of effort. Indeed, this is what happens

regularly. Often there are ten or fifteen expensive state commissions engaged in investigating the same problem. Hence, it seems reasonable and natural that the National Government should come into the field with its greater financial power and wider prestige and make available to state and local governments the fruits of the most advanced scientific research.

There is another aspect of the matter which deserves consideration, namely, the reflection of new nationalism in the extension of federal services. There was a time when the existence of ignorance, poverty, and degradation in one part of the union was regarded as a problem of that particular section. That state of affairs no longer obtains. Now there is in every field of human endeavor — education, commerce, agriculture, labor, science, and art — one or more national organizations. Among these societies there is a constant quest for higher standards and for principles applicable on a national scale. Whether it is in the field of health, housing, child welfare, or fruit growing, there are sure to evolve in some part of the Union, out of endeavor and experiment, new standards, and there is certain to spring up also a demand for the application of those standards on a national scale. In other words, America is becoming national in economy, science, thought, and culture. It is passing out of the provincial stage of its development.

One more point must not be overlooked. The costs of governmental services are mounting, and the states, especially those with small economic resources, find it increasingly difficult to carry their burdens. The sources of taxable wealth are not local, but national, in their distribution. For example, Smith owns a small farm in Indiana; it is taxable for local purposes; but it is mortgaged to Jones in New York, who receives in interest a large part of the proceeds of the farm. Is it just to put the whole burden of local improvements on local property irrespective of circumstances? The answer is not easy. As a large part of modern wealth is intangible, namely, stocks, bonds, and mortgages related to property scattered throughout the Union, it has become increasingly difficult for states and localities to tax such wealth. The national income tax reaches it more easily and surely, and there is a large body of people who believe that only through federal taxation can the funds be secured to raise the standards of public service throughout the Union. Thus the growth of

federal functions strikes at the root of the modern problem of the distribution of wealth.

It also offers one solution to the old problem of centralization *versus* decentralization in administration. If all administration in the United States were centralized in Washington and even the county farm-extension agents were appointed by the President, an immense machine would be created, a national bureaucracy, in other words. Such a bureaucracy is itself a formidable interest. It tends to harshness, dogmatism, and inhumanity, and it stifles local spirit, initiative, and ingenuity. On the other hand if all localities are left to themselves, some of them will inevitably sink to low levels in education, health, and culture. How to combine local initiative with national control and maintain high standards throughout the Union is really the problem at which the National Government is working in the extension of its functions. By distributing money automatically among the states on the basis of population, area, and other factors and requiring the states and localities to bear their fair share, the gravest evils in subsidies, especially favoritism, can be avoided. By a skillful adjustment of relations between the supervising federal authorities and the executing state and local authorities, national standards and local initiative may be combined. At all events here is a sphere of national endeavor which will deserve the most careful study during the coming years. It is here that the nature of American government and economy may be transformed.

In view of these circumstances, how can we separate American government into national and state government? Where is the dividing line?

PART III

STATE AND LOCAL GOVERNMENT

CHAPTER XXII

TENDENCIES IN STATE CONSTITUTIONAL DEVELOPMENT

The states are our laboratories for experimentation in politics. Some are old and staid; others are new and in process of rapid development. Some are agricultural, others are manufacturing, and still others possess a somewhat even balance between the two economic interests. Some have great cities; others have a very small urban population. As various needs arise from changing social and economic life and call for political action, a variety of institutions and practices are devised to meet those needs. Sometimes an individual in a rural community or a small city conceives a new political idea, persuades his neighbors to adopt it, attracts wider attention, and finally carries it to the capital of the state. As most state constitutions are easy to amend it takes a relatively slight effort on the part of citizens to bring about departures from ancient law and custom.

It is from the states that new political ideas usually make their way upward into the National Government. Many of them, as we have seen, had adopted popular election of United States Senators in effect long before enough momentum could be gathered to force an amendment to the federal Constitution. The same was true of woman suffrage and prohibition. Child labor legislation, workmen's compensation, railway regulation, and many other expedients in social control were first devised and tried in the states before anything was heard of them at Washington. It seems reasonable to infer, therefore, that whoever wishes to divine the tendencies in the National Government should study closely the tendencies in state and even city government, for they are our schools for political education.

Colonial Origins

The foundations of American government were laid during the long colonial period while the English colonists were learning the practical art of managing their own political affairs. The Revolution did not make a breach in the continuity of American institutional life. It was not a social cataclysm, the overthrow of a dominant class, the establishment of a new estate in power. It was rather an expansion of the energy of American enterprise that burst asunder the bonds which the competing interests in England sought to impose. American shipwrights could build vessels as fleet and strong as any that sailed the seas, and they were determined to conquer by main strength a free place in the world's market. American merchants were as ingenious as those who made England the nation of shopkeepers, and they could ill brook the restraints which condemned them to buy important staples in the marts of Great Britain. America was rich in timber, raw materials, and mineral resources, and American manufacturers chafed under laws compelling consumers to look beyond the seas for commodities which might well have been made in New England or Pennsylvania. It was discontent with economic restrictions, not with their fundamental political institutions, which nerved the Revolutionists to the great task of driving out King George's governors, councilors, judges, revenue officers, and soldiers.

There had long been executive, legislative, and judicial offices in all the colonies, and the American Revolutionists merely took possession of them. Unlike the French Revolutionists, they did not have to exercise their political ingenuity in creating any fundamentally new institutions. The Revolutionists of Rhode Island and Connecticut, where the governors, councilors, and judges were elected, found their ancient systems of government, based on seventeenth-century charters, so well suited to their needs and ideals that they made no alterations beyond casting off their allegiance to the king of Great Britain. The distribution of representation, the suffrage, the qualifications for office-holders, and the legislative, executive, and judicial institutions of old English origin were continued after the Revolution without many radical alterations.

On the eve of the Revolution there were thirteen colonies in

America — each with its separate institutions and its peculiar traditions, many of which, it is instructive to remember, were then older than are our national traditions to-day. In form of government, however, especially in its higher ranges, the colonies presented striking similarities. Each had a governor, an assembly, and a judicial system, and the Common Law of England, as far as it was applicable and had not been changed by legislation, was binding everywhere.

In eight of the colonies — Georgia, North Carolina, South Carolina, Virginia, New Jersey, New York, New Hampshire, and Massachusetts — the governor was appointed by the king and recognized as the king's personal deputy. He occupied a twofold position. On the one hand, he was the representative of British interests in the colony — the agent through whom the will of the British government was made known to the inhabitants, and the guardian who kept the crown informed on the state of the province. On the other hand, he was the highest executive official in the colony, charged with the conservation of the peace and advancement of the welfare of the colonists.

As the chief executive, he supervised the enforcement of the laws and he appointed, usually with the advice and consent of his council, the important civil officers. In virtue of his position as chancellor, he was head of the highest court in the colony, which entertained appeals from lower tribunals and exercised important original jurisdiction in many matters. Moreover, he granted pardons and reprieves. He was commander in chief of the colonial forces; he appointed the military officers of high rank, levied troops for defense, and enforced martial law in time of invasion, war, or rebellion.

In connection with the colonial legislature, the royal governor also enjoyed extensive powers. In all the eight colonies mentioned above, except Massachusetts, he nominated the council which composed the upper house of the legislature. He summoned, adjourned, and dissolved the assembly; he laid before it projects of law desired by the home government; and he vetoed laws which he thought objectionable. In short, the royal governor enjoyed such high prerogatives in colonial times that the first state constitution-makers, having learned by experience to fear executive authority, usually provided for the supremacy of the legislature and gave their governors very little power.

The royal governor, however, was by no means an unlimited sovereign in his province, for he was bound by his instructions and by the restraints which the assembly imposed through its power of controlling the grants of money. Indeed, in the innumerable disputes which fill colonial history, the assembly often triumphed over an obstinate governor because it was able to keep a firm grip on the purse strings. Toward the eve of the Revolution, his appointing power was curtailed by the claims of the council to a share in the distribution of patronage.

Unlike the other colonies which had governors appointed by the king, Massachusetts had a charter that set forth, among other things, the general organization and powers of the legislature. The governor could adjourn, prorogue, and dissolve the assembly, but he could not appoint the council, or upper house, and he could choose the civil officers only with its consent. However, he enjoyed considerable military authority; he organized the militia, appointed the chief officers, commanded the armed forces, and declared martial law in case of rebellion or invasion. Naturally this division of authority invited conflicts, and it so happened that Massachusetts led the way in throwing off all royal authority.

In Rhode Island and Connecticut the governor occupied a peculiar position. In the first place, he was elected annually by a general assembly composed of the governor, assistants, and representatives chosen by the voters in each city or town. In the second place, the governor did not stand out as a distinct official; he was little more than a figurehead, his functions being discharged only in coöperation with his assistants or councilors.

The executive authority in the proprietary colonies of Maryland, Pennsylvania, and Delaware stood on a different basis from that in the royal provinces or in Connecticut and Rhode Island. Each of them, as Professor Osgood says, was "a miniature kingdom of a semi-feudal type and the proprietor was a petty king" — a vast estate carved out of the royal domain and granted by the crown to a proprietor who, in theory at least, combined the rights of government with those of landlord, from which he derived large revenues. Nevertheless, under their power to control money grants, the popular branches of the

legislature in Pennsylvania and Maryland succeeded, toward the Revolution, in securing a tolerably effective control over the governor in the exercise of his large powers.

In all the colonies, except Pennsylvania, there were two branches of the legislature, and only in Massachusetts, Connecticut, and Rhode Island, was the upper house — to use the term in a general sense — elective. In these three New England colonies, the councilors, or assistants, as they were called, were chosen by the general assemblies, and thus could not assume the position of independence over against the representative branch, which was taken by the councilors of the royal colonies. In the provincial colonies, the upper house, or council, was chosen by the king acting through the royal governor, who usually determined the selection himself. In the proprietary colonies, the proprietor or his representative selected the councilors.

In addition to the usual legislative powers, that is, the right to discuss and vote on laws, the council had executive and judicial functions. It advised the governor; in conjunction with him it formed a judicial tribunal; it frequently controlled him in making appointments; and it discharged many of the official duties now vested in higher state officers, such as the secretary and treasurer. In the royal provinces the council became an aristocratic body, sympathizing generally with the governor and king in the contests with the representative branch of the government.

In every colony there was an assembly of representatives chosen by popular vote, subject to many restrictions on the right of suffrage. In Virginia the voter had to be a freeholder of an estate of at least fifty acres of land, if there was no house on it; or twenty-five acres with a house twelve feet square; or, if a dweller in a city or town, he had to own a lot or part of a lot with a house twelve feet square. In Massachusetts, the voter for member of the legislature, under the charter of 1691, had to be a freeholder of an estate worth at least forty shillings a year, or the owner of other property to the value of forty pounds sterling.

Most of the colonies also followed the example of the mother country in imposing special qualifications on members elected to the legislature. In South Carolina, for example, a member had to own five hundred acres of land and ten slaves or be worth one thousand pounds sterling in land, houses, or other property.

New Jersey members had to have one thousand acres freehold, while in Georgia delegates were required to own at least five hundred acres of land. In addition to property qualifications, religious tests were usually imposed on assemblymen.

Following the ancient practice of England, representatives were distributed, in colonial times, among distinct territorial districts rather than among equal groups of people. In New England the town was the unit of representation, and only a slight attempt was made to adjust the representation to the population. In the middle colonies and generally in the South, the county was the unit of representation, and, according to ancient English precedent, each county elected its representatives under the supervision of the sheriff as returning officer.

The colonial assemblies constantly maintained that they possessed entire and exclusive authority to regulate their domestic concerns. Especially in the matter of taxation did they stoutly assert their exclusive rights, not only in formal declarations, but also in actual resistance to the royal and proprietary governors. No attempts, however, were made to define and lay down colonial legislative powers in any complete written instruments. Such a procedure was almost unknown to the political practice of England; and no concrete need for it had arisen in the colonies. In the charters, the legislative power conferred was general, not specific. In addition to this general legislative power, the assemblies usually enjoyed a marked control over the executive department through their power to withhold the salaries of the officials.

Notwithstanding the large legislative rights asserted and enjoyed by the colonial assemblies, there were certain legal limitations on their authority. In the provincial and proprietary colonies, the governor exercised the right to veto laws, and in all colonies except Maryland, Rhode Island, and Connecticut laws had to be sent to England for royal approval. Furthermore a special act of Parliament provided that all laws, by-laws, usages, and customs in the colonies repugnant to laws made in England relative to colonial affairs should be null and void. Later, Parliament declared, with solemn emphasis, that the colonies and plantations in America were subordinate to and dependent on the crown and Parliament of Great Britain, which enjoyed the power and authority to make laws binding the

colonies and people of America in all cases whatsoever. A South Carolina court once went so far as to declare null and void an act of the colonial legislature of 1712 seizing the freehold of one man and vesting it in another; the court rested its decision on the ground that the law in question was against common right and Magna Charta. At all events the colonists were well acquainted with both theoretical and practical limitations on their assemblies, so that, after gaining independence, they acquiesced, though not without contest, in the courts' assumption of power to declare laws null and void on constitutional grounds.

Although there were in the colonies no cities of importance, measured by modern standards, the foundations of American municipal government must be sought in colonial times. It appears that there were about sixteen municipal corporations during that period, each of which received its charter from the colonial governor — New York and Albany in 1668, Philadelphia in 1691, and Trenton, New Jersey, the last, in 1746. The form of organization in general followed old English examples; the governing body was a common council composed of the mayor, recorder, aldermen, and councilors. The striking feature of the colonial municipal system was the fusion of executive, legislative, and judicial functions in the hands of the same body; and it is interesting to note that the commission form of municipal government now widely adopted throughout the United States is the return to the original principle in so far as it vests administrative and legislative powers in one authority.

In the sphere of rural local government we have departed even less from colonial models than in other branches of administration. The Revolution did not disturb, in any fundamental manner, the institutions of local government which had come down from early colonial times; for, as Professor Fairlie says, "the main features of the old systems continued in the different states. Towns in New England and the middle states and parishes in the Southern states remained unaltered; and are in fact not mentioned in most of the constitutions of the revolutionary period." In New England the unit of local administration was the town, which was governed by a meeting of the electors, who chose the town officers, levied taxes, appropriated money, passed by-laws, and reviewed the activities of the various local officers. Counties existed, of course, in New England, but only in rudi-

mentary form, and principally for judicial purposes. In the middle colonies, notably New York and Pennsylvania, there was a combination of town and county local government. Town meetings were held in New York as in New England. As early as 1691, however, a county board of supervisors, representing the various towns, was created and began to absorb at once the most important local administrative functions. In Pennsylvania, strong county administrative organization overshadowed the town and furnished the model for local government in a large number of Western states. In the South, the plantation system led to the formation of scattered settlements, so that local government had to be based upon the county rather than the parish. Thus, for example, in Virginia, "the county became the unit of representation in the colonial assembly and the unit of military, judicial, highway, and fiscal administration. The officers were the county lieutenant, the sheriff (who acted as collector and treasurer), justices of the peace, and coroners. All were appointed by the governor of the colony."

The First State Constitutions

During the revolutionary conflict the colonial governments, regularly established under the authority of the British crown, broke down or passed into the possession of the popular party. From the royal province, the governor fled before the uprising of the people, and with his departure the executive and judicial branches in their higher ranges went to pieces. Whatever the form, each colony during the Revolution had a legislature, congress, or convention chosen in some fashion by the supporters of the American cause. Sometimes the assembly was elected by popular vote, royalists being excluded; sometimes the members were chosen by local meetings of Revolutionists; and sometimes by town authorities. These provisional assemblies seized all the powers of government in their respective jurisdictions, made laws, levied taxes, raised troops, and directed the Revolution. The quarrel with the mother country had not advanced very far when the Revolutionists in each colony, except Rhode Island and Connecticut, proceeded to draw up formal constitutions for their own government. The two exceptions, finding their ancient charters well suited to their needs, merely renounced their allegiance to George III and went on their way as before.

A scrutiny of the early state constitutions reveals certain striking features. In the first place they are brief and simple in contrast to the bulky and complex documents of our time. The fundamental law of New Jersey adopted in 1776 fills only about five printed pages. The constitution of New York, drafted in 1777, including a reprint of the Declaration of Independence, covers less than sixteen printed pages, while the last constitution of New York, drafted in 1894, spreads over forty-three pages. The Virginia constitution of 1776, leaving out of account some passages from the Declaration of Independence, fills only about five and a half printed pages; the last Virginia constitution (1902) is ten times larger. The constitution of Oklahoma, admitted to the Union in 1907, crowds more than one hundred printed pages.

In the second place, while the makers of the first constitutions often spoke of government as founded on the consent of the governed, they did not think that consistency required them to give the vote to all adult males. They had been used to property qualifications under British dominion; they saw no reason for radical changes. They went back to the colonial tradition that related taxation and representation. They regarded property owners as the only safe depository of power and the best safeguard against the "excesses of democracy."

In carrying their theory into execution, they placed tax-paying or property qualifications on the right to vote. Broadly speaking these limitations fell into three classes. Three states, Pennsylvania, New Hampshire, and Georgia, gave the ballot to all who paid taxes, without reference to the ownership of property. Three states, Virginia, Delaware, and Rhode Island, declared that only freeholders could be entrusted with electoral rights. A third group of states, while restricting the suffrage, accepted the ownership of other things than land in fulfillment of the requirements. In Massachusetts, for instance, the vote was granted to all men who held land yielding an annual income of three pounds or possessed other property worth sixty pounds. Many states made a distinction between the voters for various state officers. In New York, for example, only freeholders having land worth at least £100 could vote for state senator and governor, while tax-payers and certain renters could vote for assemblymen.

Fearing that the interests of the wealthier classes could not be

amply safeguarded by restrictions on the suffrage, the first constitution-makers imposed still higher qualifications on persons eligible for the legislature and high offices. In New Hampshire, for example, a representative had to possess a freehold worth £100 and a senator a freehold worth £200. In nearly every state some such distinction was made. As the dignity of the office rose, so the property qualification upon the incumbent increased. In New Hampshire, the governor had to be worth £500, one half in land; in Massachusetts, £1000, all freehold; in Maryland £5000, one fifth freehold; and in South Carolina £10,000 freehold.

To property qualifications were added religious tests. In many states Catholics and Jews were disfranchised or excluded from office. In some states, for instance, Pennsylvania and South Carolina, belief in God and a future state of rewards and punishments was required of all voters; fear of eternal damnation was regarded as a check on wrongdoing in politics. North Carolina and Georgia specifically denied the ballot to anyone who was not a Protestant; Delaware withheld it from all who did not believe in the Trinity and the inspiration of the Scriptures. New York and Virginia, advanced for their day, made no discrimination on account of religious opinion. For office-holding, religious tests were also very common. In Massachusetts and Maryland, the office of governor was closed to all except Christians, and in New Hampshire, New Jersey, North Carolina, and South Carolina to all except Protestants. As a rule the same principle was applied to members of the state legislature.

A third characteristic of the first constitutions was unlimited faith in the legislature. Apart from the generalities in the bills of rights, those documents laid few restraints on the powers and procedure of the representative branch. Evidently it was to be supreme; that the courts were to exercise the right to declare laws null and void on constitutional grounds was by no means certain. Indeed the constitutions were not, as a rule, looked upon as solemn commandments of the people, for legislatures, on their own motion and without reference to popular judgment, often amended the instruments that were supposed to bind them.

If the legislature was to be sovereign, the executive was to be an object of suspicion. In their long and bitter conflicts with the royal governors, the colonists had grown to fear the authority

of a single officer, even though a creature of their own making. Their apprehension at the outset was so great that they empowered the legislature to choose the governor in all states, except New York and Massachusetts, where he was elected by popular vote. His term of office was usually fixed at one brief year; in most cases he did not enjoy the veto power; and in the exercise of such authority as was conferred upon him he was generally controlled by a council of some kind. In Pennsylvania, for example, the governor bore the more democratic title of president; he was elected by a joint ballot of the general assembly and the council for a term of one year; he enjoyed no authority in summoning or dissolving a legislature; he was not granted the veto power; and he was controlled to a considerable extent by an elective council. In New York, where the governor was elected by the freeholders for a term of three years, his veto power was shared by a council of revision composed of the chancellor and judges of the supreme court; and his appointing power was held in check by a special council of senators chosen by the assembly.

A fourth outstanding feature of the early state constitutions was the small number of elective offices established. We began our history with a "short ballot." Under the New York constitution of 1777 the governor, lieutenant-governor, and the members of the legislature were the only state authorities chosen by the voters. Even sheriffs, county judges, and other county officers were appointed by the governor and council. The first constitution of Virginia vested the right to choose members of the legislature in the voters; the governor and other state officers were elected by joint ballot of the legislature; the justices of the peace were appointed by the governor; the sheriffs and coroners were appointed by the respective courts. Under the Massachusetts constitution, at first the governor, the lieutenant-governor, and the members of the legislature were elected by popular vote; the leading state officers were chosen by the legislature; the minor state officers and some local officers were appointed by the governor. This general plan was adopted in the western states also. The Ohio constitution of 1802 provided that the governor and the legislature should be elected by the people, and that the other state officers should be chosen by joint ballot of both houses.

In the fifth place, the Fathers gave little thought to providing ways and means for amending the instruments which they drafted. They declared that governments rest on the consent of the governed; they asserted the right of the people to alter or abolish and to institute new forms of government likely to affect their safety and happiness; but they paid little attention to ways and means of making changes. A number of the first constitutions made no provision whatever for amendment. Nearly all of them were put into effect without being submitted to popular ratification. Indeed, the difference between a constitution and an act of the legislature was not clearly established and a notion seems to have prevailed to the effect that the legislature might itself alter the constitution or at all events call a new convention at any time for the purpose of making amendments.

Finally, the first constitutions provided for representative, not direct, government. The idea of laying constitutions and political issues before the voters for decision was not widely accepted at the time of the Revolution. The question of separation from Great Britain had not been submitted to a referendum, and only one of the first constitutions, that of Massachusetts, was placed before the voters for their approval. Jefferson recommended the referendum in Virginia and a mass meeting of mechanics in New York called for it when the new constitution was under discussion; but in neither case was the demand heeded. It does not appear that the state constitution-makers seriously considered the matter or delved deeply into fine-spun theories on the nature of popular government.

The Evolution of Democracy

The first state constitutions had hardly gone into effect when attacks were made in the name of political democracy upon the religious and property qualifications imposed on voters and office-holders. The struggle thus early begun was continued to our own day, driving the country almost steadily in the direction of universal and equal suffrage. The story of the process by which the old order has been overthrown is long and complicated; in it is involved the whole history of civilization in America; and it cannot be told here. It was not the result of any spontaneous and general action, but rather of many halting measures, tentative experiments, and specific modifications.

As new states were admitted to the Union, especially in the West, the suffrage was usually widened to include all white males, at least all who paid a small tax. Among the older states, the process was slower. Maryland, reckoned among the conservative states, embarked on the experiment of manhood suffrage in 1809; nine years later, Connecticut, equally conservative, decided that men who paid taxes were worthy of the ballot. With changes going on around them, Massachusetts and Rhode Island remained obdurate. In the first of these commonwealths, the last great struggle took place in the constitutional convention of 1820. There Webster, in the prime of his manhood, and John Adams, in the closing years of his life so full of service and honors, alike protested against radical innovations which ignored the weight of property in representative government. Their protests were in vain. The property test was abolished and a small tax-paying qualification substituted, only to be swept away a few years later. New York surrendered in 1821, during a struggle that, in the eyes of the conservative statesmen, seemed to shake the foundations of the social order; after trying minor restrictions on the suffrage for five years, the Empire state went over to white manhood suffrage. Rhode Island clung to the freehold qualification through thirty years of agitation. Then Dorr's rebellion, culminating in a mock civil war, brought about the reform of 1843 which introduced a slight tax-paying qualification in place of the old restriction. Virginia and North Carolina were still unconvinced. The former refused to abandon the ownership of land as a test for political rights until 1850 and the latter until 1856. By the eve of the Civil War the principle of white manhood suffrage was generally accepted, but free negroes were either excluded altogether, North and South, or subjected to property restrictions.

At the close of the great civil conflict, the triumphant Republicans in Congress drove through the Fourteenth and Fifteenth amendments designed to place negro men everywhere, freedmen of the South and freemen of the North, on an equality with the whites.[1] The principle of manhood suffrage had hardly been established when advocates of woman suffrage appeared upon the scene. They held their first national convention in 1848, the year of revolution in Europe, and launched a general

[1] See above, p. 90.

campaign that did not close until 1920 when the Nineteenth Amendment to the Federal Constitution was adopted. Their struggle was marked at first by partial and local gains. They won their first notable victory in 1867 when they secured the ballot in the territory of Wyoming, and held to it after the state came into the Union twenty years later. In the meantime they secured the right to vote in local and school elections in many states. In 1893 they carried Colorado; within a quarter of a century they had equal suffrage in fifteen states and partial suffrage in about as many more. By this time the woman suffrage movement had become a national force. The amendment to the Federal Constitution, introduced in 1869 and agitated without interruption for fifty years, was at last approved by Congress in 1919 and ratified the following year.

With the extension of the suffrage, property qualifications upon office-holding disappeared entirely and nearly all the religious restrictions on the suffrage as well. In only a few state constitutions are there to be found remnants of ancient theological controversies. Arkansas, Mississippi, Maryland, North Carolina, South Carolina, Texas, Pennsylvania, and Tennessee still require belief in God as a qualification for office. Two states, Tennessee and Pennsylvania, also require belief in a future state of rewards and punishments — a requirement that does not seem to have exercised such an influence on political conduct as to distinguish their politics from that of other states. Notwithstanding all these changes, it cannot be said that the suffrage question is entirely settled.[1]

Changes in the Legislative and Executive Departments

Strange as it may seem, the extension of the suffrage to the masses was accompanied by a growing distrust among the masses in the legislatures which they themselves elected — a decline of popular confidence in representative assemblies. This is not a matter of theory but of fact. It is demonstrated in every state constitution drafted since the opening of the nineteenth century. It accounts mainly for their immense growth in bulk; nearly every line added to the constitution is a limitation on the legislature.

[1] Below, p. 499.

The reckless and corrupt manner in which legislatures bartered away charters, franchises, and special privileges to private corporations led our constitution-makers to provide long and detailed lists of matters on which the legislatures are absolutely forbidden to act. To secure publicity and prevent sinister influences from working by secret methods, the newer constitutions contain provisions controlling legislative procedure. Extravagance and recklessness in laying taxes and making appropriations have brought about a series of provisions placing limits upon the borrowing power of the state legislatures. Constant interference with the local affairs of cities has been met by numerous devices designed to safeguard municipal autonomy. In every state, except one, each legislative act must now be approved by the governor, and if it is vetoed it must be repassed, generally by an extraordinary majority, before it can become a law. Finally, the crowning act of distrust in the integrity and effectiveness of the representative system has been manifested by the establishment, in many states, of the initiative and referendum, which give to the voters the right to make laws without even the intervention of the legislature.

With this growing distrust of representative assemblies has come a remarkable increase in the confidence displayed in executive authority. The position of the two branches in popular esteem has been reversed. The revulsion of feeling began early. Pennsylvania, revising in 1790 the constitution framed in the year of independence, vested the election of governor in the voters instead of the legislature, increased the length of his term from one to three years, and gave him the veto power. The new Western states, as they entered the union, without exception, provided for the election of the governor by popular vote; in the course of time every state legislature was stripped of the power to choose the executive. To give strength and stability to the office, the term was everywhere increased to two years at least and in nearly half the states to four years.

Meanwhile the powers of the governor have been enlarged. In the beginning only two states gave him the veto power; to-day only one state, North Carolina, withholds it. Once his appointing and administrative power was slight; during the opening years of the twentieth century there arose a strong movement to centralize all boards, offices, and commissions under his direct

authority and give him an appointing power equal to his responsibilities. A few states have taken steps in this direction by constitutional amendments; others by legislative acts. Moreover, the governor, once a mere agent of the legislature, has now won a recognized position as a political leader and assumes a large share of responsibility for the legislative as well as the executive policy of the state.

The same forces that have reduced the legislature and exalted the executive have wrought a great change in the position of the judiciary. The early state constitutions did not expressly authorize courts to declare acts of the legislatures null and void on constitutional grounds. The practice, though by no means unknown, was only dimly comprehended. Not until 1780, apparently, did any state court definitely invalidate an act of a legislature for the clearly avowed reason that it appeared to violate the constitution. This case, which arose in New Jersey, formed a precedent which was quickly followed in other states. At first there were violent protests by mass meetings and by the legislatures that had been overruled by the courts; but in the course of time protests died away and the practice became firmly established. A careful student of this phase of our history, Dr. Charles Grove Haines, remarks: "By a slow and almost imperceptible development, the American doctrine of judicial supremacy emerged through a long line of colonial and state precedents into a well-defined principle of judicial practice." When Chief Justice Marshall, of the Supreme Court of the United States, in 1803, set aside a part of an act of Congress he merely gave precision and impetus to a movement that had already gathered great momentum. There were and still are protests, but they have made no impression upon the judicial practice, although they have contributed to the widespread adoption of the popular election of judges.

That, however, was only a part of a more general tendency to apply the principle of popular election to state and local officials of all kinds. The whole process is illustrated in the evolution of New York. The constitutional revision of 1821 left the leading state officers, except the governor and the lieutenant governor, appointive, and gave the appointing power to the legislature. The great revolution came in 1846, when the governor, lieutenant governor, secretary of state, comptroller, treasurer, attorney-

general, state engineer and surveyor, canal commissioner, inspector of state prisons, the judges of the court of appeals and the justices of the supreme court were made elective. A similar revolution occurred in all except a few states. New Jersey, for instance, escaped the tidal wave; the constitutional revision of 1844 left the judges and nearly all the state officers appointive.

It is commonly supposed that this great democratic upheaval was due to the leaven of French philosophy working through Jeffersonian democracy. It is true that the notion of elective government was prominent in the writings of many French publicists and found its way with a vengeance into the revolutionary constitution of 1791, until the poor clodhopper's head, as Napoleon put it, was addled with elections. It is likewise true that Jefferson included elective government among the cardinal principles of his system. "We believed," he said, "that man was a rational animal, endowed by nature with rights and with an innate sense of justice; and that he could be restrained from wrong and protected in right by moderate powers confided to persons of his own choice and held to their duties by dependence on his own will."[1] Indeed the doctrine of an elective administration was propagated with great zeal by democratic enthusiasts during the sixty years that followed the establishment of our independence — propagated with such zeal that the people were converted and the notion was hardened into a political dogma.

Nevertheless there were potent forces besides "political principles" which precipitated this revolution. It requires no very deep research to discover that the appointive system worked badly in a large number of cases. A study of the debates of the state conventions which overthrew the old system yields abundant evidence in addition to that afforded by the controversial literature of the time. The early constitution-makers did not adopt a system that would fix responsibility.

Generally speaking they vested the appointing power in the legislature or in the governor checked by a council, or otherwise distributed it in such a way as to obscure responsibility, entangle the legislature in administrative work, and prevent the concentration of power in any person or body of persons. Such plans did not work well. Appointment by the legislature on a large scale was a new experiment in American politics, except in New

[1] *Readings*, p. 93.

England; and everywhere it introduced an unseemly scramble for offices which interfered with legislative business. As political authority shattered to pieces naturally tends to concentrate again, so the appointing power, deliberately dispersed by the framers, showed a tendency to pass from the governors, councils, and legislatures that nominally exercised it into the hands of party managers who dictated to all parties. So an "invisible" appointing agency arose to manage administrative affairs in the interest of the managers.

That the early diffusion of authority did not result in efficient administration is apparent in the debates of the later conventions which departed from traditions of the Revolutionary period. Discontent then led to experiments with the concentration of appointing power in the legislature. This happened in Ohio in 1802, for example, and in New York in 1821; but in neither instance did it prove satisfactory. In the latter case, an extra-legal machine, known as the "Albany regency," sprang up and controlled all appointments by secret operations in the legislature. When the people of Ohio came to revise their constitution in 1850, a member of the convention declared that appointments by the legislature had "tended to embitter party spirit and convert the general assembly into a mere political arena, and to some extent corrupt the pure fountain of legislation. . . . It is very certain that the principle which gives directly to the sovereign people the sole power of appointments to office is gaining ground."[1] The transformation of the legislature into a chamber of intrigue for office-hunters also occurred in Illinois.[2] In short, it seems to have happened in every state that tried the system of legislative appointments.

Unhappy experience with a variety of appointing schemes, and certain prevalent theories of democracy brought our state constitution-makers gradually to the acceptance of the plan of popular election as the remedy for all the evils which had sprung up. One after the other the old offices were made elective, and, as newer state offices of importance were created, the principle was applied as a matter of course. When it was suggested in a convention or legislature that the governor might appoint a state

[1] *Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* (1850–51), Vol. I, p. 87.

[2] Davidson and Stuvé, *History of Illinois*, pp. 297 ff.

auditor or engineer or veterinarian, some advocate of fundamental democracy was sure to plead in tremulous tones the rights of the people. "I believe the voters of this commonwealth are competent to elect their treasurer," exclaimed a member of the Kentucky convention of 1890, when it was proposed to give the governor the power to appoint that officer; "I know full well that they are able to elect a governor. . . . I loathe in the deepest recesses of my heart any effort whatever that will go in the direction of taking from the people of Kentucky the right to choose their own officers."

Nevertheless, at the opening of the twentieth century, when the administrative burdens of state governments had grown to immense proportions, there appeared a new movement to concentrate appointing power in the hands of the governor.[1] Under constitutions and statutes it was still widely diffused although the legislature seldom enjoyed the right to exercise it alone. In surveying the constitution of New York in 1915, the Bureau of Municipal Research discovered at least sixteen different modes of constituting state agencies, including appointment by joint action of both houses, by the governor alone, by the governor and senate, and by the governor and both houses. The complaints that had been heard nearly a century before about the dominance of administration by "invisible" forces were heard again in the New York convention of 1915; the remedy put forth this time was not appointment by the legislature but by the governor alone. In every section of the country, with the spread of interest in efficient administration, came a demand that the governor be given the power to choose nearly all high state officials. We seem now to be in another period of transition.

In close connection with the doctrine that all important officers should be elected by popular vote is the notion of "rotation in office," which can be best expressed in the language of Andrew Jackson: "There are, perhaps, few men who can for any length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties. . . . Corruption in some and in others a perversion of correct feelings and principles divert government from its legitimate ends and make it an engine for the support of the few at the expense of the many. The duties of all public

[1] See below, p. 485.

officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I can not but believe that more is lost by the long continuance of men in office than is generally to be gained from their experience." Under the stimulus of this idea, it became an accepted practice to make the terms of state and local officers short and to "rotate" the positions among political workers in accordance with the methods of the spoils system. Before the nineteenth century had drawn to a close, however, the doctrine, as applied to appointive positions, had been challenged by the civil service reformers; in ten states and many cities efforts are being made to promote efficient government by giving permanence of tenure especially to those officials who have little or nothing to do with matters of policy.[1]

Popular Law-making

None of the experience with state politics, however, has dampened in the least the faith of the American people in their capacity to govern themselves. On the contrary, while widening the suffrage and limiting the authority of elected persons, they have entrusted more and more work to the voters at the polls. The first departure from the pure representative principle was made in the reference of constitutions to the electors for their judgment. As we have seen, the idea of popular ratification was not generally accepted in the beginning; only three of the constitutions drafted between 1776 and the end of the eighteenth century were laid before the voters for their approval. Very slowly did constitution-makers come to the conclusion that they should submit their handiwork to the people. New York took the step in 1821; the constitution of that year was laid before the voters and in the instrument itself was a clause to the effect that all future amendments must have popular approval before going into force. By the middle of the century the doctrine of constitutional referendum was firmly established and only a few constitutions since that time have been proclaimed without popular sanction. The exceptions have been in the South where special reasons intervened.

In was by a gradual process that the constitution-makers

[1] Below, p. 589.

arrived at a complete and elaborate system for proposing and ratifying changes in existing constitutions. That process, according to Professor Garner,[1] fell into four stages: (1) during the first half of the nineteenth century the method of amendment by convention, subject to popular ratification, was fairly well developed; (2) immediately preceding and following the Civil War the more simple method of alteration through legislative enactment and approval by the voters was widely adopted; (3) between the Civil War and the end of the century the combination of periodical conventions and legislative enactment with popular sanction was worked out in detail; and (4) at the opening of the twentieth century, there appeared the still more democratic system for making amendments as well as laws by popular initiative subject to a popular referendum.[2]

Along with changes in the organization of state governments have gone equally significant changes in the functions of those governments. The state constitutions reflect the principal legal adjustments made necessary by the social and industrial development of the country. In fact they are almost meaningless to anyone not acquainted with the course of our economic evolution. The recent constitutions make elaborate provisions for the control of railway and other corporations; they contain sections in behalf of labor; they provide in more or less detail for popular education; they take into account the special legal problems created by the rise of the great cities. Several of them specifically recognize the changed position of women in modern society by abrogating the old English legal doctrines in accordance with which her personality was merged in that of her husband while her property passed into his possession or control. Some expressly provide that women may acquire and possess property of all kinds separate and apart from their husbands and abolish all distinctions between men and women with regard to the right to acquire, enjoy, and dispose of property and make contracts in reference thereto. A few of the newer constitutions also contain special provisions with respect to the employment of women in industries.

Striking as are the changes in our state constitutions during the past hundred and fifty years, they by no means embrace all the significant developments in state government. In the course of

[1] *Political Science Review*, February, 1907.

[2] See below, p. 505.

time, the distinction between constitutional and statutory law has almost disappeared. The former is no longer confined to a statement of broad principles relative to the organization and powers of government; it breaks into the most minute matters, state and local. Although limited by innumerable restraints, the state legislature still possesses large powers over affairs of fundamental importance and many of its statutes deal with subjects as significant as the topics covered by state constitutions. Moreover, as in the case of the National Government, political practices have given a wholly new direction to the operation of state governments and the distribution of forces within them. So we must be on our guard against the assumption that the history of our states can be written largely in the terms of constitutional development; but if we should venture into the wider field we should soon be far beyond the limits imposed upon these pages by necessity.

CHAPTER XXIII

THE CONSTITUTIONAL BASIS OF STATE GOVERNMENT

There was a time in our history when the constitutional foundation of the state seemed firm and definite, anchored in the affections of the people and guarded by positive principles. The state government, based upon its own fundamental law and secure in its "reserved rights" under the federal Constitution, occupied a position that seemed impregnable. Hamilton, often discouraged by the evident weakness of the National Government, lamented that in every contest with the states it would come out second best; though, as Talleyrand said, he divined Europe, he could not foresee the future in America. Jefferson, on the other hand, rejoiced in the seeming supremacy of the states; he regarded the National Government mainly as an agent of the states charged with conducting their foreign affairs. John Jay, when tendered a reappointment to the high office of Chief Justice of the Supreme Court by President Adams, declined the honor; he preferred to be governor of the state of New York. Not long afterward, De Witt Clinton esteemed so lightly the post of United States Senator that he surrendered it to become mayor of New York City.

When Bryce made his famous survey of the American Commonwealth nearly a hundred years later, he was struck with the supremacy of the state in domestic concerns and the remoteness of the Federal Government from the life of the citizen. "An American," he said, "may, through a long life, never be reminded of the Federal Government except when he votes at presidential and congressional elections, buys a package of tobacco bearing the government stamp, lodges a complaint against the postoffice, and opens his trunks for a custom house officer on the pier at New York when he returns from a tour in Europe. His direct taxes are paid to officials acting under state laws. The state or local authority constituted by state statutes registers his birth, appoints his guardian, pays for his schooling, gives him a share

in the estate of his father deceased, licenses him when he enters a trade (if it be one needing a license), marries him, divorces him, entertains civil actions against him, declares him a bankrupt, hangs him for murder; the police that guard his house, the local boards which look after the poor, control highways, impose water rates, manage schools — all these derive their legal powers from his state alone."

The Changing Position of the State in National Life

Obviously fundamental changes have occurred in our federal system since John Jay declined the post of Chief Justice; even Bryce's emphasis is no longer correctly placed. Some of these changes have been effected by constitutional amendment. Slavery, once left entirely to the discretion of the state, was abolished by the Thirteenth Amendment. The Sixteenth Amendment authorizes the National Government to enter the economy of the state and lay income taxes directly upon its citizens without reference to its population. The Seventeenth commands the state to elect its Senators by popular vote and thus deprives Senators of the ambassadorial character which they once enjoyed. The Eighteenth strikes the cup of intoxicating liquor from the hands of the citizen; it brings the federal officers down upon him if he attempts unlawful manufacture and sale. The Nineteenth limits the right of the state to decide who shall vote for its officers and agents by making woman suffrage national in its sweep.

Perhaps the most radical of all constitutional changes[1] has been effected by the Fourteenth Amendment which brings within the jurisdiction of the federal courts every act of every state and local authority, which touches vitally the liberty and property of citizens and corporations. It has been held by those courts

"that state boards and commissions, attorneys-general and prosecuting attorneys may be enjoined from putting into effect a schedule of railroad rates, or gas, telegraph, or stockyard rates, alleged to be invalid as working a deprivation of property without due process of law or otherwise violating the federal Constitution. State officers have been restrained from levying taxes on the ground that they were attempting to act without lawful authority. A cancellation or revocation of license to do corporate

[1] See above, chapter xx, for changes effected by federal legislation.

business because of the violation of state laws has been enjoined. The enforcement of state ordinances has been prevented and seizure of property under a dispensary law has been restrained. . . . Furthermore it is to be noted that in addition to the cases where purely negative control has been exercised, there are instances of the grant of positive remedies by the federal courts against state and local officers; *e.g.*, in compelling through writ of mandamus the levy of a tax to pay a judgment on township bonds. These cases have been confined to no locality; North and South, East and West have felt the heavy hand of the national government. Nor has such control been restricted to a single field of state law; criminal as well as civil liability to the state has been involved."[1]

Other changes in the position of the state in the federal system have been effected by economic developments which have brought new matters within the scope of the powers conferred originally upon the Federal Government — powers that in the beginning were seldom exercised. The growth of railways and corporations employing the major portion of the capital of the country outside of agriculture has automatically enlarged the business of regulating interstate commerce committed by the original Constitution to Congress. The chapter on federal regulation of commerce is a commentary on this topic.[2] The action of Congress in appropriating money to the states for education and highways and in establishing administrative standards for the states foreshadows, as we have seen, a closer interlocking of the two governments in important spheres of national work. Thus travel and intercourse, trusts, corporations, trade unions, highway construction, and education come within the federal sphere in many relations of high significance.

The operations of political parties, as well as constitutional amendments and federal statutes, tend to reduce the state to a subordinate position in the American scheme of things. Our political parties are national in character. They are founded on national issues. They are organized to effect national purposes. The aspirations of their great leaders are centered in the National Government. The state forms but a section of the extra-legal party organization which dominates national politics and often

[1] "The Increased Control of State Activities by the Federal Courts," in the *Political Science Review*, August, 1909.

[2] Above, p. 382.

subordinates vital state issues to the exigencies of federal issues. Delegates to the national party conventions are assigned to states mainly on the basis of their representation in Congress; federal patronage is distributed with a view to building up the general party organization within the limits of each commonwealth; United States Senators are as a rule party leaders within their commonwealths and occupy positions of influence in the national party organization; ambitious politicians in the state usually regard state offices as stepping-stones to higher things. Thus the great nation-wide party organization, founded on national as opposed to sectional interests, tends more and more to bring the state down from that proud position occupied in the beginning of our history.

To resort to Bryce's way of stating things, the contacts of the citizen with the National Government are numerous and direct. Every time he smokes a cigar, buys a postage stamp, or purchases an imported commodity he pays tribute to Washington; if he has a moderate income, he pays a direct tax; if he ships a commodity to a point outside his state, he pays a charge that is under the supervision of the Interstate Commerce Commission; if he journeys from one state to another, he finds his carfare subject to the regulations of the same Commission. If he forms a corporation to do business throughout the country, he may have his work undone under the provisions of the anti-trust laws. If he is a laboring man engaged with his union in a strike, an injunction from a federal court may narrowly restrict his strike methods. The rural free delivery reaches him in the country as well as in the city. He can deposit his savings with the post-office and send parcels to any place in the world by means of its agencies. It is not necessary to enlarge the enumeration. The activities of the Federal Government are wide-reaching and they run deeply into the affairs of the people. We no longer speak of "these" United States. If the men who passed the Kentucky and Virginia resolutions, sat in the Hartford convention, or heard the Webster-Hayne debate, could return to earth, they would find themselves, like Rip Van Winkle, in a strange country. The national Constitution furnishes the broad legal basis for the whole system; it is within the sphere marked out by the Constitution and guarded by the federal judiciary that the state governments must operate.

Limitations Imposed on State Governments by the Federal Constitution

The boundaries and nature of this sphere are to be understood by an inquiry into the fundamental limitations on state governments laid down in the federal Constitution,[1] and also the chief judicial decisions interpreting them in practice.

1. The first group of limitations relate to the taxing power of the state. States cannot lay and collect imposts and duties upon exports and imports — that is, upon articles in the hands of any person who sends them to, or receives them from, foreign countries directly — except to defray expenses incurred in the execution of inspection laws, and then only with the consent of Congress.

A duty upon imports, said the Supreme Court in the case of Brown *v.* Maryland,[2] is not merely a duty on the act of importation, but it is a duty on the thing imported as well. "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."[3] Thus foreign commerce is protected entirely from impediments which might be devised by state governments.

2. Analogous to this provision is the clause which forbids any state to lay a tonnage duty without the consent of Congress. The word "tonnage" means the entire internal capacity or contents of a vessel or ship expressed in tons of one hundred cubical feet each. States may tax the ships of their citizens as property valued as such; but it is clear and undeniable, the Supreme Court has held, "that taxes levied by a state upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the states from levying any duty of tonnage without the consent of Congress; and it makes

[1] *Readings*, p. 391.
[2] 12 Wheaton, 419.
[3] When any state, with consent of Congress, lays duties on imports or exports, the net proceeds of all such duties must be paid into the treasury of the United States.

no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances without the consent of Congress."[1]

3. No state can lay a tax on the property, lawful agencies, and instrumentalities of the Federal Government or on federal franchises as such. This principle is not expressed in the Constitution, but it was derived by Chief Justice Marshall, with his usual logic, from the nature of the federal system itself. The power to create implies the power to preserve; the power to tax is the power to destroy, and if wielded by a different hand is incompatible with the power to create and preserve; therefore if the states could tax federal instrumentalities, they could destroy a Union which was meant to be indestructible. According to this doctrine, states cannot tax branches of a United States bank, federal bonds, or federal franchises, or by taxation "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[2] Even bonds issued under federal auspices, not for federal use, but to obtain money to be lent to farmers are federal instrumentalities exempt from state taxation.[3]

However, the strict doctrine laid down by Marshall has been modified to the effect that states merely cannot interfere with a federal instrumentality in such a manner as to impair its efficiency in performing the function for which it was designed. A state, for example, cannot tax federal bonds, but it may tax the buildings and other property of a national bank chartered by the Federal Government. "It is manifest," said the Supreme Court, "that exemption of federal agencies from state taxation is dependent not upon the nature of the agents or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge

[1] State Tonnage Tax Cases, 12 Wallace, 204.
[2] McCulloch v. Maryland, Wheaton, 316; Weston v. Charleston, 2 Peters, 444.
[3] Smith v. Kansas City Trust Co., 255 U. S. 180; see above, p. 381.

the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."[1]

4. A state cannot seriously interfere with interstate commerce;[2] but it may pass laws relative to matters which are local in character, even though they do affect in some way such commerce. For example, the Supreme Court sustained a law of Kentucky providing for the inspection of illuminating oils and imposing a penalty upon persons selling oil branded as unsafe by state inspectors; this law was in the interests of public safety, although it certainly interfered with the right of citizens of other states to sell oil freely in that commonwealth.[3] Likewise a quarantine law of the state of Louisiana was sustained, although it incidentally restricted freedom of commerce. States may prohibit the running of freight trains on Sundays; forbid the employment of color-blind engineers on interstate as well as local trains; require the heating of cars; regulate speed within city limits; and compel the guarding of bridges and the protection of crossings even though such provisions affect interstate as well as local business.

State actions which constitute an invasion of federal power may likewise be illustrated by concrete examples. A law of Minnesota requiring the inspection of all meat twenty-four hours before slaughtering, designed in the interests of pure food, was declared invalid, because it necessarily prevented the importation of meats from animals slaughtered in other states where, of course, no such inspection could be enforced.[4] The state of Illinois passed an act regulating the making of railway rates within the state; but when it attempted to apply the rule to a shipment beginning in Illinois and ending in another state, the Supreme Court of the United States by proper process interfered, and declared that the regulation of interstate commerce from the beginning of a shipment to its end was vested exclusively in Congress.[5] Again, a state cannot impose a tax upon all freight carried by a railway,[6] but it can tax the franchise of a railway company, measuring the extent of its value by the re-

[1] Railroad Company *v.* Peniston, 18 Wallace, 5.
[2] See above, p. 387.
[3] Patterson *v.* Kentucky, 97 U. S. 501.
[4] That is, by Minnesota. Minnesota *v.* Barber, 136 U. S. 313.
[5] Wabash, &c. Railway *v.* Illinois, 118 U. S. 557.
[6] See *Readings*, p. 348.

ceipts, including the receipts from interstate and foreign commerce.

5. The state has practically no power over the monetary system. It may charter and regulate state banks, but it cannot coin money, emit bills of credit, or make anything but gold and silver coin[1] legal tender in the payment of debts. It may, however, authorize a state bank or state banking association to issue notes for circulation, but the exercise of this power is practically prohibited by an act of Congress, passed in 1866, laying a tax of ten per cent on such notes. On account of the weight of the tax, state banks simply cannot issue notes at all. The law was upheld by the Supreme Court of the United States for the reason, among others, "that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers." [2]

6. The Constitution also contains some fundamental limitations on the power of states over criminal legislation. It provides that no state shall pass any bill of attainder — that is, a legislative act which inflicts punishment upon some person without ordinary judicial trial. This device had been frequently used for partisan purposes in the British Parliament, and the framers of the Constitution therefore desired to prevent such an abuse of legislative authority in the United States. No state can pass an *ex post facto* law — that is, one which imposes a punishment for an act which was not punishable when committed; or imposes punishment in addition to that prescribed when the act was committed; or changes the rules of evidence so that different or less testimony (to the serious disadvantage of the accused) is sufficient to convict him than was required when the deed in question was committed.[3] This limitation on the states was framed to protect citizens from punishment by legislative acts having retrospective operation, and applies only to criminal legislation.[4]

7. To protect citizens in their property rights the Constitution provides that no state shall pass any law impairing the obligation of contracts. The obligation of contract is the body of law existing at the time a contract is made, defining and regulating it, and making provision for its due enforcement. For example,

[1] Coined by the Federal Government.
[2] Veazie Bank *v.* Fenno, 8 Wallace, 533.
[3] Cummings *v.* Missouri, 4 Wallace, 277.
[4] Calder *v.* Bull, 3 Dallas, 386.

one Crowninshield, on March 22, 1811, gave a note for a sum of money to one Sturges; shortly afterward the state of New York, in which the note was dated, passed a bankruptcy law under which Crowninshield became a bankrupt and, by paying Sturges a portion of what he owed, claimed the right to be discharged from all the remainder. This law with reference to all debts contracted *before* its passage was declared invalid by the Supreme Court as impairing the obligation of contract.[1] Yet all future contracts, whether they mention it or not, would be subject to the bankruptcy law.

The term "contract" as used in this clause has a far wider meaning than in ordinary private law. It means "a legally binding agreement in respect to property, either expressed or implied, executory or executed, between private parties, or between a commonwealth and a private party or parties; or a grant from one party to another; or a grant, charter, or franchise, from a commonwealth to a private party or private parties."[2] This wide interpretation of the term has given the clause a particular social and economic significance, because it has been applied to the protection of the franchises, charters, and privileges secured by private corporations from state legislatures. The Supreme Court, for example, held that a charter granted to Dartmouth College by the king of England constituted a contract with that corporation which the state, as successor to the king, was bound to respect on securing its independence, and that a law of the state of New Hampshire designed to control the college and its funds was an impairment of the obligation of the contract.[3] Under a strict application of this principle, a state legislature having once granted a privilege to a person or corporation would be bound to maintain it unimpaired forever if no specific provisions were made in the grant as to time limitations.

The Supreme Court, however, has refused to extend the term "contract" to several forms of agreement between a state and its citizens. For example, appointment to a public office even for a definite term at a fixed salary is not a contract, and a state impairs no obligation when it abolishes the office. A grant of power to a municipal corporation by a state legislature, a bounty law

[1] Sturges *v.* Crowninshield, 4 Wheaton, 117.
[2] Burgess, *Political Science and Constitutional Law*, Vol. I, p. 235.
[3] In the famous case of Dartmouth *v.* Woodward, 4 Wheaton, 518, decided in 1819.

by which a state agrees to pay a fixed bounty on certain commodities produced within its borders, or a state license to sell liquor for a certain term of years is not a contract.

It is to be noted also that the Court, in applying this clause, will declare a law invalid only when it is retrospective; that is, when it impairs contracts made before its passage. Therefore, if a state provides in its constitution or laws that all future charters and contracts granted by the state may be amended or repealed, it thereby leaves the legislature free to amend or repeal such charters or contracts without impairing the obligation of contract. All the states now safeguard, by this precautionary measure, their right to control privileges once granted; hence, it is no longer possible for private corporations to secure either honestly or by corrupt means priceless franchises and then defend them against withdrawal or modification by taking shelter under the sacredness of contract. The general tenor of the provisions freeing state legislatures from the strangling effect of this clause is illustrated by the following extract from the constitution of Wisconsin: "All general laws or special acts, enacted under the provisions of this section [dealing with corporations], may be altered and repealed by the legislature at any time after their passage."

Nevertheless, attention should be called to the fact that the Fourteenth Amendment radically altered the legal effect of such provisions. The state may, it is true, revoke charters granted to corporations, if it has previously reserved the right, but it cannot revoke them in such a manner as to deprive stockholders of their property "without due process of law." In other words, property rights remain intact and secure after the life of the corporation is extinguished by a repealer; the state thus has the shadow, not the substance, of power under its right to make reservations as to the future.

8. By far the most important guarantees for personal and property rights are to be found in the general clauses of the Fourteenth Amendment, which, for practical purposes, place in the hands of the federal judiciary control over state legislation on all important matters. According to section 1 of that Amendment, no state can make or enforce any law which abridges the privileges or immunities of citizens of the United States; no state may deprive any person of life, liberty, or property without due process of law,

nor deny to any person within its jurisdiction the equal protection of the law. In order to understand the full import of the several terms employed in this brief but significant section, it is necessary to examine them in the light of judicial decisions, for in themselves they furnish only a slight clue to the real legal processes which they secure.

At the outset, what are the privileges and immunities of citizens of the United States which cannot be abridged by a state? The nationalist school of publicists, represented by Professor Burgess, contend, and advance sound historical arguments to show, that it was the purpose of the men who framed this clause to nationalize civil liberty, by setting up against the states those privileges and immunities which of right belong to the citizens of all free governments — that is, in particular, those privileges and immunities guaranteed to citizens against the Federal Government in the first ten amendments.[1]

The Supreme Court of the United States, however, has taken a more restricted view of the clause in question. It has held that the only privileges and immunities guaranteed to a citizen by the Fourteenth Amendment against infringement by a state are a few elementary personal rights which he enjoys as an American, such as the right to petition the National Government, share its offices, transact business with it, and use its navigable waters.[2] The general rights to life, liberty, and the pursuit of happiness are still within the control of the states, as before the adoption of the amendment.

This distinction has more historical than practical interest, because the most important part of the Fourteenth Amendment is the brief sentence which forbids any state to deprive any person of life, liberty, or property without due process of law. The term "life," a justice of the Supreme Court has said, means something more than a mere animal existence; the protection afforded by the clause extends to all the limbs and faculties by which life is manifested. "The provision equally prohibits the mutilation of the body by the amputation of an arm or a leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."[3] The term "liberty" used in this clause does not mean liberty in

[1] See *Readings*, p. 136.
[2] Slaughter House Cases, 16 Wallace, 36.
[3] Munn *v.* Illinois, 94 U. S. 113.

the abstract, but the freedom of the individual to do what he can within the limits of the law properly imposed and duly enforced, and freedom from interference by governmental authorities as long as he does not transgress the legal bounds to his sphere of individual action.[1] The term "property" is not limited to tangible goods having an exchange value, but it extends to every form of vested right which the possessor has legally acquired.[2]

Of none of these things may any person be deprived without due process of law; but what is due process of law? The Supreme Court has steadily refused to define "due process" in the abstract, and it is not possible to make any very satisfactory generalization. It may be said, however, that due process of law, required by the Fourteenth Amendment, does not necessitate the use, by the state, of all those legal processes, such as indictment by grand jury and trial by petty jury with unanimous verdict, prescribed in the first ten amendments to the federal Constitution. Due process of law, said the Court in one case, is "a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."[3] And in another case, the Court declared that there are certain immutable principles of free government which control the law of every state.[4] In other words, the Court seems inclined to hold that a law of a state is not invalid under the due process clause unless it transgresses certain theories of government nowhere defined precisely in the law but existing rather in the minds of the judges who render the opinion. The best way of ascertaining the import of this phrase, therefore, is to examine its application to certain classes of state laws. In this relation such laws fall into two groups: they are either procedural or substantive; that is, they either pertain to methods to be followed by the government in trying criminals, laying taxes, and performing other administrative duties or they pertain to control over the conduct of people and the management of property.

I. Taking up procedural matters first we may ask: "What is due process of law in criminal cases?" A law of California provided that a person could be prosecuted for felony by infor-

[1] For Roosevelt's view of the social implications of the term, see *Readings*, p. 286.
[2] Campbell v. Holt, 115 U. S. 620.
[3] Pennoyer v. Neff, 95 U. S. 714.
[4] Holden v. Hardy, 169 U. S. 366.

mation after examination and commitment *without* indictment by a grand jury. Under this law one Hurtado was charged with the crime of murder on information without preliminary grand jury hearing and indictment, and, after jury trial in the ordinary manner, was found guilty and condemned to death. Was Hurtado to be deprived of life and liberty without due process of law? The Court replied that due process of law under the Fourteenth Amendment was different from that under the Fifth Amendment; that it did not require indictment by grand jury; and that "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice [lying at the basis of all our civil and political institutions] must be held to be due process of law." [1]

Due process of law in civil matters was defined in a general way in the case of Walker *v.* Sauvinet,[2] in which the Court held that trial by jury in suits at common law in state courts was not a privilege which the states were forbidden to abridge by the Fourteenth Amendment, and that the requirement of the Constitution was met if a trial was had according to the set course of judicial proceedings. In other words, any process which establishes reasonable security, full notice, and satisfactory protection to persons involved in civil suits may be regarded as due process.

In the imposition of taxes states must follow due process; whenever a tax is imposed according to the valuation of property, due process merely requires general notice to the owner and a hearing of complaints so as to give him a chance to contest his liability; personal notice is not required. The right to be heard is not a necessary part of due process in the imposition of poll and license taxes, specific taxes on things, persons, or corporations, or many other kinds of taxes definitely fixed by legislative enactment.

In dealing with procedural cases, the courts are handling technical questions of the law, in the main, although of course their decisions vitally affect life and liberty. They have long lines of precedents to guide them and their principal task is to ascertain what the law actually has been and is now. In this

[1] Hurtado *v.* California, 110 U. S. 516.

[2] 92 U. S. 90.

sphere it is not often incumbent upon them to consider large questions of public policy.

II. When we pass into the field of substantive law we have to deal with matters of psychology and sociology. Did the framers of the due process clause intend to permit state legislatures to regulate the hours of women in laundries? The wages of children? The rates of street railway companies? The conduct of strikes in labor disputes? In answering such questions the courts do not deal with mere technicalities of law, but rather with broad questions of public policy. Their decisions will depend more on their social and economic theories and preconceptions than on any legal reasoning.[1]

In making laws affecting corporations, our state legislatures frequently come into conflict with the due process clause of the Constitution. Legislatures may regulate the rates and services of public utility corporations, such as railway, gas, and electric light companies, subject to two very fundamental limitations. In the first place, such rates and regulations, under the due process clause, must be reasonable as things appear reasonable to the Court; that is, broadly speaking, a company's rates cannot be fixed at a point so low that it is unable to earn a fair return on its capital. In this sphere the courts have to deal with many complex questions which cannot be treated here. What should be included in a company's capital — actual cost of its property, cost plus its good will, the cost of reproduction to-day, the increased value of its real estate? What is a fair rate — five, six, seven, or eight per cent? Obviously in passing upon these matters the judges must consider technical problems of the highest order, and they may lean to the side of the public or of the corporations according to the tendencies of their minds.

In the second place, in dealing with public utility companies, legislatures cannot deprive them of the right to appeal to the courts for the purpose of having the reasonableness of any regulations determined by judicial process. For example, the legislature of Minnesota created a railway commission with the power to compel any common carrier to fix such rates as the commission should declare to be reasonable, and made no provision for judicial review of the rates so fixed. This law was held unconstitutional on the ground that it deprived a railway company of its right to

[1] For a concrete illustration, see *Readings*, pp. 617 and 619.

judicial investigation by due process of law under the forms and with the machinery provided for the judicial investigation of the truth of any matter in controversy, and substituted for this, as an absolute finality, the action of a railway commission which could not be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

In the field of labor legislation, the states often come in conflict with the due process clause. When, for example, New York several years ago passed an act limiting the hours of labor in bakeshops to not more than ten a day or sixty a week, the Supreme Court, in the celebrated Lochner case, intervened; it declared the measure invalid on the ground that it was an unreasonable, unnecessary, and arbitrary interference with liberty of contract — the liberty to purchase and sell labor being within the protection of the Fourteenth Amendment.[1]

This case was the subject of much adverse criticism on the ground that it blocked enlightened and progressive legislation passed to protect the health and safety of working people. As judges died and public opinion changed, the Supreme Court seemed inclined to take a broader view of the matter. A few years after the Lochner case, the Court upheld laws providing compensation for persons injured in industries, an act of the Oregon legislature fixing the hours of labor regardless of sex in manufacturing establishments at ten per day, and an Oregon law relative to minimum wages for women and minors.[2] Still we should take note of the fact that in the Oregon minimum wage case the Court was divided four to four (Justice Brandeis not voting) and the law was thus sustained by a narrow margin. Since that time more conservative judges have been appointed and it is doubtful whether the Court would uphold such a law at present.[3]

In dealing with other phases of the labor question, the Supreme Court is usually even more strict in its views. It declared invalid a Kansas law making it a misdemeanor for an employer to threaten to discharge an employee on account of membership in a trade union.[4] As fourteen other states had

[1] Lochner v. New York, 198 U. S. 45 (1905).
[2] Stettler v. O'Hara, 243 U. S. 629 (minimum wage case); Bunting v. Oregon, 243 U. S. 426 (1917).
[3] In fact a District of Columbia minimum wage law was declared invalid by the Supreme Court in 1923, Chief Justice Taft dissenting; Minimum Wage Board v. The Children's Hospital, April 9, 1923, 261 U. S. 525.
[4] Coppage v. Kansas, 236 U. S. 1 (1915).

such laws, which were thus set aside at one stroke, the range of the judicial decree was sweeping. Still more significant was a decision rendered in 1922 invalidating another Arizona law — one which forbade the issue of injunctions in labor disputes in certain cases. The law in question was designed to legalize the action of strikers in "picketing," that is, in persuading other persons not to take their places or to patronize their former employers.[1]

A state, however, may do, under a vague authority known as the "police power," many things which interfere with life, liberty, and property; but the Court refuses to define the term police power, reserving to itself the right to determine at any time whether any particular act is warranted under that power or not. A broad interpretation of the very elastic term would give a state the right to do anything designed to promote general welfare as opposed to special privilege. Indeed, the Court once said that the police power is the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and its prosperity."[2] It is evident that such a generous theory might very well nullify the provisions of the Fourteenth Amendment if applied by a court in sympathy with an increase in state control over private rights in the name of general welfare.

At all events a state, under its police power, may do many definite things. It may, for example, restrict dangerous and objectionable trades to certain localities; it may provide for laying cities out into zones; it may regulate, to a limited extent, railways and other common carriers; it may fix the hours of women and children in certain industries and, at present, the minimum wages to be paid to them. It is clear, nevertheless, that police power, like that other vague phrase "due process of law," is wholly within the keeping of the judicial conscience, and its interpretation depends upon the general social and political theories of the judiciary.[3]

[1] Truax *v.* Corrigan, 257 U. S. 312; see discussion by Professor Corwin, *American Political Science Review*, Vol. XVI, p. 632.

[2] Barbier *v.* Connolly, 113 U. S. 27.

[3] This is based upon a statement by Justice Holmes; see *Readings*, p. 619. On the subject of the police power, see *Readings*, p. 394.

The Admission of New States

The federal Constitution contains no details as to the way in which a new state may be admitted to the Union. It simply provides that new states may be admitted by Congress, and that no new state shall be formed out of another state or by the junction of two or more parts of different states without the consent of the legislatures concerned and Congress as well. A variety of methods have been employed in the admission of new states. Texas, for example, was admitted to the Union in 1845 as an independent republic by resolution of Congress. California never went through the territorial stage; the inhabitants of that region shortly after the cession from Mexico drew up a constitution, and demanded admission to the Union. Congress yielded.

The ordinary process of admitting a state is simple. The inhabitants of a territory present a petition to Congress praying for admission to the Union. If the petition is granted, Congress passes an "enabling act" authorizing the voters of the territory to call a convention to frame their constitution and thus prepare to take their position among the other commonwealths. If the people of the territory comply with the conditions, Congress then passes a resolution declaring the said territory to be a state and admitted to the Union; the fact is generally announced to the world by a formal executive proclamation. In the case of Missouri, Kansas, Utah, Oklahoma, and Arizona, Congress entertained objections to the constitution drafted by the territory demanding statehood, and delayed admission until certain suggested amendments were adopted.

The only constitutional question of any importance which arises in connection with the admission of new states is whether Congress has the power to impose any limitations in addition to those laid down in the federal Constitution. It is the theory that all the states in the Union are equal in rights and privileges. The famous Northwest Ordinance declared that the new states created in that region should be admitted "on an equal footing with the original states in all respects whatsoever." On the admission of Ohio in 1802, however, Congress forced that state to agree not to tax for a period of five years any public lands sold within its borders by the United States. The enabling act for Nevada, passed in 1864, while declaring that the state

should be admitted into the Union "upon an equal footing with the original states in all respects whatsoever," specifically required that its constitution should not be repugnant to the principles of the Declaration of Independence, that perfect religious toleration should be secured, and that the land belonging to non-resident citizens of the United States should not be taxed any higher than the lands of residents.[1]

When called upon to discuss this point, the Supreme Court declared, in a case involving limitations on Illinois, that "whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787, or the legislation of Congress, it ceased to have any operative force except as voluntarily adopted by her after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted only on the same footing with them."[2]

Nevertheless, the Court upheld a limitation on Minnesota by which that state, on its admission, was bound not to impose any tax on lands belonging to the United States, or any higher tax on non-resident proprietors than on residents. The Court said in this instance: "The case before us is one involving simply an agreement as to property between a state and a nation. That a state and a nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this Court, and that they have been frequently made in the admission of new states, as well as subsequently thereto, is a matter of history."[3]

In spite of this ruling, the Court seems inclined to distinguish between limitations with reference to political rights and those relating solely to property belonging either to the state or national government.[4] For instance, it declined in 1911 to interfere with the action of Oklahoma in removing the capital from Guthrie to Oklahoma City previous to 1913 — a violation of the pledge given at the time Congress admitted the state to the Union.[5]

[1] See *Readings*, p. 397; Dunning, *Essays on Civil War and Reconstruction*, pp. 305 ff.
[2] Escanaba *v.* Chicago, 107 U. S. 678.
[3] Stearns *v.* Minnesota, 179 U. S. 223.
[4] Bolln *v.* Nebraska, 176 U. S. 83.
[5] Coyle *v.* Smith, 221 U. S. 559.

State Constitutions

Subject to the limitations of the federal Constitution and to such limitations as may be imposed at the time of admission, the voters of each state may draft the constitution of their commonwealth as they please;[1] and naturally the fundamental laws of the different states represent many varieties of political theory and experience.

The differences in the constitutions, however, are not a complete index to the real differences in form of government, for nearly all the newer and more bulky fundamental laws provide for institutions which have been set up in older states by legislative enactment. For example, there is no clause in the constitution of New York creating a public service commission, and yet New York has a commission, with large powers over common carriers, within each of the two districts into which the state is divided. On the other hand, the constitution of Oklahoma contains several pages of law creating the public service commission and defining its powers and activities.

A state constitution generally falls into six parts: (1) a bill of rights; (2) the sections providing the framework of government, central and local, and the fundamental limitations of each branch; (3) the sections dealing with state finances; (4) the clauses providing for the control of economic interests, such as railways, insurance, banking, and labor; (5) the clauses providing for education and social welfare generally; and lastly (6) the amendment clause.

I. Taking several of the state constitutions together, we find that a composite view of the bill of rights reveals two somewhat sharply defined parts. The older part contains those ancient and honorable limitations on behalf of private rights so famous in the constitutional history of England and the United States — indictment by grand jury; trial by jury; the free exercise of religious worship without discrimination or preference; the privilege of the writ of habeas corpus save in case of rebellion, invasion, or public danger; prohibition of excessive bail and fines and cruel and unusual punishments; compensation for private property when taken for public use; the right of every citizen to speak

[1] It must be noted that the Constitution requires every state government to be "republican" in form.

freely, write and publish his sentiments on all matters subject to responsibility for libelous publications; and the right peaceably to assemble and petition the government or any department thereof.

These broad principles are not, as sometimes imagined, mere platitudes or pious wishes; they are rules of law interpreted and applied by the courts especially in passing upon the constitutionality of the acts of state legislatures. Every important act of a state legislature touching seriously the rights of private property or the franchises and charters of corporations is almost certain to be brought before the courts and tested against one or more of the above generalities as well as the provisions of the federal Constitution. The bulk of such legislation declared invalid in a decade is enormous.

Less frequently are laws touching liberty of person, press, and speech carried into the courts. Measures of this character are not so numerous and the courts seem more loath to declare them unconstitutional. This was amply demonstrated when the Bolshevist fear swept over the country at the close of the World War. Many states, nearly all in the North, hurriedly adopted sedition acts laying heavy penalties upon all persons who publicly advocated violent revolution or any doctrine calculated to affect the state and national governments injuriously or bring them into contempt. Under these statutes arrests were made wholesale and penalties of fine and imprisonment were lavishly imposed. It was not uncommon for the courts to send persons to prison for ten years or more for the expression of opinions that appeared dangerous. Five years after the end of the war more than one hundred persons were still held in prison under these laws.

Again and again the "sedition" statutes were attacked in the courts on the ground that they violated constitutional provisions but, except in one or two states, without avail. The general attitude of the courts may be summed up in the language of a state judge speaking on liberty of opinion: "The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the state. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of any other action includes an injurious use of one's occupation, business, or property." Perhaps the most striking of the many decisions

touching liberty of opinion was that of the Connecticut Supreme Court of Errors in which it was held that aliens were not entitled to the privileges and liberties set forth in the bill of rights. This rather startling opinion was based upon an old case in which it had been declared that the said privileges and liberties were not guaranteed to slaves. The assumption must be therefore that aliens in this particular have the status of slaves.[1]

By the side of these rights of property, person, and opinion — rights of ancient English origin — we find, in many of the recent state constitutions, a number of newer principles; such, for example, as are laid down in the constitution of Oklahoma. In that document, prosecution for felony and misdemeanor by information as well as by indictment by grand jury is expressly sanctioned, but no one may be prosecuted by information for felony without having had a preliminary hearing before an examining magistrate or having waived such hearing. In county courts and courts not of record the petty jury consists of only six men; and in civil cases and in criminal cases involving crimes less than felony, three quarters of the whole number of jurors may render a verdict. In other cases unanimity is required. In all criminal prosecutions for libel the truth of the matter alleged to be libelous may be given in evidence to the jury; if it appears to the jury that the matter charged as libelous is true, or was written with a good motive or for justifiable ends, the party shall be acquitted — a provision in behalf of liberty of speech and press which is to be found in the constitutions of more conservative states like New York.

While safeguarding private property by providing that it shall be taken for public use only when just compensation is given, the Oklahoma constitution declares that "the right of the state to engage in any occupation or business for public purposes shall not be denied nor prohibited, except that the state shall not engage in agriculture for other than educational and scientific purposes and for the support of its penal, charitable, and educational institutions." It furthermore provides that municipal corporations may engage in any business or enterprise which may be carried on privately under a franchise from the municipality. Perpetuities and monopolies are declared to be contrary to the genius of free government and forever prohibited.

[1] See Chafee, *Freedom of Speech*, especially the tables in the Appendix. For the Connecticut case, see R. E. Cushman, in the *Political Science Review*, Vol. XVI, p. 468.

Corporations are excluded from several privileges and immunities secured to natural persons. The framers of Oklahoma's fundamental law have provided for unrestricted searches into the actual operations of corporations, by explicitly stating that their records, books, and files shall be at all times subject to the full visitorial and inquisitorial powers of the state, notwithstanding the rights secured to persons and to citizens.

The constitution of Oklahoma furthermore guarantees to its citizens complete immunity from the worst feature of martial law by declaring that "the privilege of the writ of habeas corpus shall never be suspended by the authorities of this state"; but this provision did not prevent the governor from establishing complete military rule in the capital in 1923 — an action which culminated in his impeachment and removal. The theoretical subordination of the military to civil authority is accompanied by a positive limitation of the power of the judiciary to grant injunctions. The legislature, the constitution runs, shall pass laws defining contempts and regulating proceedings and punishments in case of contempt; but every person accused of violating or disobeying an injunction out of the presence and hearing of the court is to be entitled to trial by jury to determine his guilt or innocence, and in no case shall penalty or punishment be imposed for contempt until the accused has had an opportunity to be heard.

In addition to these ancient and modern principles of civil liberty, there are to be found in several bills of rights curious provisions which belong rather to the sphere of political theory than to constitutional law, but are interesting nevertheless. The constitution of Kentucky declares that, "absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. All men when they form a social compact are equal; . . . all power is inherent in the people and all free governments are founded on their authority and instituted for their peace, safety, happiness, and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may deem proper." The Massachusetts constitution solemnly announces: "It is the right as well as the duty of all men in society, publicly and at stated seasons to worship the

Supreme Being, the great creator and the preserver of the universe." The inhabitants of Vermont are warned "that frequent recurrence to fundamental principles and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty and keep government free; the people ought, therefore, to pay particular attention to these points, in the choice of officers and representatives, and have a right in a legal way to exact a due and constant regard to them, from their legislators and magistrates, in making and executing such laws as are necessary for the good government of the state." While guaranteeing freedom of religious worship, the constitution of Pennsylvania declares, "that no person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth."

II. The second part of a state constitution embraces those sections dealing with the separation of powers, the frame of government, and the limitations on the authorities of the state. This part usually outlines the form of the central government in considerable detail, and contains more or less explicit provisions in relation to rural and municipal government. It defines the suffrage, sketches the organization of the legislature, and prescribes the limitations under which it must operate. It provides for the election of the governor and the great officers of state, leaving the construction of the minor administrative offices and boards to the legislature. It creates the judicial system, state and local; but generally entrusts the regulation of minor matters with regard to jurisdiction, procedure, and appeals to the legislature.

III. The third division of our composite state constitution places fundamental limitations upon the financial power of the state legislature.[1] The provisions are often detailed and complicated, but their general purpose is to fix a debt limit beyond which the legislature cannot go, and to compel that body to make adequate provision for the payment of the interest and principal of debts created.[2]

IV. The fourth part of the state constitution frequently lays down, with considerable minuteness, the general principles which

[1] See below, chap. xxx.

[2] *Readings*, p. 460.

shall be applied in the regulation of corporations and conditions of labor.[1] The newer constitutions are especially full and explicit on these points. They not only provide that corporations shall be chartered under general rather than special laws, but they go into great detail with regard to public service corporations. Northern constitutions — for example, those of New York, Pennsylvania, Ohio, and Indiana — dispose of the matter in relatively few words; but the constitution of Virginia, drafted in 1902, contains twelve large and closely printed pages on the subject of corporations alone; while Oklahoma gives fourteen pages of the same size to that branch of law. These newer constitutions limit very narrowly the activities of corporations. They provide for a corporation commission with large powers over the rates, charges, and general conduct of corporate business. Oklahoma provides for physical valuation of railways, endeavors to prevent stock watering, fixes a rate of two cents a mile for carrying passengers, subject to change by the legislature and corporation commission, and prohibits the consolidation of competing companies and the establishment of monopolies.

V. The fifth part of our composite constitution contains a large variety of miscellaneous provisions designed to promote general welfare. It usually includes sections relative to the public schools and the state educational system; the Nebraska constitution, for example, requires the legislature to provide free instruction in the common schools of the state for all persons between the ages of five and twenty-five; it sets aside certain revenues for educational purposes; and creates a board of regents for the state university and prescribes their duties. Under the head of general provisions we also find clauses authorizing legislation creating workmen's compensation systems, providing for the care and maintenance of the poor, exempting homesteads from forced sales for debt except under prescribed conditions, fixing the maximum rates of interest, safeguarding public health, creating charitable and eleemosynary institutions, and controlling the care and management of public property.[2]

VI. The last part of the constitution makes provision for future alterations by prescribing the way in which amendments may be proposed and adopted.[3]

[1] *Readings*, pp. 91 and 610.
[2] Below, chap. xxxi.
[3] Below, chap. xxiv, and *Readings*, p. 411.

The State Courts and the State Constitution

The constitution of a state is its fundamental law, and stands very nearly in the same relation to the authorities of the state in which the federal Constitution stands to federal authorities.[1] In other words, it is the supreme law of the commonwealth, and the state courts are bound to hold unconstitutional the act of any state authority, legislative or executive, which violates that supreme law.[2] This principle, which met with some resistance in the beginning of our history, has now been universally accepted. "In exercising this high authority," it has been said, "the judges claim no judicial supremacy; they are only the administrators of public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution and because the will of the people which is therein declared is paramount to that of their representatives expressed in any law."

In passing upon the constitutionality of acts of the legislature, the courts of New York have laid down certain principles which are now commonly accepted throughout the United States. The constitution should be so construed as best to promote the objects for which it was made, avoiding the two extremes of a wide and a strict construction; statutes are presumed to be constitutional; an act must be constitutional in substance as well as in form; the constitutionality of statutes is not to be passed upon unless necessary to the decision of the case in question; no statute should be declared unconstitutional unless it is in direct, clear, and necessary conflict with the constitution; a law, unconstitutional in part, may be enforced as to its constitutional provisions. A statute evading the terms and frustrating the general and clearly expressed or necessarily implied purposes of the constitution is as certainly void as if expressly forbidden; in the case of an act susceptible of valid or invalid construction courts should lean to the construction of validity; if an act is corruptly administered, this is no reason for holding it unconstitutional; the long and undisputed practice in the

[1] In Florida, Maine, Massachusetts, New Hampshire, Colorado, and South Dakota, the judges of the high court are required to give opinions when requested by the governor or legislature, or both. See Ellingwood, *Departmental Coöperation in State Government* (1918).

[2] The state judges are also bound to declare void a state act violating the federal Constitution.

construction of a constitutional provision by the legislature has almost the force of judicial exposition in its interpretation.

Experience has shown that the state courts have been on the whole more conservative than the Supreme Court of the United States in passing upon the constitutionality of legislation, particularly of a social character. For example, the highest court of New York, in 1911, declared the workmen's compensation act of the previous year unconstitutional on the ground that it "authorized the taking of the employer's property without his consent and without his fault and giving it to the employee, without a hearing in any judicial proceeding." That this interpretation did not represent the popular opinion of the matter was shown by the immediate adoption of an amendment to the constitution of the state empowering the legislature to enact laws to protect the lives, safety, or health of employees, including workmen's compensation measures. It was in reference to such cases that Theodore Roosevelt declared in 1912: "Whenever in our constitutional system of government there exist general prohibitions that, as interpreted by the courts, nullify, or may be used to nullify, specific laws passed, and admittedly passed, in the interest of social justice, we are for such an immediate law or amendment to the constitution, if that be necessary, as will thereafter permit a reference to the people of the public effect of such decision under forms securing full deliberation, to the end that the specific act of the legislative branch of the government thus judicially nullified . . . may be constitutionally excepted by vote of the people from the general prohibitions."[1] With a view to limiting the authority of the judiciary over legislation, it has been more than once proposed that no state court should be permitted to declare a law unconstitutional except by a unanimous vote, on the assumption that unless there is unanimity there is a reasonable doubt in favor of validity. No such proposal has yet prevailed; but a few states — Ohio, North Dakota, and Nebraska — have provided that the concurrence of an extraordinary majority of the judges is necessary to set aside a law.[2]

[1] For the recall of judges see below, chap. xxix.

[2] R. E. Cushman, *Political Science Review*, Vol. XV, p. 409, for Ohio and North Dakota cases on the point.

The Suffrage

The determination of the limitations on the suffrage is left to the states, subject to the restraints imposed by the federal Constitution.[1] All men and women, who comply with certain requirements and possess certain qualifications, can vote. These qualifications may be divided into six classes: age, residence, citizenship, property, literacy tests, and miscellaneous.

All states have adopted the ancient English rule of fixing the age limit of voters at twenty-one years.

A period of residence in the state is always required. It varies from three months to two years, but the more common term is one year. It is also a general practice to require a period of residence in the county and election district in which the voter wishes to cast his ballot. This apparently simple provision in operation disfranchises thousands of voters every year, especially in the cities where there are relatively few home owners and the amount of migration among the renters is large. Particularly does it affect working people who must of necessity move about a great deal on account of changes in their employments. On the other hand it eliminates many frauds from elections and prevents the importation of "floaters" into close districts where a few votes might turn the tide.

In nearly every state the voter must be a bona fide citizen of the United States; but Indiana, Missouri, Texas, and Arizona admit to the suffrage aliens who have declared their intention of becoming citizens. This is a relic of old days when Western states sought to encourage immigration by conferring the suffrage upon newcomers. No doubt it will be swept away in time.

Although the ownership of property is no longer an absolute requirement for the general suffrage, it is occasionally employed as an alternative to other qualifications. For example, Louisiana makes it an alternative to an educational qualification. The payment of a small tax, such as a poll tax, however, is frequently prescribed.

About one half the states impose some kind of educational test, either as an absolute or as an alternative qualification. Among them are Alabama, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Louisiana, Maine, Massachusetts,

[1] See above, p. 123.

Mississippi, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, Virginia, Wyoming, and Washington. In details the provisions vary greatly.[1] In some cases, Mississippi, Louisiana, and Virginia, the voter must be able to show that he can read the constitution and understand it — to the satisfaction of the election officers. In Washington, he must be able to read and speak English. Massachusetts requires the voter to know how to read the constitution of the state in English and write his own name. Connecticut prescribes that he must be able to read in English any section of the constitution or any statute. The law of New York in this respect is notable in that it does not leave the application of tests entirely in the hands of election officers, but arranges for the issuance of certificates of literacy under the supervision of the school authorities. The certificate must certify that the holder can read and write English.

Among the miscellaneous provisions respecting the suffrage are the laws excluding persons of unsound mind, criminals, and paupers maintained at public expense. These of course vary from state to state.

All the above qualifications and some in addition have been employed by Southern states with a view to reducing or eliminating the negro vote, without violating the letter of the federal Constitution. The following are included among these ingenious devices. No person who has ever been convicted of any one of several enumerated crimes can vote. The voter must own a certain amount of property or have paid all taxes legally required of him including the poll tax, or be able to read any section of the constitution of the state or understand it when read to him and give a reasonable interpretation thereof. Still more noteworthy was the famous "grandfather clause" now a matter of historic interest. For example, Louisiana, in 1898, after providing a literacy test with a property ownership alternative, added that "no male person who was on January 1, 1867, or on any date prior thereto entitled to vote under the constitution or statutes of any state of the United States wherein he then resided and no son or grandson of any such person not less than twenty-one years of age at the date of the adoption of this constitution and

[1] F. G. Crawford, in the *Political Science Review*, Vol. XVII, pp. 260–263. J. A. Tillinghast, *The Negro in Africa and America*.

no male person of foreign birth who was naturalized prior to the first day of January, 1898, shall be denied the right to register and vote in this state by reason of his failure to possess the educational or property qualifications prescribed by this constitution." Some other states made use of the same device, but the Supreme Court of the United States, in an Oklahoma case, declared the scheme invalid as violating the Fifteenth Amendment of the federal Constitution.[1]

It can readily be seen how such provisions may effect the disfranchisement of the negro. If he has not committed a crime and perchance has the required amount of property, still he must give a "reasonable" interpretation of a section of the state constitution. This reasonableness must meet the standards of the white election officials. The devices are undoubtedly effective. They work an almost total exclusion of negroes in the states of the far South, like South Carolina and Mississippi, and in other states they accomplish the degree of exclusion deemed desirable by the election officers.

The devices, except, as noted, the grandfather clause, also come within the letter of the federal Constitution. Educational and property tests do not conflict with the Fifteenth Amendment which provides that no citizen shall be deprived of the right to vote on account of race, color, or previous condition of servitude; neither do they conflict with the Nineteenth Amendment which forbids disqualification on account of sex.

Several attempts have been made to test the constitutionality of laws intended to exclude negroes, but except as to the grandfather requirement, the Supreme Court of the United States has been able, principally on technical grounds, to avoid coming to a direct decision on the merits of the particular measures. In one of these cases,[2] the plaintiff alleged that restrictions on the suffrage found in the Alabama constitution were intended to deprive the negroes of the vote. The Court answered that a court of equity could not remedy such a wrong; that the Court could not, through its officers, take charge of and operate the election machinery of Alabama; and finally concluded "that relief from a great political wrong, if done as alleged, by the people of a state and by the state itself, must be given by them or by the

[1] Guinn and Beale *v.* United States, 238 U. S., 347.
[2] Giles *v.* Harris, 189 U. S., 474.

legislative and political departments of the Government of the United States."[1] It should be noted, however, that all the states, North and South, which impose any special restrictions on the suffrage, literacy or property, are liable to the operation of the Fourteenth Amendment which provides for a reduction of representation in Congress in such cases — a rule not likely to be enforced.

[1] On this question, see E. G. Murphy, *Problems of the Present South.*

CHAPTER XXIV

POPULAR CONTROL IN STATE AND LOCAL GOVERNMENT

More than half a century ago Carlyle said that whoever had occasion to write or speak in that day must take account of the fact that democracy had arrived. An eminent English publicist of our time, G. Lowes Dickinson, has restated the doctrine in a little more concrete form in this way: "Governments in every civilized country are now moving towards the ideal of an expert administration controlled by an alert and intelligent public opinion." The creation of an alert and intelligent public opinion is the problem of education in its broadest sense; but in order to make this opinion effective in controlling legislatures and executives it is necessary to devise electoral machinery which will work with as little friction and waste of public spirit as possible.

The Amending System

As we have seen, the metes and bounds of each state government are set in the state constitution, subject of course to the Constitution and laws of the United States. To enable popular will to alter the fundamental law from time to time as new conditions arise, there have been evolved regular processes of amendment. The exact methods vary from state to state but all of them fall within certain broad groups. There are three ways of setting the amending machinery in motion: an amendment may be proposed (1) by the state legislature, (2) in some states by a petition prepared by private citizens and signed by a given number of voters, and (3) by a special convention solemnly elected for the purpose of making a constitutional revision.

Considered in general, amending systems may be classified as follows:

I. The first method, found everywhere except in New Hampshire and Delaware is proposal by the legislature and ratifica-

tion by popular vote. In some states a simple majority of the members of both houses of the legislature is sufficient to initiate an amendment; in others, two thirds; in a few, three fifths. About one third of the constitutions provide that an amendment proposed by a legislature must be approved again by the succeeding legislature before it is submitted to the people. It is now the common practice to stipulate that a mere majority of those voting on an amendment at the polls can put it into effect; but a few commonwealths declare that the amendment must receive a majority of all the votes cast at a state election in order to become a law. The method of amendment by legislative action plus popular approval is relatively easy to operate and almost destroys the distinction between constitutional and statutory law. Especially is this true if nothing is required beyond the action of a single legislature and the approval of a majority of those persons who take the trouble to vote on propositions. In fact the distinction is a mere fiction in Oregon where the legislature may submit statutes as well as amendments to the voters — both exactly in the same manner. If, however, the number of votes necessary to carry an amendment must be equal to a majority of all the votes cast in a state election, then it becomes in practice very difficult to make any change in the constitution.

II. About two thirds of the states provide for amending their constitutions by conventions composed of delegates elected for the special purpose by popular vote; many constitutional lawyers hold that the legislatures of the remaining states may call conventions at will under their general legislative powers. A few states provide that the question whether a constitutional convention shall be held must be referred to popular vote at stated intervals. More than one half of them, however, merely authorize the legislature to submit the question to the voters whenever it thinks a convention is desirable. In such cases the proposition to call a convention must usually receive an extraordinary majority in the legislature before it can be laid before the electorate; and sometimes a majority of all those voting at some state election is necessary to put the proposition into effect. Wherever these two provisions are combined, it is almost impossible to summon a convention.

Very few of the states which make provision for constitutional conventions prescribe the methods by which delegates shall be

apportioned and elected. In this respect the constitution of New York is unusually explicit. It provides that the legislature may submit the question of calling a convention to the voters at any time and must submit it every twenty years. It states that three delegates from each senatorial district and fifteen delegates-at-large shall be chosen by the voters; it fixes the quorum at a majority; it makes some stipulations as to procedure; and concludes by declaring that the constitution or amendments adopted by the convention must be laid before the voters for their approval.

III. The third mode of amendment, that of the initiative and referendum, is to be found in several states.[1] For example, an amendment to the constitution of Oregon, ratified in June, 1902, expressly reserves to the people the power to propose amendments to the constitution and to approve or reject the same at the polls without the intervention of the legislature in any form. It provides that eight per cent of the legal voters may propose an amendment by petition, and if the proposal, on its submission to popular ratification, receives a majority of all the votes cast thereon, it becomes a part of the fundamental law of the state. A somewhat similar method is in force in Oklahoma, but fifteen per cent of the voters must sign the petition to initiate a constitutional amendment, whereas only eight per cent are required to propose any ordinary legislative measure.

There is an element of special significance about amending constitutions by the initiative and referendum. Members of state conventions and legislatures are elected by districts; usually the rural regions have more representatives in proportion to their population than do the cities. Thus the farmers may block the proposals of the townspeople. When, however, amendments may be initiated by petition and carried into force by a majority of those voting, distinctions between town and country disappear; geographical districts are ignored; the idea of numerical democracy is carried to its logical conclusion.

Direct Popular Government

Not satisfied with making their own constitutions and choosing their own officers and legislators, the people of nearly half the

[1] See below, p. 506.

states insist on the right to make laws directly. As we have noted above, the practice of submitting propositions to the voters for decision developed steadily in various parts of the Union during the nineteenth century.[1] It was no very radical break in our political evolution when in 1898 the voters of South Dakota approved the first constitutional amendment making the initiative and referendum state wide in application. The idea, however, had been associated with Populism and leaders in the old parties were at first suspicious. Still during the opening years of the twentieth century it spread rapidly, especially in the West; by 1912 sixteen states had adopted it in some form — South Dakota, Oregon, Idaho, Missouri, Montana, Utah, Maine, Oklahoma, Nevada, Arkansas, Colorado, California, Washington, Nebraska, Ohio, and Arizona.[2] Then its advance was checked; only four states have adopted it since the year of the great Progressive upheaval: Michigan (1913, extending the system of 1908), North Dakota and Mississippi (1914), and Massachusetts (1918). In none of them has the new scheme been regarded as a substitute for representative government.

In principle the initiative is a system which permits any person or group of persons to draft a bill or proposal of law and, on securing the signature of a certain number or percentage of voters, to force the submission of the same, with or without legislative intervention, to the voters for their approval or rejection. If the requisite majority is cast in favor of the proposal, it becomes a law. The referendum is a plan whereby a small number of voters may demand that any bill passed by the legislature (with the exception of emergency measures) must be submitted to the voters for approval or rejection. If the requisite majority is cast against it, the bill ceases to be a law. Note should be taken of the fact that the term "referendum" has still wider connotations; there is such a thing as the "optional referendum" — a device which permits legislatures to submit measures to the electorate at will; and as we have seen the practice of "referring" propositions to the people is employed in a variety of ways. However, we usually mean the compulsory referendum on demand of petitioners when we use the term.

Such are the general principles which seem so dangerous to some good citizens, but in practice the principles take such a bewilder-

[1] See above, p. 470.

[2] New Mexico adopted the referendum in 1911 and Maryland in 1915.

ing variety of forms that a discussion of the theory apart from its concrete manifestations is almost useless. A survey of the variants therefore should precede a discussion of the underlying concept.

In the first place, the uses to which the initiative and referendum are put may be general in character or closely restricted. They may be employed in making both statutes and constitutional amendments or restricted merely to statutory enactments, leaving judicial control under the state constitution still supreme over measures adopted by the people. Indeed, the initiative and referendum may be separated, as was formerly the case in Michigan where constitutional amendments only could be initiated by petition and the legislature alone could employ the referendum. Such a separation takes place in all those states which require a referendum on constitutional amendments but have no system of initiative at all. Finally the initiative and referendum may be limited to cities or other local units.

In the second place, the initiation of measures may be made easy or difficult. The percentage of voters necessary to propose a law may be five per cent or twenty-five per cent. A larger number may be required to initiate a constitutional amendment than an ordinary law. For example, in Oklahoma, eight per cent of the voters may propose an ordinary law, while fifteen per cent is necessary to originate a constitutional amendment. It may be made easier to force the submission of a bill passed by the legislature than to propose a new bill; that is a smaller number of signatures may be required in the former case.

In the third place, provision may be made for the intervention of the legislature in the process of initiating laws and constitutional amendments. In Ohio, for instance, three per cent of the voters may propose a bill to the legislature; if the legislature passes the measure, that ends the matter; if the legislature defeats it, then an additional three per cent of the voters is necessary to lay the proposal before the people. In Michigan the legislature, by rejecting a constitutional amendment proposed by the voters, can prevent its submission on a referendum. In Massachusetts a one fourth vote of all the members of both houses of two successive legislatures is required to lay before the voters a constitutional amendment after it is proposed by petitioners. In a few states the legislature may itself submit a

competing measure so that the voters may choose between the initiated bill and the legislative bill.

In the fourth place, the adoption of a measure referred to the people may be made easy or difficult. The law may require only a simple majority of all those voting for and against the measure — the easiest method of all. It may require a simple majority, providing that it is equivalent to a certain percentage of all the votes cast at a particular election. A difference may be made between the vote necessary for the approval of an initiated measure and the vote necessary in case of a bill referred to the voters by the legislature itself. For example, in Oklahoma, a measure laid before the people by popular petition goes into force only when approved by a majority of all those voting in the election, while a legislative proposal becomes a law when it receives a majority of those voting thereon.[1] When a majority of all the voters in a specific election is required, it is often difficult to carry a referendum, because so many electors may be indifferent and fail to register any opinion.

Since a complete and thoroughgoing system of initiative and referendum was adopted first in Oregon and has been extensively tried there something may be said of the details of that plan.[2] It was established by a constitutional amendment approved by the voters in June, 1902. This amendment provides that any statutory or constitutional measure may be initiated by a petition bearing the signatures of eight per cent of the voters and containing the proposed measure in full. The petition must be filed with the secretary of state not less than four months before election day; it is mandatory upon him to submit it to popular vote, and if the proposal is approved by a majority of all the electors voting on it, it becomes a part of the law of Oregon. Any act passed by the legislature must likewise be referred to the electorate if five per cent of the voters file a duly executed petition within ninety days after the adjournment of the legislature, demanding such a referendum.

The most noteworthy feature of the Oregon system is, however, the statute providing for the publication and distribution of arguments for and against the propositions submitted to the decision of the voters. Under this law the supporters and op-

[1] C. O. Gardner, "Problems of Percentages in Direct Government," *American Political Science Review*, Vol. X, pp. 500 ff. (1916).

[2] See *Readings*, p. 415.

ponents of any particular measure may prepare their arguments at length; these arguments are printed by the state (at the expense of the private parties concerned), together with the measures to be referred to the voters; a copy is sent to every voter in the commonwealth.[1] It is contended by the friends of this system that it has an immense educational value in arousing the interest of the people; in securing the consideration of each measure on its merits; and in turning the searchlight of publicity and discussion upon all the important political issues in the state. Professor James D. Barnett, who has given the subject careful study, expresses grave doubts, however, whether one person in a hundred really reads the entire pamphlet issued in connection with an election or examines any considerable part of it even in a cursory manner.[2] Nevertheless it forms the basis of newspaper discussions and affords information and misinformation to those who take leadership in making opinion.

It is not at all surprising that a system which proposes to vest the legislative power in the mass of voters, rather than in the representative branch of the state government, should awaken considerable opposition and criticism. It is contended by the opponents of the initiative and referendum that legislation, being a difficult and technical matter, demands the attention of experts and careful deliberation, and cannot be done effectively by the mere counting of heads. Long ago Austin said that "what is commonly called the *technical* part of legislation is incomparably more difficult than what may be called the *ethical*. In other words, it is far easier to conceive justly what would be a useful law than so to construct that same law that it may accomplish the design of the lawgiver." This technical difficulty is illustrated by the anecdote, told by a member of a legislature: "When I came to the legislature I introduced a bill to prohibit the manufacture of filled cheese. It would have done it all right, but it would have prevented the manufacture of all other kinds of cheese, too." A practical example of the failure of the initiative and referendum to secure due consideration of the technical difficulties in law-making is afforded by the anti-pass law, submitted in Oregon on an initiative petition many years ago; it

[1] See interesting article on this system by Professor George H. Haynes in the *Political Science Quarterly*, Vol. XXII, p. 484.

[2] *Operation of the Initiative, Referendum, and Recall in Oregon*, pp. 94–95.

was so badly worded that, construed literally, it prohibited a railroad company from giving passes to its own employees and allowed it to issue passes to the employees of other roads. It failed to become a law in spite of the 57,281 votes for and 16,799 against, because the petitioners had neglected to insert an enacting clause.

To the contention that popular law-making does not secure proper deliberation and technical service, the champions of the initiative and referendum reply that even in our legislatures there is very little, if any, searching debate and criticism, while competent technical service is ordinarily lacking except in the case of bills desired by corporations that are willing to furnish their own expert service. They also cite innumerable instances of important laws poorly prepared, badly worded, and sadly deficient in technique, which have been passed after long discussion by representative bodies. The criticism that discussion and deliberation are requisites in law-making does not, of course, apply with the same force to the referendum (which merely secures the reference of a measure duly passed by the legislature) as it does to the initiative.

The recognition of the necessity for discussion and technical work in wise legislation led to the adoption of a modified scheme in Maine; there the legislature may reject any measure proposed by the initiative, enact a competing measure of its own, and submit both to popular approval, permitting the voters to choose between them. "This device," says John B. Sanborn, "enables the legislature to correct faults in the proposed legislation. The substitute law will undoubtedly be far superior to the initiative bill. The existence of the two bills will, however, greatly complicate the work of the people. Voting upon a single bill is difficult enough; the choosing between competing bills may be much more difficult." [1]

The second leading argument against the initiative and referendum is that often little interest is manifested in propositions submitted to popular vote. It can readily be shown by "horrible examples" that laws and constitutional amendments have been adopted by ten or fifteen per cent of the total possible vote of the states or districts in question. It should be noted, however, that some of the worst examples occur in states which do not have the

[1] *Political Science Quarterly*, December, 1908, p. 601.

initiative and referendum but merely refer constitutional amendments to popular judgment. If these illustrations are conclusive, then even the practice of referring such measures to popular vote should be abandoned. In dealing with this argument it is important to note also that a comparison of the vote on referenda with that on candidates for important offices is hardly fair, because party organizations work with great zeal to get the lame, blind, and halt as well as the able-bodied out to cast their ballots for governor, mayor, or President. Moreover, as Mr. Sanborn puts it, "If those who vote [on referenda] are the most intelligent, if they express the best public opinion, if the influence of the uneducated and the corrupt is substantially eliminated, and if those who vote upon the question vote with intelligence, we may still, in spite of the smallness of the vote, have conditions under which the referendum may be considered as an efficient aid to the work of the legislature." To this contention the advocates of the initiative and referendum add that the slight interest of the voters in important legislative measures is evidence of the sad need for political education, which their system promises to give in time.

At its best legislation by minorities always presents grave difficulties. It is very easy to secure the signatures of the small percentage of voters required to initiate a measure, whether it be one of great public significance or a proposal designed to advance the views or interests of a petty, corrupt, or ambitious faction. The proposal may be so worded as not to awaken any general recognition of its true importance and a small but active group may thus secure the passage of a law which does not represent the interest of any considerable portion of the population and is wholly unadapted to the social conditions to which it is to be applied. Certainly it is very easy for any pernicious interest adversely affected by a good law to secure signatures demanding a referendum and thus postpone the date of its going into effect for many months until the popular judgment can be secured; perhaps through the indifference of the majority, a solid and active minority may defeat the law.

Another argument against the initiative and referendum is the contention that responsibility for law-making is shifted from a definite group, known as the legislature, to a large and irresponsible group of persons who mark their ballots within the secrecy

of the polling place. If the legislature makes mistakes or fails to reflect popular will, its members can be punished, provided the voters are interested enough to defeat those who seek re-election; whereas it is impossible to fix any responsibility or to punish any one politically, if a badly drawn or unwise measure is passed by a popular vote.

If the issue is to be decided on general principles of public policy, then a powerful case can be made out against the initiative and referendum, as Professor Arnold Hall so ably demonstrates in his volume on *Popular Government*. But we should not try by theory alone or even by accepted dogmas that which actually exists and can be tested in many ways by results. Unfortunately, however, although a quarter of a century has elapsed since the first adoption of the idea in the United States, we have as yet no scientific survey of the operations of the initiative and referendum throughout the whole country. Professor Barnett's study,[1] scientific in temper and admirable in conception, is limited to one state, Oregon; for a judgment as to the rest we are dependent upon scattered articles and partial surveys, among which a bulletin prepared in 1923 by Judson King, of the National Popular Government League in Washington, must be reckoned as one of the most useful.

Generalizing from the studies by Professor Barnett and Mr. King we may arrive at certain significant conclusions. The first of them is that the referenda submitted to the voters ordinarily fall into certain important groups. The most numerous class relates to changes in the machinery of government and the processes of elections — propositions establishing home rule for cities, adopting or repealing direct primary laws, abolishing certain minor elective state offices, increasing the term of state and local officers, and consolidating certain state offices, boards, and commissions. Next in number to changes in political machinery, are financial measures — bills raising the debt limits of states and localities, authorizing the collection of income taxes, introducing the single tax, permitting the classification of property for taxation, abolishing poll taxes, and authorizing bond issues for roads and for soldiers' bonuses. After these classes come measures relative to the regulation or ownership of public utilities. The miscellaneous propositions range in importance

[1] *The Operation of the Initiative, Referendum, and Recall in Oregon.*

from prohibition to bills regulating the practice of dentistry. According to the analysis of Mr. King, the 135 measures submitted to popular vote in 1922 can be readily classified as follows:

Forty-three related to changes in the structure and processes of government and in the methods of political action.

Seventeen proposed changes in the system of taxation.

Twelve related to public utilities.

Seven pertained to education and public schools.

The miscellaneous remainder consisted of measures relative to good roads, soldiers' welfare, prohibition, the regulation of professions, public health, etc.

The second generalization is that few, if any, "radical" measures are adopted by the initiative and referendum. Proposals to abolish the state senate, institute a cabinet system of government, and apply the single tax have been defeated. A grand scheme for the public ownership of a state power system went down in a crash in California in 1922. Some of the laws obtained by this method in North Dakota are deemed radical because they apply the principle of state ownership rather widely, but the politics of North Dakota must be ascribed to agrarian conditions rather than to the existence of the initiative and referendum.[1] No drastic change, as prophesied, has yet been made in our form of government by the direct method. No revolutionary economic devices may be laid at the door of that institution. It is not resorted to merely by persons of progressive or radical tendencies; the so-called conservative or "business interests" frequently make use of it for their own purposes.

The third conclusion is that the popular interest in voting on referenda is extraordinarily high, taking the country as a whole and the general run of things. Naturally, as in the case of other elections, it varies from time to time and according to the character of the measures submitted. The numerical results of the system throughout its history have not yet been covered by an exhaustive study, but Mr. King, in the Bulletin cited, analyzes the figures for 1922. Taking as the criterion the highest vote cast for governor or some officer at the head of the ticket, he finds that the vote on measures referred to the electorate ranged from fifty-six to one hundred per cent of the vote for leading candidates.

[1] The North Dakota program was adopted by the legislature and state officials, and the referendum and recall were used against it by the conservatives.

He estimates that on the average the vote on referenda was seventy-three and one tenth per cent of the vote for the officer at the head of the ticket. As compared with the vote on constitutional amendments in states which do not have the initiative and referendum this is a high average, and indicates the growth of interest among the voters practicing direct government. It seems safe to assume that on the whole the new experiment, from the point of view of popular interest, is a success, but it is not proper to lay too much stress on that issue. The vote cast on a law or constitution is no indication of its significance or possible endurance; otherwise the Constitution of the United States which was carried by less than twenty per cent of the voters would have to be classed as a failure.

The fourth generalization warranted by our present state of knowledge is that nearly all the abuses associated with law-making by legislatures and some in addition have appeared in connection with the operation of the initiative and referendum. The legislature is attacked by the advocates of direct government on the ground that it is amenable to the lobby of "the interests," but no doubt the said interests are just as active and influential in referendum elections as at the state capital. Under the system of direct government, Professor Barnett points out, "every man is his own legislature"; he can initiate any bill that suits his fancy and spend immense sums of money promoting it. In the fight over the Water and Power Act in California in 1922 the public utility companies were openly active and a committee of the legislature which investigated their operations reported that they spent half a million dollars "influencing public opinion." The legislature is assailed by its critics on account of the prevalence of "log-rolling"; representatives of different sections and interests coöperate in pushing one another's bills; but Professor Barnett finds cities engaged in log-rolling under direct government. It has been noted by observers that legislatures sometimes pass conflicting laws; in Oregon the voters on a referendum once approved two conflicting bills and the next legislature was compelled to repeal both of them. The passage of badly drawn bills by legislatures has long been a matter of comment, but the initiative and referendum also offer their dreadful examples.

An indictment has been brought against legislatures to the effect

that it is impossible to fix responsibility for the drafting and enactment of laws where a hundred or two hundred members or even more, divided into two houses and different parties, all have a hand in the business, besides the lobbies, citizens' committees, and party bosses who throw their weight into the scales. But what is to be said of direct government on this score? Professor Barnett directs our attention to the fact that, under direct government, legislators may submit bills; that legislators, governors, party bosses, and anybody else may take part in getting up petitions and securing their adoption; that it is often impossible to discover who is supporting any particular measure or why it is laid before the voters. He cites the amusing instance of the owners of a private road who drafted a petition under the name of "a committee of farmers," asking the state to buy the road and throw it open to the public! Finally legislatures are often charged with defeating progressive, enlightened, and necessary measures; it would be equally easy to make a long list of enlightened measures "snowed under" by popular vote.

The Recall

Not content with bringing the legislature under the direct control of the electorate, the advocates of popular government have contrived a new device, or rather reconstructed an old institution, known as the recall. The principle upon which it is based is simple, namely, that elected officers are merely agents of the popular will and that the voters should have at all times an opportunity to pass upon the conduct of their representatives. The device itself is a plan whereby a certain number of the voters, whenever they are dissatisfied with the services of a public officer (usually elective officers only), may, on petition, compel him to stand for a new election and thus submit his claims to the judgment of the electors.

The recall began its recent career in the city of Los Angeles, California, where it appeared in the city charter of 1903. At first it attracted little attention; then suddenly it sprang into prominence. A state-wide form of the plan was introduced into the Oregon constitution in 1908, and it was seized upon by the makers of commission charters for cities as a useful check on the large powers conferred upon the commissioners. California adopted it for state-wide purposes in 1911; Arizona, Idaho,

Washington, Colorado, and Nevada in 1912; Michigan in 1913; Louisiana, North Dakota, and Kansas in 1914.

Although apparently a simple institution, the recall is susceptible of a large number of variations which affect very considerably its character as a practical instrument:

1. The percentage required to force an election to recall an officer may be high or low. It is usually about twenty-five per cent, as in Oregon. It is ten per cent in the charter of San Francisco.

2. Signatures to petitions may be gathered by solicitors, or citizens may be compelled to appear before a city official to affix their signatures.

3. The recall may be used only once against the same officer under some of the provisions, and under others, as in Oregon, it may be used many times against the same officer, if the sponsors for the second and following petitions pay the expenses of the preceding elections.

4. The vote required to remove an officer may vary. It may be equal to a majority of all the votes cast at the election at which he was elected in the first instance, or it may be simply a majority of those voting at the recall election. Moreover, the recall election may be divided into two parts: the question of removal may be submitted first to popular vote and this process followed by an election to fill the vacancy; or the vote on the recall may simply take the form of an election at which the officer against whom the petition is filed may stand if he likes.

5. The recall may be restricted to administrative officers and not applied to the judiciary at all, or it may apply to all elective officers; in one or two instances attempts have been made to apply it to appointive officers.

The recall has not been used as extensively as the initiative and referendum. It is estimated that there have been on the average six recall elections a year since the adoption of the device a little more than twenty years ago, and that about half of them have resulted in the vindication of the officers against whom they were directed. It has been applied to mayors, councilmen, county judges, commissioners, county attorneys, school boards, and other local officers. It was used for the first time on a state-wide scale in 1921 when the governor, attorney-general, and commissioner of agriculture were recalled in North Dakota.

As in the case of the initiative and referendum it is impossible in our present state of knowledge to render a sound judgment on the merits of the recall in practice. Its positive effects are various. Professor Barnett shows that the voters who resort to it may be inspired by mean and sordid motives as well as by public spirit. That was to be expected. Its negative effects are imponderable. It may have restrained the hand of the unjust and unscrupulous public servant in some cases, and it may have filled an equal number of reasonably able servants with cowardice. In a country which has frequent elections and gives the voters abundant opportunities to pass upon the merits of their rulers, it is impossible to share the enthusiasm of the advocate who offered the recall as a device "to save us from the tyranny of officials."

Popular Control through the Ballot[1]

Under ordinary circumstances, public control over the government is manifested in the nomination and election of executive and legislative officials — not in making constitutional amendments or operating a system of initiative, referendum, and recall. The instrument of control possessed by the average voter, therefore, is his ballot — a fact much neglected in our political literature. Those who are active in party organizations may, of course, bring pressure to bear on certain public functionaries in proportion to their "influence"; but in most instances the penalties of being active in politics are too severe for the man who has no talent for devising summer outings, winter festivals, huckleberry-pie contests, and other diversions for keeping his "fellow-citizens" in good humor with the organization. An excess of this kind of "practical politics" constitutes, moreover, a danger to liberty and tends to lower the standard of political intelligence and public interest. Accordingly, the great question of popular control is not how best to keep the rank and file under party discipline, but how to make it possible for the voter with his ballot in hand on election day to become a real factor in determining the character of his government.

Nowhere has the "sovereign voter" received more adulation than in the United States, and nowhere has the power of sov-

[1] Taken in part from my article, "The Ballot's Burden," in the *Political Science Quarterly* for December, 1909.

ereignty been more frittered away in futile agitations and the collateral incidents of practical politics. We have rightly felt that there was something gratifying and inspiring in the spectacle of the common people rising to the height of self-government; and we have paid wordy tribute to the power of the ballot; but we have made little effort to ascertain what the ballot can really do. We have apparently assumed that it can do everything, from deciding who among ten thousand should be clerk of a municipal court to prescribing what should be done with the surface dirt removed from a street by a public contractor. For more than a century we have been adding burdens to the ballot, until the outcome of the tendency is the paralysis of the very control which popular election is supposed to afford.

The theory underlying the doctrine that public control can best be secured by establishing as many elective offices as possible is simple enough. A number of men are candidates for a public office. Each of these candidates entertains certain notions of policy with regard to the office he is seeking, and each of them has his own standards of efficiency and integrity. The voters select the one who most accurately reflects the prevailing public sentiment and seems most likely to realize the dominant public desire. If he does not carry out the policy which he is expected to support, or fails to come up to the standards set by his constituents, he is turned out at the expiration of his term (which ought theoretically to be a short one in order to give the people a chance to express their judgment on the officer with great frequency), and someone who more nearly represents the electorate is chosen in his stead. Thus, in the long run, representative democracy triumphs and popular control is maintained. To question the essential soundness of this view is deemed petty treason by most politicians. The doubter is met with the firm assertion that the people may be trusted to elect any officer, local, state, or national — an assertion which overlooks the fundamental fact that electing *all* officers together is an entirely different matter from electing *any one* of them.

Acting on the assumption that popular election means popular choice and popular control, we have steadily increased the number and variety of elective offices. It is not uncommon to find the names of two or three hundred candidates for twenty or thirty federal, state, county, and municipal offices upon the same ballot.

Acting on the same assumption we have established popular election of many minor or technical officers whose duties are statutory and fixed, rather than discretionary and policy-determining. Constantly the voters are being called upon to decide who is best qualified to be a bailiff, clerk of a court, statistician, veterinarian, engineer and surveyor, or health officer. With the idea of making popular control doubly secure, we refer innumerable petty matters to the voters at the ballot box. May the municipal judge appoint a clerk at a salary of not more than $100 a month? Shall the rate of interest on arrears for special assessments be raised from eight to ten per cent? Shall the mayor appoint a woman auxiliary to the city police force? Such are the matters of state often laid before the voters for solemn decision. That is not all. The above practices result in frequent elections, wearing out the patience and interest of the public. An observant American publicist has listed as many as nine elections held in one city between January and November of the same year. That ardent Father of the Republic who found frequent elections the best safeguard of democracy would doubtless be satisfied with the living faith of his descendants. All over the country we have primaries and sometimes "run-off" primaries to decide between those standing highest at the first, regular elections, special elections, separate school and municipal elections, and elections on franchises, and other referenda laid before the voters.

As a result, the state and local election law usually equals in bulk and complexity a moderately comprehensive treatise on the British constitution, to say nothing of the unwritten customs of the parties and election officials. The primaries, whether under the convention or the direct nomination system, are, if possible, more complicated than the election machinery itself. Nominating petitions and certificates must be filed on or before the exact day mentioned in the law; committees and conventions must be summoned; representatives on bi-partisan election boards must be selected; and so on through the long process.

Here, then, are large, important, numerous, and possibly lucrative functions to be performed by citizens in order to set the official election machinery in motion. Someone must know where, when, and how the complex machine must work; the average citizen is busy and uninformed as to law and practice;

hence, the duties have fallen into the hands of regulars and professionals, known as "politicians," large and small. They are aptly described by Richard S. Childs as persons "who know more about the voter's business than the voter does himself." Thus, in seeking to establish popular control through the ballot, the American people have in reality called into existence an elaborate party organization to serve as an office-filling and spoils-sharing machine.

The more the elective offices and elections multiplied, the stronger became the party and the louder the protests against "invisible government" — namely, government by party bosses and managers, with their sponsors standing in the background. On one thing conservatives, progressives, and radicals seem to agree: government by the people has become government by party machines. The whole bill of indictment was framed in vigorous and pointed language by the Hon. Elihu Root, a statesman accustomed to speak with caution and to measure his words:

> What is the government of this state? What has it been during the forty years of my acquaintance with it? The government of the constitution? Oh, no, not half the time or half way. When I ask what did the people find wrong in our state government, my mind goes back to those periodic fits of public rage in which the people rouse up and tear down the political leader, first of one party, then of the other party. . . . I am talking about the system. From the days of Fenton and Conkling and Arthur and Cornell and Platt, from the days of David B. Hill down to the present time the government of the state has presented two different lines of activity; one, of the constitutional and statutory officers of the state and the other of the party leaders; they call them party bosses. They call the system — I don't coin the phrase — the system they call "invisible government." For I don't know how many years Mr. Conkling was the supreme ruler in this state. The governor did not count, the legislature did not count, comptrollers and secretaries of state and what not did not count. It was what Mr. Conkling said, and in a great outburst of public rage he was pulled down. Then Mr. Platt ruled the state; for nigh upon twenty years he ruled it. It was not the governor; it was not the legislature; it was Mr. Platt. And the capital was not here [Albany]; it was at 49 Broadway; Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Conkling or Cornell or Arthur or Platt or by the names of men now living. The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the constitution or by law. . . . The party leader is elected by no one, bound by no oath of office, removable by no one.

Specifically it is urged that the complex election and party system makes it impossible for the citizens to exercise any real discrimination in choosing from among so many candidates to so many offices; that it has perverted the party from its function of concentrating opinion on issues into an office-filling machine dealing in offices and the privileges which office can bestow; and that it has excluded persons of independent character from political activities. On the first of these points, President Woodrow Wilson wrote with characteristic felicity of phrase:

> In the little borough of Princeton, where I live, I vote a ticket of some thirty names, I suppose. I never counted them, but there must be quite that number. Now I am a slightly busy person, and I have never known anything about half the men I was voting for on the tickets that I voted. I attend diligently, so far as I have light, to my political duties in the borough of Princeton — and yet I have no personal knowledge of one-half of the persons I am voting for. I couldn't tell you even what business they are engaged in — and to say in such circumstances that I am taking part in the government of the borough of Princeton is an absurdity. I am not taking part in it at all. I am going through the motions that I am expected to go through by the persons who think that attending primaries and voting at the polls is performing your whole political duty. It is doing a respectable thing that I am not ashamed of, but it is not performing any political duty that is of any consequence. I don't count for any more in the government of the borough of Princeton than the veriest loafer and drunkard in the borough, and I do not know very much more about the men I am voting for than he does. He is busy about one thing and I am busy about others. We are preoccupied, and cannot attend to the government of the town.

On the second count in the indictment, namely, the influence of the complex election system on party organization it seems hardly necessary to speak, for the matter is one of common knowledge. Of its effect upon legitimate political ambitions there can be no doubt. Many of the best citizens are excluded from legislative and executive positions on account of the necessity of making terms with the office-filling machine. The person interested in issues, rather than in the spoils of office, finds it difficult to get a hearing in his own party and still more difficult to secure a nomination to office. As political life must be constantly renewed from the sources of independent thinking, the healthy processes of government are hampered by the exigencies of spoils division.

In response to the protest against the methods which defeated

popular control, there arose about 1908, under the leadership of Richard S. Childs, a demand for the simplification of the election process, known as "the short ballot movement." The principles of this reform may be succinctly summed up in this fashion:

1. Only policy determining officers should be elected by popular vote.

2. Popular election should be restricted to officers important enough to deserve and attract public attention and interest.

3. The number of officers chosen at any one election should be small enough to permit the voter to scrutinize carefully the policies and character of each candidate.

Simplification, it is urged, will permit the electorate to bring steady and persistent pressure upon the great organs of government in the broad daylight of interested public discussion. To put the argument in the trenchant language of President Wilson:

> Elaborate your government; place every officer upon his own dear little statute; make it necessary for him to be voted for; and you will not have a democratic government. Just so certainly as you segregate all these little offices and put every man upon his own statutory pedestal and have a miscellaneous organ of government, too miscellaneous for a busy people either to put together or to watch, public aversion will have no effect on it; and public opinion, finding itself ineffectual, will get discouraged, as it does in this country, by finding its assaults like assaults against battlements of air, where they find no one to resist them, where they capture no positions, where they accomplish nothing. You have a grand housecleaning, you have a grand overturning, and the next morning you find the government going on just as it did before you did the overturning. What is the moral? . . . The remedy is contained in one word: *simplification*. Simplify your processes, and you will begin to control; complicate them, and you will get farther and farther away from their control. Simplification! simplification! simplification! is the task that awaits us; to reduce the number of persons to be voted for to the absolute workable minimum — knowing whom you have selected; knowing whom you have trusted; and having so few persons to watch that you can watch them.

The effort to attain simplicity in politics naturally began with an attempt to reform the central governments of the states by giving the governor the power to appoint all executive officials, just as the President of the United States appoints heads of departments. Indeed, the reconstruction of state executive departments has already begun,[1] and the process of simplification has passed beyond the academic stage of discussion. No

[1] See below, chap. xxvii on "State Administration."

good argument can be advanced to prove that purely administrative officers such as treasurers and secretaries should be elected, for they have no large discretionary power and no share in shaping the policy of the administration. If the lieutenant-governor is made the presiding officer of the upper house of the state legislature, some reason may be given for making the office elective; but it would be better to allow the Senate to elect its own president. Everywhere it is being recognized that the governor is the logical person to assume responsibility for efficient state administration.

In the sphere of municipal government, the tendencies in the direction of simplification are marked. The great cities are increasing the appointing powers of the mayor and giving him a larger place in the scheme of municipal politics and administration. What New York did many years ago in this regard is a matter of common knowledge. Philadelphia, Detroit, and Boston have followed this example. The spirit of modern municipal government, with respect to organization, was summed up several years ago by the Boston Finance Commission in the following paragraph: "a simplified ballot with as few names thereon as possible; the abolition of party nominations; a city council of a single small body elected at large; the concentration of executive power and responsibility in the mayor; the administration of departments by trained experts or persons with special qualifications for the office; full publicity secured through a permanent finance commission." The manager plan of city government, now so widely spread among our municipalities, reflects this spirit.

The movement for the short ballot has even reached county government where time-honored institutions inherited from the days of William the Conqueror remain entrenched. As Professor Fairlie points out, the so-called elective offices in the county are really filled, as a rule, by the county political machine, and in the fog of "court house" politics, efficient and responsible government is lost to sight. At last those who manifest an interest in the improvement of our political methods have begun to take thought about rural affairs. It has been proposed that the commission-manager form be adopted in our counties and that the manager be given the power to appoint practically all the county officers.[1]

[1] See below, p. 782.

Thus, it is said, local government could be brought into daylight and responsibility fixed. As this reform can be effected as a rule only by an amendment to the state constitution, its progress is impeded; but the forces behind it are gathering momentum.

Although it must be conceded that simplification of the election machinery makes the scheme and methods of government more obvious to the public and enables a larger number of citizens to understand and take part effectively in government, it does not automatically solve all the problems of control in politics. On the contrary it leaves many fundamental questions still untouched. How shall legislatures and executives be chosen? What shall be their relations? By what processes shall public questions be proposed, discussed, defined, and decided? What devices call forth effective leadership? These and kindred questions, which run to the very root of responsible government, are not to be solved by any of the schemes of simplification mentioned above. They are, as we have seen in the second chapter, still open questions.

CHAPTER XXV

STATE AND LOCAL POLITICS

All that has been said above about the position of the political party as the controlling power in the National Government [1] applies with equal force to state, local, and municipal governments. It is through the party that the citizens ordinarily bring their influence to bear upon the daily operation of these governments. The ballot at the primary and the regular election is the point of contact between the citizen and his government; and the ballot at the primary is in many instances far more important than the ballot at the regular election, for it is at the primaries that the voters determine party policies and select party candidates and leaders. It needs no extended argument, therefore, to demonstrate that, from the point of view of the citizen seeking to maintain his rights and do his duty to his state and community as well as to the nation, a study of political parties, their structure, and actual operations can take no secondary place.

It is well to bear in mind at the outset that the state is a unit in the national party organization and forms the basis of that structure. The state regulates the suffrage within limits, nominations, primaries, and elections—in short, practically all of the operations of parties. It is in the state and city organization that the party has reached its most complete development and has secured the most rigid discipline over the rank and file of the voters. The state organization merges into the larger national organization; the federal patronage is used to build up local machines; and members of Congress serve as party leaders in their respective states. Nevertheless, the overshadowing interest in national politics should no longer be allowed to obscure the fact that the foundations of party government are laid in state and local organization.

[1] Above, p. 125.

State Party Organization[1]

The permanent structure of a political party within a state consists of the state and local chairmen, committees, and conventions. At the head of the party organization is the chairman of the state committee who may or may not be the dominant leader in the party. Sometimes he is a mere figurehead who obeys the orders of leaders, bosses, and private persons who dictate party policies and use him as a screen.[2] The real director of party affairs may be a United States Senator who has much patronage to dispense or the governor who commands a large popular following on account of his personality or policies.[3] The state chairman may be chosen by the state committee, the state convention, at a party primary, or by a group of party candidates nominated at a primary — according to the laws and political customs of the several states.

The state committee is a representative party organization. It consists of members from various subdivisions in the state — counties, legislative districts, or congressional districts, as the case may be. The members may be elected in their respective districts at party primaries or selected by the delegates from such districts at a state convention. The power of a state committee, in the absence of legislative control, cannot be defined, because party rules usually contain no provision on the subject, and the work of the committee really depends upon the personal strength of its members and their capacity for leadership in the party. In a formal way, the committee holds periodical meetings, makes the preparation for state conventions and other state party meetings, and takes charge of the preliminaries of such assemblies. In a few states the committee chooses delegates to the national convention.

It is the duty of the state committee to supervise the process of obtaining a full party registration and vote; to prevent or heal quarrels and dissensions within the ranks; to see that local organizations are in good working order; to raise funds; and to nominate candidates for state offices in case of vacancies and for minor offices. Finally, it is the duty of the committee to direct campaigns throughout the state, coöperating, on the one hand,

[1] For legal control over state machinery, *see* below, p. 545.
[2] See H. F. Gosnell, *Boss Platt and His New York Machine* (1924).
[3] Above, p. 237.

with the national committee when there is a national election, and, on the other hand, with the local party committees, strengthening the weak places and devoting special attention to the districts in which it is believed the vote will be close.

The work of the state central committee is chiefly done by the officers — the chairman, secretary, and treasurer — and such members as choose to devote their time and attention to party matters. In most state committees there is an executive committee, composed of a small number of members who manage to gather into their hands, by constant attention to business, substantially all the powers.

For nearly a hundred years it was customary for each party to hold a state convention previous to every state election, nominate candidates for office, and draft a platform of party principles. At the opening of the twentieth century, however, as we have noted,[1] the state convention was attacked as a mere tool in the hands of party bosses; in the course of a decade or more it was abolished by law in every state in the Union except Connecticut, Rhode Island, Delaware, North Carolina, New Mexico, and Utah. Later it was partially restored in Idaho and New York; where it was abolished as a nominating device the convention sometimes re-appeared in the shape of an informal party caucus or unofficial assembly. Though forbidden to make nominations it often does in fact arrive at agreements and suggest candidates for the primary. Under a cloud at present, the convention still has vitality in many states.

The state convention, where it is permitted by law, is composed of delegates from counties or legislative districts chosen by party voters or local conventions. So far as the management of party affairs is concerned, the convention is supreme, subject of course to the laws of the state. It is bound by nothing save its own will, the theory being that the delegates coming "direct from the party voters" are the sovereign power within the party for the time being. Accordingly there is often no written constitution for the party; each convention is regarded as an original and independent body, which may make its own rules of procedure; for practical purposes it is governed only by the principles of parliamentary law and by precedents.

The formal party organization just outlined is only a part of

[1] Above, p. 153.

the state "machine." Indeed, as indicated, the dominant figure in the party may not be a party official at all. He may be a United States Senator, a governor, or a silent, retiring figure behind the scenes. The machine itself consists of all the state, city, county, and village officials belonging to the party, all the party chairmen and committeemen throughout the state, all the aspirants for office who expect to rise by services to the party, numerous attorneys for railway, utility, and other corporations that are involved more or less in politics, and all the retainers affiliated with the precinct or election district captains whose function is described below. In short, the most permanent, most loyal, most dependable elements of the party machine are those who derive emoluments directly or indirectly from its operations or expect to do so. Since we have in America no leisure class of independent means devoted to party management, as was once the case in England and still is to some extent, it is necessary that those who apply themselves to this form of public service should derive at least a certain degree of economic support from their activities. Of course the public suffers frequently from the evil deeds of machine politicians, but on the whole perhaps the public business is managed as well as could be expected in the circumstances. The truth is that thousands of members of political machines transact with a fair degree of efficiency business which the indolent voter cannot or does not transact for himself.

Local Party Organization and Methods

Leaving out of account the congressional district organization which, save in rare instances, is of no considerable importance in state politics, the basic unit in the state party machinery is the county organization, except in New England where the town is the home of local politics. It consists of a chairman, committee, and convention (unless the direct primary takes its place). The county convention is composed of delegates from lower units — towns, townships, precincts, or election districts as the case may be. The county committee, as a rule, is also made up of representatives from certain local subdivisions and the chairman is chosen at a convention, or by the committee, or at a primary. The county organization runs into the great cities; the Cook

county organization in Chicago, the New York and Kings county machines in New York, and the Suffolk county organization in Boston are already more than famous in the history of local politics.

The most famous of them all, perhaps, is the Democratic machine in New York County — the central portion of the metropolis — popularly known as Tammany Hall. This organization was established some time before the adoption of the federal Constitution, for the purpose of connecting in "indissoluble bonds of friendship brethren of common bonds of attachment to the political rights of human nature and the liberties of the country." It seems that William Mooney, an Irishman of humble extraction, eager to "diffuse the light of liberty," was chiefly instrumental in the organization of this society.[1] As its purposes were patriotic and benevolent, it took the name of an Indian chief of William Penn's time, Tammany, celebrated for his wisdom, peace, diplomacy, and exemplary life. Tammany had been canonized as a saint by the Revolutionary army in place of St. George, the slayer of the dragon and the patron protector of the British army. In honor of this noble red man, a number of Tammany societies had been established at various points throughout the East. The New York organization, therefore, got its name from older societies, and, as if to give more weight to its American character, it took the name of Columbus also and called itself "the Tammany Society or the Columbian Order."

The early purposes of the Tammany Society were social and patriotic rather than political, and strange to say it seems that some of the first leaders were decidedly anti-Catholic. Being a secret society its membership was limited; candidates were initiated according to prescribed rites; and officers bearing Indian titles were elected. The Society, however, in its membership and spirit was in decided contrast to the more aristocratic clubs of New York City. When it was incorporated in 1805, its avowed object was to afford "relief to the indigent and distressed of the said association, to widows and orphans, and others who may be found proper objects of free charity."

The Tammany Society seems to have entered politics in support of Jefferson during the hot campaign of 1800, and from that

[1] The traditional date, 1789, for the establishment of Tammany Hall seems to be wrong, and even Mooney's part in it is uncertain. See Dr. E. P. Kilroe, *St. Tammany and the Origin of the Tammany Society* (New York, 1913).

time forward it began to exercise more and more control over elections in the city. The extension of the suffrage by the state constitutional convention of 1821 strengthened its hold upon the working-class electors of the city; and its influence was further advanced on the adoption of manhood white suffrage by the constitutional amendment of 1826. A few years later the great famines in Ireland began to drive thousands of Irish peasants to America. They were received with open arms by the Tammany Society, and through that organization many rose to positions of wealth and influence.

As the population of the city and the membership in the Society increased, a Democratic-Republican political organization was slowly evolved which was nominally distinct from the Columbian Order. This political organization, in the beginning, took the form of a "general meeting" composed of members of the Tammany Society and its political supporters. About 1822, the general meeting was supplanted by a general committee composed of delegates elected at ward primaries; and in due time complete control over the Society and the Democratic-Republican organization, formed in connection with it, passed into the hands of a sub-committee of the general committee. For practical purposes, moreover, the leading members of the general committee and the sub-committee were at the same time officers and leading members in the Tammany Society.

After the victory of the Jeffersonian party in the presidential election, appointments to federal offices in New York City began to fall to the leaders in the Tammany organization. In 1839 the organization elected its first mayor of New York, and thus the spoils of local offices were added to the rich gains made in federal elections. The Society was further strengthened by the multiplication of municipal offices, and the astounding rise in local expenditures. Here were unlimited opportunities for an astute leader bent upon the manipulation of politics for his own personal gain.

This leader appeared in 1863 in the person of William Marcy Tweed,[1] who, in that year, became chairman of the general committee of the political machine and Grand Sachem of the Tammany Society. Tweed was born in 1823; he was educated at a public school, and entered politics in his ward as a fireman in a volun-

[1] There were, however, leaders of some renown before Tweed's day.

teer company about 1850. He was soon elected to the county board of supervisors, which had large powers, distinct from those of the city authorities, in levying local taxes and spending money for county buildings and improvements. He served on this board for a period of thirteen years, being four times elected its president; and he used the financial power which it gave him to extend his authority over the other branches of the city administration. From this point of vantage he began an organization within the Tammany Society for the purpose of controlling the city administration. In 1869 the Tweed group had possession of the mayor's office, the common council, the district attorney's office, the county and city treasury, the street department, the comptroller's office, the municipal judgeships, the speakership of the assembly at Albany, the state legislature, and even the executive department of the state.[1]

The pernicious operations of this group when in control of the metropolis and the commonwealth cannot even be catalogued here. Between 1860 and 1871 the debt of the city was multiplied nearly fivefold; a county courthouse which was to cost $250,000 really cost more than $8,000,000, the tax-payers being charged $470 apiece for chairs and $400,000 apiece for safes; and under the specious title of "general purposes" enormous sums of money were paid out fraudulently by the comptroller. In short, no bounds seem to have been set to the ambitions of Tweed and his fellow-workers; but they overreached themselves in 1871, when their operations were exposed by the New York *Times*. A committee of indignant citizens was formed to break up the ring, and prosecute the criminals. Tweed was arrested on the charge of having stolen $6,000,000; he was convicted, fined, and sentenced to twelve years in prison in 1873; released on an order of the court of appeals, he was rearrested and confined in Ludlow Street jail, from which he escaped in 1875, only to be arrested in Spain and brought back to prison, where he died shortly afterward. The other leading members of the ring were likewise made to feel the penalties of the law.

The exposure of this group of astute and unscrupulous political operators showed to the American people for the first time the precise ways in which powerful political machines might be built up out of the spoils of municipal offices and municipal privileges.

[1] For Croker's own description of his Tammany organization, see *Readings*, p. 567.

New York City has not been the only sufferer from exploiting political organizations. Philadelphia, Chicago, Cincinnati, St. Louis, San Francisco, and, in fact, all other American municipalities of any size have had experiences not differing fundamentally in character although varying in the extent of the public plunder involved. There have been improvements in recent years, and there are many people, not given to optimism, who think that "the worst is over."

It is to be noted that there is, in theory at least, a distinction between the Tammany Society and the Democratic organization in New York county. The former has been all along and still is a social affair, like a club; the latter is a political machine. The governing body of the political organization is a grand general committee consisting of over eleven thousand members apportioned among the party members approximately on the ratio of one committeeman to every twenty-five voters. Theoretically democratic, it is practically so unwieldy that it is powerless. It is mainly useful in bringing money into the party chest, for every member is assessed an annual fee. The real management of the business is in the hands of an executive committee composed of two members (including one woman as a "co-member") elected indirectly at primaries from each of the twenty-three assembly districts within the county. The executive committee and the persons intimately associated with it virtually control the government of the city of New York whenever the Democrats are in power. They manage the finances of the county organization, disburse the funds, agree upon the distribution of city offices, and decide the policies of the board of aldermen and other branches of the city administration. Prominent in the councils of the executive committee are the leaders and officials in the social organization known as the Tammany Society.

The Democratic county organization has its regular officials: chairman, treasurer, secretary, and other minor officers. The directing power in the organization, however, is usually in the hands of some astute leader who may or may not occupy an official position in the party, but, in fact, "controls" a majority of the executive committee.

Within recent years a number of things have conspired to reduce the power of Tammany Hall in New York City politics. The population of the outlying boroughs is outgrowing that of

New York county, or Manhattan, so that the geographical area now controlled by Tammany is of diminishing political importance. Civil service reform has materially reduced the spoils of office. In many of the East Side districts the Socialists are encroaching upon Tammany's control over workingmen. The adoption of woman suffrage introduced a new factor. Finally the abolition of the saloon destroyed one of the very pillars of the political organization, the place where the "boys" congregated and kept party feeling and activities alive. But the remarkable thing is the adaptability of the organization to changing times. The "braves" even welcomed the women (when they had to) with much suavity and survived prohibition.

Ward Politics

The basic unit of the county organization is the precinct, the ward, or, as in New York, the election district — the lowest possible subdivision of the state — the unit in which the polling place is stationed and in which party delegates to the conventions of the larger units are chosen. Here it is that the party workers come into immediate contact with the voters; here it is also that public opinion may be organized to bring pressure to bear upon the party machinery. It is of fundamental importance, therefore, that the party should have in each precinct, ward, or election district, as the case may be, at least one loyal and tried official known as the captain, chairman, or president — a tireless party worker, personally acquainted with a large number of voters and trained in the art and science of winning votes.[1] If this party worker in the lowest political subdivision represents the interests and aspirations of the party voters in his district, we have a representative party organization. If, on the other hand, the ward leader is appointed, sustained, and financed by some body "higher up," the whole party organization may be lifted out of popular control and vested in the superior officers who are in charge of the base of supplies. Vote-getting "pays"

[1] In New York City, each county is divided into assembly districts, each of which has a committee, composed of the committeemen serving for the district in the county committee, and also two assembly district leaders who are at the same time members of the county executive committee. The assembly district is in turn divided into election districts, and in each election district there is an election district captain usually selected in fact by the assembly district leaders, who are, as noted above, at the same time members of the county executive committee, which directs the general business of the county organization.

in the economic sense of the word, for the man who can deliver votes can exact his price from those who are willing to pay for the delivery; it has come about, unfortunately in very many instances, that party members, engrossed in the struggle for a livelihood, neglect to do their share in party work. The organization then falls into the hands of those who make it their business to be always on guard.

The precinct, ward, or the election district, in which the leader or captain operates, contains from 200 to 600 voters of all sorts and conditions; perhaps the number of active voters is not more than three or four hundred at most. Let us fix the figure at four hundred. Then two hundred and one constitute a majority. If the captain can get out a party vote of two hundred or more, he can carry his district. So he has to manage only about two hundred party members. If he has one hundred of them "sewed up," he can easily "swing the district" at will. How can he get control of a hundred voters? He starts with his own family and relatives — perhaps eight or ten voters. Then he has the right to choose ballot and election clerks allotted to his party — petty jobs which pay sometimes as high as fifty or sixty dollars a year and are eagerly snapped up by party members. He recommends persons for positions in the civil service, suggests candidates for minor local offices, gets jobs for the unemployed with contractors in charge of municipal work, and renders numerous other services of an economic sort. Perhaps he is himself a petty office-holder and can work "a few boys" into his own branch of the city government. He distributes freely the share of the campaign fund which is assigned to his district; usually there are ten or twenty shiftless persons who are happy to "run errands" and do other odd jobs more or less arduous during the campaign rush. The captain or leader therefore has no trouble in bringing together a fairly solid mass of voters on a practical, monetary basis. Counting the members of the families of the retainers, the number may run up as high as one hundred.

By managing this group the precinct leader makes himself "solid" with the party machine higher up; it cannot ignore him as long as he holds his forces together and delivers the vote as instructed in primaries and elections. Inasmuch as the primary vote seldom amounts to more than fifty per cent of the party

vote, it is evident that nothing but the most powerful effort on the part of independent citizens can force the nomination of a candidate who is not approved by the machine. It is evident also that a huge sum of money rightly placed among the district leaders will marshal a considerable vote for any person who will supply the funds. When we remember that there are perhaps 200,000 or more precinct leaders in the United States each with his band of faithful retainers held together by substantial bonds, we can begin to appreciate the power of the political machine.

Besides managing the machine in his own party, the leader or captain must always be seeking to win new voters. If he is efficient, he has a list of all the voters in his district, knows their occupations, and discovers how to help those who are in trouble. When newcomers take up their residence in his neighborhood he finds out about them from the leader of the precinct from which they moved. As the youngsters approach the voting age, he takes an interest in them and invites them to enroll in the party. He is acquainted with business men in his district and does what he can to "throw business" their way. He is always accessible and anyone in difficulty can easily approach him. He is the channel through which the humble citizen can reach the city officials high in authority; if necessary he may take a constituent down to the city hall to see the mayor. He is always treated with respect by superiors because he is their sheet anchor in time of a political storm. If he can call the mayor by his first name, the whole neighborhood finds vicarious pride in his self-esteem. In fair weather and foul, in victory and defeat, in primaries and elections, in season and out he must keep his battle array in order. His livelihood, his chances of promotion, his honor, such as it may be, are all at stake; if he cannot "deliver the vote," he is ruined.

Election Laws

The frequent abuses connected with party organizations and operations, as we have seen,[1] have led to elaborate laws controlling the entire election process from the enrollment of the voters to the final review of the official count. It is impossible to set down here in any detail the provisions of the election law of a single state — the election law of New York is a volume of

[1] Above, p. 152.

about 250 pages of ordinary print — but the following principles are now to be found in the legislation of any fairly advanced commonwealth:

1. Certain officers — the secretary of state, county clerks, and in some instances special election boards — are placed in charge of the entire election process.

2. Provisions are made for bi-partisan boards of poll clerks, ballot clerks, and election inspectors in each polling place within the state.

3. Duly authorized watchers from each party may be present at each polling place in order to secure a fair count.

4. Standard and official tally sheets, or records, on which to make the returns of each polling place, are furnished, and all returns must be certified by the proper officers in charge.

5. Special arrangements are made to police polling places.

6. In order to secure to every citizen, properly qualified, the right to vote, official registers of voters are prepared and each citizen is entitled to enter his name so that on election day his right may be realized. A most drastic scheme for preventing false registration was created in New York, in 1908, by a law requiring the personal identification of voters in cities of 1,000,000 or more inhabitants.[1] According to this law the voter, on registering, in addition to answering the ordinary questions, must give the number of the floor or room in which he lives and the name of the householder or tenant with whom he lives; he is furthermore required to sign his name if he can write, and when on election day he appears to vote he must again sign his name opposite the first signature. By a comparison of the signatures, the election officials are able to detect frauds and thus prevent from voting a large number of "floaters" and "repeaters." There is no doubt but that the effect of the law has been most salutary.

7. Finally, there is a long line of important legislation on the ballot — designed to prevent intimidation by securing secrecy to the voter and to foster independence rather than the "herd instinct" in choosing from among the various candidates.

The earliest form of balloting seems to have been viva voce voting in the open air or in open meetings. This practice, imported into colonial America from England, was continued in

[1] California already had a similar law.

some states until well down into the nineteenth century. When the ballot was substituted for this method the idea was to secure secrecy, but the purpose was generally defeated, for it was customary for party organizations and candidates to furnish their own ballots. Usually each party chose its own color of paper so that even when the ballot was folded anyone could see what ticket was being voted. Since the voter could be watched from the moment a ballot was handed to him somewhere outside the polling place until he deposited the same in the ballot-box, it was easy to find out whether he had, according to the modern phrase, "delivered the goods." The result of this was to facilitate and encourage bribery. Persons economically dependent, being deprived of the protection of secrecy, were readily coerced into voting as others bade them, or punished if they disobeyed. The expense of printing the ballots, moreover, while not a heavy burden on the party organizations, was large enough to act as a deterrent on independent candidacies. Such tricks as the distribution of ballots bearing the emblem of one party and the candidates of another, or of ballots containing the wrong candidates for certain offices, although usually forbidden under the penal law, were common.

The prevalence of these abuses, especially in the presidential campaign of 1884, aroused a strong movement for reform and finally led nearly all the states to adopt the so-called "Australian ballot system."[1] The principal features of this system may be outlined as follows:

(1) All ballots used in elections of public officers (except, usually, certain minor local elections) are printed under the direction of public officials, at public expense, and are distributed by officials to the various polling places previous to the election.

(2) Each ballot contains on a single sheet the names of all the candidates nominated by all the parties and by special petition, and is duly protected against counterfeit by a number and an official endorsement on the back.

(3) Ballots can be obtained by the voters only within the polling places, on election day, from the regular election officials. They are to be marked in absolute secrecy in voting booths provided for the purpose, folded so as to conceal the marking on the face and yet leave exposed the official endorsement on the back,

[1] Above, p. 153. The name is applied because the essential idea was borrowed from Australia.

and returned to the election officers to be deposited in the ballot-box, before the voter leaves the polling place.

(4) Special safeguards are usually provided to make sure that the official ballots shall not be lost or stolen; that none but official ballots shall be cast or counted; that the number of ballots counted shall correspond exactly to the number of persons voting; that the ballot actually cast by each voter shall be the identical one given to him by the election officers (these two objects are attained by a system of detachable, numbered stubs); that no official ballot shall be left unaccounted for when the election is over; that no electioneering shall be done in or around the polling place; that only the election officers, the duly appointed watchers of each party, and a specified number of voters shall be allowed within the polling place at any given time; that no voter shall place any mark upon his ballot tending to identify it as having been cast by him, or shall divulge, while in or near the polling place, how he has voted; and that no election officer or other person shall attempt to discover, or having discovered shall in any way disclose, how any person has voted.

(5) Numerous devices have been invented to encourage the voter to act independently in casting his ballot. When the Australian ballot was first introduced it was the general rule to print the names of the candidates of each party in a separate column with the name of the party at the top in large letters and also the party emblem for the benefit of illiterate voters. Immediately under the emblem was placed a circle and by merely making a mark within that circle the voter could cast his ballot for all the candidates of the party at one stroke. Obviously this called for no discrimination or intelligence. Moreover it placed great obstacles in the way of the voter who wished to choose freely from the candidates of the various parties. If he did not mark in the circle — that is, vote a "straight ticket" — he had to make a mark beside the name of every candidate for whom he wished to vote and thus incurred the risk of becoming confused as he looked from column to column.

With a view to stimulating independence and penalizing the lazy voter, a large number of states have abolished the party column ballot and substituted for it the Massachusetts ballot, adopted in that commonwealth in 1888. On this ballot the names of the candidates of all parties for each office are grouped usually

in alphabetical order under the title of that office. There is only one way of marking this ballot; the voter must put a cross opposite the name of each candidate for whom he wishes to vote. He is nearly always aided in his natural desire to stick to his party by the name or emblem of the party printed on the ballot near the names of the respective candidates.

Even this party prop is taken away from him in the municipal elections of a large number of states by laws forbidding the nomination of candidates for certain offices by political parties and excluding the names and emblems of all parties from the ballot. In this way an attempt is made to establish a non-partisan primary and a non-partisan election. The system has been widely adopted, especially for the choice of municipal officers. One form is found in the Des Moines plan of commission government: any person may get his name on the primary ballot as a candidate for commissioner by securing a small number of signers to his petition; no party designations or symbols are allowed; the ten candidates polling the highest votes in the primary appear on the ballot in the regular election, still without any party signs or symbols; the five receiving the largest vote in the election are the victorious candidates. In Boston anyone can become a candidate for mayor by securing 3000 signatures to his petition, which bears no party symbol.

As the non-partisan idea spread among cities, it was carried over into the election of judges in many states, including Arizona, California, Idaho, Minnesota, Nebraska, Ohio, North Dakota, South Dakota, Washington, Wisconsin, and Wyoming.[1] Kansas, Iowa, Missouri, and Pennsylvania, after trying the system, abandoned it. The form of non-partisan election for judges varies, but a common type of law authorizes designation by petition; the names of the persons so designated by petition are placed without party signs or names upon a separate ballot at the official primaries; the two candidates for each judgeship receiving the highest votes appear without party signs upon the official ballot at the regular election. Minnesota in 1912 adopted the non-partisan primary for the selection of judicial, county, and certain municipal officers as well as members of the legislature. It is recorded that "this is

[1] See R. E. Cushman, "Non-partisan Nominations and Elections," *Annals of the American Academy of Political and Social Science*, Vol. CVI (March, 1923), pp. 83–96.

the first instance of the abolition of the party label in the nomination and election of members of a state legislature."

There are evident limits to the application of the non-partisan principle. Party organizations are too well grounded in American political life to be uprooted by the mere abolition of symbols. In municipal and judicial elections, where partisanship is ordinarily not so strongly manifest, the exclusion of party designations and signs frequently works for independent voting and hampers somewhat the operations of the party "boss." The larger the city, the more difficult it is to divorce elections from partisan methods.

Absent-voting Legislation

The whole trend of modern election legislation is in the direction of protecting the voter in the exercise of his rights and making it possible for him to cast his ballot in comfort and safety. In the old days, elections in rural sections were held at the county seat and all voters who expected to take part had to journey thence and remain till the close of the polls, perhaps two or three days if the contest was a hot one. Now we bring the polls near to the voter. In the city he has only to walk a block or two to find his ballot-box.

That is not all. Modern industrial and commercial life makes it necessary for men to be away from home frequently, in distant cities or states, and thus, in effect, deprives them of the franchise, as long as physical presence at the polling place on election day is necessary to the exercise of the suffrage. To meet this condition of affairs, at least half of the states, beginning with Vermont in 1896, have enacted laws which permit electors to vote at primaries or elections or both without appearing at the polls.[1]

The absent-voting laws, as may be imagined, differ widely in form and content, but certain principles run through them all. They cover the following elements: (1) distance from home necessary to entitle the voter to the privilege; (2) causes of absence, such as sickness, nature of his business, some unavoidable cause, or in a few cases no cause at all; (3) whether the absent voter shall be entitled to vote in primaries, elections, or both, and on questions before the electorate on referendum;

[1] P. O. Ray, in *American Political Science Review*, p. 251, May, 1918, for a complete and detailed summary of legislation up to that date.

(4) the application for the ballot and the declaration necessary to obtain it; (5) the marking of the ballot and the affidavit required to authenticate it; (6) the transmission of the ballot to the election official in the home precinct of the voter; (7) and the rules governing the acceptance, rejection, and counting of such ballots. In the more carefully drawn laws, such as those of Indiana, Illinois, and Minnesota, all these points are covered with such precision that collusion and fraud are almost impossible. The right of the absent voter is fully safeguarded, while the possibility of misuse of the privilege of absent-voting is reduced to the minimum. Among the states that have this legislation in some form are Illinois, Iowa, Massachusetts, Michigan, Montana, Ohio, Texas, Wisconsin, Nebraska, Oklahoma, Oregon, and Washington.

By way of summary, it would appear that American legislation covers almost everything necessary to enable the voter to exercise his rights:

1. The polling place is brought near to his residence.
2. Notices of the time and place of the election are printed, posted, and published.
3. Official specimen ballots are furnished for his instruction before entering the polls.
4. Spaces are left on the ballot so that the voter may write in the names of any candidates that do not appear on the official ballot.
5. The ballot is marked in secret.
6. Provisions are made for bi-partisan election boards and for watchers and challengers of all parties.
7. Official tally sheets and poll books are kept and the ballots are numbered so that the possibility of "counting out" candidates is reduced to a minimum.
8. In case of a contested election a judicial review of the ballots may be had before a regular court of law.
9. The voter may exercise his right even though away from his residence at the time of the election.

The Legal Control of Party Organization

The political party, as we have seen,[1] began as a purely private association of citizens. It devised its own form of organiza-

[1] See above, p. 152.

tion, decided how many and what committees it would have, provided for the choice of its officers, arranged for the nomination of candidates, and raised money for campaigns without any interference from the government. All that, however, belongs to history. To-day every state in the Union regulates these party operations in more or less detail.

I. At the outset, when the state legislature undertakes to control political parties, it must define just what it means by the term "party," for obviously groups having slight numerical strength or formed for semi-political purposes need not be brought within the purview of the law. In meeting this problem of definition, two rules have been devised. It is sometimes the practice to extend the application of the law only to those political associations which cast a *fixed* number of votes for some specified candidate, such as for governor, at the preceding state election. The more frequent practice, embodied in the most recent statutes, is to provide that any political organization which receives a certain percentage of the entire vote cast shall be subject to the law. The percentage varies: sometimes it is two per cent of the entire vote; sometimes it is twenty-five per cent.

II. After deciding what political organizations shall come within the purview of the law, it is next imperative that some precise and regular mode shall be provided for determining who are entitled to membership and voting rights within the party. Otherwise it would be impossible for the primary law to attain its fundamental purpose of securing the expression of the popular will on the composition of the committees and conventions, the nomination of candidates, and the drafting of the platform. This principle is enunciated in the preamble to the Oregon law: "Every political party and every volunteer political organization has the same right to be protected from the interference of persons who are not identified with it as its known and publicly avowed members that the government of the state has to protect itself from the interference of persons who are not known and registered as its electors. It is as great a wrong to the people, as well as to the members of a political party, for any one who is not known to be one of its members to vote or take any part at any election or other proceedings of such political party, as it is for one who is not a qualified and registered elector

to vote at any state election or to take part in the business of the state."

This seems axiomatic; but obviously it is difficult to prescribe the conditions of party allegiance without preventing that independence in voting which is the hope of decent politics. If only known party voters are to attend the primaries, what becomes of the secret ballot at elections — that boon which it took so many years to secure? In the midst of a great diversity of practices in this matter of providing a party-allegiance test, four general methods are discernible: official enrollment in the party by secret or open process; personal declaration at the primary; the investing of the right to determine the test in party officials; and the heroic device of abandoning the test altogether by the establishment of secret primaries.[1]

1. The first of these methods has been adopted in New York. In that state, after many experiments, personal enrollment was established; the voter, on registering for the coming election, receives a blank which he must fill out if he intends to participate in the primary elections of any party. He then goes into a booth where he indicates by a pencil mark the party with which he intends to affiliate, and at the same time subscribes to a declaration running as follows: "I am in general sympathy with the principles of the party which I have designated by my mark hereunder; it is my intention to support generally at the next general election, state or national, the nominees of such party for state and national offices." The enrollment blanks so filled out are placed in sealed envelopes and deposited in a special box; a week after the regular election the seals are broken and the lists of each party made up from the declarations. The chief objection to this system is that urged against viva voce voting at elections; namely, that it makes public the party affiliation of every voter who enrolls, and makes him liable to the pressures incident to such publicity.[2] Furthermore, as used in New York, the scheme compels the voter to choose his party, for primary purposes, nearly a year in advance.

2. The second test of party allegiance, that is, personal declaration at the primary, is one very generally applied, but it tends

[1] On this problem, see a valuable article by Professor Charles E. Merriam in the *Proceedings of the American Political Science Association*, 1907, pp. 179 ff.

[2] Another disadvantage of the scheme of enrollment and in fact of all tests for party membership is the difficulty it places in the way of separating state and national from local issues.

to approximate the New York plan because an official register based on such declarations is frequently compiled. According to this scheme, the voter at the primary asks for and receives the ballot of the party in whose nominations he wishes to take part; unless challenged, he deposits the ballot in the box of the party he has chosen; if challenged he must take an oath to the effect that he is a member of that party, supported it generally at the last election, and intends to vote for at least a majority of the candidates at the coming election.

3. The third method — leaving the imposition of the test to the party officials operating under organization rules — is prevalent in the South, where, for well-known reasons, the dominant party has desired a generous freedom in this respect.

4. Wisconsin has attempted to solve the problem of the allegiance test by a novel provision: each voter at the primary is given ballots of all the parties; the ballots are officially prepared, are alike in form and color, and are sheets, perforated, and bound into a pad. On each ballot the names of the several party candidates are arranged under the titles of the offices to which they seek the nomination; the voter separates from the group of ballots the ballot of the party which he wishes to vote, marks it, folds it, and then deposits it in the regular box. All the other papers he puts in a separate box for blanks which are destroyed immediately after the canvass. Thus absolute secrecy is preserved. Colorado has followed this example.

III. Having defined the type of organization which shall be deemed a party and laid down the rules determining membership in the party, legislatures next provide for safeguarding the balloting at primaries; in this connection they have regulated the dates of primaries, polling places, size and shape of ballots, the conduct of the balloting, the count, and the payment of the expenses. The principles now accepted in this field of primary legislation are the oldest and best known, so that they need little more than mention here. There is a uniform tendency to fix the holding of all primary elections of all parties on the same day and at the same place for all territorial divisions coming under the provisions of the law. This is not universally adopted; some states, for instance, forbid two parties to hold their caucuses on the same day, leaving the matter otherwise to the determination of the committees, subject to certain limits as to time.

There is also a tendency to require an official primary ballot for all parties, printed at public expense; this is intended to eliminate the evils connected with the private printing of ballots, such as use of different colors by separate factions to control the purchased vote. It is also a generally accepted principle that the primaries shall be conducted by regular officials according to minute provisions as to opening and closing the poll, and counting the ballots; and finally that the expenses shall be borne by the same governmental authority that bears the regular election expenses. This last provision was long contested in state legislatures. It was held that, while the state should safeguard the primaries of political parties, it should not pay their bills. The same arguments that were advanced in support of the Australian ballot, however, finally prevailed.

IV. The definition of the party, the provision of an allegiance test, and the protection of the ballot at the primary are but the preliminaries to the control of party organization and operations. The dominating element in the state party organization is, of course, the central committee (including the chairman), which has charge of marshaling the party hosts in campaigns and has more or less to say, according to circumstances, about the conduct of party members in legislatures and official places. In many states this important body has taken advantage of the rich opportunities offered to build up a centralized machine, and accordingly our legislatures have sought to bring it under control and fix its responsibility. In determining the composition and mode of selecting the state committee, the law-makers have adopted a bewildering variety of expedients which do not reveal any positive tendencies. These devices are illustrated by the types of regulation described below.

1. The law of a few states, full as it may be in many respects, does not enter this sphere of party organization; but leaves each party to follow its own rules in the constitution of its state committee. Practice, therefore, varies.

2. The Wisconsin law of 1907 presents a rather unique method of choosing the state chairman and committee. It provides that the candidates for the various state offices and for senate and assembly nominated by each political party at the primary and the senators of such party, whose terms of office extend beyond the first Monday in January of the year next ensuing, shall

meet at the state capitol, formulate the platform of the party, and elect by ballot a central committee composed of at least two members from each congressional district and a chairman of the said committee.

3. The most democratic method of selecting the state committee is provided by the Illinois law which went into effect on July 1, 1908. The central committee is composed of one member from each congressional district in the state chosen for a term of two years by the party voters at a regular primary. "The state central committee," runs the law, that there may be no mistake, "shall be composed of members elected from the several congressional districts of the state as herein provided and of no other person or persons whomsoever." Within thirty days after their election the committee must meet and select the state chairman and such other officers as may be deemed necessary to the conduct of party business.

Descending from the central party organization to the basic unit in the state machinery — the county organization — we discover here a tendency on the part of the legislatures to regulate the most minute details. The form and organization of the county committee are provided by law or left to party rules under the terms of the law. The county committee is usually made up of members specially elected for that office in the townships, precincts, or wards of the county or of *ex officio* chairmen or members of the committees in the lower subdivisions of the county. The county committee has a chairman, who is generally selected by the committee or by the county convention. The county convention is composed of delegates chosen by party voters in the lower units. Its importance has greatly diminished as a matter of course with the application of the direct primary to the nomination of county officers.

The Direct Primary

V. The state legislatures have not been content with attempts to "democratize" party organization by requiring the popular election of party officers and delegates to conventions. They have savagely attacked the convention system itself. As we have seen, the practice of holding local conventions composed of party delegates from small units for the purpose of making

nominations appeared very early in our history. In the Jacksonian era it was everywhere substituted for the legislative caucus as the more democratic method of selecting party leaders. It was not without critics, however, from the beginning; as early as 1868 local leaders in Crawford county, Pennsylvania, abandoned the convention in favor of selecting candidates by a direct vote of party members. As the scheme worked very well it was tried for local purposes in many other states, especially in the Middle West.

By the opening of the twentieth century, a profound distrust of the convention had appeared in all parts of the country, because it was often a mere tool of corrupt interests seeking control of the government for private ends. At best it was composed mainly of professional politicians bent on monopolizing offices and emoluments and excluding disinterested citizens from any effective rôle in party councils. New political leaders, who had appeared with the growth of popular distrust, failing to capture the convention, worked for its destruction. They proposed the total abolition of the convention, state and local, and the substitution of the direct primary or election within the party. By 1913 nearly every state in the Union had adopted the direct primary for either state or local purposes; only a few retained the convention for making nominations to offices.

It is impossible to relate here the history of this innovation or to describe the bewildering variety of schemes evolved with a view to giving the independent voter more power as against the machine.[1] It is sufficient for our purposes to note that there are only a few signs of any return[2] to the convention system and that current legislation on the subject relates to details rather than to fundamental changes in the principle of nominating by direct party vote. Generalizing from a survey of recent statutes, we may say that the direct primary involves the following elements:

1. A primary election within each party held at a stated time previous to each election for the purpose of enabling party voters to choose from among the several aspirants persons whom they wish to stand as candidates of the party in the coming election.

2. Some method by which party members who aspire to nomi-

[1] For the historical aspects, see the periodical summaries by Professor Holcombe in *The American Yearbook*, and by Professor Aylsworth in the *American Political Science Review*.

[2] See below, p. 550.

nation to office may have their names placed upon the official primary ballot used at the primary election.[1] The most popular method is the petition plan which permits anyone to obtain a place on the primary ballot by securing a certain number of signatures to a petition in his favor. Sometimes the number of signatures is a fixed quantity and sometimes (more generally) it is a certain percentage of the party voters within the city, county, district, or state, as the case may be. Objections have been made to this system largely on account of the expense attached and the burden which it places upon the poor man unable to employ persons to collect signatures.

A substitute method — already widely discussed as a possible working compromise between the old convention and the straight direct primary—would authorize official party committees, chosen the year before, to name a party slate; dissatisfied elements in the party, however, would be permitted to present other names by petition; primary elections, held only when such contests developed, would give the party voters a chance to choose between the committee designees and those designated by petition. An approximation to this plan is found in the primary laws of South Dakota and Minnesota, but there the official designations are made by conventions elected by the voters, thus adding a complication to the process.

3. Some method must be devised for determining the order in which names appear on the primary ballot. They may be put in alphabetical order, but it has been found by experience that those who get at the top of the list simply because their names begin with B or C have an actual advantage over those who, through no fault of their own, happen to be named Xantippe or Yontz. The discovery of this fact has led to the practice of "rotating" the names, that is, allowing each aspirant to appear at the top of a portion of the ballots to be determined by the number of aspirants and the number of ballots. This practice now seems to be growing in favor. Another method is to place the names of aspirants on the ballots in order of the time of the filing of their respective applications or petitions, but this is objectionable because it introduces an unseemly scramble for places outside the office where such petitions are filed. Still another plan is to determine the position by lot.

[1] The process is called "designation."

4. The practice has now been established of printing party primary ballots at public expense and of making them as "official" as the ballots used at regular elections.

5. It is necessary to determine what vote shall be required to constitute a choice at the primary. A majority of the direct primary laws in the United States provide that the person who receives the highest number of votes shall be declared the party candidate for the office which he seeks — thus making it possible to nominate by minority vote. That this is highly undesirable has long been evident even to the most ardent advocates of direct nomination. "It prevents," urges an able critic, "a number of candidates representing the majority sentiment as to party principles from coming into the field as candidates for the nomination for fear the candidate of a minority may be named by receiving a higher vote than any one candidate among the majority candidates. The present primary is, in effect, a convention to which every voter is a delegate and in which the candidate receiving the most votes on the first ballot is the nominee." [1] It affords an opportunity for a man representing a minority to become the standard-bearer of the whole party, thus violating the first principle of the democratic rule which primary legislation was designed to obtain.

Several attempts are made to obviate this defect. (*a*) In some instances, a rule is introduced to the effect that any aspirant at the primary must receive an absolute majority of all the votes cast in order to be victorious. In the South, where nomination is usually equivalent to election, it is a general practice to require an absolute majority and if no aspirant receives such a majority, a second ballot is taken on the two candidates standing highest on the list. (*b*) A second method for overcoming the objection to plurality nominations is to provide that, unless the candidate standing highest on the poll at a direct primary receives at least thirty-five per cent of the total vote, a convention shall be held for the purpose of making the nomination in question. Another method of obviating minority rule is the preferential primary, a form of which was tried in Wisconsin and abandoned. Under that plan, in case no one receives a majority

[1] For a criticism of the nomination by plurality vote and an ingenious suggestion for a remedy without readopting the convention system, see an article in the *American Political Science Review*, Vol. II, pp. 43 ff., by Charles K. Lush.

of the votes at the primary, the aspirant receiving the smallest number of votes is eliminated and his votes are distributed among the other candidates according to the second choices indicated. This process is continued until someone receives a majority.

6. If the convention is abolished it is necessary to provide for an assembly of some kind to formulate the principles and issues of the party into a platform preparatory to the election.[1]

7. In order to carry out the theory of equality among candidates for nomination at the primary, Oregon has devised a publicity pamphlet (issued and sent to party members by public authorities), in which each aspirant may lay before his fellow-citizens his claims to the nomination, by paying a sum proportioned to the importance of the office which he seeks for the use of a certain number of pages. This is supposed to offset, in part, the publicity which the press affords to candidates able to pay for advertising.[2]

8. The extent to which the principle of the direct primary is applied to offices varies from state to state. In the great majority of states the application is universal and state-wide, that is, it covers all elective officers from the governor down to local officers, with only minor exceptions. Other direct primary laws are restricted to the nomination of local officers, the convention being employed for state purposes. Some primary laws specially exempt judges from their provisions and substitute nomination by petition without party interference.

After the strong outburst of enthusiasm for the direct primary which swept over the country between 1903 and 1915 and revolutionized the nominating systems of nearly every state, there came a period of questioning and some reaction, accompanied by certain modifications in the laws. In the West, the primary was assailed because the farmers voted in such large numbers that they captured the party machine. In the East, it was attacked because the voters were so apathetic that it often became a mere form. Minnesota and South Dakota reëstablished conventions as pre-primary institutions with a view to concentrating party opinion before the direct vote on candidates. New York, in 1921, restored the convention for the nomination of candidates for state offices. Idaho took the same step. It looked for a time as if there were to be a general return to the old system;

[1] See below, p. 552.

[2] *American Yearbook*, 1910, p. 151.

but the tendency was quickly checked. Attempts to revive the convention or, at all events, to limit seriously the operations of direct voting were defeated in 1922 on popular referenda in Arizona, Nebraska, and Washington. Apparently, therefore, the direct primary, notwithstanding its shortcomings, is firmly established in the affections of the voters.

As was to be expected, it has not fulfilled all the hopes of its advocates. It has not destroyed party bosses, eliminated machines, or led to radical changes in the character of the men nominated. Its actual achievements are difficult to measure. In fact no searching examination has yet been made into the operations of the direct primary throughout the Union. The most exhaustive inquiry is that made by Dr. Ralph S. Boots into the working of the New Jersey law, the results of which are incorporated in a large volume.[1] His conclusions may be summarized as follows. There is an immense waste in printing ballots, in advertising, and in election administration. Where there are no contests for offices, especially of a minor character, the printing of ballots and holding of primaries are an unnecessary expense. Where there are no contests and the voters must write the names of their favorites, they take little interest in nominations. The system of plurality nominations results with a high degree of frequency in the selection of candidates by a small vote and plays into the hands of the party bosses because it enables them to win by concentrating forces on their picked men. The percentage of voters who actually take part in direct primaries, though it fluctuates according to time and circumstances, seems to be slightly higher than the percentage that voted in the old days for delegates to nominating conventions; but the increase is not marked. It is not possible to determine accurately from what section of the population the increase comes or why it comes. In some cases Dr. Boots found the increase among the working-class wards of industrial cities; in other cases in the business and professional wards. He could not discover that popular interest in the primaries showed any tendency to vary according to the wealth, education, or economic status of the voters. As to the character of the men chosen by the sys-

[1] *The Direct Primary in New Jersey* (State Bureau of Research). For a brief but valuable study of the direct primary, see O. C. Hormell, *The Direct Primary with Special Reference to the State of Maine* (Bowdoin College Studies, 1922). For interesting glimpses into actual practice, *Annals of the American Academy of Political and Social Science*), Vol. CVI, March, 1923.

tem, Dr. Boots reports that when the primary was first adopted it was very common for the office-holders who had been elected before the law was passed to secure a renomination under the direct primary whenever they sought it. As the old "war horses" fell out of line and new men came in, those candidates were usually successful who had the backing of the political machine or spent large sums of money in their campaigns.

No doubt the direct primary, taking the country as a whole, has increased the popular interest in nominations to some extent. It gives the independent candidate and the independent voter a chance to be heard. It makes the grip of the boss somewhat less secure by occasionally upsetting his calculations. Certainly the voters can no longer complain about having no voice in managing party affairs. At the same time the direct primary has increased the complexity of our election machinery. It does not make for simple, clear-cut, direct responsibility in government, but adds to the confusion and fog in which public administration is obscured. That is the reason why most of our political critics contend that it will work satisfactorily only where there is a "short ballot," and hence it must be considered in relation to a reorganization and simplification of government.[1] This thesis we find developed with emphasis and cogency in the writings of Professor Charles E. Merriam, one of the first authorities on the American party system.[2]

VI. Nominations for those offices to which the direct primary is not applied are, naturally, left to party conventions, but these are in every case regulated with more or less strictness as to selection of delegates, conduct of meetings, and modes of procedure. The laws of each state allow the nomination by convention of all candidates who are not required to be nominated by direct primaries. The authorized committees of the parties must give due notice of the primaries to be held for the election of delegates, indicating at the same time the officers to be nominated by the conventions so called. In general, the primaries held for the purpose of choosing delegates must be conducted like other primaries at a regular polling place which must be kept open a stipulated time.

VII. In connection with the nomination of candidates, especially for state offices, it is a custom of political parties to make a

[1] See above, p. 522.

[2] *The American Party System*, p. 261.

declaration of the principles, known as the platform. In some states, even where the direct primary is used for making nominations, the business of drafting the platform is entrusted to a party convention. Other states which have abolished the convention must provide a substitute. Wisconsin vests this function in a kind of party council composed of certain candidates for office and certain party members already in office. At least eight states have followed this example with modifications.

VIII. The extensive use of money in elections by candidates and committees and the notorious gifts of huge sums by corporations and individuals to campaign funds, especially during the closing years of the nineteenth century, led to a widespread belief that party machinery had fallen into the hands of "the predatory rich," as journalists were wont to say. Hence the control of money in elections became a fundamental concern of those interested in regulating the operations of political parties. The general principles embodied in legislation to effect this control may be briefly summarized as follows:

1. The amount of money which candidates for office may spend is limited to a specific sum varying according to the character of the offices. Candidates must file with certain public authorities sworn statements of their expenditures.

2. Political committees must keep a record of their receipts and expenditures even to minute details and must file complete statements with appropriate officials designated by law.

3. Corporations are absolutely forbidden to make any contributions in aid of any political committee or candidate.

4. The objects for which candidates and political committees may spend money are defined by law. The New York statute embraces the following list: rent of halls and expenses connected with public meetings, preparation and publication of various kinds of political "literature," compensation for agents who prepare and supervise articles and advertisements for the press, payment of newspapers for publishing materials, rent of offices and club rooms, compensation of clerks, agents, and attorneys managing the "reasonable business of elections," preparation of lists of voters, personal expenses of candidates, traveling expenses, compensation of workers at the polls, and the hire of carriages. Indeed, this act goes into such detail that it appears to the laymen in politics an insurmountable barrier to corrupt

election expenditures; but probably to the eye of an experienced election worker there are plenty of loopholes.

Non-Partisan Politics

While strongly emphasizing the place of party government in American politics the influence of non-partisan organizations should by no means be lost to sight. The non-partisan or independent vote is often the really decisive element, particularly when the contest between the two great parties is very close, and it is probable that there is an ever increasing proportion of the voters who are independent of party organization. In many a national election an appeal has been made to the non-partisan voter. The first Republican platform of 1856 invited the affiliation and coöperation of the men of all politics, and the platform of 1860, after enunciating the principles of the party, appealed for "the coöperation of all citizens, however differing on other questions, who substantially agree with us in their affirmance and support." The Democrats in 1876 appealed to their "fellow-citizens of every former political connection"; and from that day to this the independent element of the nation has not been overlooked in national campaigns. In the second decade of the twentieth century the agrarian movement produced the Non-Partisan League.[1]

However, it is in local, and especially municipal, politics that the non-partisan or independent element is strongest. In every great city there is a non-partisan citizens' organization of one kind or another. In 1896, the Municipal Voters' League of Chicago was founded to fight corruption in government. The League is composed of voters scattered throughout the city who express their approval of its purpose and methods by signing its cards. The purpose of the League is not the establishment of a new party but the concentration of public opinion and public scrutiny upon the candidates nominated by the various parties. It is, in a word, a publicity committee. Previous to each city election it establishes headquarters into which pour suggestions for nominations and criticisms of city officials; as soon as candidates are announced or nominated it sends letters of inquiry to them in order to ascertain what stand they intend to take if elected;

[1] See above, p. 147.

and during the campaign it endeavors to secure the widest publicity with regard to the character and policies of the various candidates. It has undoubtedly wielded some influence for good in the city, and party managers in selecting candidates in many wards in the city cannot ignore its recommendations.

The non-partisan organization of New York is the Citizens' Union, a group of persons united without regard to party for the purpose of securing the honest and efficient government of the city of New York by the nomination and election of candidates or by endorsing the nominees of the regular parties whose character and policy the Union can approve. The Citizens' Union, however, differed at first from the Municipal Voters' League in being a sort of political party with officers, committees, and conventions modeled somewhat on the plan of the older parties. By uniting with the Republican party, which is in a minority in New York City, it was able in 1901 to contribute powerfully to the election of Seth Low as mayor; but it was unsuccessful in the next mayoralty contest, and since that time has confined its work largely to political education and the endorsement or nomination of candidates for minor offices. It maintains a representative at Albany to keep a watch on legislation affecting New York City. It issues bulletins from time to time on the questions of local government, and scrutinizes the important acts of the city administration.

The widest-reaching non-partisan organization, however, is the National League of Women Voters formed by certain leaders in the woman suffrage movement shortly after the adoption of the Nineteenth Amendment. It consists of local and state associations federated in one great national society. Women of all parties are affiliated with it. They do not endorse or support political parties as such. They favor many specific legislative proposals, state and national, and they sometimes give their support to candidates who agree to promote the measures they have approved. The League maintains headquarters in Washington, holds an annual convention, keeps speakers in the field enlisting the interest of women in public affairs, conducts schools of citizenship, gives special attention to laws pertaining to women, and urges the election or appointment of qualified women to positions in local, state, and national governments. The League also carries on investigations in problems of efficient government

and social welfare and actively supports the cause of international peace. To enlarge its membership and promote its objects the League has laid the country out into seven great regions, each with its director and local headquarters. More than two million women are associated with it, and the sphere of its influence is constantly widening.

Fifty Years' Warfare on Party Abuses — a Balance Sheet

Half a century has now elapsed since the mighty boss of Tammany Hall, William Marcy Tweed, was sent to prison; nearly forty years have passed since the enactment of the famous Massachusetts ballot law; two decades have run their course since Wisconsin's adoption of the first state-wide direct primary system. Where do we stand now? Are our public officers of a better quality, more efficient, more intelligent, more honest? Has corruption diminished? Are party bosses shorn of their power or reduced in strength? Is the government more responsive to the wishes of the people? Is there less slavish devotion to party machines? Is the independence of the voter increased? Is public opinion more alert, more influential in party councils and official circles? If our governments, national, state, and local, are more responsive and efficient to-day than half a century ago, how much of the improvement is due to the unending stream of election and primary laws that has flowed from the state legislatures?

The correct answers to these questions would require the establishment of criteria which are scarcely formulated at the present time — a science of government which we do not possess. Still a tentative balance sheet may be struck, on the basis of some obvious facts and many opinions hazarded by students and practitioners of government. There is no doubt that the whole election process has been lifted to a higher plane during the past fifty years. Elections are no longer held in saloons — the licensed saloon is gone. Brawls, drunkenness, and disorder are no longer the prominent features of election day. Local elections are sometimes tainted with fraud, but there is less ballot-box stuffing; there are fewer cases of ballot stealing and defacing; and it is not often that the voter has his head broken at the polling place. There seems to be more independence on the

part of the voters both within and without the established party organizations. There is still a large annual crop of political scandals, but perhaps the offenders are driven from office more resolutely and more quickly than before. There are political bosses still, but they do not appear to be as mighty as the men of old like Marcus A. Hanna, Matthew Stanley Quay, Boies Penrose, and Richard Croker. On the whole there is reason for believing that our public officers have higher standards and more professional skill than they did half a century ago; but this is largely due to civil service reform, the recent advance in technical education, the establishment of many official associations for the improvement of administrative methods, and the growth of private societies for the criticism and discussion of government. Bryce, that keen observer, that cautious student of public affairs, that informed man of the world, looking over the American commonwealth once more near the close of his rich, full life, concluded: "No Englishman who remembers American politics as they were half a century ago . . . will fail to rejoice at the many signs that the sense of public duty has grown stronger, that the standards of public life are steadily rising, that democracy is more and more showing itself a force making for ordered progress." [1]

[1] *Modern Democracies*, Vol. II, p. 165. See also R. S. Boots, *The Direct Primary in New Jersey. The Annals of the American Academy of Political and Social Science*, Vol. CVI; Robert C. Brooks, *Political Parties and Electoral Problems*.

CHAPTER XXVI

THE OFFICE OF GOVERNOR

The Political Rôle of Governor

The governor is the central figure in state politics and administration. He is no longer a mere "presiding officer" as Jefferson wished him to be — a nonentity or a servant of the legislature as all the early state constitutions, except those of New York and Massachusetts, sought to make him. He now enjoys executive powers of a high order. He is, at least in the public mind, responsible for complex and technical administrative work of vital significance to public welfare. Nearly every new constitutional convention seeks to enlarge his prestige and authority. The statutes which flow in an unending stream from the legislatures add to his duties and widen his control over personal liberty.

Politics, even more than the law, tends to exalt the position of the governor. Next to the President of the United States, it is the governor of the state who engages the interest of the voters. Thousands who do not know the names of the men who represent them in the legislature know who is the chief executive and have some idea of his personality and opinions. As a rule the number of votes cast for governor rises far above that cast for any other state or local officer. So great is the popular interest in the office that even the most powerful party managers in making nominations must be on their guard; they may choose a nonentity or even a man of doubtful reputation for auditor or treasurer, but seldom, very seldom for governor. They may even be forced by public opinion to choose someone whom they dislike or distrust. In the old days in New York, when Senator Platt was "boss" of the state, he was compelled to take Theodore Roosevelt as the Republican candidate for governor in spite of himself. "Senator Platt picked me for the nomination," said Roosevelt. "He was entirely frank in the matter. He made no pretense that he liked me personally; but he deferred to

the judgment of those who insisted that I was the only man who could be elected, and that therefore I had to be nominated."

After his nomination a candidate for governor is expected to interpret the vague desires and drifting opinions of the people, especially the voters of his party, and transmute them into a rather concrete program of legislation and administration. It is true that this function of concentrating and defining opinion is supposed to be discharged by the party and the results are supposed to be expressed in the platform. But in actual practice the voters pay little attention to the platform and a great deal of attention to the personality, speeches, and declarations of the candidate for governor. They know from experience that he, not the platform, will set the tasks of the legislature. After he is elected and assumes office, a governor continues the function of formulating popular opinion on issues as they arise from time to time during his term. He presses his policies and measures upon the legislature, and may take the stump to arouse support among the people for his program. As the representative of great popular interests, he may overshadow the legislature and the judiciary and spring into prominence as a national figure.

Indeed in the strategic states, such as New York, Ohio, and Indiana, the office of governor may well be a stepping stone to the Presidency. It was as governor of New York that Cleveland arrested the attention of the country and secured the prestige which sent him to the White House. McKinley had been governor of Ohio as well as a Representative in Congress before he was elevated to the presidency. It was his triumphant reëlection as governor in 1893 which made his career secure. "The brilliance of this victory," says Herbert Croly in his *Life of Hanna*, "made a profound impression on the public mind. No such majority had been known in Ohio since the war. Hundreds of telegrams and letters of congratulation were showered on the victor, and two thirds of them welcomed him as the next President of the United States. For the first time he began to be named, not merely as an eligible, but as the logical, candidate. Two days after the election, his name was placed on the editorial page of the Cleveland *Leader* as its candidate for the nomination." Roosevelt was governor of New York when he was elected Vice President and thus made the successor of McKinley. It was as governor of New Jersey that Wilson drew

the attention of the country to his program, his personality, and his spirited leadership; while occupying that office he toured the country from Massachusetts to Oregon, from Michigan to Texas, and stimulated the growing sentiment in his party which made him President.

It is no doubt the system of popular election which gives the governor such high prerogatives within the state and demonstrates his capacity to conduct a whirlwind campaign on the national stage if fates should so will it. In all the states except Mississippi, which has a curious indirect process, the governor is chosen by direct popular vote, the plan of election by the state legislature having been abandoned long ago.

In a few states, candidates for the office of governor are nominated by party conventions composed of delegates apportioned among the counties or other subdivisions according to population, party vote, or some arbitrary rule. Among these states are some which never abandoned the convention and New York, which once abolished it but later returned to it. In by far the majority of the states the convention has been abolished by law, and each party is compelled to select its candidates for governor and other state offices by direct vote, usually of the enrolled party members. This "direct primary" is, as we have seen, an election within the party. For example, any Republican who wants to be a candidate for the office of governor must get his name on the primary ballot of his party by securing the signatures of a certain number of Republican voters to a petition; on primary day, each Republican voter may designate one among the several persons whose names are thus placed on the ballot as his choice for the Republican candidate for governor at the next ensuing general election. The person receiving the highest number of votes at this primary is usually declared to be the official Republican candidate, and his name is then printed on the regular election ticket with the names of the candidates of other parties selected in the same manner. The nominees of the several parties are all placed before the voters of the state at a general election. It is now the commonly accepted practice to declare elected that candidate for governor who receives the highest number of votes — not necessarily a majority.

What manner of man is likely to be elected governor? It is not often that a person who has served long and faithfully in

the legislature or some minor office of the state is made chief executive. Though the position of the governor is in some measure analogous to that of prime minister in England, the career that leads to the goal is very different. The aspirant for the office does not begin in the legislature and serve many years, now with the majority and now in the opposition, until at length he wins predominance in his party. The career of Alfred Smith, who served more than a decade in the legislature before he became governor of New York, is one of the exceptions that prove the rule. Of course, it often happens that governors have already had legislative experience; Roosevelt served a term in the New York assembly before he became governor, but that was not a deciding factor in his election, not even an important factor. Perhaps as frequently men are taken from private life, men who have had no political experience at all, or certainly very little experience. Wilson was the president of Princeton University when he was chosen governor of New Jersey; Hughes was a lawyer busy with private practice when he was sent to Albany as governor by the voters of New York.

Since the appeal must be made to the voters of an immense constituency, there must be something rather spectacular about the personality of a candidate for governor. There are, it is true, quiet days when the managers of the majority party find little difficulty in electing an obscure or reserved man; but in close contests no reliance can be placed on such an expedient. More often elections are exciting; an electorate that loves baseball games, boxing matches, and every form of sport calls for more "ginger" than is afforded by a lawyer or banker of a retiring disposition. The occasion calls for a man who has "fought" something or somebody. A prosecuting attorney who has shown relentless energy in prosecuting criminals and putting "grafters" in jail is good gubernatorial timber. It is suprising how many governors have been district attorneys in their younger days: Folk, of Missouri; La Follette, of Wisconsin; and Whitman, of New York. "War on the political bosses" curiously enough has compelled many bosses to nominate or at least accept the selection of their erstwhile opponents. Speaking of his effort to win the Republican nomination for governor in Wisconsin, La Follette says: "It was clear to me that the single issue against boss rule would be more immediately effective than a program for legislation which

would necessarily require much more time for educational work." Hughes, of New York, had hardly been heard of in political circles, when as counsel for a life insurance investigating committee he "grilled" some of the political bosses of the state, held them up to public scorn, and called for drastic reforms. In a few months he was nominated for governor by the party, some of whose leaders he had exposed as lobbyists and "grafters." There are times, too, when the advocate of some outstanding issue of reform must be chosen. At all events, as a politician of the old school once remarked, "you can't elect a dead one."

The constitutional provisions with respect to the qualifications and term of the governor are very few. Nearly all states provide that the governor must be thirty years of age. Citizenship and a term of residence in the state (five years in New York) are almost unvarying qualifications. Some states stipulate that the governor cannot be reëlected to succeed himself; Indiana, for example, provides that he shall hold office for four years, but shall not be eligible for more than four in any period of eight years. Other states, however, place no limitation whatever on the number of terms which a governor may serve; but custom has decreed that it should not be more than two terms, though the third-term rule is by no means so absolute as in the case of the presidency. It is also usual to forbid the governor to hold any federal office during his term of service; and Alabama, California, and Utah provide that he shall not be elected to the United States Senate while in office.

Twenty-three states fix the governor's term at four years, and twenty-four at two years; Massachusetts, in 1920, gave up the ancient practice of holding annual elections; New Jersey alone has a triennial election. The tendency is strongly in the direction of the longer term; even the constitution of Oklahoma, which reflects in many clauses the spirit of the Jeffersonian democracy, fixes it at four years. This is the result of the recognition of the patent fact that the governor must have time at least to master the details of the complicated system over which he presides if there is to be an efficient administration. No considerable attempt, however, has been made to coördinate the governor's term with those of the administrative officers whom he may appoint. In fact, the terms of the latter are frequently longer than the governor's.

The salary paid to the governor is sometimes fixed by the state constitution, but many commonwealths, following the example of the federal Constitution, leave the amount to the discretion of the legislature. About half the states pay the governor $5000 or more a year. The constitution of New York has placed his compensation at $10,000, and stipulates that the legislature shall provide "a suitable and furnished executive residence."

The formal powers enjoyed by the governor must be sought in the express terms of the constitution. The legislature possesses every power and authority not denied to it; but the governor has no such high prerogative. The customary clause that "the executive power shall be vested in a governor" bestows upon him practically no authority which is not explicitly conferred somewhere by the written instrument itself. According to Professor Goodnow, "Little if any power is to be regarded as vested in the governor as a result of the grant to him of executive power. . . . The state courts have not derived, as has the Supreme Court of the United States, any very large powers from such a general power or duty as the duty to see that the laws be faithfully executed. In other words, the principle of narrow construction is more commonly adopted with regard to the powers of the governor than with regard to those of the President."

As a rule, the governor may be removed from office by impeachment. The process in the states follows the principles laid down in the federal Constitution with differences only in detail. Usually the lower house brings the impeachment charges and the upper house tries. In the long history of our republic only ten governors have been ousted by this humiliating process, the latest instances being Governor Sulzer of New York in 1913, Governor Ferguson of Texas in 1917, and Governor Walton of Oklahoma in 1923. In the eleven states which have adopted the state-wide recall that radical device has been used only once — in case of Governor Frazier of North Dakota in 1921.[1]

The Work of the Governor in Relation to Administration

Although a turn in fortune, unforeseen by the founders of the American system, has made the governor a political leader and a formulator of legislation, his position is nominally that of chief

[1] See above, p. 516.

executive. The state constitution generally vests "the executive power" in the governor and instructs him to take care that the laws are faithfully executed. In the discharge of this duty the governor must observe the conduct of private persons and supervise the work of public officers. In the enforcement of the law, he may act directly by ordering the state's attorneys to proceed in the proper courts against persons who violate the law. When there is a riot or other disorder too serious for the regular processes of the courts, he may declare martial law in the region affected and employ the militia of the state. In this connection he may usually suspend the writ of habeas corpus. If there is a state constabulary or police force, he has an agency directly at hand and is therefore especially responsible for law and order.

As many disorders to-day arise in connection with strikes, the position of the governor in this regard is very delicate. A reckless state constabulary may interfere with strikes lawfully conducted and by arbitrary action bring about violence. It may in fact assist employers to "break" strikes by interfering with labor meetings and arresting strike leaders on flimsy pretexts. Such cases are not unknown. On the other hand, if disorders arise in connection with a strike, there is always great pressure on the governor not to interfere; he may be threatened with a loss of "the labor vote" if he does employ state forces. So in this sphere, particularly in the great industrial states, the governor often has serious duties to perform and in their performance he is likely to alienate powerful groups in the community. There are matters of fact to be ascertained in times when the truth is difficult to discover. Hasty and arbitrary action may work injustice; timidity and hesitation may result in the loss of life and property.

In some states, the governor's power of law enforcement permits him to control, to some extent at least, local agencies. In a few instances, for example, he appoints and removes police commissioners. In New York, where he enjoys no such authority over local officers, he may remove local prosecuting attorneys and municipal police commissioners after hearings on charges preferred against them. The exercise of these powers over local officers may have great political significance. It was a story of his action during a police strike in Boston that made Gov-

ernor Coolidge a national figure and contributed powerfully to his nomination and election to the office of Vice President of the United States.

The major portion of the governor's duties in relation to executive functions involve the appointment and supervision of state officials. In a few states, he still appoints the judges of the higher courts, but nearly everywhere popular election has stripped him of this power. Theoretically, he is the chief executive of the state and head of the entire civil administration, but in fact, as Governor Hughes observed long ago, "there is a wide domain of executive or administrative action over which he has no control or slight control." Unlike the federal administration, in which nearly all the offices are grouped under department heads selected by the President, the state administration, except in a few instances noted below, is not organized in a hierarchical form. It consists, on the contrary, of a large number of officers, bureaus, commissions, and boards, some elective and some appointive, each with its appropriate duties prescribed by law. The head of a department in a state government is hardly a head at all in the sense in which the term is used at Washington.

Compare, for example, the Secretary of the Treasury of the United States with the treasurer of New York. The former is appointed by the President, and in his department are grouped the revenue and disbursing officers — all the agencies dealing with taxation, revenues, and finance. The treasurer of New York is elected by popular vote; he is custodian of the moneys paid into the treasury and he pays out on proper warrants; he is *ex officio* a member of several boards. The supervision of banking, insurance, assessments, and taxation is in the hands of other officers appointed by the governor with the consent of the senate and removable only by the consent of that body. If the treasurer does not do his duty the governor may temporarily suspend but cannot remove him; he can only institute tedious legal proceedings against him. The state comptroller is equally independent. To supervise properly state financial administration, the governor has not merely to watch the treasurer, he must watch various independent officers and commissioners, some of whom he has not chosen in the first place and none of whom he can remove at will.

The governor of a state, therefore, is not like the President of the United States, the undisputed head of an administration. He is ordinarily only one among several high state officers elected by popular vote. The auditor, the secretary of state, the treasurer, and other state authorities are not under the governor, but in the eye of the law his peers. He does not appoint them; he cannot remove them; he cannot prescribe their duties, for they are prescribed by law. There are, it is true, many offices which he can fill by appointment, but as a rule the consent of the state senate is necessary to appointments and removals. If the governor is of one political party and the senate of another, conflicts and division of responsibility inevitably ensue. In such cases the senate may dictate to the governor in making appointments and compel him to retain subordinates who dissent from his policies or attempt to thwart his measures.

The executive power of the governor is further dissipated by the practice of making the terms of many state officers longer than that of the governor and providing that the terms of members of commissions and boards shall overlap so that one governor can seldom if ever appoint even a majority of the incumbents. It is true that there is now under way a strong movement against the decentralized system of state administration. It is true also that a few states, such as Illinois, Massachusetts, and Nebraska, have brought about a consolidation of numerous boards, commissions, and other agencies in a hierarchical form similar to that obtaining in the departments at Washington; but in no case has a state been willing to carry the principle to a logical conclusion and place the entire range of administration under the control of the governor.[1]

One of the primary results of this decentralization is to prevent that harmonious coöperation among the various administrative officials which is so marked in the President's Cabinet. Of course, it sometimes happens that all these officials are of one political party and represent a coherent section of that party; but it also often happens that the governor is the "drawing card" on the party ticket, while obscure machine workers with no administrative capacity and sometimes with little integrity are associated with him as candidates for the minor state executive offices. There is at least one instance in our history of a gov-

[1] See below, chap. xxvii, on "State Administration."

ernor who was afraid to trust the legal advice of the attorney-general of his state on account of the strong factional feeling which existed between them. This form of antagonism is often more marked when the governor represents one party and his immediate associates represent the opposition.

Another primary result of administrative decentralization, curiously enough, is to increase the administrative responsibilities and burdens of the governor. As he is compelled by law to appoint the heads of many minor offices, bureaus, and divisions, he is personally responsible for their conduct in matters of little importance. They can go directly to him with problems and complaints whereas in Washington such questions go to the head of the department, who does not trouble the President with them except in cases of extreme urgency. So it comes about that the governor is often loaded down with trifling details of office which should never come to his attention, while at the same time he is deprived of many of the large powers befitting his position as chief executive.

As if to atone for the severe restraints placed upon the governor's administrative authority, several states authorize him to make special inquiries into the working of the various executive departments. The constitution of Montana, for example, provides that "the governor may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath whenever so required; he may also require information at any time, under oath, from all officers and managers of state institutions upon any subject relating to the condition, management, and expenses of their respective offices and institutions, and may, at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or state institution."

The constitution of Georgia makes it obligatory upon the governor to examine under oath, quarterly or even more frequently, the treasurer and comptroller-general on all matters pertaining to their respective offices and to inspect and review their books and accounts. Occasionally, but not often, the governor is given power to suspend certain state officers during a recess of the legislature. The governor of New York, for example, may temporarily suspend the treasurer whenever it shall appear

to him that that officer has violated his duty in any particular; and under the Moreland Act of 1908 he may order an investigation of any department. In several states, the various officers are required to make periodical reports or render opinions in writing to the governor, but these are generally perfunctory, or at best of slight significance in advancing the governor's power of control over the administration.

In addition to his administrative functions, the governor generally enjoys the quasi-judicial function of issuing reprieves, commutations, and pardons. In some states he exercises it in conjunction with the legislature or the upper house of that body; in other states he shares it with a board of pardons; in several the governor is made solely responsible.

In Pennsylvania, for instance, the governor has the power to remit fines and forfeitures, to grant reprieves, commutations of sentence, and pardons, except in cases of impeachment; "but no pardon shall be granted nor sentence commuted, except upon the recommendation in writing of the lieutenant-governor, secretary of the commonwealth, attorney-general, and secretary of internal affairs, or any three of them, after full hearing, upon due public notice and in open sessions; and such recommendation, with the reasons therefor at length, shall be recorded and filed in the office of the secretary of the commonwealth." New York, however, has accepted the great argument of Hamilton, that a single person is the best depository of such an important power because, being alone responsible, he dreads charges of weakness or connivance and is not likely to be so obdurate as a group of men. That state, therefore, gives the governor alone the power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and in cases of impeachment, with such restrictions and limitations on its exercise as he may think proper.

Finally we must take note of the governor's military authority. He is commander in chief of the armed forces of the state, and in case of an extraordinary disturbance beyond the control of the regular officers of the law he may call out the state militia to restore order. In nearly all states he has the power of suspending the writ of habeas corpus, thus staying the processes of the courts and placing life and property involved in a disorder in the care of the military authorities. Most states, how-

ever, declare that the writ of habeas corpus may not be suspended unless in times of rebellion and invasion when the public safety may require it. Two states stand with Oklahoma in providing that the writ shall never be suspended by the authorities of the state, thus leaving it always open to persons claiming that their rights are infringed by military officers to appeal to judicial tribunals.

The Relation of the Governor to the Legislature

It may seem strange that public sentiment has so far prevented the concentration of administrative supremacy in the executive of the state, and has nevertheless elevated him to the position of chief director in legislation. Still the explanation is not so difficult. Technical and complicated administration is really a new thing in American history. It is associated with the growth of industrial society and is not widely comprehended. Moreover, there yet linger many traditions of popular resentment against "executive tyranny" that have come down from the early days of the Republic. At the same time the decline of state legislatures has made the people look to the governor for leadership in that field.

Legislatures have often been found to be corrupt. Very generally they are the centers of log-rolling and trading in which great grists of laws and appropriations for local benefits are turned out at the sacrifice of larger and more general interests. The existence of two houses, often at cross purposes, and the necessary absence of single legislative leadership also work against the establishment of responsibility within the legislature itself. There is another factor to be taken into account in this relation. The legislative career is one of great labor (if taken seriously) and honors are slight at best. A man cannot hope to start at the bottom, like the member of the English House of Commons, and rise to a position of high importance. Long and efficient service does not lead to the office of governor. Hence, as a rule, young men or men of small caliber are in a majority in the legislature. There is constant fluctuation in the personnel of the body, as the older and abler men, weary of labors that yield minor honors and open no doors to advancement, leave for private life.

These are the circumstances in which the governor has risen to the position of legislative leader. In part this leadership is

established by constitutional provisions relative to the message, the budget, the veto, and the special session; in part by political custom.

It is a regular practice to confer upon the governor the duty of communicating with the legislature on the state of the commonwealth and of recommending such legislative measures as he may see fit. This right, like that enjoyed by the President, may become a powerful instrument in presenting issues to the people and in forcing the legislature to act. "It is not," said Governor Hughes, of New York, "his constitutional function to attempt, by use of patronage or by bargaining with respect to bills, to secure the passage of measures he approves. It is his prerogative to recommend and to state the reasons for his recommendation, and in common with all representative officers, it is his privilege to justify his position to the people to whom he is accountable." The governor, in his message, often sets the tasks for the legislature; in case of the refusal of that body to accept his proposals, he may, if he is confident of popular support, take advantage of the important power of calling a special session of the legislature to consider the particular measures he has at heart.

It was long a common practice for the governor to include in his regular message to the legislature a statement of the finances of the commonwealth; legislation in a great majority of states now requires him to present to the legislature a complete program of revenues and expenditures — a budget, in short.[1] The governor may discharge this duty in a perfunctory fashion or he may assume genuine leadership in the formulation of fiscal policies. Taken in connection with the right (which many governors have) to veto single items in appropriation bills, the budget may become an important instrument in the hands of a strong governor who has a decided policy of his own.

The power of calling extraordinary sessions of the legislature is now regularly conferred on the governor by the state constitution, and often the governor is bound to submit to the legislature the proposals to be considered at such sessions. The governor may "on extraordinary occasions," the constitution of Ohio provides, "convene the general assembly by proclamation, and shall state to both houses when assembled the purpose for which they have been convened." The New York constitution ex-

[1] Below, p. 657.

pressly stipulates that no subject shall be acted upon by a special session except such as the governor may recommend, and thus the legislature cannot evade the issue which the governor has provided. It may of course reject the measure or measures which he proposes or it may adjourn without taking any action. At all events, however, it is forced to debate and vote under the direct observation of a public intensely interested in the outcome. An issue is thus set which can hardly be evaded at the next election. The practical significance of such a power in the governor's hands calls for no further comment.

Of great political significance also is the governor's right to veto bills. This is a two-edged sword. It may be used negatively to defeat bills, or it may be employed positively as a threat to compel the passage of measures advocated by the governor. It is easy for the governor to inform members of the legislature that their favorite bills will be vetoed if they do not accept his recommendations on other measures. Indeed more than one governor has openly announced his intention to veto certain bills if the legislature failed to adopt his proposals.

With one exception, North Carolina, all states give the governor the power to veto measures passed by the legislature and also permit the legislature to override a veto by repassing the bill. About two thirds of the states, at the present time, require a majority of two thirds in both houses to overcome the governor's veto; Delaware, Maryland, and Nebraska fix the number at three fifths and a few at a mere majority vote. In the hope of checking the extravagance of the legislature, more than half the states authorize the governor to veto single items in appropriation bills, and in three states, Washington, Virginia, and Ohio, the governor may even veto a part or parts of any measure.

It is customary, in case of an exercise of the veto power, for the governor to return the bill to the house in which it originated with a statement of his objections. Like the President, the governor may veto measures which he thinks contrary to his policy as well as measures which he deems unconstitutional. "The plain intent of the constitution," said Governor Hughes, "is that the governor shall express his judgment upon legislative measures before him and that his judgment shall control unless the measure is so strongly supported that it counts in its favor two thirds of

the members of the legislative houses after the objections have been formally stated."

In actual practice the number of bills vetoed by governors varies greatly. In some states it amounts to as high as one sixth or one fifth of the bills passed, but this only happens in case the governor enjoys the power to veto items in appropriation bills. The number of vetoes is also likely to be large if the governor and the legislature are of different parties; the legislature may try to embarrass the governor by submitting bills which he is known to oppose, or the governor may veto measures on purely partisan grounds. Where the governor assumes leadership and arranges his program with the party directors in the legislature, perhaps on a give and take basis, there are few vetoes. The veto in such circumstances is not an evidence of merit, but of bad management.

Before taking leave of the veto, we should examine an important matter that is usually passed over lightly, namely, the exercise of the veto after the legislature has adjourned. Most legislatures are in the habit of passing a huge grist of laws during their closing hours. Hence it is often provided in the constitution that bills shall become laws unless vetoed by the governor within a certain period, perhaps thirty days, after the adjournment of the legislature. This means that after the legislators have gone home and cannot call him to account for his conduct the governor may slash bills at his pleasure. If he enjoys the right to veto items in the appropriation bills, he may punish districts and administrative officers for incurring his displeasure or failing to support his programs. He may cripple public services for political reasons and no one can hold him to account. The next legislature may be composed of new members representing another party. The general public, not usually exercised over such matters, has forgotten. Quite rightly this procedure has been termed "dark-room finance."

Far more important than the letter of the constitutional provisions with respect to the message, the veto, the budget, and special sessions are the spirit and practice of state politics. The governor is the outstanding figure of his party, even though a "boss" may wield great power over him behind the scenes. The condition was neatly described by Woodrow Wilson when he was governor of New Jersey: "Inasmuch as it is next to impos-

sible to determine who is running the legislature from the inside, there is an instinctive desire that there should be some force directing and leading it from the outside; some force which shall be obvious and therefore responsible, open to the view of everybody and subject only to the restraints of public opinion. Public opinion must by hook or crook get into the business. If it cannot get into it through the committee rooms, it may possibly get into it through executive leadership." Acting on this theory, Governor Wilson laid a complete program before the legislature and made a national reputation in a spectacular battle that accompanied his driving it through. "More than half of my work as governor," wrote Mr. Roosevelt of his experiences in New York, "was in the direction of getting needed and important legislation. I accomplished this only by arousing the people, and riveting their attention on what was to be done. . . . My success depended upon getting the people in the different districts to look at matters in my way and getting them to take such an active interest in affairs as to enable them to exercise control over their representatives."

This direct testimony of two eminent governors has been confirmed by the statements from a number of governors not as well known to the nation at large. When Finley and Sanderson, several years ago, prepared their work on the American executive, they addressed an inquiry to the state governors asking their views on the point of executive influence over legislation. It appears that, with few exceptions, the legislatures generally follow the suggestions of the governors with regard to particular matters of legislation, but not merely because the proposals come from the chief executive. The legislatures really respond to an imperative public opinion which is reflected in the policies of the governor, who, by virtue of his high position, is able to gauge the popular temper. One governor stated that whenever the executive of a commonwealth desires a certain law, he should lay his plan before the legislature in the form of a carefully drafted bill, and then interest influential men in the measure, acquainting them with the arguments for and against it. Another governor replied: "The legislature of the present year enacted into law practically all the measures suggested by the governor in his message to that body. I mention a few of these as indicating the general character of the legislation in several

of the states: the anti-pass bill, two-cent fare bill, prohibiting contributions by corporations for political purposes, primary election bill, joint freight rate bill, child labor bill, extension of pure food law, resolution asking Congress to call a convention for amendment of Constitution so that United States Senators may be elected by the people." [1]

Still more recently the subject of executive influence over legislation in Indiana during a period of twenty years has been examined with great care and in a scientific spirit by Burton Y. Berry. His conclusions are significant. The platforms of the political parties did not exert any appreciable influence on the great majority of the bills proposed and the measures enacted into law; in fact the platforms mentioned only about one fourth of the principal measures considered by the legislature during the two decades under examination. Of the platform planks which actually proposed legislation about one half were carried into law without the support of the governor; of the planks approved by the governor nearly three fourths were enacted into law. On the other hand, the major portion of the measures proposed by the governors during the period were not mentioned in the platforms at all; they were bills sponsored by the governors as party leaders. The projects proposed by the governors independently outnumbered the platform proposals two to one, and half of them were enacted into law. At the special sessions of the Indiana legislature called during the two decades in question every measure proposed by the governor was passed — probably because the consent of the party leaders was secured in advance.[2]

Thus from the testimony of distinguished governors, from the testimony of unknown governors, and from intensive studies of political practice emerges the conclusion that the governor, like the President of the United States, is often the head of the legislature as well as chief executive of the state. This, it should be noted, is not a confirmation of Bryce's dictum that the merit of the governor is "usually tested by the number and boldness of his vetoes." It is rather the more constructive concept that the merit of the governor is tested by the extent and character of his legislative program.

[1] Finley and Sanderson, *The American Executive*, pp. 181 ff.
[2] *The Political Science Review*, Vol. XVII (1923), pp. 51–69.

CHAPTER XXVII

STATE ADMINISTRATION

In the history of state administration, dull as it may seem to the casual student, we find reflected the material changes of American life and the growth of the American spirit. If we take the statute books of any state showing the creation of one office after another, we can trace the effect of railways, industries, mining, agriculture, corporations, highways, and automobiles upon law and its administration. There we find also the development of natural science in its manifold applications to the protection of life and health and the encouragement of industry and agriculture. There, written large, is revealed the humane spirit of America — the passion for universal education, the solicitude for the sick, dependent, and unfortunate, the anxiety about the safety and health of those who labor in dangerous places, and the eagerness to stamp out, as far as it can be done by community action, undeserved poverty. This legislative history is often marked by crudeness and marred by corruption, but, as Bryce said of it, threads of gold are shot through the texture.

Running down through the record showing the creation of state agencies in Illinois, which is fairly illustrative, we find the following important entries year by year:

1827	State penitentiary
1839	School for the deaf
1847	Hospital for the insane
1849	School for the blind
1851	State geologist
1854	State superintendent of instruction
1857	Board of education
1865	Asylum for feeble-minded children
	Soldiers' orphans' home
	Eye and ear infirmary

1867	Canal commissioners
	Industrial university
	Reformatory
	State library
1869	State board of public charities
	Normal university
1871	Railroad and warehouse commission
1872	Board of agriculture
1875	Fish commissioner
1877	Board of health
	Humane agents
	Natural history museum
1879	Commissioners of labor
1881	State board of pharmacy
	Dental examiners
	Veterinarian
1883	Mining board
	Mine inspectors
1887	Industrial home for the blind
1889	Asylum for insane criminals
1893	Factory inspector
	Superintendent of insurance
1899	Food commissioner
1903	Board of prison industries
1905	Civil service commission
	Highway commission
1907	Food standard commission
	Examiners of registered nurses
1909	Library extension commission
1910	Mine rescue commission
1911	Park commission
1917	Consolidation and reorganization of state administrative agencies

To this bare outline showing the growth of administrative interests from decade to decade we may add another table showing in percentages the outlays of thirty states for various governmental services for a single year, 1921. This gives the emphasis of public opinion, for it reveals the classes of expenditures and the proportion of the total outlay assigned to all important departmental functions, except public service enterprises. Here we find what the American people think is most worth while in state administration, what they are willing to pay for:

Education, libraries, and recreation	35.3
Charities, hospitals, corrections	22.5
Highways	10.0
General state government	8.9
Use of natural resources	5.7
Protection of persons and property	5.6
Health and sanitation	2.3
Miscellaneous	9.8

The Older State Administrative Officers

In the beginning of our state constitutional development, when the functions of government were confined largely to the maintenance of order, the administrative powers were distributed among a few offices, most of which have come down to us in spite of the bewildering changes brought with time. Among the older officers, now usually elected by popular vote, but in some cases by the legislature, are the following:

1. A majority of the states have a lieutenant governor who is the legal successor of the governor in case of the death, impeachment, or disability of the latter. The lieutenant governor is also generally president of the senate, with a vote in case of a tie. In those states where there is no lieutenant-governor, it is the common practice to designate the president of the senate or the secretary as the successor in case of a vacancy in the office of governor.

2. All commonwealths have a secretary of state whose functions are very much the same everywhere. He is custodian of the state archives; he has charge of the publication and distribution of laws; he generally keeps the election records, issues notices for elections, and supervises the compilation of election returns for state offices. In some states he issues certificates of incorporation to companies formed under the general laws, including banking and insurance companies; he reports annually to the legislature on a large number of subjects as ordered by law or by legislative resolution; he administers the oath to members of the legislature and other state officers; he is *ex officio* member of certain boards and commissions; and he is the custodian of the great seal of the state.

3. Every state has a treasurer who is the keeper of the moneys accruing to the state from taxes, fees, and other sources of rev-

enue and who, on proper warrants based in due form upon legislative appropriations, pays out the money of the state.

4. In most states there is an auditor or comptroller. In general, we may say, this officer audits all accounts against the state, draws warrants on the treasury for the payment of moneys as directed by law, inquires periodically into the court and trust funds deposited with county treasurers, appoints examiners and prescribes the forms of reports in case there is central inspection of local accounts, and acts as *ex officio* member of certain boards and commissions.

5. It is the duty of the attorney-general to prosecute and defend all actions and proceedings in which the state has an interest, to advise the governor and other state officers on legal questions, to take charge of the legal business of the departments and bureaus of the state requiring the services of counsel in order to protect public interests. Frequently, the attorney-general has certain specific duties in addition to the general supervision of the state's legal interests: when required by the governor, either he or one of his deputies must appear before any judicial court or the grand jury thereof for the purpose of conducting such criminal proceedings as the governor may specify; upon the request of the governor, secretary of state, treasurer, or other state officer, the attorney-general must prosecute any person charged with the violation of the laws which these officers are especially required to execute; he must cause all persons indicted for corrupting, or attempting to corrupt, any member of the legislature, to be brought to trial.

The Newer State Agencies

As the state government assumed from decade to decade new functions, it was the fashion to create special offices, boards, commissions, and other agencies to discharge them. In doing this, the state legislature did not follow the policy generally pursued by Congress and distribute the new functions among a few great departments. On the contrary, it usually created independent agencies each with its own responsibilities and statutory sphere of operation. In the larger commonwealths there are to be found one hundred or more different offices, boards, and other administrative agencies. The following list taken from a single

state is fairly typical: state engineer, superintendent of insurance, superintendent of banks, commissioner of excise, superintendent of public works, commissioner of education, commissioner of agriculture, forest, fish, and game commissioner, commissioner of health, state civil service commission of three members, prison commission of seven members, superintendent of prisons, superintendent of public buildings, state architect, tax commission of three members, commissioner of labor, lunacy commission of three members, board of charities, managers for a large variety of charitable and reformatory institutions, fiscal supervisor of state charities, water supply commission, land office commission, canal board, commission for the canal fund, state board of canvassers, equalization board, classification board controlling wages of labor for state employments, state historian, miscellaneous reporter, quarantine commission, superintendent of weights and measures, commission for the promotion of uniform legislation in the United States, an agent for the Indian tribes, voting machine commission, board of pharmacy, embalming board, state fair commission, statutory consolidation board, highway commission, and public service commission — to say nothing of some other minor independent commissions and offices. These may be classified in four divisions: (1) those supplementary to the older departments, such as excise, tax, and civil service commissions; (2) those in charge of public property and public works; (3) those connected with the social activities — education, charities, and health; and (4) those dealing with economic questions relative to insurance, banking, corporations, and labor.

It must not be thought, however, that no principles whatever have controlled legislatures in creating this complex scheme of agencies. As Professor A. N. Holcombe[1] points out in his careful survey of state administration, all of them belong to one of five general types, for each of which there is a specific reason assignable. The first is a department with a single head appointed by the governor usually with the approval of the senate. This device is generally adopted when the duties conferred on the officer are routine and specific and do not permit much discretion. Banking and insurance departments are frequently found in this class. The second type of state agency is that

[1] *State Government in the United States*, p. 321.

with a single head appointed by a board or commission itself chosen by the legislature, the governor, or popular vote. In this case the head performs the administrative duties, while the board advises and supervises in a general way. The underlying idea is to "remove the department from politics" by making the board unpaid and bi-partisan in composition. If no pay is attached to membership, then the politicians hunting for spoils will not interfere; such at least is the theory. Educational and charitable institutions are often administered in this way.

The third type is the unpaid board which assumes a great deal of the actual responsibility for administration, although it employs a skilled secretary for routine work. This, like the second device, is intended to draw into service public-spirited citizens and thereby reduce political interference to a minimum. It is frequently employed in charities administration. The fourth type is the single-headed department with an incumbent appointed by the governor, with or without the approval of the senate, and an advisory board enjoying no authority except that of informing, warning, and proposing to the officer in charge. Here the underlying concept is to fix responsibility upon the governor and his appointee, and at the same time obtain the moderating and consulting services of private persons more or less expert in the work of the agency.

Finally we come to the fifth type — the board or commission composed of three or more members who are paid salaries and expected to perform specific duties separately or in conjunction with one another. In this class may be placed railway and public utility commissions charged with the regulation of railway and utility rates and services. Here, too, belong bi-partisan civil service commissions which carry out employment policies. In this group also fall industrial commissions which make and administer rules relative to factories, industrial accidents, workmen's compensation, and kindred matters.

Such boards and commissions are in fact executive, legislative, and judicial in character.[1] They enforce laws. They make rules. They hold hearings and decide specific cases very much as the judges of courts do. For example, an industrial com-

[1] U. G. Dubach, "Quasi-Legislative Powers of State Boards of Health," *American Political Science Review*, Vol. X, pp. 80 ff.

mission, in administering the law providing compensation for those injured in industry, will hear the employer and the employee in each specific case and award damages to the injured according to its interpretation of the law and facts. This type of organization is always advocated whenever the legislature is about to vest in the hands of some agency the power to enlarge the provisions of statutes by devising rules applicable to details. Although it is severely criticized as making for irresponsible government, it is defended with equal force as making for flexibility and reasonableness in the application of general principles to concrete cases.

Responsibility in State Administration

Acting under the influence of many forces, our states have created an administrative system unlike any other type in the world. It differs from that at Washington, which gives the President large appointing and removal powers, groups the departments and agencies under his control, and makes him responsible for the entire range of the national administration. It is unlike that of England, where the great departments of government are in the hands of cabinet officers led by a premier and responsible through the majority in the Parliament to the voters of the nation.

Everywhere in state administration we find diversity rather than clear and simple principles in organization. Take, for example, the methods of appointing officers. Some are elected by popular vote; some are appointed by the governor alone; some are chosen by the governor with the consent of one or both houses of the legislature; some are chosen by the legislature. On the same board there may be members chosen by two or more methods supplemented by members who hold other positions and serve merely in an *ex officio* capacity. Some officers are appointed for long terms; others for one or two years. In the case of boards and commissions a special effort is made to assure continuity by providing long and overlapping terms; only a part of the members go out of office at one time. It never happens that a new governor on coming to power can make a clean sweep and assume full responsibility before the people for carrying on the work of the state; he must nearly always operate with the aid of many high officials who belong to some other

political party and are more interested in discrediting his administration than in making it a success.

The same diversity exists in the methods of removal. The governor has no general power of removal like that enjoyed by the President of the United States. Not only do we discover a great variety of practices among the several commonwealths, but in each state we find different processes of removal applied to officers of equal rank as well as officers of different grades. In almost any commonwealth one may find three or more methods of removal.

The first method is that of impeachment. Many constitutions provide that any civil officer of the state may be impeached; others make all executive officers liable to that procedure; and still others especially enumerate the officers who may be impeached. The causes of impeachment vary, but crime, misdemeanor, treason, bribery, drunkenness, malfeasance, gross immorality, extortion, neglect of duty, incompetency, and misconduct are among those enumerated in various constitutions. South Carolina, however, assigns no causes whatever; it leaves the matter to the legislature.

The process of impeachment, in general, follows that prescribed by the Constitution of the United States: the lower house of the state legislature initiates the proceedings, and the senate acts as a court of trial, sometimes in conjunction with one or more justices of the state supreme court; for example, in New York the judges of the highest court of the state (the court of appeals) are associated with the senate in trying cases of impeachment. Nebraska has a somewhat curious method of impeachment by a joint session of the legislature and trial by the judges of the supreme court. "The senate and house of representatives in joint convention," runs the Nebraska constitution, "shall have the sole power of impeachment, but a majority of the members must concur therein. Upon the entertainment of a resolution to impeach by either house the other house shall at once be notified thereof and the two houses shall meet in joint convention for the purpose of acting upon such resolution within three days of such notification. A notice of an impeachment of any officer other than a justice of the supreme court shall be forthwith served upon the chief justice by the secretary of the senate, who shall thereupon call a session of the

supreme court to meet at the capital within ten days after such notice to try the impeachment."

The effect of an impeachment is generally to remove the offender from office and to disqualify him from holding any state office; but any person impeached, whether convicted or not, is liable to trial and punishment for his offense in the ordinary courts of law.

A second method of removal is by a resolution of the state legislature. This method is often provided for the removal of judges and judicial officers. For example, in New York, judges of the court of appeals (the highest court of the state) and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, two thirds of all the members elected to each house concurring therein; and all other judicial officers, excepting certain minor officers, may be removed by the senate on the recommendation of the governor, two thirds of the members of the senate concurring in the action; but in all cases an opportunity to be heard must be afforded the defendant.

The third method of removal is by the governor with the consent of the senate. This is the common practice in the case of the state officers and members of commissions who are appointed by the governor and the senate.

The fourth method of removal is by the governor alone; but this power is not very extensively granted by state constitutions. In several states — for example, Colorado, Maryland, Illinois, Nebraska, and Pennsylvania — he may remove those officers whom he appoints. In New York, the governor may suspend the state treasurer during a recess of the legislature; he may also remove the superintendents of public works and of prisons, members of the public service commissions, and some local officers, including district attorneys, county treasurers, sheriffs, mayors, etc.

The fifth method of removal is by the courts. In a few instances the judges of the higher courts may remove prosecuting attorneys, minor judicial officers, and minor county and town officers. For example, the constitution of Oregon provides that "public officers shall not be impeached; but incompetency, corruption, malfeasance, or delinquency in office may be tried in the same manner as criminal offences and judgment may

be given of dismissal from office and such further punishment as may have been prescribed by law."

A sixth method of removal — recall on petition and action of the voters — is to be found in several states.[1]

However they may be appointed or removed, most of the state officers have independent duties prescribed by law. They regard themselves as sovereigns in their respective spheres, not as parts of a collective group charged with the coöperative administration of public work. Each agency, jealous of its rights, eager to extend the sphere of its operations, sometimes seeking more spoils of office, applies to the legislature for more money and more employees. At no time can the citizens of a state point to any person or body of persons and say: "You have chosen the officers of the state administration; you can remove them; you are responsible for inefficiency and wrong doing."

Waste, friction, duplication of effort, lack of coöperation, and irresponsibility inevitably flow from the system or lack of system. The governor cannot be held accountable for the business transacted nominally under his leadership. The hydra-headed legislature which meets for sixty or ninety days every year or two could not be held responsible in fact even if it were made so in theory. Inevitably, therefore, the state administration tends to become a collection of special interests — official and private. In connection with each one of the great functions undertaken by the state — those pertaining to health, education, charities, highways, industries, labor, etc. — there usually appears some kind of citizens' organization. It may be in theory disinterested, not formed for profit, or it may be directly interested in promoting operations which yield private gains. Often it has one or more paid secretaries who lobby in the halls of the legislature and besiege state authorities in their offices. The mass of the people have only a vague idea of what is going on; the active agents of various societies at the state capital work day and night. In such circumstances unity in government is dissipated; indeed administration tends to pass from the hands of duly constituted political authorities into the hands of separate and specialized groups, which fight one another or coöperate in common efforts to secure appropriations from the state treasury. Those advocates of guild socialism, who would place the

[1] See above, p. 515.

administration of each great function of modern society in the hands of a guild or trade, may find something approximating their idea in the chaos that forms the government of the average American state.

This condition of affairs is the outcome of more than a hundred years of almost unrestricted development in administration. It was not until the rising costs of state governments at the opening of the twentieth century directed the attention of the taxpayers to the waste and confusion evident at the capital that protests were heard against the time-honored methods. About that time new ideas on scientific management were advanced. After a season of discussion and agitation came tentative experiments in administrative reform. Then the development of state governments entered upon a new phase.

Reorganization of State Administration[1]

As early as 1891 the governor of Massachusetts analyzed the state administrative system in a message to the legislature, pointed out with great cogency the defects in it, and recommended a consolidation in the interests of economy and efficiency. About the same time other governors spoke on the theme. But these criticisms failed to bear fruit. Then followed a period in which the subject was discussed mainly in treatises on government and administration, such as the writings of Frank J. Goodnow and Herbert Croly. In 1909 the idea took practical form when a committee of Oregon citizens, known as the People's Power League, proposed and advocated state constitutional amendments reorganizing departments and centralizing responsibility in the hands of the governor. Comprehensive plans along similar lines were made by expert commissions in Iowa in 1913 and in Minnesota in 1914. In 1915 the New York Bureau of Municipal Research prepared for the constitutional convention of that year a complete survey of the state government and suggested a scheme of reorganization and consolidation.[2] The con-

[1] This statement is based on an admirable summary by A. E. Buck, *National Municipal Review* for November, 1919, revised September, 1922. The great report by "The Efficiency and Economy Committee" of Illinois, under date of 1915, is a mine of information and wise comment on state administration. Of special importance also is the scientific study of the subject by J. M. Mathews, *Principles of American State Administration*, the first treatise of the kind to break away from the purely legalistic method of handling the question.

[2] *Municipal Research*, Nos. 61, 62, and 63.

stitution which was prepared went far in the direction of centralization, but it was rejected by the voters.

Two years later, Illinois adopted a general program of reorganization based upon a careful survey of the institutions and agencies of the state by a staff organized under the direction of Professor John A. Fairlie. The reform was effected by an act of the legislature and therefore did not touch the elective officers of the state who stood on the same footing as the governor. The new law, however, abolished more than one hundred statutory offices, boards, departments, and agencies, and consolidated their functions under nine departments as follows:

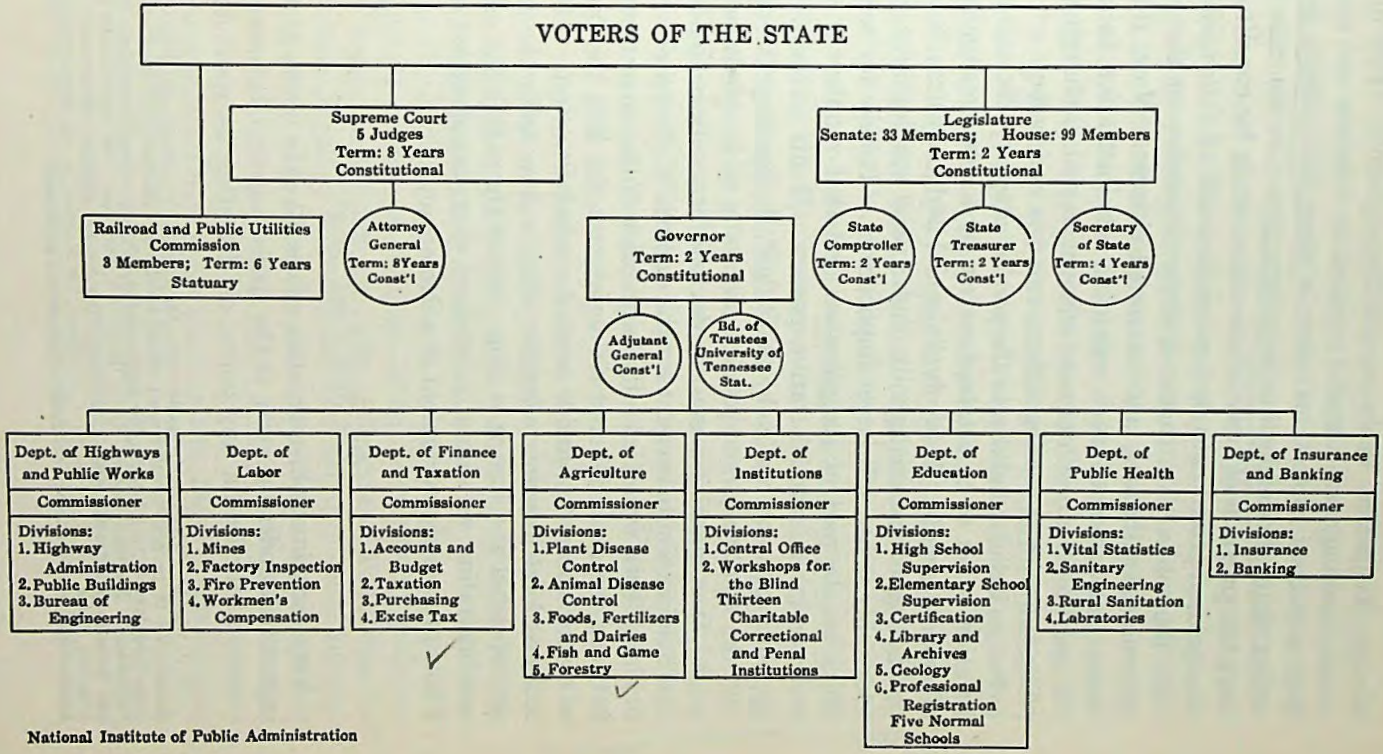
1. Finance, charged among other things with the responsibility of preparing the budget for the governor's scrutiny.
2. Agriculture, including all agricultural and related activities as well as food inspection.
3. Labor, including an industrial commission in charge of arbitration and conciliation matters.
4. Mines and Minerals.
5. Public Works and Buildings.
6. Public Welfare, having jurisdiction over all charitable, penal, and reformatory institutions.
7. Public Health, including control over laboratories.
8. Trade and Commerce, embracing the regulation of utilities.
9. Registration and Education.

Each department is headed by a single director appointed by the governor with the approval of the senate. In all cases in which departments are called upon to exercise quasi-legislative or quasi-judicial functions boards are provided. These include an industrial commission, a mining board, a tax commission, a miners' examining board, a public utilities commission, a normal school board, and a food standards commission. Each board is a part of the department to which it belongs and is under the system of financial control to which other officers are subjected. In several cases advisory boards were instituted to serve as counselors to department heads and the governor. They do not have, however, any power over actual administration. The responsibility rests squarely on the department chiefs.

After Illinois had broken the path, other states followed in rapid succession: in 1919, Massachusetts, Idaho, and Nebraska; in 1921, Washington, Ohio, and California; in 1922, Maryland;

TENNESSEE

Organization of State Administration under the Administrative Reorganization Act of 1923



National Institute of Public Administration

in 1923, Tennessee, Vermont, and Pennsylvania. Few of these states, however, have adopted a system as complete and symmetrical as that of Illinois, and some of them have made gestures rather than thoroughgoing reconstruction. In no case has a complete program of consolidation been made by constitutional changes and placed entirely beyond the reach of the legislature.[1] Still, the subject is a theme of lively discussion on the part of governors, legislatures, and interested citizens. Now, that our states have assumed such extensive administrative functions, the quest for the best and most efficient way of discharging them will go on with increasing influence on law and policy.

But as indicated above in the second chapter, efficient administration is not to be attained merely by a new arrangement of offices and boards. It involves a sound budget system, scientific purchasing of material goods, and a wise employment policy. Inevitably it has still larger implications. It calls for responsibility on the part of the governor and that requires a radical increase in his administrative powers. If his authority over appointments and removals, the budget, the purchase of supplies, and the employment of public servants is to be immensely enlarged, then machinery must be devised for scrutinizing his work and holding him to account for the exercise of the powers vested in him. Then we are led into the question of the correct relations between the executive and the legislature, for it is the business of the legislature to provide funds for administration. Theoretically at least it ought to inquire what is done with the money appropriated and how it is done. So in the search for efficient administration we cannot stop short of a consideration of the whole process of government in a democracy.

The State Civil Service

Very early in our history, state offices, like the offices at Washington, fell under the sway of the spoils system. It became the common practice for any party, on defeating its rival, to oust

[1] F. F. Blachly, "Who Should Organize State Administration?" *Southwestern Political Science Quarterly*, Vol. IV, pp. 95 ff; F. M. Stewart, *Officers, Boards, and Commissions of Texas* (University of Texas Publications); H. J. Peterson, *The Selection of Public Officials in Iowa* (State Historical Society Publications); *Municipal Research*, No. 61 (1915); J. L. Donaldson, *State Administration in Maryland* (Johns Hopkins Studies, 1916); L. D. Upson, "Unscrambling Michigan's Government," *National Municipal Review*, Vol. X, pp. 361 f.; C. G. Haines, *The Movement for the Reorganization of State Administration* (1918); Eugene Fair, *Public Administration in Missouri*.

from power even all the employees whose duties were purely clerical. An official investigation in New York into the methods prevailing during the early eighties led to the conclusion that political considerations controlled almost exclusively all appointments; that the partisan service of the appointee, either past or expectant, was the reason for his appointment; that the public welfare was only a nominal factor in selecting employees; that the most meritorious persons were deterred from entering public service; that the character of the service was lowered by the patronage system; that the public officers having the power to make appointments were burdened and embarrassed by the pressure upon them for spoils; and that officers imperiled their positions by showing any independence.

New York led the way in civil service reform by passing, in 1883, a civil service law providing for a commission authorized to coöperate with the governor in preparing rules, classifying the state civil service, and conducting the examinations for the positions to be filled by competition. Other states were slow to follow the example of New York, even in a tentative way. In 1924 the civil service reformers were able to report only ten commonwealths with state civil service commissions, namely, California, Colorado, Illinois, Kansas, Maryland (single-headed department), Massachusetts, New Jersey, New York, Ohio, and Wisconsin. The greatest gains were made in cities where the functions of government are more technical in character, and the dangers of reliance upon mere political appointees more obvious.

State political organizations cling with great tenacity to the spoils of office as rewards for political services. Even technical work of the highest order such as highway engineering, or the management of state institutions, in an overwhelming majority of the states, is subject to party exigencies. Politicians do not hesitate to put in jeopardy the lives and comfort of the unfortunate wards of the state by entrusting the control of asylums and other institutions to men whose sole claim to consideration is "party regularity."

In the few states having the merit system, the civil service laws follow, in general, the national law. They provide for the division of public offices into two groups: the classified and the unclassified. The unclassified service includes all offices filled by election or by the legislature or by the governor and senate, and

other specified positions. The classified service comprises all other offices, which are subdivided into three groups: the competitive, the non-competitive, and the exempt. The competitive group includes such officers as clerks, copyists, stenographers, cashiers, and civil engineers. The offices in this group are filled by examinations or promotions and transfers.

The civil service laws require all examinations to be practical in their character and to relate to such matters as will fairly test the relative capacity and fitness of persons examined to discharge the duties of the service which they seek to enter. For the various places requiring technical skill — such as the positions of factory inspector, health officer, civil engineer, chemist, and expert accountant — special examinations in the respective branches are given; and in no case is reliance placed solely on book knowledge. The persons who are successful in the examinations are grouped according to the services which they seek to enter and arranged in the order of their respective grades. Whenever a vacancy occurs, the appointing officers must choose usually from the three names highest on the roll of candidates.

The non-competitive class includes those minor employees whom it is impracticable to include in the competitive class, such as bakers, carpenters, stone-cutters, and picture-framers. Appointments to the non-competitive class are made after non-competitive examinations conducted according to rules.

In the exempt class are the deputies of the principal executive officers, the chief clerks, and skilled and unskilled laborers not included in the other classes.

The civil service laws, as a rule, provide, furthermore, that removal must not be made for political reasons, but only for incompetence or insubordination. In case of removal, the employee affected usually has the right to be heard in his own behalf.

The administration of the civil service law is generally vested in the hands of a commission composed of three members, not more than two of whom may be adherents of the same political party. An exception to this general principle is offered by Maryland where in 1920 the function was entrusted to a department with a single head; it is the duty of the commissioner to prescribe and enforce rules carrying the civil service act into effect, to plan and hold examinations for the various branches of the service, to make investigations, to certify eligibles to appointing

officers as called for, and to hold hearings in case of removals. The Maryland law is also noteworthy because it authorizes the commissioner to make a complete classification of the positions coming under the merit system and to assign the various offices to their appropriate classes. Furthermore he is instructed to make a study of rates paid for similar services in public and private employment and to recommend schedules of compensation for state officers to be put into effect on approval of the governor. The Maryland commissioner is called the director of the state department of employment and registration and has a place in the governor's cabinet.[1]

[1] *National Municipal Review*, Vol. XII, p. 358.

CHAPTER XXVIII

THE STATE LEGISLATURE

The legislature should occupy a high position in the esteem of the citizens of a commonwealth, for in it are made the laws which most vitally affect their lives and property. Unlike the Congress of the United States, the state legislature is not restricted to the exercise of certain powers, but enjoys every right and authority which is not expressly denied to it by the Constitution of the United States or the constitution under which it is erected. It has control over the whole domain of civil law; that is, it lays down the rules governing contracts, real and personal property, inheritance, corporations, mortgages, marriage and divorce, and other civil matters. It defines crime; that is, it prescribes those actions of the citizen which are to be punished by fine or imprisonment or death. It touches the property of the citizen not only by regulating its use, but also by imposing upon it a burden of taxation. Finally, it has control over that vast domain known as the police power; in other words, it makes regulations concerning public health, morals, and welfare, devises rules for the conduct of business and professions, and in other ways restrains the liberty of the citizen to do as he pleases.

The general term applied to the representative branch of the state government is "the state legislature"; but the technical name for that body varies from state to state. In about one half of the commonwealths it is known as "the general assembly"; in a few states as the "legislative assembly"; and in New Hampshire and Massachusetts as "the general court." All the states call the upper house of the legislature the senate; and in most of them the lower house is known as the house of representatives, though in some states, including New York, it bears the name of the assembly, and in a few others that of the house of delegates.

The Structure of the Legislature

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The state legislature is always divided into two houses. In the source of their authority and the nature of their powers, they are substantially alike. Both are elected by the same voters and in ordinary legislation they are equal. The differences between them are, except in one or two matters, unimportant. The ancient rule that money bills must originate in the lower house is frequently inscribed in the constitution, but in practice it amounts to almost nothing. The senate is always smaller in number and the term of the senator generally longer than that of his colleague in the lower chamber. Very often the senate, like its greater counterpart at Washington, is made a continuous body by provision for partial, instead of total, renewal at each election. The senators, being elected from larger districts, are, as a rule, more prominent and more influential in party councils and public affairs. Their influence is usually augmented by the constitutional provision that they shall have the right to approve or reject nominees to high state offices presented by the governor and to concur or dissent when removals are proposed. This gives them a power over patronage, with all its by-products, which their brethren below do not enjoy.

Theoretically speaking, there is no reason why a state legislature should have two houses. The House of Lords in England, the upper house in Switzerland, and the Senate of the United States are to be accounted for on the ground that some provision had to be made for the representation of specific interests which could not in the nature of circumstances be separately represented in the lower chamber. The House of Lords, in its historic origin at least, spoke for the landed aristocracy and the clergy; the Swiss Federal Council and the American Senate represent large and important subdivisions which enjoy the flavor if not the substance of sovereignty and cling stoutly to their ancient rights. When, as in the early days of our constitutional history, the state senators represented openly and lawfully the larger propertied interests,[1] there was a practical justification for the two houses; but that reason has long ago disappeared. Before the Fourteenth Amendment to the federal Constitution placed all state legislation under the supervision of the federal judiciary and removed

[1] See above, p. 459.

all danger of confiscatory measures, there was some ground for claiming that the more checks and balances in the state government, the better for property rights.

As things stand now the only defense of the double-chamber system in the states rests upon the theory that it helps to prevent hasty and ill-considered legislation by assuring more deliberation and reflection. This hypothesis, much lauded in orations and praised in grammar-school books, has seldom been put to the acid test of fact. Indeed there has been only one detailed and searching inquiry made into the working of the hypothesis in practice,[1] namely, D. L. Colvin's *Bicameral Principle in the New York Legislature.* Mr. Colvin could discover very few evidences of any checks on hasty legislation imposed by the two chamber system. He reported that only nineteen per cent of the bills which passed one house were killed in the second and that only fifteen per cent of all bills were amended after they fell into the hands of the second chamber. The bills killed or amended, however, were not fundamental laws which might "shake the foundations of the commonwealth"; they were relatively insignificant measures. Moreover a large number of them would never have been passed by the chamber in which they originated if that house had known that it would have to assume full responsibility for them. "Two considerations," he justly remarks, "do not necessarily mean double consideration. There is a tendency to assume that a subject has been considered in the other house when that consideration has been very inadequate; or sometimes one house passes a bill with the expectation that the other house will deal with it more carefully" — an expectation not always realized. That is not even the most significant element to be noted. In practice all important measures passed by a state legislature are determined upon by party leaders in both houses and debate on those measures is only a slight incident in their life history. Of course the conclusions drawn by Mr. Colvin from a study of one legislative session are not of universal application; but the burden of proof rests on those who assert that a second chamber in a state legislature really acts as a check upon hasty and ill-considered legislation, and works as an important safeguard to the rights of person and property.

In determining the size of each house, our state constitution

[1] For the historical aspects of the subject see Moran, *Rise and Development of the Bicameral System.*

makers have arrived at no concensus of opinion. New York at one end of the scale with more than ten million inhabitants has fifty-one senators and one hundred and fifty assemblymen. Nevada at the other end with about eighty thousand people has seventeen members in the upper house and thirty-seven in the lower. New Hampshire with under half a million inhabitants once had more than four hundred members in the lower chamber; it required heroic efforts to induce the voters to approve an amendment reducing the maximum to 325.

What, after all, is the psychology of numbers? Is there any relation between the number of members in a legislature and the quality of the representatives? Not necessarily, but it seems to be safe to say that the larger the number, the narrower the horizon of the individual members. Men of capacious minds sometimes come from little districts, but the chances of securing men of small caliber are increased by diminishing the size of the constituencies.

Who should be represented in the apportionment of members throughout the state — population, citizens, adults, or voters? The question is not yet answered to the satisfaction of all sections of the country. The drift of opinion is decidedly in favor of apportioning representatives among the several divisions of the state on the basis of the total population, citizens and aliens, as ascertained by the federal census. The rule, however, is not universal. Other bases of apportionment are white population, adult males, legal voters, qualified voters, and all inhabitants excluding aliens. California bars persons not eligible for American citizenship, thus eliminating Oriental residents.

According to the strict theory of numerical democracy, representatives should be apportioned among districts containing substantially an equal number of inhabitants. About one third of our state constitutions adopt this principle and order a periodical redistribution to correct inequalities caused by changes in population. Prescribing and applying are, however, two different things, for in actual practice there are often great inequalities in the size of the constituencies. Does not the constitution of California say that the legislative districts shall be as "nearly equal in population as may be"? Professor Victor West reminds us that a "fair apportionment would give Los Angeles eleven senators and twenty-two assemblymen instead of eight

and fifteen respectively as at present and at the same time reduce the representation of San Francisco." [1] Nothing causes the politicians more pain than the surrender of anything which they have well in hand, and the pride of citizens is wounded by compulsory admission that their cities are not growing faster than Chicago and New York. So the great principle of equality is sometimes slain in the house of its friends.

In fact about one third of the states expressly depart from the principle by making exceptions in favor of local units, the town in New England and the county generally. Pieces of towns and counties cannot be torn away and united with pieces of other towns and counties to make equal districts — for the sake of a theory. The temptations to gerrymander would be multiplied and village statesmen would be deprived of offices. In every state convention, therefore, some person is sure to rise and champion in tremulous tones the right of each town or county to have at least one member in the state legislature. In the New York convention of 1894, Joseph H. Choate, an orator of commanding power, employed all his arts in defending the right of the county, no matter how small, to have its spokesman in the assembly of the state; in a telling speech, rich in allusions to the history of local government, he almost moved his auditors to tears. He saved the day, for the convention was controlled by Republicans; by giving the rural counties one member each, they were assured a larger representation in the assembly than they could otherwise get.[2] Sometimes the cases are reversed and Democrats by the nature of circumstances must plead for the county. Thus there has been established a very general rule that the county — in New England the town — must have at least one member in the lower house, no matter how small the number of its inhabitants. Wherever the principle is applied there are to be found inequalities in the size of constituencies — sometimes slight, often gross. The smaller counties are over-represented; the populous counties are under-represented.

The outcome is in keeping with the general tendency to discriminate against the cities in favor of the country in making apportionments. This is accomplished in New York by the county-unit rule mentioned above and by the constitutional

[1] *National Municipal Review*, Vol. XII, p. 369.
[2] New York makes an exception of Hamilton county with a population of 3900.

provision that no county, no matter how populous, shall ever have more than one third the senators, and that no two counties, adjoining or separated only by public waters, shall ever have more than one half the senators. Similar devices, equally effective but less obvious, are employed in other states to accomplish the same end.

In the warfare of political democracy against political geography a compromise is sometimes reached in a provision that numerical equality shall prevail in the apportionment of one house and geographical equality in the other. This is a favorite idea in New England. Connecticut, for example, provides that the senators shall be distributed throughout the state on the basis of population, saving always the unity of counties and towns, and that the members of the lower chamber shall be assigned to the towns, giving one or two members to each. This system results in gross inequalities. For example, Hartford with 138,000 inhabitants according to the last census has two representatives in the lower house, while Union with 257 people sends the same number to the capital. Bridgeport with a population of 143,000 and Hartland with 448 inhabitants have equal representation. The largest town with one member is Berlin which boasts a population of 4298 while the smallest is Prospect with 266 inhabitants. If we take the number of voters behind each representative we find conditions which compare with the worst that the English rotten borough system had to offer: the two Republicans elected in the town of Union in 1922 received fifty-eight and fifty-six votes respectively. Even in the case of the Connecticut senate where equality is the general rule, we find one county with 23,700 people for each of its senators, and another county with 41,500 inhabitants for each of them.

Strange to say, such violations of the democratic principle of equality in representation do not seem to incur any serious opposition on the part of the people — probably owing to the tenacity with which the rural districts cling to their special privileges and also to the general indifference to constitutional questions shown by the electorates of the great urban centers. Only occasionally is an effective protest made against it.

On account of the general practice of "gerrymandering," it has become the custom to fix in the state constitution some general principles controlling the distribution of representatives.

These principles generally include provisions to the effect that legislative districts must be composed of areas compact in form and contiguous, that counties shall not be divided except into whole districts, that townships and city blocks shall not be divided, and that citizens may appeal to the courts against gerrymandering on the part of the legislature. Maryland and Ohio take the matter out of the hands of the legislature. The former provides that the governor shall make the periodical apportionment according to the principles laid down in the constitution; the latter vests the power in the governor, auditor, and secretary of state or any two of them.

In the distribution of representation, the rule of one member to each district is most generally applied. In only one state, Illinois, has there been an attempt to avoid the inevitable inequalities of this system by the introduction of minority representation. This was done in 1870 by a constitutional provision that the house of representatives shall consist of three times the number of the members of the senate; that the representatives shall be elected in each senatorial district at the regular biennial election; and that in the election of representatives each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute his votes or equal parts thereof among the several candidates as he sees fit. The three candidates standing highest on the list after the votes are counted are declared to be elected.

Dr. B. F. Moore has made a careful study of the working of minority representation during the period from 1870 to 1919 and has presented certain conclusions relative to it.[1] He shows that in practice the system almost always secures to the minority party a representative from every district. It also prevents those gross inequalities in constituencies which are to be found in most other states; it reduces the evils of the gerrymander. It also guarantees a strong minority in the legislature to act as a check on the corrupt practices which are likely to ensue whenever one party for a long period enjoys an overwhelming supremacy. On other points Dr. Moore speaks with caution. He is not sure that cumulative voting improves the quality of the representatives, or guarantees more independence on their part. Its effect upon the power of the political machine is an unknown

[1] B. F. Moore, *History of Cumulative Voting and Minority Representation in Illinois, 1870–1919.*

quantity. Certainly the experiment has not led other states to follow the example of Illinois. Even Illinois seems to be in a quandary on the point, for the constitutional convention of 1920–22 proposed to abolish cumulative voting and return to the single-member district system. The fact that the voters rejected the new constitution saved the system for the time being.[1]

How often should the voice of the people be heard in the election of representatives? There was once a firmly fixed tradition that annual elections were necessary to the safety of the public, but grave doubts have arisen on the subject. In fact the tradition has been uprooted, and only two states, Massachusetts and Rhode Island, renew both houses every year. More than half the states have established a four year term for senators; New Jersey clings to the odd number three; the remainder have adopted two years as the period. In all but a few states the term of the members of the lower house is fixed at two years; Alabama, Louisiana, and Mississippi raise it to four; while Massachusetts, New York, New Jersey, and Rhode Island retain the old custom of annual elections.

A serious attempt was made in the New York constitutional convention of 1894 to increase the term in that state, but it failed. On that occasion, a member argued against any change, declaring that it was to the best interest of the state to have the assemblymen returned to the people every year in order that the latter might pass upon their acts. "You take away the dread," he said, "that the average member of the assembly has that his constituents at home are watching his acts and will pass upon them at the coming election and you will take away one of the greatest incentives to right action."

Experience, however, seems to run against this position. When a member is elected for one year, he hardly has time to learn the rules of the body before his period of service expires; and if he contemplates reëlection, he must devote a considerable portion of his energies to "nursing" his district. As everybody knows, effective work in a legislature can only be done by a man of experience, notwithstanding the best intentions. A district can be effectively represented only by a man who is able to accomplish results.

[1] W. F. Dodd, in *Political Science Review*, Vol. XVII, p. 70.

Should there be any effort to improve the character of state legislatures by imposing special qualifications on the members? The answer of the constitutions is an emphatic negative. The legislator must have merely the qualifications of a voter of the commonwealth. Several states fix an age limit above twenty-one years, differentiating between members of the senate and of the lower house.

As in the case of elections, it was for a long time a cherished tradition that frequent meetings of the legislature were required by the purposes of democracy. On this point also doubts have arisen. Only six states, Georgia, Massachusetts, New Jersey, New York, Rhode Island, and South Carolina, now require annual sessions; Alabama has a quadrennial meeting with occasional special sessions; and the remainder of the states provide for convening the legislature biennially. California and West Virginia have split each session into two parts.[1]

The length as well as the frequency of legislative sessions is subject to constitutional limitations in a majority of states. Some of them have fixed a definite period, varying usually from forty to ninety days and have forbidden the legislature to sit longer; others seek to check legislative labors by reducing the daily wage of the members after the expiration of a certain number of days. It is argued that where the time at the disposal of legislators is short they will devote their attention mainly to important matters, to the exclusion of local and special bills and the pet schemes of small politicians. Experience hardly supports the argument. In every session there are many new members and much time must be spent getting down to business; usually the session is half over before either house is ready for serious work. It does not appear that the quality of the laws passed is improved by the attempt to reduce the length of the legislative session. The laws of Oregon with a forty-day session are not better than those of Massachusetts where there is no limit on the time of the legislators.

In all states the members of the legislature are paid. Several constitutions prescribe the amount; and other constitutions, which leave the matter of compensation to the legislature, forbid any increase during the term of service. Some commonwealths provide an annual salary; for example, New York pays

[1] See below, p. 615.

each member of the senate and the assembly $1500 per annum. Other states make a per diem allowance, combining this with a limitation on the length of the session or at least on the number of days for which payment can be drawn. Oklahoma provides that the members of the legislature shall receive $6 per day for a term of sixty days and only $2 per day after the expiration of that period.

So far we have been dealing with the formal provisions of the law. What can be said of the human element — the kind of persons elected to state legislatures? On this subject a great deal has been written but not many generalizations are safe. In our legislatures will be found the representatives of all professions, trades, and crafts — lawyers, doctors, teachers, ministers, merchants, manufacturers, bankers, farmers, insurance agents, local politicians, artisans, and last but not least housewives.[1] Some of them are versatile; on one occasion a legislator professed to be at the same time "a furniture dealer, undertaker, miller, and dealer in grain and feed." Another admitted that he was

[1] The following table gives the occupation of the members of the Vermont lower house in 1923. The figures in parentheses indicate the number of each class where there are more than one:

Accountant
Auctioneer and deputy sheriff
Assistant store manager
Automobile dealer
Bookkeeper
Business
Chairmaker
Clergyman (5)
Contractor and builder
Creamery manager
District highway commissioner
Druggist
Farm manager
Farmer (120)
Farmer and cattle dealer
Farmer and civil engineer
Farmer and contractor
Farmer and creamery manager (3)
Farmer and dealer
Farmer and deputy sheriff, lumberman, dealer in live stock and real estate
Farmer and fruit grower (2)
Farmer and lumberman
Farmer and meat dealer (2)
Farmer and merchant (2)
Farmer and school teacher (2)
Farmer and stockman
Farmer and wood dealer
Garageman (2)
Grain and coal dealer
Grain and feed dealer
Hotel proprietor
Housekeeper
Housewife (2)
Inspector, Vermont State Highway Department
Insurance man (4)
Investor
Laborer (4)
Lawyer (14)
Lawyer and general insurance
Live stock dealer and butcher
Lumberman (9)
Lumber manufacturer and dealer in general merchandise
Machinist
Manufacturer of builders' woodwork, etc.
Marble expert
Marble and granite dealer
Merchant (16)
Merchant, town clerk and treasurer, insurance agent
Mill wood worker
None (2)
Not stated (1)
Physician (4)
Physician and surgeon (3)
Plumber and heater
Real estate dealer (3)
Retail provisions dealer
Retired (2)
Retired farmer (2)
Retired lawyer
Salesman
Sawyer
Station agent
Store manager
Surgeon and farmer

a composer of music "with a national reputation, being the author of many works on music and over 100 piano compositions, many of which had proven very popular." The stable boy of a college president in New England was once elevated to the legislature and bore the title of "the Honorable" with great dignity. The lawyers, however, seem to be the favorites, except in the agricultural states, while workingmen are seldom chosen, as in Europe, by labor parties.

The personnel of the legislature is constantly changing. It happens not infrequently that three fourths of the members are new to the business. Few there are who make a career in the legislature, for it offers no career. The ablest member cannot by any chance become a great party leader or national figure through mere legislative service. Young lawyers, briefless and waiting for clients, often put in their leisure hours running for the lower house, but if they remain in politics permanently they turn their attention to higher places, such as the governor's office or membership in Congress. State senators have a larger opportunity to become better known and more influential in party affairs, but an efficient senator of long standing usually makes so many enemies that he becomes "unavailable" as a candidate for chief executive of his commonwealth. So it happens that there is a constant change in the membership of the senate as well as the lower house.

All in all our legislatures seem to be fairly representative. Their members spring from the people and are in close touch with all interests, prejudices, and customs. Every miscellaneous group in society except the industrial workers has its spokesmen in one or both houses. The restless motion of American life, a phenomenon which has struck every foreign observer from de Tocqueville to our time, is reflected in the state legislature, in the changing personnel, the ebb and flow of opinions, the violent actions and reactions. The voters always want the legislators to be "just folks" like themselves, but strange to say they are always busy devising constitutional limitations to prevent their agents from injuring the public.

The Powers of the State Legislature

In fact the history of state constitutions is the history of restrictions on the authority of the legislature. A hundred years

ago the commentator on the subject had little occasion to consider the powers of the legislature, for it was almost a sovereign body; to-day an examination of it at work must be prefaced by an account of the constitutional restraints under which it must operate.

At the outset, of course, there are those limitations laid down in the federal Constitution,[1] which are common to all states, forbidding the legislature to emit bills of credit, coin money, pass ex post facto laws or laws impairing the obligation of contract, or to make or enforce laws abridging the privileges and immunities of United States citizens, or to deprive persons of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. The Fourteenth Amendment to the federal Constitution is frequently called into play to check our state legislatures. Only by exercising great care in framing important measures affecting property rights can they escape the wide sweep of this provision.

The general limitations imposed on legislatures by the state constitutions themselves fall into six groups. In the first place, there is the bill of rights guaranteeing jury trial, religious freedom, and liberty of press and speech, securing to the citizen the ancient right to the writ of habeas corpus, and forbidding the legislature to take private property for public use without compensation. In the second place, there are generally numerous provisions controlling the legislature in dealing with corporations, forbidding it to grant special charters of incorporation or special privileges of any kind. A third group of limitations curb the financial power of the legislature, restrict its capacity for incurring debts, compel it to make provisions for paying the interest and ultimately the principal of all money borrowed for public purposes, and secure publicity for financial measures during their passage. In the fourth place, the constitution provides the framework of the state government, defines the terms and powers of various officials, and prescribes the qualifications for voters, thus placing these matters beyond the reach of the legislature. In the fifth place, the state constitution generally lays down some fundamental principles with regard to local government, public institutions, and education.

There is finally the very important group of restrictions on

[1] See above, p. 477.

the power of the legislatures to pass special and local laws. All statutes fall into two classes: (*a*) general or public laws; and (*b*) special laws. The former apply equally to all persons or classes of persons throughout the state. For example, an act regulating the time of opening the polls at elections throughout the state is a general law; likewise a statute compelling all manufacturers to maintain certain sanitary standards in their shops. A special law is one applying to some particular person or corporation or locality — township, county, or city; for example, a law requiring a county to build a certain bridge or lay out a certain highway is a special law; so is an act exempting some manufacturer or profession or corporation from state taxes. It can be seen at a glance how easily corrupt and pernicious legislation could be enacted in favor of local and special interests by a legislature having no restraint upon its power.

The right to pass such laws, wherever it is freely given to a state legislature, produces two unfortunate results. It leads private persons, localities, and corporations to exert a powerful influence in politics in the quest for special favors, thus stimulating lobbying, bribery, and log-rolling. It crowds the legislative program with petty bills which obscure the more important public measures and occupy the time of the members with trivial matters. These things, in turn, have an evil effect on the quality of men who seek to enter the legislature. Persons of high standards and more than average intelligence are not willing to waste their life trying to get an iron bridge over Duck Creek in Posey township or working for a highway through the town of Bad Angel. Business of this kind appeals to men of small caliber; sometimes to men deficient in integrity.

The evils of the system have been recognized and our constitution-makers have devised a variety of limitations to restrain the legislative hand. One method is to provide that no special laws shall be passed relative to matters which can be covered by general legislation. This hurdle is easily vaulted by enterprising legislators. Another method is to insert in the constitution a long list of topics on which the legislature cannot enact any laws whatever; sometimes the list will include twenty or thirty subjects, such as regulating the rate of interest, changing county seats, remitting fines, and granting divorces. A third way of restraining the legislature is to prohibit all special legis-

lation. This barrier is easily thrown down, for legislatures can classify cities into groups and pass laws binding on the cities of each group. This practice has been sustained by the courts. Another check on local legislation, found in a few states, requires the publication of proposed bills in the newspapers of the communities affected, thus giving the citizens notice and a chance to protest. Finally, pressure for special legislation can be reduced by giving cities and counties a large measure of self-government, namely "home rule," which permits them to legislate for themselves on many matters without resorting to the state legislature.[1] The effect of these various limitations has been marked, but it can hardly be said that the problem of special legislation has been solved — indeed, it cannot be solved because there is in reality no sharp dividing line between general and special interests.

Legislative Organization and Procedure

In organization and procedure our state legislatures follow, in general, the example of Congress. In taking up this phase of state government, therefore, we encounter the party system, the speaker, and the committee, just as in Congress. The lieutenant governor, where such an officer is provided for, usually presides in the state senate and occupies a position analogous to that of the Vice President at Washington; the lower house of the legislature, like the House of Representatives, elects its own speaker. The chief difference between the two bodies with regard to procedure lies in the fact that the state legislature is more closely hampered by limitations designed to secure regularity, publicity, and deliberation in the enactment of laws.

Among such limitations are provisions requiring that laws must be passed in the form of bills and that each bill must cover only one subject clearly expressed in the title. In this manner the legislature is supposed to be estopped from making laws in the form of resolutions and from burying vicious measures in the heart of a long bill dealing with some apparently harmless matter. There are commonly some stipulations to the effect that when an existing law is to be amended, the section changed shall be

[1] Below, p. 705 and p. 782.

reprinted in the new bill with the emendations clearly indicated in some form. It is also a favorite practice to require three different readings of every bill, but the rule is more honored in the breach than in the observance — if "reading" means anything more than mumbling the title. Most of these limitations are little more than pious wishes, for only a few "have teeth" and will be enforced by the courts if they are violated by the legislature. Ordinarily, as Professor Reinsch remarks, "the observation of the rules of procedure is very largely dependent upon the will and purpose of the majority in the legislative body. The leaders do not often find it difficult to arrive at an understanding with the minority under which legislation can be carried on largely by common consent."

The second fairly definite group of rules respecting procedure are those designed to secure publicity in the consideration of measures. The constitution of New York, for instance, provides that no bill shall be passed or become a law unless it shall have been printed and upon the desks of the members in its final form at least three calendar legislative days prior to its final passage, except in case the governor certifies to the necessity of its immediate passage; at the last reading of a bill no amendment may be made; the question upon its final passage must be taken immediately afterward, and the yeas and nays entered on the journal. The rule that no bill shall be introduced during the last few days is also intended to secure publicity, but it is commonly nullified by allowing such an introduction of measures either by unanimous consent or by the consent of a large portion of the members of the house.

Turning from constitutional law to party practice we meet at the outset the caucus in each chamber of the state legislature. In the caucus of the majority party the speaker of the lower house is chosen subject to the admonitions of the party leaders on the outside; and by much "higgling of the market" the chairmen of the important committees to be named by the speaker are agreed upon. Here, too, controversies over the leading legislative measures to be sponsored by the party are threshed out and settled. Here it is that the party organization within the legislature does its work. Here it is that members who fain would be independent are brought to realize that practically the only hope for securing a consideration of their own bills is

a judicious submission to the will of the party managers. It is the caucus that keeps discipline in the ranks; and usually by the force of circumstances, the caucus is dominated by a small and experienced group of legislative workers. Indeed, it may be dominated by forces outside its own ranks. Roosevelt, in an amusing passage in his *Autobiography*, tells us that when he was governor of New York, the boss of the state, Senator Platt, asked him whether he wished to name any members of the assembly for committee positions; he expressed surprise because the speaker had not yet been selected. Thereupon Senator Platt, "with a tolerant smile," replied that it made no difference, for the speaker when chosen would agree in advance to the appointments "we wish."

The speaker in the lower house is nominally chosen by that body, but in practice by, in, or for the caucus, depending upon the degree of party pressure on it. Like the speaker at Washington he enjoys enormous power if he has tact and capacity — and more important still, the support of his party brethren. He usually appoints committees in theory and to some extent in fact. Like the speaker in the House of Representatives he has at his side a rules committee, or a group of his party colleagues who, acting in coöperation with him, determine ordinarily the fate of all bills. He may kill them by distributing them as introduced to unfriendly committees, and he may refuse to permit them to be called up for consideration if they are not reported favorably from the committees.

As at Washington, committees play an important rôle in the legislative process. Among those to be found, as a rule, in a legislature are the following: finance, ways and means, judiciary, affairs of cities, railroads, commerce and navigation, codes, insurance, taxation and retrenchment, banks, forest, fish and game laws, internal affairs of towns and counties, military affairs, miscellaneous corporations, public education, public health, penal institutions, revision, affairs of villages, agriculture, printed and engrossed bills, trade and manufactures, privileges and elections, public printing, roads and bridges.

Legislative committees, of course, are not all of equal importance. Perhaps first in the list ought to be placed the committees which deal with financial measures, commonly known as the committee on finance in the senate and the committee on ways

and means in the house. If there are great cities in the state, the committee on cities is, naturally, high in rank. The committee on the judiciary also enjoys great power because it often has referred to it, under the cover of questions of constitutionality, important measures, such as primary legislation and election laws. In addition, it frequently has to review proposed amendments to the existing statutes.

In actual operation the committee system in the state legislature does not ordinarily differ much from that in Congress. The committee may report favorably on a bill, report it with amendments, or kill it by silence. Committees in charge of important matters are often given the privilege of reporting to the house for action out of the regular order of business. If a committee refuses to report a bill, its sponsor can get it before the house only by securing unanimous consent or a special vote in support of his request; as all the powerful committees are directed by party leaders, a motion to take a bill out of the hands of a committee is usually a revolt against party understandings and seldom meets with success. In other words, the speaker of the house and the committee chairmen possess nearly all the sovereignty that is assigned to the legislative chamber by the party managers and the governor as party leader. It is in the committee that bills are drawn, amended, or "smothered" with due reference to party policies and plans.

In this respect the practice of Massachusetts offers some remarkable contrasts to the prevailing modes. There the committee enjoys no special privilege except that of scrutinizing bills referred to it. It must report all bills to the legislative chamber which it serves. The bills reported are passed upon in regular order — an order that must run its course unless changed by a four fifths vote. The committees of the two houses act jointly, and hold public hearings on practically all bills submitted for their consideration. Accordingly there is little opportunity for "dark room" procedure — for smothering bills without public knowledge. The system has one great disadvantage, however; it prolongs the transaction of business because it offers no swift process for selecting a few measures for legislative decision. Nevertheless, for its fairness and usefulness in producing discrimination in law-making it is justly held up as a model. "In Massachusetts," says Professor Reinsch, "committee hearings are a

very important part of legislative action. Notice of all hearings is given in the public press, and the committee meetings are well attended, not only by people who have an axe to grind, but by citizens of the state who interest themselves in legislative reforms. All testimony brought before the committees is carefully weighed; in fact, the legislature and its committees assume rather a judicial attitude. Petitions are brought before them, testimony is given, arguments are made, and they can generally decide the matter impartially upon the basis of all these considerations."[1] The recommendations of the committees naturally carry great weight in the legislature.

Nebraska, impressed with the need of reform in the prevailing committee system, made, in 1914, a thoroughgoing investigation into legislative organization and procedure and three years later brought about the following important changes:

1. The number of committees was reduced.
2. Definite hours are set for committee meetings.
3. Records of committee meetings must be kept and made a part of the report on the bills considered.
4. Final action on bills can be taken by committees only during the daylight hours, thus preventing "snap" meetings to push through measures while objectors are absent.
5. Schedules of committee meetings are printed so that everyone can know the hours of each committee.

To give some concrete idea of the general character of legislative procedure we may take up the practice of a well-ordered legislature. A bill is introduced in the lower house by any one of four methods: by a private member who may deposit it with the speaker or the clerk, by the report of a committee, on the order of the house, or by a messenger from the senate. At each regular meeting the speaker announces the introduction of the bills for their first reading and thereupon refers them to appropriate committees with the consent of the house. If a bill is favorably reported and the report is approved by the house, the bill is then placed on the order of second reading. If the report is adverse and is approved by the house, the bill is considered rejected.

When a bill is placed on the order of second reading, it is then subjected to debate, being considered section by section — unless,

[1] *American Legislatures*, p. 174; Holcombe, *State Government*, p. 253.

by unanimous consent, it is advanced to the third reading. When a bill passes the second reading and is ordered to the third reading, it is referred to the committee on revision; then it goes to the committee on engrossed bills, where it is put in final form; then it is laid on the desk of the members sometime before the last reading. When a bill is ready for its third reading, it is placed on the proper calendar and taken up at the proper time. Unless there is a demand, the bill is not read through. If some member wants to reopen debate on the bill, he moves to strike out the enacting clause. The proceedings in the senate of the average legislature are very much like those in the house.

To prevent unnecessary delays various expedients are embodied in the rules of legislatures. The amount of time which a speaker may consume is often limited; he cannot exceed the limit without the consent of an extraordinary majority. The fine old theory of unrestricted debate so dear to United States Senators does not prevail in the states. On the contrary, the motion for closure is freely employed both before and after the expiration of the time allotted by the rules to debate on any particular question. If this were not done, legislative sessions limited to forty and sixty days would be impossible.

The law and the rules, however, are, as Mr. Dooley remarked in another connection, "triumphal arches" to experienced manipulators in American legislatures. In states such as New York where party conflicts are ardent and the business is voluminous and complex, the party organization in the legislature takes charge. The sum and substance of procedure are somewhat humorously given in the following account written many years ago but still true to life:[1] "Before I came up here I had an idea that a legislator, after a profound study of the subject, would introduce a bill with a few words that would at once attract the attention of the press and through them the public. Presently, by some machinery which I never clearly understood, the bill would be taken up in its turn and after grave and serious argument would either be passed or defeated. But what really happens is this. You sneak up back of the desk and drop into a slot your bill, which half the time you don't know anything about yourself, because either your boss, or your senator, or some organization in your district, gave it to you. By bothering the

[1] New York Evening *Telegram*, February 25, 1908.

clerk next day you can find out what committee it has been referred to. If you are a member of the committee, there is a good chance to get it reported, because the other members of the committee want your vote to get their own bills out. If not, you are a hundred to one shot, unless your senator comes over and sees Wadsworth [the speaker of the assembly] or Merritt [the floor leader of the majority] about it. The next thing you do is to ask for a hearing on the bill. You find out who is the chairman and hunt him up. When he sees you are only a first-year man, he insists in mistaking you for a doorkeeper or messenger, just to let you know your place. After you get that straightened out and tell him what you want, he pulls a long face and talks about the flood of bills they have to consider. That's all you can do. If the committee, or rather if two or three men on the committee, are willing to give your bill a chance, you may get it out after begging like a college president. Once on the calendar, instead of the chairman of the committee, you have one man, Merritt, the Republican floor leader, to convince before you can get a vote on the bill at all. They say it's even worse over in the senate, but it's bad enough here. All a new assemblyman is good for is to vote as he is told. If he doesn't do that, never a bill of his will see daylight. The committee holds the power of life and death over a bill, and Wadsworth and Merritt hold the committee in an iron grip."

In other states, where party lines are not as sharply drawn, the grip of the party machine in the legislature is by no means so firm. It seems that the direct primary, especially the open primary, is bringing about greater independence on the part of legislators. At all events, a competent observer in California, Professor West, in an important article on the state legislature, ascribes extraordinary changes to the open primary which permits any aspirant to seek the nomination of any or all parties. Under this system candidates for the legislature are often nominated by two or more parties and the party label may thus lose its significance. After the "progressives" got control of the legislature in 1911, they assumed the mastery in the Republican caucus, and thenceforward there was only one caucus, usually known as "the" caucus. That caucus embraced all "progressive elements" and organized and managed both houses. In 1923 when a conservative governor came to power, his adherents

were able to capture the caucus in the lower house and leave "the" caucus with only the senate in hand. In this conflict party lines were disregarded, and legislative divisions were based on issues rather than machine-made regularity.[1]

Broadly speaking, legislative procedure in the American states is characterized by chaos and irresponsibility, no matter what is the strength of the party organization. There is no one person or group of persons responsible in law and fact for formulating a program of legislation to be laid before the legislature when it meets. Theoretically all members are equal; if they are not, the fact is due to accidents and the advantages arising from experience and political connections. Every member can introduce as many bills as he pleases. Ordinarily the members dawdle during the opening weeks of the session, spending only two or three days at the capital and going home "over Sundays." Not until the end approaches do they begin hard labor; necessity is the mother of activity. For example, the Illinois legislature which met in January, 1923, sent ten bills to the governor during the first sixteen weeks of the session and 296 bills during the last nine days.[2] No one is responsible for a legislative program; no one is responsible for expediting business; no one is responsible for searching all the bills, for bringing unity into the grist of laws, for eliminating confusion, conflict, and favoritism. If there is a strong party machine, it may take things in hand, but it usually follows what is known as "dark room procedure." If there is no strong party machine, then the chaos is still more confounded. In other words, our legislatures are not organized to bring public opinion to a focus, to secure a definition of questions, to concentrate debate on issues, to formulate laws on some principles of public policy; they are miscellaneous assemblies of citizens, chosen independently, subjected to local influences, slightly experienced in public affairs, busily engaged in making a living, eager "to get things done and get home," and though generally zealous to do something for the public good, often without the knowledge or power necessary to effect their purposes.

[1] Victor J. West, "Our Legislative Mills," in the *National Municipal Review*, Vol. XII, p. 369.

[2] For a study of the legislative session in Illinois in 1923, see a valuable article by Leonard D. White, "Our Legislative Mills," *National Municipal Review*, Vol. XII, pp. 712 ff. The correct scientific method for studying this subject is illustrated in these articles.

Criticism of State Legislatures — Constructive Reforms

No branch of American government, except possibly city councils, has been subjected to such merciless criticism as the state legislature. The character of the persons elected to membership, its procedure in the transaction of public business, and the quantity and quality of the laws enacted by it are subjects of constant disparagement on the part of those who take an interest in public affairs. It has often been charged with being corrupt, negligent, and wasteful, with enacting laws for the benefit of corporations and private persons, and with bartering away public franchises. These charges are not based upon the statements of irresponsible persons. They are set forth in many official investigations into public scandals and expounded in the debates of state constitutional conventions. They are substantiated in the clauses of the constitutions, for nearly every new paragraph and section is a reflection of public distrust. Almost every line betrays an unwillingness on the part of the framers to trust the matter covered to the honor and intelligence of the legislators limited by it. In fact convention after convention has exhausted its ingenuity in devising new limitations on the power of the legislature for evil.

For instance, the constitutional conventions of Pennsylvania held in 1837 and in 1873 were, to a considerable extent, devoted to the task of providing some way to prevent a renewal of the corrupt actions on the part of the legislature which had discredited that body with the people of the commonwealth. Likewise the constitutional convention of Kentucky, held in 1890, gave serious attention to discovering methods for checkmating the legislature. "It is a well-known fact," said a member during the debates, "that one of the prime causes for calling this convention was the abuses practised by the legislative body of this state; and I venture the assertion that, except for the vicious legislation and the local and special laws of all kinds and character passed by the legislatures that have met in Kentucky for the past twenty years, no proposition to call a constitutional convention could ever have received a majority of the votes of the people of Kentucky." [1]

In the bill of indictment brought against the personnel of the

[1] *Readings*, p. 445.

legislature, the chief article is that the members are often wanting in independence and experience, in character and intelligence. Touching the first point, Bryce expressed the opinion forty years ago that the nomination of candidates by political conventions was mainly responsible for the choice of mediocre men, subservient to the political machine. Now the direct primary has generally taken the place of the convention. What changes has it effected? There is some reason for believing that it works for more independence on the part of legislators, especially in the states which permit any aspirant to seek the nomination of any or all parties. Still no revolution has been wrought in the composition of our legislative bodies. Experience is something more easily measured; it grows out of long service. The direct primary apparently does not lead to the more frequent reëlection of members. Indeed it is questionable whether any mere device can accomplish this. Election machinery is only one element in the case; the nature of legislative work does not invite able members to seek reëlection.

Intelligence and character are elusive factors, but in an industrial civilization like that of America they are most likely to be devoted to some business, professional, or industrial career. Men of talent who have built up great manufacturing concerns or organized powerful trade unions are seldom found in state legislatures. They cannot or will not spare the time necessary to become effective leaders in politics; they prefer to exert their influence through proxies and criticism. Still more significant, perhaps, is the fact that, as our state governments are now organized, legislative service offers no career; years of loyal and intelligent work in a legislature usually lead to no higher position in the state — produce at best only local esteem and appreciation. There are exceptions, as already noted in the case of Governor Alfred Smith of New York, but they are few in number. It is evident that the problem of securing intelligence and character in legislatures runs deeper than matters of nominating machinery; it strikes into the nature of our civilization and the organic structure of our state governments.

Criticisms relative to legislative procedure and the output of laws in quantity and quality raise questions not as elusive as those of intelligence and character. A great deal has already been done to correct the grosser faults in the daily operations

of the legislature; as already noted our state constitutions contain many provisions designed to attain this end. Still subterranean methods, haste, and irresponsibility are found everywhere. Not long ago the senate of Pennsylvania rushed through one hundred appropriation bills in thirty-six minutes, while the house ground them out at the rate of two a minute. Of more than four hundred such bills passed at the session in question a vote was called for on only four, and less than three per cent of the members took the trouble to record a protest. A study of the New York legislature reveals the same high speed methods in the closing days of the session. In fact they are common throughout the country.

Numerous remedies have been offered to cure this disease. Several states provide that no new bills can be introduced in the legislature after the lapse of a certain number of days; others prohibit the introduction of bills near the end of the session. It seems necessary, however, to leave room for exceptions and this is done by permitting the introduction of bills during the "closed season," with the consent of all or a large majority of the members. In times of stress party leaders can find a way to break through the barriers. Aware of this fact, a few states absolutely forbid the legislature to consider any new bills at all during the closing days of the session.

Far more constructive than these expedients is the plan adopted in California in 1911, known as the "bifurcated session." The ordinary session of the legislature is divided into two parts. During the first thirty days the budget and all bills are supposed to be introduced. Then follows a recess of thirty days, intended to give the members and citizens an opportunity to examine with care proposals to be enacted into law. At the expiration of the recess, the legislature reassembles to act upon business before it. During the second part of the session no new bills can be introduced in either house except with the consent of three fourths of the members, and no member may introduce more than two such bills. In practical outcome this scheme is characterized by Professor West as "reasonably successful."

No limits upon procedure seem to curtail the legislative output. It was estimated by the Hon. Elihu Root that 62,000 statutes were enacted by the state legislatures during the five-year period ending in 1914. A more recent inquiry results in an estimate

that in a single year almost 40,000 bills were introduced in thirty-five of the forty-eight legislatures and that 13,000 of them were passed at a cost of $900 each. On top of this mountain of laws come the court decisions interpreting them, on the average, one decision for each law. Of course most of them are insignificant, but enough are fundamental to invite serious consideration. New laws and amendments to old laws pour out in a never ending stream, leading inevitably to conflict and confusion.

It is not probable that any devices will reduce this quantity. Nor is it easy to reach any general agreement as to eliminations. Nevertheless the problem of introducing more order and precision in the laws has been and is being attacked from many angles. First may be recorded the plans for bringing accumulated information and experience to bear on bills introduced in the legislature. As early as 1890 New York established a legislative bureau which keeps a careful record of the legislation of all the states, and in addition maintains a well-equipped library. In 1901 the Wisconsin legislature appropriated a small sum of money for a legislative reference library, and employed Dr. Charles McCarthy to act as head of it. Dr. McCarthy began at once to collect materials bearing upon every kind of measure that might possibly come before the legislature of that state. That body now has at its service a competent expert and a full supply of legislative papers and documents; any member is at liberty to make the widest possible use of the library and technical assistance at his disposal. Since the launching of the Wisconsin experiment twenty-three more states have established legislative reference bureaus: Maryland, Indiana, Iowa, Michigan, North Dakota, South Dakota, Montana, Pennsylvania, Texas, Ohio, Nebraska, Rhode Island, Vermont, California, Colorado, Illinois, New Hampshire, Georgia, New Jersey, Virginia, Arizona, Washington, and West Virginia. Several other states have developed their state libraries into legislative reference agencies.[1]

Supplementing the work of reference agencies is that of legislative committees appointed for special investigations and empowered to employ expert services. To deal with complex matters such as education, housing, banking, taxation, local government, natural resources, water power, and social welfare, our

[1] J. A. Fairlie, in *The Political Science Review*, Vol. XVII, p. 305.

legislatures are relying more and more on scientific inquiries. A study of such activities, made in 1922, revealed nearly eighty investigating committees generously supplied with funds and at work on vital problems of legislation. Some of them were making surveys of state administration with a view to reorganization; others were studying special problems such as coal, housing, markets, the management of state institutions, workmen's compensation, old age pensions, and taxation. In that same year a group of distinguished lawyers formed the American Law Institute at Washington for the purpose of analyzing, criticizing, and offering constructive proposals respecting the vast body of state legislation.[1] The use of the expert to develop information for legislative action is growing in frequency and it is full of promise for technical improvement in law-making.

After the pertinent information has been accumulated comes the actual drafting of laws. This calls for technical skill of the highest order. In the English parliament there is an expert bill drafter, a high-salaried and skilled lawyer, who helps to give the laws the form necessary to accomplish their purpose and assists in fitting them to the older statutes; but in the United States many of our laws are drawn up in a haphazard fashion by irresponsible persons in and out of the legislature. Some of the most important public laws, designed to achieve large reforms of one kind or another, are drafted without remuneration by persons outside the legislature, interested in the proposed legislation. Another portion of our laws, especially those affecting private interests, are drafted by high-salaried persons in the employ of corporations; while they are usually wanting in none of the technicalities that make for the accomplishment of their purpose, they often contain clauses which are understood only by the private parties interested in them. Other bills are frequently drafted in a careless fashion by private members who are entirely without any legal knowledge, and sadly deficient in their understanding of the English language.

Some attempts have been made to remedy these technical defects. New York, for example, provides by statute that the temporary president of the senate and the speaker of the assembly shall appoint a number of competent drafters. It is the duty of these officers, on the request of either house, or of a committee,

[1] *Review of Reviews*, Vol. LXVIII, p. 191.

member, or officer thereof, to draw bills, examine, and revise proposed bills, and advise as to the consistency and legal effect of any legislation.

To assist in technical bill drafting, Wisconsin created in 1909 the office of revisor whose functions are as follows: "(1) to maintain a loose-leaf system of the statutes, separating those statutes in force from those repealed or superseded; (2) to maintain a loose-leaf ledger of court decisions referring to the statutes; (3) to present to the committees on revision of each house of the legislature, at the beginning of each session, bills providing for such consolidation and revisions as may be completed from time to time; (4) to keep an alphabetical subject card-index to the statutes; (5) to formulate and prepare a definite plan for the order, classification, arrangement, and printing of the statutes and session laws; and (6) to supervise and attend to the preparation, printing, and binding of such compilations of particular portions of the statutes as may be ordered by the head of any department of the state."

These technical devices, excellent and useful as they are, do not, however, reach the root of such evil legislation as springs from the pressure of private interests seeking special favors at the hands of the legislature. "There is hardly one of the many and widely diversified interests of the state," said Theodore Roosevelt, "that has not a mouthpiece at Albany, and hardly a single class of these citizens — not even excepting, I regret to say, the criminal class, which lacks its representative among the legislators."[1] The same elements are also represented outside the legislature by organized lobbyists, bringing every imaginable kind of pressure to secure the enactment of special laws. The far-reaching ramifications and the efficient organization of lobbies were revealed by the famous insurance investigation in New York.[2] A powerful interest that wishes to secure some favor will maintain a representative at the state capital for the purpose of becoming acquainted with those members of the legislature who can be reached by one of many influences — by social considerations, money, or fear of being defeated for reëlection. On the other hand, corporations are often forced to maintain lobbyists to defeat "strike" bills brought in for the purpose of extorting money from them.[3]

[1] *American Ideals*, pp. 63–66. [2] See *Readings*, p. 482. [3] *Ibid.*, p. 484.

Several states have sought to drive out undesirable influences by anti-lobby legislation. New York, for example, has provided that every person employed for compensation as a counsel or agent by any person, firm, corporation, or association, to promote or oppose, directly or indirectly, the passage of any bill or resolution, by either house, or to influence executive approval of any such bill or resolution, must be registered every year (before entering upon any such service) in the office of the secretary of the state; he must give the name of the person or association by whom he is retained and at the same time furnish a brief description of the legislation for or against which he is working. The law requires also every person or corporation to file in the office of the secretary of state a complete account of all the money spent in influencing legislation during the immediately preceding session. The duly accredited agents of counties, cities, towns, villages, public boards, and public institutions are exempted from the provisions of this law, but penalties are imposed upon all others failing to observe its terms.

It is doubtful whether such laws exercise any considerable restraint upon illegitimate lobbying, and it is in fact difficult to draw the line between proper and improper influence on legislators. The laws enacted by them affect vitally the rights and property of citizens and especially important groups of citizens, such as farmers, manufacturers, real estate owners in cities, trade unions, dairymen, insurance companies, railway corporations, and so on throughout our complex society. Most of these groups are well-organized and have skillful counsel to advise and represent them. Their prominent members have extensive personal influence in politics. No one can deny that they are all entitled to be heard. Who can say just what shall be the nature and measure of their influence? Legislation in the abstract without reference to their needs and interests is impossible. Loose declamations about "driving them from the state capital" are both foolish and futile. Far more to the point is the discussion of ways and means for bringing the whole legislative process and the social forces that control it out into the broad daylight of popular knowledge and understanding.

The inadequacy of all minor remedies offered for legislative ills has led to a consideration of radical changes in the structure of state governments — changes in the interest of simplicity,

directness, power, and responsibility. Such consideration does not come from extremists, but from thoughtful publicists and impartial students. Gamaliel Bradford, in a book that should not be permitted to fall to the ground unnoticed,[1] suggested more than a quarter of a century ago the adoption of something like the English cabinet system in our state governments. Many years later, Herbert Croly, in his *Promise of American Life*, proposed a reconstruction of state government along the following lines. The center of the new system would be a governor, elected for a long term, but liable to recall by the voters under certain definite restrictions. The governor would be surrounded by a cabinet composed of the heads of departments appointed by himself; he would have the power of removing every important administrative officer in the state and would hold his departmental chiefs strictly responsible to himself for the work of their several divisions. Departmental chiefs would be able to appoint their more important subordinates, but the technical work of administration would be in the hands of experts chosen under a carefully planned civil service system. The legislature, under this scheme of government, would consist of a single chamber composed of delegates elected from districts by some system of proportional representation; at the same time the recall would be provided to hold them accountable to the voters. The ancient tradition respecting the separation of executive and legislative power would be entirely abandoned; the governor would be given not only the veto, but also the right to propose legislation, and dissolve the legislature and appeal to the people in case his particular measures were rejected or seriously amended.

A somewhat similar program for reconstructing state government was presented to the National Municipal League in 1923 by its committee charged with drafting a model state constitution. The striking proposals of this document are: a single-chamber legislature elected by popular vote under a system of proportional representation, a governor and council chosen from and by the legislature, high executive officers appointed by the governor and enjoying with him the right to be heard in the legislature, and a budget system. It differs, however, from Mr. Croly's plan in that the governor though removable by the

[1] *The Lesson of Popular Government.*

legislature would have no right to dissolve that body and appeal to the people.

At present these and kindred projects are merely on paper and in the minds of a few critics. When they have been presented in state constitutional conventions they have met short shrift. Constitutional amendments framed on such general lines have been proposed in Oregon, Kansas, and California, but they have not passed beyond the discussion stage. Whether, like commission government for cities, the city manager plan, and administrative reorganization, they will in time find their way into the organic laws of our several states or like many other projects be laid aside as chimerical only time can tell. Macaulay has said: "The sound opinion, held for a time by one bold speculator, becomes the opinion of a small minority, of a strong minority, of a majority of mankind." It may be that the idea of a simple, powerful, and responsible state government may prove to be "sound" and in due time make its conquest over the minds of those who shape the development of state constitutions.

CHAPTER XXIX

THE JUDICIAL SYSTEM

The Structure of the Courts

The courts are the great tribunals of the citizen for the protection of his personal and property rights; and almost everyone, in some capacity, comes in contact with the judiciary of his state. If he is a business man, he may have to resort to a court to collect a bad debt or a note, or to settle a dispute with a fellow merchant. If he is injured in an accident, he goes into a court to sue the responsible party for damages. He may have to appear as a witness to tell what he knows of the transactions involved in a lawsuit; or if he is unfortunate enough to have his pocket picked or his house robbed, he may testify against the offender. Then, practically every man not legally exempt, is liable, at one time or another during his life, to be called upon to serve on a jury, and thus himself become a part of the regular judicial machinery. Finally, if he dies leaving heirs, they may need the assistance of the courts in the distribution of his estate or in collecting his life insurance. These are only a few of the innumerable instances which illustrate the place of the courts in the life of the citizen. Women as well as men are vitally affected by their decisions.

The great mass of litigation is disposed of by the state and local courts.[1] The jurisdiction of the federal courts is specifically defined, and within somewhat narrow limits, by the Constitution of the United States.[2] Moreover, in many cases the state courts have a concurrent jurisdiction with the federal courts, and a litigant has a choice of tribunals before which to bring his suit.

In every state, the courts are arranged in a progressive series.[3] At the bottom of the scale stand the justices of the peace, who have jurisdiction over civil cases involving very small amounts, and over petty offenses. In large cities, the criminal and civil

[1] Reference, Baldwin, *The American Judiciary*, p. 125.
[2] See above, chap. x.
[3] For the local courts, see below, p. 737 and p. 770; for the court of impeachment above, p. 582.

jurisdiction of the justices of the peace is sometimes divided between two sets of courts: the police courts and the municipal civil courts.

In most states there are county courts, generally of limited jurisdiction. They have cognizance of actions involving considerable sums and usually consider appeals from judgments of justices of the peace. They also have jurisdiction over most of the criminal offenses. They are sometimes styled courts of common pleas or district courts. In some states, they have certain administrative functions in addition to their judicial duties.

Often there is a superior, circuit, or district court, immediately above the county court, which enjoys unlimited original jurisdiction in civil and criminal matters and may try all cases over which the lower courts have no jurisdiction. The judges of this tribunal are generally elected or appointed for districts larger than the county, but hold terms of court within the several counties of their district or circuit.

At the head of the judicial system of each state stands the appellate court of last resort, which ordinarily deals only with appeals on points of law, not of fact. It is known by various names, such as supreme court, court of appeals, court of errors and appeals, or supreme judicial court.

In addition to these courts, there are sometimes special tribunals for particular purposes: chancery courts, which administer equity;[1] probate or surrogates' courts for the settlement of estates of deceased persons;[2] children's courts dealing with offenses committed by children;[3] and courts of claims for hearing claims against the state.

The courts, with the exception of the very lowest, have clerks to keep the record of their proceedings and to perform ministerial functions such as the issue of processes and writs. In many states, the offices of county clerk and court clerk are combined in one person, who is an elective official.[4] In other states, however, there are separate clerks for the courts, in some in-

[1] Below, p. 628.

[2] Below, p. 637. Where the latter are established, there is usually a separate one for each county. They are ordinarily known as courts of probate, but in some cases as surrogates' courts, or as orphans' courts.

[3] Below, p. 738.

[4] A clerk is chosen for each county, even in cases where several counties are grouped in one judicial district, for it is desirable for each to keep its own records.

stances appointed by the judges, and in others, particularly in the South and West, elected by the voters for short terms.[1]

An account of the judicial system would not be complete without some consideration of the prosecuting attorney.[2] In most states he is an elective county officer, but in some instances he is selected for districts larger than a county.[3] He represents the state in all criminal cases and conducts the prosecution. He makes preliminary investigations into crimes and determines whether a prosecution should be instituted. If he decides in the affirmative, he presents the case to the grand jury.[4] If the grand jury returns an indictment — that is, declares that the accused should be held — the prosecuting attorney takes charge of the prosecution at the trial. In one respect, his functions are similar to those of the counsel for the plaintiff in a civil suit. Yet, in another way, he is much more than that. He should not be interested in securing a conviction at any cost. He is a quasi-judicial officer and is, or should be, interested in getting at the truth and doing justice. In addition to performing his functions in criminal trials, he at times also represents the county in civil cases.

In the great majority of the states the judges are chosen by popular vote. The judges of the lower courts are elected for short terms; those of the higher courts hold their office for a longer period of time, usually varying from six to twelve years. A few states make the term even longer. Thus in New York the justices of the supreme court and the judges of the court of appeals are elected for fourteen years, while in Pennsylvania the term of the judges of the supreme court is twenty-one years. In general it may be said that the tendency is toward the longer term because it makes the judges more independent of the politicians who happen to be in power for the moment.

There are some states that do not vest the selection of judges (especially of the higher courts) in the people. In Delaware, for example, the chancellor, chief justice, and associate judges are chosen by the governor and senate; and in New Jersey the jus-

[1] There seems to be little reason for making the court clerk an elective official. His duties are generally purely ministerial and are performed under the direction of the judges, who ought to have the power of appointing and removing him. The highest court of the state has a separate clerk, who is also, in some cases, an elective officer.

[2] See below, p. 770.

[3] He is known variously as prosecuting attorney, district attorney, state's attorney, attorney for the commonwealth, county attorney, and county solicitor.

[4] For a discussion of the grand jury, see "Criminal Procedure," below, p. 646.

tices of the supreme court, chancellor, judges of the court of errors and appeals, and judges of the inferior court of common pleas are likewise appointed by the governor and senate. In Massachusetts all judges are appointed by the governor with the approval of his council — a small body elected by popular vote. Other states — South Carolina, Rhode Island, Vermont, and Virginia — leave the choice to the legislature. In Massachusetts, New Hampshire, and Rhode Island the judges have practically life terms; but in other states the term is fixed at a number of years.

There has been considerable controversy as to which of the three methods of choosing — namely, selection by the legislature, the governor, or popular vote — is the most advantageous to the cause of justice. It is generally agreed that the first is not at all desirable; the choice is too often made by log-rolling tactics when it is entrusted to the legislature. On the other hand, there is much to be said on the merits of the other two methods — popular election and appointment by the governor. The friends of the former practice emphasize the fact that choice by the people seems to be the only democratic way of selecting important officials, for appointment by the governor renders the judges too independent of the popular will and tends to make them arbitrary. They point out also that, in the case of local judges, the people of the district are likely to know more about the qualifications of the candidates than the governor who is obliged to depend on recommendations of third parties — that is, on the recommendations of a local political machine.[1] Finally, the champions of the elective system point to the fact that on the whole it has worked successfully[2] and that excellent judges have been obtained under it. The higher courts of states like New York with elective judges have generally been composed of men of unquestioned integrity and legal standing; judges who have served a long time are often renominated by both parties and thus reëlected practically without a contest. Finally, the advocates of popular election point out that in so far as judges have the power to declare laws void their functions are political, and therefore they should not be removed from popular control.

To offset these arguments, those who favor appointive judges say that where good judges have been obtained, they have been

[1] *Readings*, p. 493. [2] *Ibid.*, p. 489.

secured in spite of popular election, not because of it. Massachusetts, whose judges have always been distinguished for their high character and learning, is usually cited as the state in which the appointive system has proved eminently successful. It is contended that the people do not have the capacity to pass upon qualifications required for a successful judge and often select the most popular man rather than the one most fit. Making the judge an elective officer, the advocates of the appointive system continue, renders him dependent on political leaders; party service — not fitness — is made a test for the office; in order that the republican form of government may be a success and justice be done between man and man, the judiciary must be absolutely independent; the judge must feel that he need not come up for a renomination before the leaders of his party; he must not be afraid to render an unpopular decision which may perhaps cause his defeat if he is a candidate for reëlection. Therefore, they conclude, the appointive system is the only one which puts the judges in such a position.[1]

Akin to the older question of elective judges, is the newer issue of the recall of judges and judicial decisions. The adoption of these devices has been brought about by popular dissatisfaction with the action of the courts in declaring unconstitutional acts of state legislatures, particularly those dealing with labor and social reforms. As we have seen, some of the states which have adopted the recall[2] have refused to apply it to judges, while other states, Oregon, California, and Arizona, for example, apply it to all officers, including judges. And Arizona has attempted to apply it to federal judges (appointed by the President and Senate) in such a way as to allow the expression of popular opinion on such officers within that state. The machinery for working the recall of judges is the same as that employed in the recall of ordinary administrative officers. It is likewise subject to the same variations.

The recall of judges had scarcely been adopted when a variation on the plan was evolved by Mr. Roosevelt. In a speech before the Ohio constitutional convention in 1912, he said: "Every public servant, no matter how valuable, and not omit-

[1] On this whole question of choice of judges, see *Readings*, p. 488. The American Judicature Society proposes a novel compromise, namely, the election of the chief justice of the state by popular vote and the appointment of the other judges by the chief justice.

[2] Above, p. 515.

ting Washington or Lincoln or Marshall, at times makes mistakes. Therefore we should be cautious about recalling the judge, and we should be cautious about interfering in any way with the judge in the decisions which he makes in the ordinary course as between individuals. But when a judge decides a constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall that decision if they think it wrong."[1] In a way, this is little more than setting aside a judicial opinion by a constitutional amendment — a thing which is frequently done without raising any serious controversy.

The arguments on this question of the recall of judges and judicial decisions are almost identical with those formerly employed when the question of popular election of judges was discussed.[2]

The salaries of judges are usually rather low in comparison with the compensation afforded to judicial officers in Europe, or with the income of the first-class practicing lawyer. For example, the judges of the supreme court in Vermont receive only $4000 a year. There has been, however, a tendency in recent years to increase the salaries of judges, and in some states they are well paid. New York now pays the chief justice of the court of appeals $14,200 a year and the associate judges $13,700 each, while supreme court justices in certain districts receive $17,500 a year.

The Sources of Law

I. The first great source of our system of jurisprudence is the English common law.[3] Its characteristic feature consists in the fact that its rules are to be found, not in some code enacted at one time by the legislature, as is generally the case on the continent of Europe, but in decisions of the courts spread over several centuries. The law is thus built up and developed by judicial precedents. To find what principle governs in some question of private law, a lawyer practicing in a jurisdiction where the common law prevails must find what has been previously decided by the courts on that point and be guided by those decisions.

The common law began its development in medieval England.

[1] *Readings*, p. 497.
[2] See Beard and Shultz, *Documents on the Initiative, Referendum and Recall*, pp. 55 ff.
[3] Louisiana, whose law is derived from the continental system, is an exception. There are some southwestern states which are not regarded as common law states.

When a case came before the royal justices, they tried to discover the prevailing custom on the subject and decide the question in accordance with it. Theoretically, they did not make the law, but merely formulated the customs of the community into legal rules and gave them an official sanction. As a matter of fact they did make law, for they interpreted the customs and had the power of selecting some and discarding others. When another case involving the same point was brought before the judges, they naturally followed the rule laid down in the decision of the first case. If, however, it was thought that the rule of the first case was incorrect or that conditions had changed, they would overrule the previous decision and work out a new doctrine. This flexibility is one of the best features of the common law. In this way a body of precedents was built up and a set of legal principles developed. When an entirely novel case came up, some "general principle" of the common law was invoked for its decision.

As the common law developed, it gradually became more and more crystallized and less flexible. The judges tended to be technical, and any litigant whose case did not fall within certain well-defined classes was liable not to be granted the relief really due him. In numerous instances in which obvious injustice was done there was no remedy at law.

These deficiencies of the common law made necessary the development of a new body of jurisprudence along with it. This new system began to be known as *equity*. It was customary for a person who felt that he had been wronged and could obtain no remedy at law, to petition the king, and at a later period the king's chancellor, for relief. The granting of this relief was at first considered an executive act and purely a matter of grace, but gradually the chancery evolved into a regular court with its own body of equity principles, which were much more flexible and far less technical than the ordinary law. Equity, therefore, gave relief in cases where none could be had at law; and in many instances where the legal remedy was inadequate it accorded the relief that was really demanded by the plain justice of the situation.

For example, the only redress granted at law is money damages, but equity goes much farther and will command a person to do something which is for the benefit of the plaintiff. Thus, in some kinds of contracts, a court of equity will compel the party in default to perform his part of the agreement. Again, equity will

command a person, by an order called an "injunction," to refrain from doing something which is injurious and unjust to the plaintiff.

The English systems of law and equity were transplanted to America. When the colonies cast off their allegiance to Great Britain, some of the state constitutions specifically provided that the common law should continue in force; but without such a provision, the common law continued to be applied in the American courts and is to-day applied in so far as it has not been modified by legislation. Very few commonwealths, however, have retained the system of separate chancery courts.[1] Generally the same court administers both law and equity, sitting with a jury for the trial of cases at law and without one for the disposition of equity causes; and the term "common law" has come to include both law in its technical sense and equity.

Although the common law as administered in the various states constitutes a single system of jurisprudence, it has undergone modification in the different jurisdictions. Thus, for instance, on many points the "common law" of Massachusetts and New York will be found to differ. In each state the interpretation which is binding is made by its court of last resort; and as different courts will hold varying views on what is or ought to be the law on a particular topic, the rules applied in different commonwealths will vary. But the courts of each state by no means disregard the decisions of sister states. Although the latter are not considered as authoritative as the precedents of the state in which the case is tried, they are looked to as advisory statements of the law and have a great moral weight, particularly in matters which have not been passed on in that jurisdiction.

II. The second important source of the law is the statutes enacted by the state legislatures.[2] Though the number of acts passed by the various legislative bodies is enormous, the great majority of them, probably nine tenths, are purely administrative in character. They relate to the structure and functions of the government — elections, powers of officers, etc.— and do not generally affect private law, which is left almost entirely to judicial tribunals.[3] There are a few branches of private law,

[1] New Jersey, Tennessee, Alabama, Delaware, and Mississippi.

[2] In the broadest sense, state and federal constitutions, executive orders, etc., are to be included among the sources of the law.

[3] On codification, however, see below, p. 630.

however, which it is customary to regulate by statute. These include principally matters which affect the public at large as well as a single individual. Thus the rules controlling marriage and divorce, wills and succession to property, the formation of corporations, are ordinarily found in legislative enactments.

During the last fifty years several fields of the common law have been covered by statute.

(1) One of these is criminal law. In many states there is a penal code or penal law defining the various crimes and providing punishments for each of them. It is generally declared in such cases that only acts prescribed as crimes in the code shall be penalized, and the common law of crimes is abolished, except in so far as it is used as a guide for the interpretation of the statute.

(2) Criminal procedure is another subject that is commonly covered by statutory enactment, and special codes or laws regulating in detail such procedure now exist in a large number of the states.

(3) A third very important field now frequently occupied by statute is civil procedure. The technical and cumbersome system of common law pleading has been simplified and modified by legislative enactment. New York was the pioneer in this reform. It adopted a code of civil procedure about seventy-five years ago, and many other states have since followed this example.

(4) Another form of encroachment on the common law is to be found in the codification of the common law on some particular topic and its enactment into statute. Thus in New York — one of the states which has gone far in this direction — we find a real property law, general business law, lien law, etc. The tendency toward codification has been expedited by the national conference on uniform state laws consisting of commissioners appointed by the governors of various states. It has codified the law on many subjects, particularly those relative to commerce, and has recommended its proposals to the state legislatures for adoption. An important act drawn up by the commissioners is the negotiable instruments law, which has been enacted by all the states. It has also prepared a sales of goods act, a warehouse receipts act, a bill of lading act, etc., all of which have been adopted by one or more of the commonwealths.

(5) Finally, some states have taken a still further step, which many persons regard as undesirable, and attempted to codify the

entire domain of law. Louisiana adopted a code soon after its annexation by the United States. California, North Dakota, South Dakota, and some other states in the West and South have adopted codes which purport to include all the principal rules of the common law. In those commonwealths the code, instead of previous decisions, has to be examined in order to find the law that governs a particular case. But even there, the common law has to be considered as supplementary to the code, as no code commission, no matter how wise, can possibly foresee every possible set of circumstances that can arise or decide in advance every question of law that may come up.

Most lawyers consider the codification of the whole common law an undesirable consummation of the movement toward the increase of legislation. In the first place, they contend that a civil code fails to accomplish the only purpose for which it is enacted; namely, to make the law more definite and certain. It is conceded that no code can provide for all possible contingencies and, therefore, its rules have to be made sufficiently general and elastic to allow their application to novel cases. Quite as much litigation arises over the interpretation of the code, as arises in other states over the question as to what is or ought to be the common law rule on a particular subject.

In addition, the opponents of the system urge that a civil code involves a number of positive disadvantages. In the first place, it increases the diversity of the law among the various states. While the development of private law is in the hands of the courts, the tribunals of one state are always guided to some extent by the precedents of other commonwealths, and at times they modify their views so as to accord with the general weight of authority, thus working toward a desirable uniformity in the law throughout the United States. But the moment that the law is codified, the diversities among the states are crystallized and tend to become greater by subsequent legislative amendment.

The greatest objection, however, brought up against codification is the fact that it puts an end to the flexibility of the law. Where the common law is not codified, the courts, by distinguishing new cases and at times by overruling former precedents, may adapt the law to new conditions and keep it more or less up to the needs of the community. But as soon as the law is codified, this power of the courts is taken away from them and the rules

of law can only be modified by legislative action, which leads to constant tinkering and uncertainty.

The Civil Law

The whole domain of the law falls into two divisions: civil and criminal. The purpose of the latter — to use legal terminology — is to punish and prevent public wrongs, while that of the former is to protect the rights of the individual and to redress his wrongs. The rights of the individual can be classified under three heads: the right of personal security, the right of personal liberty, and the right of private property. The last is the most complicated of the three and to it we must devote some attention.

(1) Real Property. — Property is divided into two classes, real and personal. Real property consists, in general, of land and rights connected with land, while personalty includes all movable things and rights not connected with land. Real property is again subdivided into corporeal, or tangible, and incorporeal, or intangible. The former is land and buildings, while the latter includes all the rights which a person may have in the land of another, such as the right of way over his neighbor's farm, the right to pasture cattle in another's meadow, etc.

According to legal theory, land is not owned absolutely. The so-called owner has an interest or an "estate" in the land. These "estates" are of various kinds. The highest estate that one can have in land is an estate in fee simple, which virtually amounts to absolute ownership, and the person who has such an estate in a plot of land is ordinarily regarded as the owner. He may use it for any purpose that does not violate another's right, and dispose of it in almost any way that he chooses. Next to the estate in fee simple comes the estate for life. The person who owns land in fee simple may convey it to another to hold during life. The latter thus gets a "life estate." Then there are life estates which arise by operation of law; in most states a husband has a life estate, which is called curtesy, in his wife's real property, after she dies. In the same way, if the husband die first, the wife has a life estate, or dower, in one-third of all the real property owned by the husband during their married life.[1]

[1] Estates in fee simple and estates for life are called "freehold estates," all others being named estates less than freehold. The most important one in the latter category is the estate for years. A person who leases land or a building from another for a period longer than one year is said to have an estate for years. Estates can be created to commence in the future. For instance, a person may grant

(2) PERSONAL PROPERTY. — Personal property is divided into four classes. Leases of lands or buildings are personal property and constitute the first class; they are known as chattels real. The second group includes everything which is ordinarily known as personal property; that is, tangible things, such as watches, pianos, clothing, etc. The third group consists of rights which do not extend over any tangible things, either immovable or movable, but are directed against particular persons or corporations, such as claims against debtors, notes, stocks, bonds, etc.; they are called in law "choses in action." The fourth group consists of trade-marks, copyrights, etc.

(3) TORTS. — The violations of private rights recognized by law are called "torts."[1] A person guilty of a tort may be sued for damages by the person whom he injures. For convenience, we may subdivide torts into three classes: those directed against the person, those aimed at property, and those which are invasions of both person and property.

(*a*) False imprisonment — one of the torts in the first class — consists in arresting or detaining a person without sufficient cause. Somewhat akin to false imprisonment is malicious prosecution. A person who maliciously and without probable cause institutes proceedings against another is guilty of this tort, provided the original action has terminated in favor of the injured party. Another tort directed against the person is assault and battery.[2] All the various forms of disturbance of family relations are torts, such as abduction of the wife or child, adultery, alienation of affection, etc. Finally, there is the tort of defamation of character. It occurs in two forms: libel, which is expressed in print or writing; and slander, or oral defamation.

(*b*) Of the torts directed against property, the most important one is trespass or disturbance of another in the possession of his property. This is found in two forms: trespass upon land, to constitute which mere unauthorized entry on another's land is sufficient; and trespass to goods, which consists in wrongfully taking or destroying personal property. Deceit is knowingly

an estate for life, at the same time specifying that when the life tenant dies a certain person shall get the estate in fee simple. Estates may also be made conditional. To illustrate, a person may leave all his real property to his widow for life, provided she remains unmarried. Then if she should marry, she generally loses the estate.

[1] Reference: Burdick, *Law of Torts*.

[2] Putting another in fear of personal injury is an assault, while inflicting violence upon him constitutes a battery.

making a false statement to another on which the latter relies and is thus damaged.

(*c*) Some torts affect both person and property. The first of these is nuisance. In law any disturbance of another's reasonable use and enjoyment of his own property constitutes a nuisance. Thus the maintenance of smelting works which give out unpleasant odors, unreasonable ringing of church bells, noises which disturb sleep, and numberless other acts are called nuisances. Finally, there is the tort of negligence, which consists in the failure to perform the duty of care which one owes to others. Thus the reckless running of a railroad train which results in an accident, negligent driving in a city street, the collapse of a building due to defective construction, are all actionable torts.

Although a person may be guilty of a tort there are circumstances under which no recovery is allowed against him. Thus if the injured party was himself guilty of negligence and his negligence was one of the causes that led to his injury, he cannot recover any damages. This "contributory negligence" on the part of the plaintiff is considered a complete defense. In many cases, the so-called "fellow-servant rule" prevents a recovery. For example, a master is liable for his servant's torts; but if one employee is injured by the carelessness of another employee, the one so injured cannot recover against the employer, on the ground that they were "fellow-servants" and are presumed to have assumed the risks of each other's negligence.[1]

(4) Contracts. — A large group of rights arises from agreements between individuals known as "contracts." To constitute a contract there must be an offer made by one party and an acceptance of the offer by the other. Thus if Smith says or writes to Jones, "I offer to sell you my house for $10,000," and Jones replies "I accept your offer," in legal terminology their minds have met and there is a contract between them. Smith is then bound to convey the house, and Jones to accept and pay for it. A contract, to be valid, must be made for a "consideration"; that is, each party must give up something. Thus in the illustration above, one promises to convey the house, while the other agrees to pay for it. A mere promise made by one party, with nothing received in exchange for it, is not binding. A contract need not

[1] This rule is expressly abolished in some states with regard to certain employments. See below, p. 685.

always be expressed in so many words, but is often implied from the transaction. For instance, if one orders goods from a store, a promise to pay their reasonable value is implied.

In most instances, no formality is necessary to make a valid contract and an oral agreement is as binding as a written one.[1] There are some classes of contracts, however, which must be proved by written evidence, before a court of law will enforce them. Among these are contracts for the sale of real estate, for the sale of goods worth more than a certain amount, contracts which are not to be performed within a year, and a few others.

There are several forms of contracts that are especially important. One of these is negotiable instruments, such as promissory notes, drafts, checks, etc. Negotiable instruments have one peculiar characteristic. A person may obtain such an instrument from another by fraud and therefore may not be able to sue on it, but if he transfers it for value to another, who does not know of the fraud, the latter can enforce it. This rule originated in commercial law, and its purpose is to facilitate dealings among merchants and bankers. Another common form of contract is the contract for the sale of personal property. What are known as bailments are contracts that occur very frequently: they consist in the delivery of personal property to another for some particular and temporary purpose. When a person lends a book to a friend, gives his watch to a watchmaker for repairs, pawns his jewelry, deposits his goods in a storage warehouse, or ships goods by freight or express, a contract of bailment is consummated. Still another large class of contracts is seen in policies of insurance, — life, fire, marine, accident, etc.

If one of the parties to a contract fails to perform his obligation, the other may sue him and get such damages as were caused by the breach. But in some cases the injured party may do much more. He may bring a suit in equity, and the court of equity will order the other party to carry out his contract. Such relief, which is known as "specific performance" is limited, however, to certain classes of contracts, the principal one of which consists of agreements for the sale of real estate.

(5) Domestic Relations. — One of the important branches of the law deals with marriage and all the relations growing out of it. At common law no particular formality was necessary to consti-

[1] Contracts do not have to be made in person, but may be made through an agent.

tute a valid marriage. An agreement to live as husband and wife was sufficient. This rule is now generally modified by requiring a formal solemnization of all marriages. But no marriage may be consummated anywhere between close relatives or by persons below a certain age, and any marriage induced by fraud or duress may be declared void at the instance of the injured party. Mental or physical incapacity is also a ground for annulment of marriage.

At common law, all personal property belonging to a woman becomes the property of the husband on her marriage; the husband is obliged to support his wife, and for this reason he is liable for all necessaries furnished to her, if he fails to provide them himself; he is also liable for debts contracted by his wife previous to their marriage; a married woman is incapable of making a binding contract, unless her husband has abandoned her; the husband may be sued for any torts committed by his wife, and at the same time he may recover for any injury done to her. All these common law rules, however, have been modified to a greater or less degree throughout the United States; in the most advanced commonwealths married women now have substantially the same property rights as men; and there is strong movement in favor of giving women "absolute equality" with men before the law.[1]

In every state except one, South Carolina, the marriage tie may be dissolved by an absolute divorce. In certain cases where a sufficient cause for an absolute divorce does not exist, a limited divorce or a separation may be granted. The grounds on which an absolute divorce is allowed vary greatly in the different states, the rule being very strict in some commonwealths, and very liberal in others. In New York, the only ground on which a divorce is granted is adultery, but in some states mere incompatibility of temper or abandonment for a period is sufficient.[2] In some Western states divorces are so easily obtained that persons from all over the country desirous of dissolving their marriages acquire a residence in one of them and bring proceedings there. Such divorces, however, are not always recognized in the state in which the parties really live. There now is a strong agitation on foot to secure a uniformity in the laws of the different

[1] The law also makes provision for regulating the relations between parent and child.

[2] In South Dakota the chief grounds are cruelty, desertion for one year, neglect for one year, habitual drunkenness, adultery, and felony.

states relating to marriage and divorce; but it is carried on principally by the opponents of liberal divorce, and has awakened a powerful opposition among those who contend that the old system (which absolutely bound husband and wife) is a relic of slavery.

(6) INHERITANCE. — A branch of the law that is somewhat akin to domestic relations is the one dealing with the distribution of a person's property after his death. It provides how one's real and personal property shall be distributed if one dies intestate; that is, without having made a valid will. The rules of succession vary greatly in the different states. Often there are separate rules for the disposition of real and personal property. Where a person has left a will, the law provides for its enforcement and the disposition of the property in accordance with its terms. Usually a person names an executor in his will, who is to administer the property and distribute it to the legatees. In cases in which there is no will, or no executor is named, the court may appoint an administrator, who takes charge of the property and distributes it in accordance with law or the will.

(7) CORPORATIONS AND ASSOCIATIONS. — Finally, the law governs the various forms of associations among individuals and regulates the rights and liabilities of the members. The principal forms which these associations take are partnerships and corporations, between which there are several important distinctions. A partnership can continue in existence only so long as the partners are living, but a corporation is permanent and is not in the least degree dependent upon the lives of its original members. Partnership action in important matters may require unanimity; in corporations, the will of a majority prevails. Every member of a firm is generally liable for all the partnership debts, while a stockholder of a corporation is usually responsible for no more than the par value of his stock. Finally, an interest in a partnership cannot be transferred without the consent of the other partners, while shares in a stock company may be conveyed at will.

Civil Procedure

If a person wishes to enforce some right, which he thinks has been violated, he must bring an action in a court. A suit is usually commenced by the plaintiff's writing out a statement,

called the complaint or declaration, of the facts on which the grievance is based; this is served on the defendant, together with a summons calling upon him to answer within a certain time. If the defendant admits the facts but believes that the plaintiff has no right of action, he may file what is called a "demurrer." An argument is then had before a judge on the question as to whether, granting the facts alleged in the complaint to be true, a sufficient cause of action has been established. The other alternative which the defendant has is to take up the question of fact. He must then serve on the plaintiff what is called an answer, or plea, either denying the whole or a portion of the complaint, or else acknowledging its truth and making some affirmative defense. The plaintiff again has his choice of demurring to its sufficiency or replying to the facts.

In states where the original common law procedure prevails, this interchange of pleadings, as these various statements are called, can go on indefinitely until an issue is reached, one of the parties affirming some fact and the other denying it. The various codes of civil procedure frequently limit the number of steps to two — the plaintiff's complaint and the defendant's answer; but sometimes they also allow the plaintiff to reply to the answer.

As soon as its turn is reached the case comes up for trial. If it is a suit in equity, it is tried by a judge alone. If it is a suit at law, it is generally tried before a judge and a jury, unless a jury trial is waived by agreement of the opposing sides. In a jury trial, the duty of the judge ordinarily is to regulate the conduct of the trial and to pass on all matters of law, while the function of the jury is to decide questions of fact under the guidance of the judge.[1]

If the case is to be tried by a jury, a number of jurors are summoned; these are examined by the opposing counsel; and if it is shown that anyone is legally exempt or incompetent to serve because of bias or otherwise, the judge may excuse him. Besides this, each side may challenge a certain number of jurors without stating any cause.

When the jury has been procured, the actual trial is ready to start. Usually the plaintiff's counsel opens by describing the

[1] Taft, *Four Aspects of Civic Duty*, pp. 37 ff.; see *Readings*, p. 490, on this important point of the relation of the judge to the jury.

nature of the case to the jury and stating the main facts which he expects to prove. He then calls his witnesses and examines them one by one, the defendant's attorney being given an opportunity to cross-examine at the close of the direct examination of each witness. The questions that may be asked are strictly regulated by complicated rules of evidence, and an error on the part of the judge in the admission of improper evidence or the exclusion of competent testimony is ground for reversal of the judgment on appeal to a higher court.

After the plaintiff's side of the case has been laid down, the defendant's side is presented in the same manner. His attorney makes a statement to the jury and then examines his witnesses, the counsel for the plaintiff being allowed to cross-examine. The plaintiff and defendant may be witnesses if they wish. After the defendant rests, the plaintiff may introduce evidence in rebuttal, and then the defendant may bring forth testimony in sur-rebuttal. At the close of the evidence the attorneys for the opposing sides may address the jury.

If the plaintiff has failed to make out a prima facie case, the judge may dismiss the complaint without sending the case to the jury. Or if from the evidence that has been presented only one conclusion of fact is possible, the judge may direct the jury to return a verdict in accordance with that conclusion. If, under such circumstances, a verdict for the plaintiff is directed, the only question to be decided by the jury is the amount of damages or the award. But if there are controverted questions of fact, as is usually the case, decision with regard to them is left to the jury. The judge makes a charge to the jury in which he ordinarily instructs them as to the law applicable to the case.[1]

The jury then retire to decide upon a verdict. They must find a verdict either for the plaintiff or defendant, or agree to disagree; and if they decide for the plaintiff, they must also assess the damages. The verdict in most states must be unanimous; if the jury is unable to agree, the case, unless the plaintiff drops it, must be retried with another jury.[2]

If the case is tried without a jury, the procedure is practically the same, except that the judge passes upon all questions himself. Where the case is complicated, it is often customary to send it

[1] *Readings*, p. 491.
[2] Unanimous verdict is not required in all cases in all states. *Readings*, p. 88.

to a master or a referee to take testimony and to make a tentative finding. The judge then goes over the record of the testimony and the report of the master or referee, and makes a final decision.

The usual remedy that a person gets at law is money damages. A judgment for the amount of the verdict is entered against the defendant. If he does not pay voluntarily, an "execution," or an order to the sheriff, may be issued. Armed with the execution, the sheriff or one of his deputies takes possession of the defendant's property and sells enough at auction to pay the amount of the judgment to the plaintiff and his own charges. Of course, if the defendant should be a man without property, the plaintiff has no redress. In litigation over title to real estate, however, the usual judgment is that the plaintiff enter upon the premises. If the defendant then resists the plaintiff, he may be evicted by force by the sheriff.

In equity cases the decision of the court is called the decree. It does not ordinarily award money damages, but orders the defendant to do or not to do something. The decree may, for instance, command him to carry out his part of a contract and convey to the plaintiff land which he agreed to sell to him, or it may enjoin him from maintaining a nuisance, such as using soft coal in his furnace. In fact, a decree in equity may take on any one of innumerable forms, but it always is in essence a command to do, or an order not to do, something. If the defendant fails to obey the decree, he is guilty of contempt of court, and may be fined or imprisoned until he complies with the order.

After the case is decided, the losing party may appeal: (*a*) because of errors of law committed by the judge or (*b*) on the ground that the verdict was contrary to the weight of evidence. The side that loses on the appeal may sometimes carry the matter still higher, until the case finally reaches the highest court of the state or of the nation.[1] The highest court usually passes only on questions of law.[2]

If the highest court which the case can reach affirms the judg-

[1] For the conditions of appeal to federal courts, see above, chap. xiii.

[2] The appellate courts always consist of several judges, and the opinion in each case is written by one of them. The opinions of the highest court of each state, and sometimes those of some of the inferior courts, are published and become precedents for future decisions. If one or more of the judges dissent from the opinion of the majority of the court, a dissenting opinion may be handed down. In most states there are special reporters, whose duty consists in publishing the official reports of the decisions of the court.

ment of the trial court, that ends the litigation. But if the judgment is reversed, the case is usually sent back for a new trial.[1] Then the party that loses on the second trial may again compel his adversary to run the gauntlet of the appellate courts because of alleged errors committed in this trial. If the judgment is again reversed, a third trial must be had and the same process may be repeated. If the party that loses at each stage desires to appeal, there is no way of ending the litigation until some judgment of the trial court is affirmed on appeal.

In some instances this freedom of appeal results in practical injustice. Thus there is one case on record in New York which was in the courts for twenty years. In 1882 a brakeman who was injured while in the service of a railroad brought suit against the company.[2] In 1884 he recovered $4000 damages, but two years later the verdict was reversed on appeal. On a new trial he got a verdict for $4900. This was appealed to two courts successively. The first affirmed and the second reversed the judgment. The company was successful at the third trial in 1889. Two appeals by the brakeman followed, the court of last resort deciding in his favor in 1897. The case was then tried for a fourth time, and the brakeman recovered $4500. The company then appealed and met with success. A fifth trial was necessary, and the jury awarded the plaintiff $4900 damages. The judgment was again set aside on appeal. A sixth trial followed with the same result. In 1902 the seventh and last trial took place. The plaintiff recovered $4500. The company again appealed, but was unsuccessful. This finally put an end to the litigation.

This is, of course, an extreme case and similar cases are rarely found in our legal history. Appeals are generally taken only when the counsel in the case feels that there is a fair chance of success or of wearing out the opposing party. A majority of appeals are unsuccessful, and it is only a small minority of cases that have to be tried more than once.

Nevertheless, the freedom of appeal and the consequent law's delay have been made the subject of severe criticism.[3] Delays in civil cases are far more frequent than in criminal cases, and, as has been truthfully remarked, often amount to a denial of

[1] See below, p. 651.
[2] Baldwin, *The American Judiciary*, pp. 366–367.
[3] *Readings*, p. 500.

justice. But, on the other hand, it is hardly practicable to restrict the freedom of appeals without making arbitrary rules that would be bound to work injustice at times. To allow appeals only in controversies involving large amounts would be undemocratic and give unjust privileges to wealthy litigants. Moreover, cases that are of comparatively trifling pecuniary value sometimes involve legal principles of great importance that should be passed upon by the higher courts.

It has been suggested that appeals should not be made a matter of right, as they are to-day, and that no appeal should be allowed unless permission is granted by the trial judge or by the appellate court. However, it is pointed out that such a system would be likely to result frequently in a denial of the right of appeal in cases in which injustice had been done and should be righted by a higher tribunal.

Generally, when an appellate court reverses a judgment, it has the power to enter a final judgment for the other party. This power is rarely exercised, however, and the case is usually sent back for a new trial. In some instances, a new trial is inevitable, as when the proof of essential facts has been shut out at the trial or damages have been assessed on an improper basis. But very often the appellate court has sufficient data on the record before it to make a final disposition of the case. If this were done whenever it is possible, one of the largest sources of delays would be abolished without any revolution in our legal system.

Criminal Law[1]

We have briefly surveyed the principal wrongs against which the state protects the individual, and have examined the methods for redressing them. We must now consider another class of wrongs — public wrongs, or wrongs against the state or community. Wrongful acts included within this class are known as "crimes," and are punished by the state. While in most cases these acts primarily harm some person, they are also regarded as injuring the state, because the state has an interest in the safety of the lives and property of its citizens.

Inasmuch as a criminal act may at the same time contain the elements of a civil injury, a person guilty of a crime may lay him-

[1] Reference: May, *Criminal Law.*

self open to a suit for damages as well as to punishment. Thus if one person assaults another, he may be prosecuted by the state as a criminal and also sued for damages by the injured party.

All crimes are divided into two classes; felonies and misdemeanors. The former includes all graver offenses, generally those punished by death or by confinement in a state's prison. All lesser offenses constitute the second class. They are ordinarily punished by fines or imprisonment in a penitentiary or county jail for comparatively short terms.[1]

The principal felonies are murder, manslaughter, arson, burglary, robbery, and larceny. Murder is the intentional, and manslaughter the unintentional, killing of a human being. In some states murder is divided into degrees according as it is premeditated or unpremeditated. Manslaughter may take any number of forms and sometimes is also divided into degrees. Thus if a person dies as a result of a blow which was not intended to cause death, or if he is run over and killed by an automobile because of the negligent driving of the chauffeur, or if he meets his death in a railroad wreck brought about by the failure of the proper employee of the company to give the required signals or set the switch, the act in each case constitutes manslaughter. Intentional killing in a sudden heat of passion caused by adequate provocation is also generally regarded as manslaughter and not murder.

Arson is the willful and malicious burning of a dwelling. Any incendiarism, however slight, is sufficient to constitute the crime. Burglary consists in breaking and entering into the house of another with the express intention of committing some felony therein. It makes no difference whether the person actually commits some crime within the building: the breaking and entering is itself burglary. Robbery is taking another's property from his person or in his presence by force. Picking a man's pocket so that he is not aware of what is being done is not robbery, but larceny; but taking money from a person at the point of a pistol, or knocking him down and then stealing something from him is punishable as robbery. Larceny is stealing the personal property of another. All the various forms of theft and swindling are larceny, and it is often divided into

[1] Conviction of a felony very often carries with it the loss of the right to vote.

grand and petty larceny, according to the amount stolen, the former being a felony and the latter a misdemeanor.

In addition to the felonies enumerated above, many other offenses are often made felonies. Forgery is generally a felony. It consists in making or altering a written instrument to defraud another. Thus, writing another's signature on a check or changing the amount called for constitutes forgery. Somewhat akin to forgery is the crime of counterfeiting or making false money, which is punishable by the Federal Government. Kidnapping is usually made a felony. Bigamy, which consists in having more than one wife or husband at the same time, is a felony. So is also the offense of perjury — the willful giving of false testimony while testifying under oath in a judicial proceeding.

Other offenses are misdemeanors. They vary greatly in enormity and many of them differ in the several states. Mayhem, though a felony in some states, is generally a misdemeanor. It consists of violently depriving another of the use of any of his members or often of any permanent physical disfigurement inflicted by force. Bribery is also a misdemeanor, though at times it is made a felony. So is knowingly receiving stolen goods. Malicious libel, which consists in defaming another in print or writing, is a crime and is punished as a misdemeanor. Assault and battery, disturbance of the peace, violations of the pure food laws, the use of false weights and measures, spitting on the floor of a street car or other public conveyances, and other miscellaneous offenses, are misdemeanors. In fact, the whole mass of minor offenses is included in this group.

It is not alone for offenses actually committed that punishment is inflicted. It often happens that a person conceives the design of committing a certain crime and take steps toward carrying out his purpose, but is, for some reason, prevented from effecting it. In that case he is punished for the attempt to commit the crime. Of course, a slighter punishment is inflicted for an unsuccessful attempt than for the crime itself. Thus a person intending to kill another might shoot at him, but miss his aim; he is then guilty of an attempt to commit murder.

Not only the principals who actually commit a crime are punishable for it; their accomplices are liable as well.[1] Ac-

[1] *Readings*, p. 449.

complices are of two classes: accessories before the fact and accessories after the fact. The former category includes anyone who in any way advises, encourages, or assists in the preparation for the crime which is afterward committed. In some states, accessories before the fact are put in the same group with principals and are punished as such. An accessory after the fact is one who assists in the escape of the offender after the crime has been committed, or helps to cover up the crime.

To be convicted of a crime, a person must have a criminal intent. This is ordinarily presumed. But a small child cannot have such an intent and his acts do not constitute crimes. An insane person is also not responsible for his acts. But legal tests of insanity are much stricter than medical tests, and often persons considered lunatics by medical men are held to be sane in law. An intoxicated person is responsible for his crimes, voluntary drunkenness being no excuse.

Criminal Procedure

While civil actions are brought by the injured party, criminal prosecutions are conducted by a prosecuting officer in the name of the state. A criminal proceeding as a rule begins with the arrest of the offender. The arrest may be either by warrant or not. A police officer or a private individual may make a complaint before a magistrate who will thereupon issue a warrant or order of arrest against the person so accused. But in many cases an arrest may be made without a warrant, particularly when the crime is committed in view of the person who apprehends the criminal, or when the officer making the arrest knows that a felony has been committed and has reasonable grounds for believing that the one whom he is taking into custody committed the offense. The exact rules defining the cases in which an arrest may be made without a warrant vary in the several states.

After a person is arrested, he is brought before a magistrate[1] as soon as possible. The proper official examines the case and hears whatever evidence may be produced; but neither at this examination nor at any subsequent stage of the proceedings may the accused person be questioned, unless he himself desires to

[1] For the writ of habeas corpus, see above, p. 291.

testify. This is one of the cardinal principles of the English and American criminal procedure and is one of the main distinctions between the Anglo-American system and that in vogue on the continent of Europe where the accused may be and usually is interrogated.[1]

If the magistrate before whom the prisoner is arraigned finds that there is probable cause for holding him for trial, he commits him to jail until further proceedings are had, at the same time allowing him to give bail if he so desires, unless the accusation is one of murder. By giving bail is meant that one or two individuals, called sureties, sign a bond obligating himself or themselves to pay a certain sum of money to the state or county if the accused person fails to appear when his case is called for trial.[2] If bail is given, the person is released.

The case (unless it is a petty offense) is now ready to enter upon the next stage of the proceedings, namely, indictment by the grand jury, before whom the matter is presented by the prosecuting attorney. The grand jury is one of the oldest institutions of the common law and for a long time it was cherished as a safeguard against needless and oppressive prosecutions. It is a body of citizens drawn at the beginning of each term of court from qualified inhabitants of the county. It passes on all accusations, and if it decides that there is at hand evidence which, if unrebutted, will probably convict the accused, it finds an "indictment" against him and the case will then go to trial. If the grand jury determines that the evidence is insufficient, the charge is dismissed and the prisoner is released from jail or his bondsmen are discharged, as the case may be.

The proceedings of the grand jury are secret and it hears only one side of the case — the prosecution. The evidence is generally presented by the prosecuting attorney, who also prepares the bill of indictment, and if the grand jury decides to indict, it indorses the fact on the bill. The decision of the grand jury need not be unanimous, as is the case with petty or trial juries, but a majority vote of the whole body is sufficient. The grand jury is not limited to passing on matters presented to it by the prosecuting attorney, but may undertake investi-

[1] This principle is now often most grossly violated in the United States by the "third degree" practice of "sweating" prisoners.

[2] The amount of the bond varies with the enormity of the offense and the probability of escape.

gations of its own. It does not often do so, however. While cases usually begin with the arrest of the accused, it frequently happens that an accusation is presented first before a grand jury, and in that event, of course, there is no preliminary examination before a magistrate.

In some states indictment by grand jury, even in serious crimes, is not necessary to bring a person to trial, but the same result is accomplished by "information"[1]; that is, by an accusation brought by the prosecuting attorney. This procedure gives more influence to the prosecuting attorney, as he then has the sole initiative in determining whether a case shall be brought to trial or not. Prosecution by information is generally employed for minor offenses.

After a person is indicted, he is brought before the court, the charge is read to him, and he is directed to plead. If he pleads guilty, no further proceedings are had,[2] and the judge imposes sentence either at once or at some later date. If he pleads not guilty, a trial is accorded to him. When the date set for the trial arrives, the cause is called before the judge holding the court. The first step consists in impaneling a jury of twelve citizens. The various jurors summoned are examined in turn by the prosecuting attorney and the defendant's counsel, until finally the jury is selected. The process is at times a long one, particularly in important and sensational cases. Any juror who states that he has formed a definite opinion about the case is incompetent to serve, and this rule always excludes many persons, if the case has attracted much attention and has been discussed by newspapers. In addition to this, each side may challenge a certain number of jurors peremptorily without giving any reason.[3]

After a jury is thus selected, the prosecuting attorney opens his case, inasmuch as the defendant is presumed to be innocent and the burden of proving him guilty is on the prosecution. In his opening speech, he generally describes the circumstances in which the alleged crime was committed and states by what evidence he expects to prove the guilt of the prisoner. The prose-

[1] *Readings*, p. 88.

[2] A man cannot plead guilty of murder in the first degree, however, for some form of trial must be employed in such a serious case.

[3] The old process of selecting jurymen has been severely criticized within recent years on account of the great expense and waste of time. In the famous Gilhooly case in Chicago it took three months to secure a jury and the costs of that process to Cook county are estimated at $18,000.

cuting attorney then summons his witnesses one by one, and examines them about the facts of the case. As he finishes with each witness the defendant's attorney may cross-examine.

The questions that may be asked of the witnesses are limited by rules of evidence, so that no irrelevant matter may be brought in, and the witness may be confined to testimony about the facts with which he is personally acquainted. The purpose of these rules is to prevent the jury from being misled or prejudiced by facts that are not closely connected with the case. If either lawyer believes that the other is asking an improper question, he may object, and the judge then decides whether the question should be allowed or not. If the lawyer against whom the court rules is dissatisfied, he takes an "exception."

After the prosecution completes the presentation of its side of the case, the attorney for the prisoner presents the other side in about the same manner. He first makes an opening statement to the jury, and then calls and examines his witnesses one by one, the prosecuting attorney being given a chance to cross-examine as soon as each direct examination is finished. The prisoner is not questioned at any stage of the trial unless he wishes to go on the stand as a witness in his own behalf, and in that event, the prosecuting attorney may cross-examine him in the same way as all the other witnesses for the defense.

After the taking of testimony is ended, the prosecuting and defending counsel make speeches to the jury; and upon their completion, the judge delivers his charge. He sums up the evidence brought out by each side, and states to the jurors what is the law applying to the case before them. Thus, he tells them what must be shown in order to constitute the crime with which the defendant is charged, describes the different degrees of that crime (if the particular offense happens to be divisible into degrees), and states how much proof is necessary. The jury must feel convinced beyond a reasonable doubt that the defendant is guilty in order to convict; otherwise it must find a verdict of not guilty.

When the judge finishes his charge,[1] the jurors retire to deliberate. They must, as a rule, arrive at a unanimous verdict, and often that takes many hours.[2] If they are absolutely unable

[1] If either lawyer is dissatisfied with any part of the charge he again "excepts."

[2] In a few states in the West a verdict by nine or ten out of the twelve jurors is allowed in some cases; *Readings*, p. 88

to agree, they are discharged, and the prisoner has to be tried again. When the jury comes to an agreement, it returns to the courtroom and the foreman announces its verdict — guilty or not guilty. If the defendant is found not guilty, he is discharged at once. If he is convicted, the judge imposes sentence either immediately or at some future date.

The punishment for most crimes is imprisonment. For minor offenses a fine is often imposed, and sometimes the sentence consists of a combination of both. The term of imprisonment varies from a short confinement in the county jail or penitentiary to imprisonment at hard labor in a state's prison for life. The law generally lays down minimum and maximum limits of punishment for the various offenses, and the trial judge has full discretion in imposing any punishment within those limits. In some Southern states convicts are compelled to work in the open air in chain-gangs. At times they have been turned over to private employers to work for wages paid to the state; but this system has given rise to great cruelty and is being abolished because it is revolting to an enlightened public opinion.

For good behavior the prisoner usually receives a substantial reduction in the term of his sentence, and it often happens that he is pardoned by the governor before his term ends, if there are extenuating circumstances warranting mercy.[1] A new system of punishment known as the "indeterminate sentence" has been introduced in some states. Under this method the judge imposes a minimum and maximum term, and whether the prisoner is released at the close of the minimum term or is kept in prison longer, possibly until the expiration of the maximum term, depends on his behavior and on the promise of reform that his conduct shows. If he is liberated before the close of the maximum term, he is generally kept on probation for a while and is obliged to report to the prison officials or to special probation officers at stated intervals.

For murder the death penalty is inflicted in most states, and in a few commonwealths it is also imposed for some other crimes. Execution is generally carried out by hanging, but in a small number of commonwealths electrocution has been substituted as a more humane and less painful method of putting to death. There are a few states — Maine, Michigan, Wisconsin, Rhode

[1] For an excellent illustration, see *Readings*, p. 448; on the pardoning power, above, p. 568.

Island, and Kansas — in which capital punishment has been entirely abolished. Opponents of the death penalty claim that the fear of death does not diminish the percentage of crimes, and that juries are reluctant to convict where they know that the penalty will be death, often convicting of a less degree so that the prisoner may be punished by imprisonment. Although cases in which innocent persons are, by a miscarriage of justice, put to death are exceedingly rare, still a few are on record, and a mistake may be made at any time on account of the circumstantial character of the evidence frequently admitted. Finally, the reformation of the offender, as well as the protection of society — not retaliation — is the end of enlightened punitive justice, and the death penalty is altogether inconsistent with such a humane notion.

When the prisoner has been found guilty and sentenced, his resources are not yet at an end. He may appeal to a higher tribunal if any mistakes have been made by the trial judge. Any alleged error in the admission or exclusion of evidence or any incorrect statement of the law applicable to the case made in the judge's charge, is ground for reversal. If the appeal is decided against the prisoner, he may, in some instances, carry the case still higher, until finally it is passed upon by the highest court of the state or by the Supreme Court of the United States, if a federal question is involved. If he wins on the appeal, a new trial is usually granted, and the case is sent back for a rehearing to the court in which it was originally tried. If he loses his appeal, the defendant must acquiesce in the sentence, unless the governor can be persuaded to pardon him.

A great deal of criticism has been evoked against the liberality of the system of appeals in criminal as well as civil procedure and the consequent failure of justice. While it cannot be denied that verdicts are too frequently reversed for purely technical reasons, which could not have possibly injured the defendant, the evil is not as extensive as it is often supposed to be. Thus in New York County, during the five years from 1898 to 1902 inclusive, about 11,000 persons were convicted of felonies, of whom less than nine in a thousand took an appeal; of these, less than a third were successful.[1] But the cases that attract public notice because of their sensationalism are generally the ones in which delays

[1] *Harvard Law Review*, Vol. XVII.

incident to appeals occur. In a good many instances in which verdicts have been reversed, obvious injustice had been done to the appellant. This is particularly true where evidence offered in his defense has been wrongfully excluded by the trial judge, where the prosecution has failed to make out a prima facie case and show facts sufficient to constitute proof, and where the trial judge has made a serious mistake in his charge to the jury. Nevertheless, in a considerable number of reversals, the errors are purely technical and do not involve at all principles of strict justice.

The remedy, however, does not consist in a narrow limitation of the system of appeals. If the prisoner has no absolute right to appeal, there will be cases of wrongs committed at the trial, which will never be righted. But the appellate courts should adopt the practice of refusing to reverse a verdict if the errors complained of are not of such a nature as could have prejudiced the defendant in the eyes of the jury. Finally, many of the delays and technicalities of legal procedure are avoided if at the trial the judge exercises a close control over the proceedings, as is done in England, and to a less extent in the federal courts.[1]

Critical and Constructive Tendencies

There is undoubtedly a great deal of dissatisfaction with the administration of the law on the part of learned members of the legal profession and citizens interested in the matter. In addition to the protests against delays and appeals and against the conduct of local courts noted elsewhere, there is a growing criticism of the judicial system itself. It is said that there are too many conflicting courts having jurisdiction over the same classes of cases and that they render conflicting decisions and opinions respecting identical laws. Legal tradition requires judges to abstain from rendering an opinion respecting the constitutionality or meaning of a law except when considering an actual lawsuit brought before them. As a result the public in many cases cannot know what is lawful and what is unlawful without resorting to extensive legal proceedings; and such proceedings are costly, besides being tedious and sometimes well-nigh interminable.

[1] For a searching inquiry into the causes of injustice in our courts, especially to the poor, see R. H. Smith, *Justice and the Poor* (Carnegie Foundation for the Advancement of Teaching, 1919). A number of specific remedies are suggested.

Disputes among business men even though slight in nature if long delayed may work great inconvenience and loss in production and trade. Poor persons or persons of moderate means are often unable to obtain justice without a lawsuit for which they have no money to pay. Hence they suffer losses which are small in amount but ruinous to them. Finally, it is pointed out that state courts often set aside state laws by a small margin of four to three judges, or three to two, creating uncertainty and dissatisfaction among the people interested in the fate of the measures in question. All these matters are now vigorously discussed by bar associations and private citizens and out of the analysis of the situation have arisen a number of constructive remedies.

To meet the criticism respecting overlapping and conflicting jurisdictions it is proposed to create one consolidated system of high state courts in which the supreme court, as the Michigan constitution runs, "shall have a general superintending control over all inferior courts." Louisiana gives the supreme court power to assign and distribute judges in such a manner as to secure a prompt administration of justice and also to supervise and coördinate the work of lower courts. Ohio, Nebraska, Massachusetts, and Illinois have taken significant steps in this direction. Perhaps more important still is the reform that permits private citizens to appeal to the courts to find out what the law is on some point or points without going to the expensive process of a lawsuit. This departure from tradition has been made in Wisconsin, New York, Florida, and Kansas where the courts are empowered to make "declaratory judgments" as they are called. If, for example, the heirs of a dead man are uncertain as to their rights under his will, without engaging in a lawsuit they may call upon the proper court to tell them just where they stand. Thus, as one writer has put it, the courts are made "authorized legal advisers to the people." Akin to this is the practice of allowing the highest court of the state to give "advisory opinions" to the governor and either branch of the legislature as to the constitutionality and general legality of any proposed act or law. This system prevails in New Hampshire, Massachusetts, Maine, Rhode Island, Florida, and Colorado.

An attack has been made on the law's delays by the establishment of courts of arbitration and conciliation. Strictly speaking

these are not courts at all, but are institutions intended to prevent lawsuits by substituting arbitration. Illinois in 1917 and New York in 1920 created arbitration systems designed especially to enable business men to settle their disputes about commercial matters without becoming involved in a lawsuit or legal technicalities.[1] In 1921 North Dakota took a novel step by establishing a state-wide conciliation system permitting citizens to settle disputes involving small sums of money without going to the courts at all. The district judges are to appoint in each county a conciliation board from which citizens may choose conciliators. If a citizen has a claim against another he can appeal to one of the arbitrators who will notify the opposite party to appear and will attempt an "amicable settlement" of the controversy. If both parties agree to abide by the decision of the arbitrator it shall have the force of a decision of law.[2]

The complaint that state courts sometimes declare laws unconstitutional on doubtful grounds as evidenced by four-to-three or five-to-four decisions is met in a few states, namely Ohio, Nebraska, and North Dakota, by a provision that an extraordinary majority shall be required in such cases. This provision has been hotly attacked by conservative lawyers and has not won widespread acceptance. Indeed it involves many considerations other than those of a purely judicial character.

[1] On the point of law reform, see W. F. Dodd, *State Government*, pp. 341 ff.
[2] R. E. Cushman, *Political Science Review*, Vol. XVII, p. 434.

SD art 11, -12+13 & 83

CHAPTER XXX

STATE FINANCIAL MANAGEMENT

Our early constitutions laid very few restraints on the power of the state governments to spend money, lay taxes, and incur debts. The legislatures made the most of their opportunities. Funds were misappropriated; legislative procedure was degraded by unseemly scrambles to get money out of the state treasury for local and private benefit; debts were accumulated and in some cases repudiated; huge gifts were made to canal, railway, and manufacturing concerns in the form of bonuses; and special privileges were granted in the way of tax exemptions. Indeed by the middle of the nineteenth century the credit of some of the states had sunk so low as to alarm investors at home and abroad. Since that time the subject of finance has loomed large in every state constitutional convention; one check after another has been devised to control legislatures in their headlong course. Hence it is necessary before taking up the subject of state finance to consider the general character of the limitations under which the state government must work.

Constitutional Limitations

The ancient rule that money bills must originate in the lower house — once so prominent in Anglo-Saxon politics — is now laid down in less than half the state constitutions. A number of them in fact expressly abrogate it. "Any bill may originate in either house of the legislature and all bills passed by one house may be amended in the other," runs the New York constitution; but out of courtesy the senate often concedes to the lower house the right of originating money bills. It cannot be said, however, with due respect for the ancient and honorable doctrine, that it constitutes any safeguard against careless and corrupt finance in legislatures; and it has been gradually declining in public esteem.

Perhaps the most important security against reckless finance is the limitation on the power of the legislature to incur indebted-

ness. In some cases the amount of indebtedness is fixed at a definite sum or a certain percentage of the value of the property assessed for taxation; additional indebtness is permitted only when incurred for specific purposes and approved by the voters on a popular referendum. Generally the state legislature is utterly forbidden to lend public money or credit to any private person or association — an echo of old days when states recklessly went into debt to construct canals and to aid railway companies. Very generally the state is forbidden to incur debts for, or assume the debts of, cities, counties, and other local subdivisions. Coupled with such limitations, there is usually a clause requiring the legislature, on creating a debt, to provide the funds for meeting the annual interest and paying the principal when it falls due. The debt charge is made the first charge on taxation; sometimes there are elaborate provisions for sinking funds to redeem outstanding bonds as they mature. By these restrictions, the credit of our states, once very low in many cases, has been raised to such a high position that state bonds are among the premier securities offered to the public.

State legislatures when left free to tax at will made so many exceptions and granted so many special favors that it was found necessary to limit them closely in this sphere also. The chief device, once widely applied, is a clause to the effect that all real estate, personal property, money, credits, investments in bonds, and stocks of private corporations must be assessed according to their true value in money and assessed uniformly; exceptions are made of the buildings and other property of religious, educational, and charitable institutions. The principle that all property must be taxed alike seems fair at first glance, but experience has shown that it is impossible to do justice under it. State and local assessors cannot by any process unearth the intangible property of citizens — stocks and bonds — laid away in strong boxes. Hence those states, such as New York, Massachusetts, and Wisconsin, which permit various forms of taxation are fortunate. The people of other states, plagued by the uniformity rule, are constantly seeking constitutional amendments authorizing the classification of property for taxation or the collection of income and other kinds of taxes.

To secure regularity and publicity in legislative appropriations, it is now quite common to embody in the constitution some or all

of the following principles. Money shall be paid out of the treasury only in pursuance of an appropriation by law; every law imposing a tax must specify the object to which the income is to be devoted; the yeas and nays must be taken on the final passage of a money bill and recorded; the credit of the state may not be given or lent to any private person or association; the governor may veto single items in appropriation bills; the general appropriation bill may embrace nothing but appropriations for the ordinary expenses of the state executive, legislative, and judicial departments and for some other specific purposes; no appropriation shall be made for a longer term than one or two years; and no revenue bill may be passed during the last five days of the session.

Appropriations and Appropriation Methods — the Budget

Although there is a great variation in the functions undertaken by the states and the appropriation laws embrace thousands of items, state outlays of money are readily classified by the Federal Census Bureau under nine different heads: general government, protection to person and property, development and conservation of natural resources, highways, charities, hospitals and corrections, education, recreation, and general. All together approximately three quarters of a billion dollars is spent annually by the forty-eight state governments combined, the amount ranging in 1922 from $161,000,000 in New York to $1,300,000 in New Mexico.

As the exact methods followed by our legislatures in making appropriations are in a state of transition, they can be understood best by a brief reference to the old ways. We have never had and do not now have in any state legislature a finance minister responsible for presenting to the legislature and defending before it a balanced budget showing proposed expenditures and proposed revenues. The traditional method of making appropriations was to permit each member to introduce as many bills as he pleased calling for outlays of state money. Administrative measures, such as changes in ballots and election procedure, which incidentally called for huge expenditures for printing and employees, were introduced without a thought as to the cost involved.

Appropriation bills and other bills requiring expenditures were referred to various committees, no one committee in either house having control over all projects making a charge on the treasury. These bills were taken up one after another under the system of committee control and log-rolling which prevails in the legislatures and passed seriatim without much thought as to totals. Finally at the very close of the session, scores of appropriations were rushed through at lightning speed and thrown upon the governor's table for his approval or veto. If the governor had the power to veto single items, he could cut and slash the bills at his pleasure. Not until the governor was through with his review was it possible to know just how much money had been actually appropriated at the legislative session and how much revenue had to be raised to pay the bills.

As long as the tax burdens were light, citizens paid little attention to the unbusinesslike methods of the state legislatures, but at length the worm turned. The New York Bureau of Municipal Research from its foundation in 1907 laid increasing emphasis upon budget making as the basis of all good administration and at last practical men began to give heed to "the theoretical fellows." In 1911, Dr. Frederick A. Cleveland, of the Bureau, as head of President Taft's Commission on Economy and Efficiency, called the attention of the whole country to the importance of the budget problem. In 1915, the New York Bureau laid before the state constitutional convention a complete program of budget reform, and a constitutional provision based upon it was adopted only to go down to defeat when the constitution was submitted to the voters. Nevertheless the idea was in the air. In 1911, Wisconsin and California had enacted laws designed to introduce some system in their finances, and before a decade had passed nearly every state in the union had made an attack on the traditional appropriation methods handed down from the fathers. Six states, California, Louisiana, Maryland, Massachusetts, Nebraska, and West Virginia, have embodied the reform in their constitutions. In the other states it is statutory.

The new budget laws of the several states, as might be expected, differ widely in their nature and they are being amended from year to year so that a complete picture of them cannot be drawn. Still certain principles run through them all. In the first place

there is an attempt to centralize and fix responsibility for the preparation of a single, consolidated statement of expenditures and revenues — the budget. In creating the agencies charged with preparing the financial program, our law-makers have tried four types. (1) The most popular plan is that which makes the governor of the state squarely responsible for compiling the budget and laying it before the legislature. This is the "executive" budget system which was adopted in Maryland in 1916 and has become increasingly popular. (2) A number of states have vested the task of formulating the financial program in an administrative board composed of high state officers, or state officers and citizens chosen by the governor or by the legislature. (3) To draw the legislature into the budget-initiating process, several states have created a legislative-administrative board, which includes members of the legislature and state officers. (4) Finally, reluctant to yield any of their prerogatives, some legislatures leave the preparation of the budget to a legislative committee.

In the second place, a great deal of attention is paid in this new legislation to the *content* of the budget, which must be laid before the legislature by the authority or agency made responsible for that operation. In this respect, the Maryland constitutional amendment is very specific. It provides that the budget shall contain a complete plan of proposed expenditures and estimated revenues, with estimated surplus or deficit in revenues, for the coming fiscal period. It must be accompanied by a statement showing: (1) the revenues and expenditures for each of two fiscal years next preceding, (2) a balance sheet, (3) debts and funds of the state, (4) estimates of the state's financial condition at the end of each of the fiscal years for which appropriations are being made, and (5) explanations of the budget by the governor responsible for presenting it.

A third and vital element in budget making is the procedure to be followed by the legislature in dealing with the budget after it has come from the hands of the authorities who prepare it, but this phase of the subject has not yet received the attention which it deserves. If the legislature is free to deal with the budget as it pleases, tearing it to pieces, passing innumerable special appropriation bills, and ignoring the recommendations of the budget makers, then little or no benefit is to be derived even from

the most careful preparation of financial plans. This is obvious, and a few states have at least faced the issue.

1. Maryland provides that the legislature shall not consider any other appropriation bills until the governor's budget has been finally acted upon. This prevents the old practice of "jamming" bills through the legislature by members powerful enough to get their measures considered.

2. Shall the legislature be permitted at pleasure to increase or add to the items proposed by the governor? This is a debated point. If the legislature cannot increase the budget as proposed but can merely reduce it, then it cannot enact new legislation calling for expenditures or enlarge functions already undertaken. Clearly that would seriously cripple the legislature and make the governor the sole agent authorized to initiate new state enterprises. On the other hand, if the legislature can do as it pleases with the governor's budget, it may ignore it or tear it to tatters. Hence a compromise on this subject has been reached in some states. Maryland provides that the legislature cannot increase or add to the governor's items; it can decrease or eliminate; after it has passed the governor's budget it may make additions and increases but only in the form of special bills, subject to the governor's veto, and subject to the necessity of providing the revenues required to meet the said increases and additions. Nebraska permits the legislature to enlarge the executive budget by a three fifths vote and deprives the governor of the right to veto additional appropriations.

3. The governor and administrative officers may, and on call must, appear before the legislature to defend the budget or explain it (Maryland).

4. The standing appropriation committees of the legislature must within five days after the receipt of the budget begin to hold joint and open hearings on the estimates. The governor and his representatives shall have the right to attend and be heard (Virginia).

5. The budget bill shall be the special order of the day for at least five full legislative days and all meetings of the houses for the consideration of the bill shall be open (New York).[1]

[1] This survey is based entirely upon an article in the *National Municipal Review* for September, 1919, by A. E. Buck, of the staff of the New York Bureau of Municipal Research. See also the Report of the Reconstruction Commission (New York, 1919), part iv, for the preparation of which Mr. Buck was largely responsible, and his technical work, *Budget Making* (1922).

It is too early now to strike a balance sheet and estimate the effects of the new budget legislation. Undoubtedly in those states, such as Maryland, which place a rather strict control on legislative procedure, the budget law in operation throws more light upon state finances, gives more publicity to expenditures, and checks the tendency to pass local and special bills carrying a charge on the treasury. But it can hardly be said that the ideal has been reached. Too much faith has been placed in the letter of the law and too little attention given to political custom. If the legislature is deprived of the power to increase the governor's estimates, but can reduce them, then legislative leaders will see the governor and if necessary compel him by threats of slashing his budget to insert special items as a price of peace. This has been done; it is being done. So the boasted executive responsibility does not always succeed in fixing responsibility after all. It is still diffused in spite of appearances. The importance of budget making and the need of constructive statesmanship in finance are emphasized in the new laws, and useful measures have been taken to reduce the chaos of the old practices to an orderly system. But work remains to be done.

The New York Bureau of Municipal Research has devised "an ideal budget system" which includes the following elements:

1. Consolidation of all offices, commissions, boards, and agencies into a few departments under the governor, the department heads to constitute the governor's cabinet.

2. Preparation of the budget by the executive branch, the cabinet and governor being held responsible for it.

3. A single-chamber legislature.

4. Consideration of the budget, not by standing committees, but by the legislature in open session as a committee of the whole with the governor and his cabinet present.

5. No additions to be made to the governor's budget except in the form of special bills passed after the executive budget has been adopted and subject to the executive veto.

6. The governor to enjoy the right to dissolve the legislature and call a new election in case of a fatal disagreement.

The revenue side of budget making has not received as much attention as the matter of appropriations. In about half the states it is the custom to raise revenues under general laws which stand in force from year to year. In these states the appropria-

tions of the legislature are totaled and a rate fixed on the evaluated property. Such a practice works best, of course, when the general property tax is in use. In the states which have a more miscellaneous system of taxation a part of the revenue will be collected under laws reënacted at each session and the remainder under continuing laws. Owing to the lack of one responsible finance minister in the legislature and to the practice of rushing appropriation bills through the legislature at the very end of the session, there is often an absence of coördination between income and outgo. The Maryland system which calls for a balanced budget from the governor and requires the legislature to provide the funds for any supplementary appropriations offers the best remedy for chaotic finance, assuming that no radical changes can be made in the relation of the executive and the legislature in state governments.

Taxation and Assessments

The state derives its revenues from six main sources: (1) taxation, (2) earnings from public property such as canals, forests, and lands, (3) fees charged for licenses, franchises, and charters of incorporation, (4) fines and penalties imposed for violation of the criminal laws, (5) interest on public funds, and (6) grants in aid from the Federal Government. Only the first of these call for special consideration here.[1]

1. For almost a century the chief source of state revenue was a tax imposed at a certain rate upon all property, real and personal, evaluated by local assessors. This state tax, consisting of a certain number of mills on each dollar of valuation, was added to the local rate, collected by the local authorities, and forwarded to the state treasury. Although some states have abandoned in part, or altogether, the general property tax, it still constitutes the main reliance of a majority of the commonwealths; more than three fourths of state and local revenues from taxes are drawn from this source.

The method of laying and collecting the general property tax is practically the same throughout the United States. The property is valued by a local assessor of the town, township, or county, as the case may be. The assessor is furnished with printed blanks containing long lists of every conceivable kind of

[1] For federal grants see above, p. 443.

property — houses, lands, notes, stocks, bonds, pianos, watches, live stock, etc.; and he secures, usually by personal visits, a valuation of each class of property possessed by every resident in his area.

From these lists the total value of the general property in the township or county is obtained, and the amount due the state is readily discovered by applying the rate imposed by the legislature. If the township is the unit of the assessment, there is generally a county board charged with the duty of equalizing the values of property in the different units. When it was found that the county authorities habitually undervalued property in order to reduce the burden imposed by the state, the legislatures resorted to the expedient of creating central boards of equalization to impose uniform values for the same classes of property throughout the state, thus correcting the work of the assessors and making each county pay its proper quota into the treasury of the commonwealth.

As the country passed from an agricultural into a commercial and manufacturing stage, there arose serious difficulties in connection with the general property tax.[1] When property consisted of tangible things, lands, houses, live stock, etc., or mortgages on real property recorded at the county seat, it was easy for the assessor to secure a fairly complete and accurate list of the property of each resident within his district. However, when joint stock concerns and corporations came into existence, persons could invest their wealth in the bonds or stocks of some corporation organized in a distant state, or even in a foreign country, and could lock their papers in a strong box; then the assessors could no longer keep track of the property within their local units. There were many other reasons, too, why the states were forced to cast about for some other sources of revenue, but they cannot be discussed here.[2] The result has been a revolution in the tax system of many states, New York having gone so far as to abandon largely the general property tax for state purposes in favor of inheritance, corporation, income, and other special taxes.

2. The inheritance tax,[3] though long employed in Europe, has found favor in America only within recent times — practically since 1890 — but it has now been adopted in some form by

[1] See *Readings*, p. 597.
[2] See *Readings*, pp. 592 ff., for extracts from state tax reports on this whole subject.
[3] See *Readings*, p. 603.

more than three fourths of the states, and its principles are everywhere receiving extended development. The rates are being raised; the progressive rule increasing the rate with the amount of the inheritance is more frequently applied; the exemptions allowed to direct heirs are being lowered; and there is a tendency to apply it equally to real and personal property. All states having this tax are continually improving the administrative machinery for collecting it, especially the methods of appraising estates for taxing purposes.

The argument in favor of this tax is that it is easy to collect, falls upon those ablest to bear it, and permits the state to secure a revenue from intangible personal property which so largely escapes under the regular property tax. Moreover, it is held that, inasmuch as the recipient of an inheritance, as such, does not render any service to the state, it is proper for the state to place a special burden on him. The chief argument against the tax is that it is injurious to business where collected in large amounts, because it withdraws capital from private enterprises and devotes it to non-productive purposes.

3. The income tax has grown in favor particularly since its adoption for federal purposes in 1913 and is now used in many states, including Massachusetts, Virginia, New York, North Carolina, Delaware, Wisconsin, and Oklahoma. An attempt is being made in Oklahoma to overcome the difficulty of evasions by requiring all persons to certify under oath the excess of their incomes over the limit of exemption; by authorizing the assessor to send to the state auditor the names of persons who, he believes, have not correctly certified their incomes; and by empowering the auditor to resort to drastic measures for the purpose of ascertaining the truth in the matter. New York compels the tax-payer to state the amount of his income reported to the Federal Government.

4. A most fruitful and popular source of revenue is the tax on corporations now quite generally imposed. This branch of state finance, however, presents so many puzzling problems that it can be considered here only briefly. The taxation of a manufacturing corporation doing business at a particular point within the state is comparatively simple: the property of the corporation may be estimated and taxed just as the general mass of property within the state; perhaps a special tax varying with the capitalization

may be imposed for incorporation. However, railway, telegraph, express, street car, and other corporations of a quasi-public character, operating under special franchises or privileges, often monopolistic in character, are in an entirely different class. In taxing them, the legislature is constantly harassed by perplexing problems. A part of the total value of the property of such a corporation is in tangible form in the state, a part in the privilege which it enjoys, and a part, perhaps, is due to operations carried on in other states or in foreign countries. Take, for example, an express company doing business in Ohio: its tangible wealth — horses, wagons, offices, etc. — is relatively slight, but its privilege of doing business is highly profitable, because it carries goods to and from all points of the Union. In fixing the total value of the business of such corporations within any state, the public authorities are compelled to rely largely on statements made by corporation officials, which are not always entirely satisfactory sources of information; and in laying such taxes, states must also be careful not to come into conflict with the interstate commerce clause of the federal Constitution. To meet these perplexing questions a variety of expedients has been devised. Some states tax corporations on the estimated value of their property; others tax them according to their gross receipts or their earnings.

5. A large proportion of the states, especially in the South, employ business and professional taxes for state or local purposes or both. In some of them only a few special trades, professions, occupations, and business enterprises are taxed; in others the list may embrace three or four hundred different callings and undertakings. West Virginia and South Carolina make use of the sales tax levied on the volume of business done by merchants. States which have great mineral resources, such as Pennsylvania, often lay a severance tax or duty on the minerals taken out of the earth.

6. Among the newer forms of taxation are two taxes relating to the use of the automobile. Very soon after the automobile became commercially successful, the practice of laying upon it a small license tax was generally adopted, partly as a means of effecting police control over reckless drivers through registration. When expenditures for roads were increased, the automobile license fee was raised until it became a producer of large revenues

which, in some cases, were devoted entirely to the construction and maintenance of highways. In 1919, there appeared a new tax on automobiles, namely, a gasoline tax laid at a flat rate on each gallon consumed. Within four years, thirty-five states had adopted this tax. The rate varies from one fourth of a cent to three cents per gallon and it yields large sums to state treasuries. This tax, it is claimed with good reason, is more equitable than a straight license fee based, for example, on the horse power of the engine, because it represents a fair measure of the amount of wear and tear on the roads which may be charged to each car.[1]

The relative importance of the various classes of taxes[2] is shown by the following table giving in percentages the receipts of the forty-eight states (not including local taxes) from various sources, in 1919:

General property	35.1
Business	19.4
Special property	15.5
Non-business licenses	5.9
Other special taxes	2.0
Poll taxes	.3
Miscellaneous	21.8

The Current Trend in State and Local Taxation

In a report made in 1918 by a committee of distinguished tax experts selected by the National Tax Association to draft a model system of state and local taxation, there is to be found an excellent summary of the drift of American thinking and practice in this field. The committee proposes, it is true, a model tax system for the future, but in so doing it merely brings together the outstanding lines of development during the previous years and projects on that basis the course to be taken in the future. In this "model tax system," the following elements appear:

1. A PERSONAL INCOME TAX levied upon all sources of income that can be reached by the state, assessed and collected by the state, even if a part of it is to be returned to the localities.

[1] James W. Martin, "The Gasoline Tax," *Bulletin of the National Tax Association*, Vol. IX, No. 3.

[2] In 1922, the state governments collected $867,468,000 in taxes, an increase of 183 per cent over 1912; the counties collected $742,331,000, an increase of 141 per cent; cities and other incorporated places collected $1,627,339,000, an increase of about 80 per cent; townships collected $151,318,000; school districts $738,433,000, and all other civil divisions, $102,069,000.

"This tax," reports the committee, "is better fitted than any other to carry out the principle that every person having taxable ability shall make a reasonable contribution to the support of the government under which he lives." The committee also recommends that the rate of taxation be progressive.

2. A TAX UPON TANGIBLE PROPERTY levied exclusively at the place where such property is located. Having recommended the income tax as a means of reaching income from intangible property (such as stocks and bonds), the committee advises the complete exemption of intangible property from all taxation as property. The committee is of the opinion that a distinction should be drawn between real estate and tangible personal property (such as furniture, jewels, live stock, and other movables) and that the latter should receive a separate classification.

3. THE INHERITANCE TAX. Though it makes no specific recommendations as to inheritance taxes, the committee goes on record as favoring its use by the American states.

4. BUSINESS TAXES. Finding business taxes now being laid by several American states the committee accepts this form of taxation. Such a business tax, the committee suggests, should be laid upon net income — that, rather than volume of business or gross sales, being the best index of a company's ability to pay.

5. TAXES UPON CONSUMPTION. The committee suggests the possibility of deriving some revenue from what may be called taxes on "luxurious consumption," such as automobiles, but does not urge the matter, partly on the ground that such a tax would never yield a large portion of the total state revenues.

A point of special interest about this report is that it proposes a sweeping simplification of our perfect jumble of state taxes and the adoption of a few workable general principles. As to the separation of state and local taxes which a few years before was so much emphasized in American economic writings, the committee holds that in an extreme form it is wholly objectionable. "There is no experience to justify the belief that, if the states turn over to the local governments independent sources of income and adopt the theory that local taxation is an affair of purely local interest, we shall ever have a satisfactory administration of the tax laws by local officials."

On the problem of tax administration the committee makes two recommendations of first-rate importance, reflecting the

best American experience. First, it advises that assessment districts should be large enough to justify the employment of at least one permanent official in each such district, and that all assessors, whether appointed or elected, be subject to removal by the state tax commission for willful negligence or malfeasance in office. Secondly, the committee recommends the establishment of a permanent state tax authority empowered: (1) to administer the income, inheritance, business, and other taxes of state-wide concern, (2) to equalize local assessments, (3) to remove local assessors for inefficiency or misconduct, (4) to supervise the assessment of all property for taxation, and (5) to act as a board of appeal.

As to the exact character of the state authority, whether it should be a commission or a single officer, the committee takes no dogmatic position. It does claim that a state tax board made up of men holding other public offices is totally inadequate to the work of tax assessment and supervision. Administration of tax laws by a single commissioner has been found effective in some states. Many states, however, are unwilling to vest such large powers over the property of citizens in the hands of one man, preferring to trust such quasi-judicial powers to a board. "We merely say," continues the report of the committee, "that neither the system of taxation which we recommend nor any other can be expected to give satisfactory results in states that refuse to place in the hands of some permanent central authority the administration of taxes upon incomes and inheritances, the original assessment of certain classes of property, and general supervisory powers over the assessment of all property subject to local taxation."

It will be seen that the committee sums up the very practical attempts of the citizens of American states to devise a system that will produce enough revenue to meet the rising costs of government and at the same time be comparatively easy to administer. It refuses to propose measures "wholly foreign to American experience and contrary to the ideas of the American people." Nevertheless there are some signs of change. For example, in 1913 Pennsylvania granted to Pittsburgh and Scranton the right to reduce gradually the tax on improvements to one half the rate on land, the minimum to be reached in 1925. Advocates of the single tax, or, at all events, a tax on the increment

in the value of land, are busy in all parts of the country, and experiments along the lines of those made in some parts of Canada are possibly not far off.

Audit and Custody of Funds — Purchase of Supplies

All states provide for the regular audit of state receipts and expenditures although a few of them do not have special auditors or comptrollers but delegate the function to other state authorities. The duty of an auditor is to see that the money appropriated by the legislature is spent according to the provisions of law and that there is no fraud in the disbursements. The auditor is concerned merely with the enforcement of the law, not with the wisdom or outcome of the expenditures.

The important element in the function of auditing is the independence of the auditor over against the spending officers whose accounts are to be checked. To secure this independence all states except three provide that the auditor shall be elected by popular vote; in New Jersey, Tennessee, and Virginia he is chosen by the legislature. In point of fact it is questionable whether the desired independence is secured by popular election because the auditor is usually closely associated in politics with the group represented by the governor and other state officers. Election by the state legislature, at least in theory, seems better calculated to assure the expenditure of funds in accordance with the law than election by popular vote. Indeed a few states which have elected auditors also provide that the legislature may or shall appoint an auditing committee or auditors to examine the accounts of state officers; in many states the governor is required to account to the legislature for all state funds paid out by him.

As to the legality and wisdom of expenditures, a great deal of responsibility is placed upon the governor in theory and law, but not in practice. Some Southern states, notably Georgia, Maryland, and Mississippi, authorize the governor to make periodical examinations into the accounts of the auditor and treasurer without previous notice to those authorities. All states require the publication of financial reports in some form, although as a rule they are not detailed and specific enough to prevent the concealment of peculation. As Dr. F. F. Blachly has shown in his minute analysis of the accounting and reporting methods of

New York, a great deal remains to be done in the way of developing state financial reports before the publication of accounts can act as a serious check on spending officers.[1]

The custody of state moneys from all sources is vested in the treasurer, and it would seem that this function could be readily controlled by the auditor, the legislature, and public opinion; but as a matter of fact there have been numerous cases of defalcation and robbery by state treasurers. Hardly a year passes without a scandal in some section of the country. Indeed the treasurer's office is often regarded as one of the choice spoils of politics, especially where the treasurer has the right to deposit state funds in banks of his own choosing. It often happens that politicians organize a bank with a small capital and secure from their friend, the treasurer, a deposit of state funds which they lend at a good rate of interest, sometimes to themselves for speculative purposes. Professor Merriam, in his study of the American party system, relates an interesting story of "Bull" Andrews of Pennsylvania, who, with some confederates, got hold of a small bank in that state, obtained a deposit of state funds amounting to more than a million dollars, and embarked on railway construction schemes in New Mexico![2]

Such evils, of course, can be cured by proper legislation, and a few states have taken steps to end them. Legislation designed to effect this reform embraces the following principles. Banks must bid for public deposits by offering rates of interest on state money. They must also guarantee the state against loss by pledging as security for deposits bonds of undoubted soundness. Bidding for public deposits must be open and the awards must be made public. The interest on deposits must be paid into the state treasury. In such a case the treasurer has no choice; he cannot favor political banks, entrust money to unsafe institutions, or derive any benefits from the use of state funds.

Expenditures for materials and supplies form a large item in the state budget; from twenty to fifty per cent of the total current outlay is for this purpose. The amounts involved are so large and the opportunities for profits are so great that politics inevitably enters into the purchases and contracts of the state government. On the one hand there is danger that the state will be charged exorbitant prices; on the other hand there is a

[1] *Municipal Research*, No. 74.

[2] *The American Party System*, p. 146.

risk that poor materials will be supplied and the inmates of state institutions furnished with food scarcely fit to eat. Those familiar with asylums and penitentiaries know how frequent are the abuses in this sphere. If each important spending officer is permitted to do his own buying, political merchants will gather around him, and there will be irregularities in one or more departments in spite of all precautions.

With a view to correcting abuses in this phase of government, Texas, as early as 1899, established a central purchasing agency to buy supplies for the various charitable institutions of the state. In 1912 Vermont created a state purchasing agency, and within ten years more than half of the states had provided for centralized purchasing in some form. Three types of authorities are employed in this work: a special purchasing agent, a board of control, and an *ex officio* board composed of representatives of the chief spending departments. The laws dealing with the purchase of supplies set up safeguards with respect to correct specifications for goods, open bidding, and careful testing of deliveries.

State Supervision of Local Finances

Of the public money expended for governmental purposes within the state by far the major portion goes for local, not central, government. In New York the proportions are approximately eighty-three per cent for cities, towns, counties, and villages, and seventeen per cent for the state government. Except in the largest cities, the collection and disbursement of revenues is, as a rule, in the hands of men whose technical experience in finance and accounts is, to say the least, limited. To limited experience is added the bane of village and county politics which always makes for waste and carelessness, and often for corruption. The history of American local government shows that communities are prone to exceed their debt limits in borrowing money; that they sometimes fail to make provision for paying off their bonded indebtedness; that they make expenditures not authorized; that outgoing officers frequently leave big debts for their successors to pay; and that local accounts are kept in a crude fashion which conceals waste and peculation. In one of the Western states it was discovered not long ago that county officers were in the habit of playing poker in their offices and

paying their losses in warrants on the county treasurer, nominally "for the purchase of supplies."

Attempts to correct these evils in local finance have taken the form of state supervision over local budget making, purchasing, and accounts. A general survey of legislation relating to such supervision reveals the following elements: a state bureau of supervision, the establishment of uniform accounts, the requirement of annual reports in specified form by local authorities, periodical audits of local accounts by state officers, the development of statistics in standard form permitting comparative studies, inquiries into the management of local property and funds, specifications as to the making of local budgets, and control over local building contracts. No state has yet worked out an ideal scheme complete in all details, but Indiana, Illinois, Massachusetts, and New Jersey are among the leaders in this field.

Although local authorities show some resentment at interference with their autonomy, and village and county politicians are loud in the defense of their "rights," there has been no recession in the movement for central control over local finances. On the contrary, legislation to effect this object shows a steady advance. Enforcement, however, is another story. If a political party is in power in the state it may be zealous in auditing the accounts of opposing politicians in certain counties and cities and negligent in scrutinizing its own local strongholds. Moreover by mutual agreement, the two parties sometimes overlook the enforcement of state supervision; they refuse to appropriate enough money to the bureau of control; or they send out notice that "soft-pedal is the motto." Still, in spite of many lapses, there is a steady improvement in local financial operations as a result of state supervision.

CHAPTER XXXI

ECONOMIC AND SOCIAL FUNCTIONS

The United States began its career as an independent nation before the steam engine and machinery had revolutionized Western civilization. When the Declaration of Independence was issued, the majority of the people earned their livelihood on farms or in the few scattered industries where the simplest of tools were used. There were no great factories filled with complicated and dangerous machinery, no railways, no large cities with their countless thousands of workingmen dependent for a livelihood upon mills and mines; there were no vast accumulations of capital invested in gigantic enterprises; and consequently no need for government interference and regulation.

The manufactured articles that were not imported from Europe were made by hand in small shops where the workman was both master and laborer. And many statesmen hoped that the United States would never become a manufacturing nation. "While we have land to labor," said Jefferson, "let us never wish to see our citizens occupied at a workshop or twirling a distaff. . . . Let our workshops remain in Europe. It is better to carry provisions and materials to workmen there than to bring them to the provisions and materials and with their manners and principles. . . . The mobs of great cities add just so much to the support of pure government as sores do to the strength of the human body."

The Doctrine of Laissez Faire — No Government Interference

This primitive economic system, resting upon agriculture, handicraft industries, and small business undertakings, had its own justification in political philosophy and jurisprudence. The government should interfere as little as possible with the right of the individual to buy and sell labor and commodities under whatever terms and conditions he could secure. Each man, ran the theory, is the best judge of what is conducive to his

own happiness and will pursue his own enjoyment and self-interest; the result will be generally good. Competition will keep prices down within a reasonable distance from the cost of production, and any individual, by thrift and industry, may secure the small amount of capital necessary to start in business for himself.

Jefferson was the leading exponent of this doctrine and looked with unconcealed dislike upon the party of strong government led by Hamilton, who was willing to use the political system to advance the interests of manufacturers, merchants, and shippers by bounties and protective tariffs. In political theory, though by no means in political practice, the doctrine of Jefferson triumphed; and the notion of the less government the better for the people became the cardinal dogma of American politics.

In many ways, accordingly, our state governments have favored the development of the class of small property owners to whose interests the individualistic doctrine of the eighteenth century corresponds; and at the same time they have tried to restrain the growth of corporate and other forms of enterprise tending to concentrate wealth in the hands of a minority. A few states, notably California, Florida, Montana, and Texas, have sought to maintain a class of small farmers by providing that public lands shall be sold or granted only to actual settlers. According to the constitution of California, "the holding of large tracts of land uncultivated and unimproved by individuals or corporations is against the public interest and should be discredited by all means not inconsistent with the rights of private property. Lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers and in quantities not exceeding 320 acres to each settler." The amount of public land to be sold to individuals and families is strictly limited in several other states. Everywhere legislatures have abolished the ancient system of primogeniture according to which a landed estate always passed on the death of the owner to the oldest male heir and was thus preserved intact; by setting aside that rule, legislatures provide for the dispersion of estates among many heirs and check the tendency to accumulation. "Perpetuities and monopolies," runs the constitution of Oklahoma, "are contrary to the genius of a free government and shall never be allowed, nor shall the law of primogeniture or entailments

ever be enforced in this state." A few states even limit the term of years for which agricultural land may be leased; and Oklahoma expressly forbids the creation of any corporation in the state for the purpose of buying, acquiring, or dealing in agricultural lands.

While thus endeavoring to encourage widespread diffusion of farming lands, the states have at the same time lent support to the class of small traders, merchants, and manufacturers by attempting to check the absorbing power of great corporations and combinations. Consequently, in most states, if not in all of them, those combinations and trusts which strive to restrain trade or in any way control the prices of commodities or the charges of common carriers are expressly prohibited and declared to be unlawful and against public policy.[1] "Free and fair competition in the trades and industries," declares the constitution of New Hampshire, "is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." Several other state constitutions lay upon the legislature the imperative duty of enacting such laws as may be necessary to prevent trusts, pools, combines, and other organizations from enhancing prices of commodities, restraining competition in the various trades and industries, and otherwise blocking "the natural process of reasonable competition." In their endeavor to maintain the individualist system of competition, state legislatures have loaded our statute books with laws imposing heavy fines and penalties upon persons and associations seeking to control trade in any manner.

The Control of Corporations

It must be noted, however, that there is a difference between combinations striving to monopolize a particular group of interests and mere corporations which, however large they may be, do not necessarily constitute monopolies, although they may always show a tendency in that direction. Our state law-makers have gradually come to perceive this distinction, and while attempting to restrain monopolies, they now recognize the function of corporations in modern economy, and have devised elaborate schemes of law to control their creation, management, and operation.

[1] Such combinations in restraint of trade were, of course, illegal at common law.

In the beginning of our history it was the practice of the state legislature to authorize the formation of each corporation by a special law, but the abuses connected with this method were widespread and scandalous. As a rule the legislature is now forbidden to create corporations by special act or is otherwise limited in that respect. According to the New York constitution, corporations must be formed under general laws except in cases in which, in the judgment of the legislature, the objects of the corporation cannot be attained in that manner. Delaware has sought to control the process of chartering corporations by stipulating that general and special corporation laws must have the approval of two thirds of all the members elected to each house of the legislature. Georgia has provided that all corporate powers and privileges granted to banking, insurance, railroad, canal, navigation, express, and telegraph companies shall be issued by the secretary of state in accordance with the provisions of law laid down by the legislature. In Virginia the corporation commission, appointed by the governor of the state, issues all charters and amendments of charters for domestic corporations and all licenses to foreign corporations seeking the right to carry on business in the state. Whatever may be the device adopted to control the creation of corporations the aim is always the same — to check the state legislature in granting special favors to particular corporations.[1]

To prevent corporations once chartered from claiming perpetual rights under the clause of the federal Constitution forbidding states to impair the obligation of contract,[2] our state constitutions now make provision for the future amendment or repeal of general and special laws under which corporations may be created. Some states expressly forbid the granting of perpetual franchises. "No law," declares the constitution of Alabama, "making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant of a franchise, privilege, or immunity shall forever remain subject to revocation, alteration or amendment." Such sweeping declarations are sometimes qualified by provisions to the effect that the power of repealing and amending corporation charters cannot be so exercised as to impair or destroy property rights or work injustice to the parties concerned. In reality,

[1] See *Readings*, p. 86 and p. 458.

[2] See above, p. 480.

however, this is unnecessary because the Fourteenth Amendment to the federal Constitution carefully protects such vested interests. It is, therefore, subject to a general rule with respect to safeguarding property rights that state legislatures may create, abolish, or regulate corporations.

The internal management of corporations is controlled by the constitution and laws of most states. To secure stockholders in their individual rights several states have provided that every stockholder shall have one vote for each share of stock he owns. In some instances, the directors of corporations are made liable, jointly and severally, both to creditors and to stockholders, for all money embezzled or misappropriated by the officers of the corporation during their term of service.

To prevent stock-watering, it is frequently stipulated by law that corporations shall not issue stock except for money, labor, or property actually received to the amount of the par value; that corporate indebtedness shall not be increased except in accordance with the general law and the consent of the persons holding the majority of the stock; and that fictitious issues of securities shall be deemed void. Several states have enacted "blue sky" laws which forbid the sale of all stocks and bonds that have not been approved by state authorities, whether issued within or outside the state. Wherever a public service commission exists, it is the practice to require utility corporations to obtain the sanction of the commission for every issue of securities.

The combination of competing railway and utility corporations is usually prohibited altogether or permitted only under state supervision. This end is ordinarily effected by forbidding any corporation of that class to consolidate its stocks or property with its competitors, to purchase the franchises or property of such concerns, or to acquire any control whatever over them except when necessary to collect bona fide debts.

Banking corporations are subjected to special supervision. Legislation in this field ordinarily provides for a state department of banking which makes periodical inquiries into the accounts, securities, assets, and liabilities of banks. The fundamental purpose is to make sure that every bank allowed to do business is solvent; in other words, is in a position to pay its depositors as required by law. A few states have even gone so far in this

sphere as to require all banks to contribute to a state bank-insurance fund which is used to guarantee payment to the depositors of any bank which fails.

Having suffered grievously from frauds and irregular practices on the part of many irresponsible fire, life, and other insurance companies all our states now bring such concerns under public supervision. In many cases companies are required to deposit in the state, securities sufficient to cover the payment of all sums for which they are obligated in their policies. In all states their finances are under close scrutiny. Indeed the great companies doing a national business are often seriously hampered in legitimate transactions by the numerous restrictions, confused and varying, imposed on them by state governments. This condition of affairs is responsible for the demand that all insurance companies doing a general business should be brought under federal control; but that apparently would require an amendment to the Constitution of the United States or a reversal of an opinion rendered by the Supreme Court more than fifty years ago to the effect that insurance is not interstate commerce.[1]

A few states are actively engaged in certain lines of insurance themselves. North Dakota, South Dakota, and Nebraska insure the crops of farmers against damage by hail. A larger number insure against injuries in industry, and a few have ventured hesitantly into the field of life insurance. Although apparently simple, the insurance business is highly complicated; it calls for great scientific skill to determine the nature of risks incurred, to assess the damages suffered in various circumstances, and to invest wisely large sums of money collected in the form of premiums. The regulation as well as the management of such a difficult economic operation throws a great strain on the administrative machinery of the state and calls for talent as well as honesty.

The Regulation of Public Utilities

Railways and other common carriers and public utility corporations, state and local, are controlled by special regulations so numerous and complex that only the barest outline can be given here. Railways are now generally forbidden to discriminate in their charges or facilities between places or persons or in the

[1] Paul v. Virginia, 8 Wallace, 168.

transportation of the same classes of freight; to issue free passes to state officials and members of the state legislature;[1] to grant rebates and bonuses; and to deny individuals, associations, and corporations similarly situated equal rights in the transportation of persons or property. Most states, either by constitutional or statute law, provide some system of publicity requiring each railway company to have a public office and to issue from time to time statistics relative to its business, profits, dividends, transfers of stock, and the like. Railroads are compelled to maintain fences, protect grade crossings, put in switches under certain conditions, adopt safety appliances, heat and light their cars, and do many other things for the safety and convenience of passengers. The list of precise regulations imposed upon common carriers in almost any state would fill a volume of reasonable compass.

Periodically a wave of railway rate regulation sweeps over the country, affecting especially the West where the shipment of grain is such a vital matter to farmers.[2] The first of these waves came in the early seventies and the last during the opening years of this century. Several states fixed passenger rates within their borders at from two to three cents a mile. Others varied the rates according to the mileage and earnings of the roads.

It was soon found by experience, however, that railway operation was too complex to be ruled by flat rates and rigid laws; then the legislatures began to resort to a more flexible method. They created commissions, variously known as railroad commissions, public service commissions, etc., and endowed them with broad powers in supervising all common carriers and utility companies and regulating their rates and services. Under such general laws public utilities are required to furnish safe and adequate services and facilities at reasonable and just charges not exceeding the limits allowed by law or the orders of the commission. Common carriers must keep open for public inspection their schedules showing rates and fares and charges; they must grant no rebates or unjust discrimination or unreasonable preferences; they must grant no free passes except to certain specified persons. They cannot assign, transfer, or lease franchises, or acquire the stocks and bonds of other common carriers, or issue stocks, bonds, or other evidences of indebtedness without

[1] *Readings*, p. 478.
[2] R. S. Saby, *Railroad Legislation in Minnesota, 1849–75* (Minnesota Historical Society Publications).

the approval of the commission. The commission is especially empowered to inquire into the general condition and management of utilities; to examine their books and papers; to investigate accidents; to fix rates and services; to order repairs and improvements designed to secure adequate services; to order changes in time schedules; to inspect gas and electric meters and fix gas and electric rates.

To assure fair treatment in controlling rates and the facilities furnished by public utilities, the constitutions and laws of a few states have ordered the physical valuation of their property. In Oklahoma, for example, the corporation commission must ascertain and keep as a matter of public record the amount of money expended in the construction and equipment of every railroad and public service enterprise in the state, the amount of money expended to secure the right of way and, furthermore, the amount of money it would require to reconstruct the roadbed, track, depots, and transportation facilities, and to replace all the physical properties belonging to the railroad or public service corporation. The commission must also ascertain the outstanding bonds, debentures, and indebtedness and the amount thereof; when issued and the rate of interest; when due; for what purposes issued; how used; to whom issued; to whom sold, and the price in cash, property, or labor (if any) received therefor; what became of the proceeds; by whom the indebtedness is held, and the amount purporting to be due thereon; the floating indebtedness of the company, to whom due and the residence of the creditors; the credits due on it; the property on hand; and, finally, the judicial or other sales of the said road, its property or franchises and the amounts purporting to be paid therefor. After having thoroughly analyzed the physical structure of the system, the commission must ascertain the salaries and wages paid by the railroads and public service corporations.

It is evident from this necessarily brief and fragmentary review of legislation controlling corporations that our states are engaged in a gigantic undertaking which requires the highest type of administrative ability; for the control of a vast network of railways with their complex and bewildering processes is a task almost as great as actual operation. The investigations of commissions, their studies in railway management, their supervision of rates, charges, and accounts have given state governments an

insight into business affairs which could have been secured in no other way.

There is no doubt that the commissions have been successful in preventing some of the worst corporate abuses against which legislation has been directed. Whether the public has received the protection against extortionate rates and charges, which it was entitled to expect, is a matter of controversy. During the period of high prices which followed the outbreak of the World War in Europe, utilities all over the country, faced with increased costs for labor and materials, sought and usually obtained permission to raise their rates. It is contended by some specialists in the utility field that the corporations succeeded in winning from state commissions the right to make unfair charges for their services — charges which enabled them to earn handsome incomes on inflated values.[1] Whether this is true or not as to utilities in general, it is certain that state regulation of railways has not proved a success. It has produced few constructive results. This is partly due to the fact that our railway system is really national in character and regulation by forty-eight independent agencies is bound to result in confusion where it involves interstate commerce.[2]

Although the chief relation of the state to business of all kinds takes the form of regulation, several states carry on enterprises of some magnitude. Many of them have forest domains and water power sites. North Dakota has embarked on the construction and operation of grain elevators. New York must administer a great canal with numerous terminals. Two states, North Dakota and Tennessee, have public coal mines, the latter using prison labor in exploiting them. Nearly all of them engage in highway construction on a large scale, especially as the Federal Government has come to their aid. As an adjunct in constructing highways and other public works, states sometimes operate cement mills. A few have power plants. But on the whole American states shrink from undertaking industrial and transportation enterprises directly; they prefer to entrust such things to private initiative, subject to limitations laid down in the public interest.

[1] *National Municipal Review*, Vol. VI, p. 472; Vol. VII, pp. 76, 151; Vol. VIII, pp. 33, 235; Vol. IX, pp. 633, 765.

[2] See above, p. 387. For municipal utilities, see below, p. 746.

Labor and Social Legislation

The great inventions which revolutionized industry have done more than call into being immense corporations and combinations, rivaling in wealth and power the state itself; they have created a new social group — a working class, dependent in the main upon the sale of its labor power to the owners of the machinery of production. With the development of this social group have come many problems undreamed of by the fathers of the American system of government. Like all other classes in history, this new class evolves interests and ideals of its own, and demands from the government protection, security, and special legislation.

Just as the ancient doctrine of divine right, so ardently cherished by monarchs, seemed to be lacking in reality to the rising middle class, so the doctrine of individual liberty appears to be wanting in utility to the working class. Freedom of contract between an employer with large capital and an employee with a few days' supplies in hand obviously cannot have the same meaning that it has to manufacturers and merchants equally endowed with economic goods. To discourse on the liberty afforded by jury trial to a man who never appears in a court during his life but often drops into the abyss of poverty in times of commercial depression is to speak of the shadow, not the substance of things.

Naturally the new industrial democracy is evolving a political philosophy of its own, confused and half articulate, but containing many positive elements ranging from minor modifications in the labor contract to the socialist doctrine that the passive ownership of property is merely a special privilege to be eliminated by collective action. With the larger implications of this philosophy the student of politics need not tarry unless he is of a speculative turn of mind; but he cannot overlook its concrete manifestations in the form of labor and social legislation.

Generalizing from a survey of such legislation, we may say that the following topics form the subject matter of law-making in this sphere.

1. First of all there is the question of the status and conduct of trade unions — a theme over which bitter conflicts have been waged for more than a century.[1] It was once a widely ac-

[1] Mary Beard, *A Short History of the American Labor Movement.*

cepted, though not universal, axiom of law that a mere union of laborers, formed for the purpose of raising or fixing wages and reducing hours of work, was *ipso facto* a conspiracy in restraint of trade and hence illegal. Under judicial decisions and modern legislation this axiom is no longer valid. A trade union formed for the above purpose is not in itself unlawful.

The chief instrument employed by a trade union for the realization of its demands is, however, in last resort the strike, and the legality of a strike depends upon the purposes and methods of those who conduct it and upon the laws of the state in which it occurs. If the end is to increase wages or prevent a reduction, then the strike is legal. A strike to assist another union, a sympathetic strike in other words, is in general unlawful. So is a strike to prevent the employment of non-union men, the transformation of an open into a closed shop. Nevertheless, as soon as we leave general principles, we are lost in a maze of conflicting laws and practices.

The methods employed by a union during a strike are subject to legal control. Violence, of course, is unlawful. Theoretically the practice of "picketing" is permissible; that is, strikers may parade in front of their former place of employment and use peaceful means in persuading others to leave work or refuse employment. In fact, however, the decisions of the courts usually run against strikers whenever specific acts are challenged by employers; so that no generalities on this point are safe. The same is true of "boycotts," that is, notices attacking an employer, declaring him to be "unfair" and urging the public not to patronize him. In some states "peaceful boycotts" have been legalized, but strikers are frequently penalized for such actions.

The injunction is the chief instrument relied upon by employers to check trade union action, and it is liberally used by state as well as federal courts to forbid "unlawful" conduct on the part of strikers. Trade unionists who refuse to obey are often fined and imprisoned for contempt of court.[1] As in the federal sphere, so in state jurisdictions innumerable attempts have been made to limit the power of the courts to issue injunctions, but most of the legislation has been ineffective and some of it has been declared unconstitutional by the courts. Injunctions are still issued with great frequency to forbid acts which seem lawful in them-

[1] Above, p. 399.

selves, such as holding meetings in trade union halls and distributing pamphlets calling upon working people to leave their employment. The extensive use of the injunction in labor disputes creates a great deal of bitterness in trade union circles and is responsible for widespread criticism of the judiciary. Employers' periodicals, however, usually praise the courts for their courage; the more drastic the injunction, the louder the praise.

2. The length of the working day is a subject of extensive legislation. Although, in general, adult males are supposed to be able to take care of themselves in the struggle for existence, they are not left to the tender mercies of competition in all cases. More than a third of the states have established eight hours as the normal day on public works undertaken by state and local governments. The hours of labor for all persons engaged in unusually arduous or dangerous employments are often established by state law; it is frequently the practice to fix the length of the working day in mines, smelters, and similar industries, and especially on railways where long hours induce negligence and endanger the safety of the traveling public. Oregon has taken the position that substantially all industrial employments are of a special character and that the state may with propriety regulate the hours of labor in them. Although legislation of this character in New York was declared void by the Supreme Court of the United States in the famous Lochner case of 1905, it was sustained twelve years later in the Oregon laundry case.[1]

Women and children form a separate division of the working class and are partly safeguarded by law. More than one half of the states, including Colorado, Connecticut, Massachusetts, Nebraska, New York, Pennsylvania, and Wisconsin, have limited the hours of labor for women in the important branches of industry. The precise number of hours varies from state to state, but at the present time the general tendency is to fix it at from forty-eight to fifty-four per week. Many states vary the length of the working day more or less in accordance with the nature of the industry. The Massachusetts law not only fixes a maximum number of hours per week for women in certain industries, but also forbids their employment at night in various establishments.[2] Nearly all states have such legislation.

[1] Lochner v. New York, 198 U. S., 45; Bunting v. Oregon, 243 U. S., 426.

[2] Legislation of this character is vigorously opposed by a group of women who insist that women should stand exactly on the same footing as men before the law.

With some exceptions the states prohibit the employment of children under a certain age in factories, and furthermore fix the hours of those children above the age limit actually employed. Night work for children is also forbidden in the most progressive commonwealths. Generally speaking, the child labor laws tend to fix the minimum age limit at about fourteen years and to require for each child a certain amount of education. It has been pointed out, however, by a careful observer that the arbitrary limit of fourteen or fifteen years is not a safe guarantee that the child is able to work in industries; it is suggested that a physical test, in addition to an age limit, would be better calculated to protect children.

3. The safety, health, and comfort of all persons — adults as well as children — employed in mines, factories, and other places of industry are protected by an ever-growing body of state laws. The principles applied in this sphere are fairly definite and are usually sustained by the courts under the police power. Factories and workshops must be ventilated; dangerous machinery must be safeguarded; penalties are placed upon employers using unsafe and improper scaffolds, ladders, and mechanical contrivances in building work; the cables and gears of elevators must be inspected and maintained at certain standards; fire escapes must be provided for factories more than three stories in height; suitable time must be allowed for meals in factories; boilers generating steam and heat for factory purposes must be kept in good order and periodically examined; public laundry work must not be done in living rooms, and all laundries must be kept in clean condition and free from vermin and impurities of a contagious nature; tenement houses cannot be used in the manufacture of a large number of articles, and tenement-house manufacturing generally is closely restricted; certain standards of cleanliness must be maintained in rooms used as bakeries; mines must be ventilated, timbered, and provided with suitable outlets; proper sanitary arrangements must be provided in factories and mercantile establishments.

4. The regulation of wages [1] is a field of private economy which the state does not ordinarily enter; it is left to agreements between employers and employees acting as individuals or organizations as the case may be. The state and local governments

[1] R. J. Swenson, *Public Regulation of the Rate of Wages.*

must of course fix the wages of their employees; sometimes they go further and provide that contractors engaged on public work must pay "the prevailing rate of wages" which means in practice the trade union rate in the locality.

A somewhat radical departure with respect to wages was made in Massachusetts in 1912 when that state enacted a law establishing a commission to supervise the wages of women in industry. In any trade in which the commission finds the wages too low to maintain the female employees properly, it may set up a wage board to ascertain the minimum wage which should be paid, and it may request the employer to pay the said wage. If the employer refuses, the commission may announce the fact to the public through the newspapers, but it cannot impose any penalties on him for his refusal. California, Colorado, Nebraska, Oregon, and Washington speedily followed the example of Massachusetts; within ten years attempts to establish minimum living wages for women and minors were found in at least thirteen states. Most of them have sought to make the wages fixed by public authority compulsory by imposing penalties on employers who cut below the standard. This legislation has been sustained in the Supreme Court of the United States by a very narrow margin, and in view of a decision in the District of Columbia case it has a precarious legal status.[1]

5. Compensation to those injured in industry or to their families in case of death has been for the last decade a theme of progressive legislation. Under the old common law, employers were liable for damages in cases of injury only when they were themselves personally responsible — that is, they were not liable when an accident was due to "unpreventable causes or to the carelessness of the employee himself or one of his fellow employees." In other words, the employee had to assume practically all the risks of the industry; the result was poverty for himself and his family in case of serious injury and poverty for his family in case of his death. Studies of accidents in American industries revealed appalling conditions — that more persons were killed and injured in American industries in proportion to the number employed than in any other country in the world. It was shown that more than half the accidents were not the result of carelessness on the part of the employees, but arose from the hazards of

[1] See above, p. 487.

industry. Moreover when employees had legitimate claims for damages, they could only realize them by lawsuits which were long and tedious and expensive. One third of the amount paid out by employers in the form of damages to injured employees went to lawyers.

The cruelty and injustice of the system early attracted the attention of labor leaders and reformers who maintained that the human risks of industry should be borne by industry and that employers should insure against accidents as well as against fire, charging the cost to working expenses. The battle over this matter was long and stubbornly fought, but about 1910 there set in a decided movement in the direction of shifting the burden of accidents from the unfortunate victims to the industry itself — in fact, to the consumers of the goods produced and society as a whole. This movement bore fruit in two classes of legislation.

In the first place, state after state swept away the unjust rule of the common law noted above and required employers to pay injured workmen compensation in certain amounts according to the nature of the case, whenever the accidents were due to the negligence of the employers, their agents, or employees, or to the necessary risk or danger inherent in the industry. In New York, where a law of this character was declared unconstitutional by the state court, a constitutional amendment was adopted in 1913 authorizing compensation laws with or without an insurance plan. By 1924 more than two thirds of the states had set aside or materially modified the doctrine of the common law in respect to damages for accidents in industry.

In the second place, there was devised a system of industrial insurance designed to make compensation for accidents automatic and simple. The ordinary damage suit brought by an employee against his employer, even in the best of circumstances, involved high costs and long delays. To obviate such evils progressive states enacted laws providing the terms and conditions on which compensation should be granted to injured persons and creating industrial commissions empowered to hear accident cases and to make awards. Thus the technicalities of the law are avoided and quicker action is assured. This system is accompanied by the requirement that all employers coming within the terms of the law must insure their employees against accidents either in a private company or through an insurance fund established by

the state. At the present time nearly all states have industrial insurance laws of some type, and the principle of social liability for accidents is firmly established.

Closely related to accidents are specific diseases more or less directly associated with industry. Indeed there are some industries which tend to cause diseases of certain kinds. It is asserted, therefore, and not without reason that society should carry the burden of disease as well as accidents. This principle is well established in European countries and the American Association for Labor Legislation advocates here a plan for general insurance against sickness and invalidity. The plan includes: (1) universal and compulsory insurance against sickness for all those below a certain level of income; (2) a system of voluntary insurance for all those above the level fixed by law; (3) cash benefits and medical service in case of sickness; (4) the framing of legislation designed to prevent sickness and improve conditions affecting the health of employees. Already many states have extended their industrial compensation laws to cover diseases arising from occupations so that this type of sickness is brought within the scope of insurance. The general and more sweeping program outlined above, however, is merely in the stage of discussion and argument.

In one respect, nevertheless, care for the disabled soldiers of industry has made rapid advances during the past decade. It is not enough to pay damages to those injured; wherever possible the victim should be restored to usefulness. In a large number of cases this can be done by a process known as vocational rehabilitation. If an expert watchmaker is suddenly blinded in an accident, of course he cannot make watches. His insurance fund will save him from poverty, but by re-training for another industry he can be made a useful wage-earner again. In the Industrial Rehabilitation Act of 1920, as we have seen, Congress made appropriations to aid states in providing training for civilians injured in industry, and a large number of states have already accepted the principle.

6. Unemployment is another specter that lurks in the modern industrial system. Business revolves in cycles — prosperity, depression, prosperity, depression, and so on through the decades. As a result thousands, sometimes millions, of people are out of work through no fault of their own; then, as night follows the

day, come poverty, discouragement, crime, and social unrest. There was a time when periodical unemployment and the resultant misery were viewed as plagues were viewed in the Middle Ages — as terrible visitations which the mind of man could not prevent. More recently the question has arisen as to whether we can eliminate the evils of unemployment as we reduce the evils of epidemics by precautionary measures. In 1921, during a period of industrial depression when it was estimated that 4,000,000 people were out of work, President Harding called a conference on unemployment to suggest ways and means of dealing with the problem. Among the recommendations advanced were the provision of better facilities for getting the facts of unemployment, a study of the possible control of capital in industries through the Federal Reserve system, the construction of national, state, and local buildings and public works during periods of unemployment, the reduction of public building enterprises in times of prosperity, the creation of reserve funds to insure against unemployment, and the establishment of public employment agencies.

After the President's conference reported its findings, the distinguished economist, Professor John R. Commons, laid before the country the somewhat startling proposition that responsibility for unemployment be placed, like accident insurance, "on the businessmen who alone are in a position to prevent it." He called attention to the fact that sound business concerns set aside a reserve fund out of which to pay dividends to stockholders in times of depression and he declared it of equal importance that employment funds be set aside to make secure the wages of those who labor. A measure embodying this idea was laid before the Wisconsin legislature but not enacted into law. As in the case of sickness insurance, we are in the stage of discussion and debate, but all agree with the late President Harding that the problem of periodical unemployment is one which ought to be faced and solved.

7. With a view to preventing strikes or at least mitigating the harshness of industrial disputes, a large number of states have made some provision for mediation and arbitration in labor controversies. Massachusetts led the way in 1886 by authorizing the state industrial commission to act in this relation; whenever a strike is about to occur, the commission may intervene by

attempting to get the parties to the dispute to reach a voluntary agreement or to submit the issues to arbitration. If the parties consent, the commission itself may act as the board of arbitration, hear both sides, and make an award. At all events the commission may lay the pertinent facts in any controversy before the people and thus bring the pressure of public opinion to bear on the contestants. More than half the states followed the example of Massachusetts in providing for voluntary mediation and arbitration, with good results on the whole.

Still strikes continued to be numerous and sometimes costly to the public because one or the other of the parties to disputes often refused to accept the good offices of the state authorities. Bent on finding a sure remedy, Kansas enacted in 1920 a law creating a state industrial court with power to summon both parties, hear labor disputes, and issue decrees absolutely binding upon the contestants. The measure precipitated a controversy which did not even come to an end when the Supreme Court of the United States declared the law unconstitutional as applied in two industries.[1] A less drastic method of dealing with labor disputes was attempted by Colorado in 1915 by an act forbidding strikes in certain industries until an official investigation can be made into the facts in the case. This law is modeled along the lines of experiments undertaken in Canada which are more efficient at least than the ordinary schemes for voluntary arbitration and conciliation.

8. More than three fourths of the states have created special state departments, bureaus, or boards charged with the supervision of labor interests. In many states the board is preferred because it must discharge semi-judicial and legislative functions, such as making awards in compensation cases and issuing ordinances expanding the principles of the state labor code. The duties of the labor department or commission also usually include the inspection of factories and mines, the enforcement of labor laws, the collection of industrial statistics, and the execution of provisions relative to arbitration and mediation in strikes. In those states which maintain free employment bureaus, the supervision of this function is also vested in the labor department.

[1] Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923), packing houses; Dorchy v. Kansas, decided March 10, 1924, coal mines.

Public Warfare on Disease and Poverty

In addition to the social functions just surveyed, all of which bear upon human welfare broadly conceived, the state assumes several specific functions pertaining to the control of disease, the care of the sick and unfortunate, and the prevention of pauperism.

First among them may be placed government action designed to eliminate conditions which breed disease. This is comparatively a recent development. It was not until about the middle of the nineteenth century that the health laws of our states went much beyond attempts to control, usually in a very ineffective manner, smallpox and other contagious diseases. The terrible cholera epidemic of 1848 and 1849 brought an awakening of public interest in the whole question of sanitation and its relation to general welfare. In the latter year Massachusetts appointed a commission to investigate the sanitary conditions of the entire state; the report of the commission formed the basis for public health legislation not only in that commonwealth but in all parts of the union. One after another the states created boards of health, and by the opening of the nineteenth century every state had followed the example of Massachusetts.

On the side of organization, a thorough-going health law will provide for a state health department and for local health authorities in counties, cities, and villages. The head of the state department usually makes inquiries into the causes of diseases; investigates the sources of mortality; studies the effect of localities, employments, and other conditions upon the health of the persons affected. He obtains and preserves information useful in the discharge of his duties; he may compel the attendance of witnesses and force them to testify in matters before him; he may nullify the regulations and ordinances of local boards of health in certain circumstances.

Local health authorities have large and arbitrary powers over life and property in the case of epidemics and a general control over all conditions inimical to health. They may make ordinances, conduct investigations, and order the removal of nuisances and dangers to health.

Generally speaking, the state health department also regulates and supervises the practice of medicine, surgery, dentistry, and

veterinary medicine. It registers and regulates pharmacies and drug stores, especially the sale of narcotics. It supervises undertaking, embalming, optometry, and chiropody. It provides for the inspection of institutions for orphans, destitute children, delinquents, and other wards of the state. It thus has supervision over the conditions bearing directly upon health and over those persons concerned with the care and cure of the sick.

The health code of a progressive state is a voluminous document of a hundred pages or more, which cannot be surveyed in the narrow compass of this chapter. Note should be taken, however, of the special efforts made to prevent the manufacture and sale of adulterated food and drugs. Food is usually regarded as adulterated if any substance has been mixed with it in such a fashion as to reduce, lower, or injuriously affect its quality or strength; or if an inferior or cheaper substance or substances have been substituted wholly or in part for the article; or if any valuable constituent of the article has been wholly or partly abstracted; or if the article is an imitation or sold under the name of some other substance; or if it contains wholly or in part diseased or decomposed animal or vegetable substances, whether manufactured or not, or, in the case of milk foods, is a product of diseased animals. Most health laws further provide for maintaining certain standards in drugs and for a certain degree of purity in "soft drinks" and confectionery.

Those who fall sick in spite of all precautions, if they are too poor to look after themselves, may find care in the hospitals and institutions maintained by the state directly or in conjunction with local governments. Our states spend more each year on hospitals, asylums, reformatories, and charities than on any other branch of work except public education, and the burden grows heavier every year. The number of persons to be cared for increases rapidly. The spirit of science and humanity advancing into this field makes ever greater demands upon the public treasury. The idea of rehabilitation and cure leads the state to gather into its institutions many people who in olden times would have been left at large, to sink down to the bottom of the social scale. It seeks to educate and care for them in accordance with the latest scientific view of their troubles and maladies.

As science moves forward by specialization, so our state insti-

tutions tend to divide and subdivide in order to concentrate upon many different classes of ills. An enlightened state will now maintain institutions for feeble-minded children and adults, idiots, epileptics, inebriates, crippled and deformed children, the deaf, dumb, and blind, persons afflicted with tuberculosis, decrepit and enfeebled persons, juvenile delinquents, unfortunate women, unprotected girls, orphans, and also soldiers and sailors and those dependent upon them. In addition to specialization in institutions, our progressive states are constantly working to improve the facilities and methods in each service. Associations of doctors, nurses, teachers, and persons particularly interested in the several specialties hold annual meetings, report their findings, and build up a body of scientific literature.

The management of these institutions involving such large outlays and the command of so much technical skill, constitutes one of the gravest problems in state administration. The historic organ of management has been a separate board for each institution endowed with power to appoint the employees, buy supplies, and control the policy. At the present time, however, there is a strong tendency to place all the institutions of a single class under one state authority and a few states have gone so far as to centralize all charitable and penal institutions under a single agency. The arguments advanced by the Illinois Efficiency and Economy Committee in favor of this system fall under three heads:

1. It makes possible uniformity in the organization and administration of the various institutions, — the standardization of services, salaries, accounts, methods, and reports.

2. It promotes economy by the elimination of duplicate officials and employees, by establishing a more vigorous supervision over expenditures, and by centralizing the purchase of supplies.

3. It promotes efficiency by the centralization of power and responsibility. A single central agency giving its whole time to its public duties can keep in close touch with conditions in the different institutions and bring all to common standards.

Whatever form of management is adopted, central or local, the administration of state institutions calls for constant watchfulness on the part of citizens and the legislature. The purchase of supplies and the erection of buildings offer opportunities for peculation which are tempting to politicians of the lower order.

Even the positions of control which call for technical skill of the highest kind are frequently made the subject of political spoils, and institutions degenerate under the direction of men who are often incompetent and sometimes brutal; then the inmates of institutions suffer from poor food, insufficient clothing, and cruel treatment. Scandal after scandal has marked the course of institutional management and nothing but unremitting vigilance can uphold high standards.

Institutions, especially for the normal poor, are at best unsatisfactory substitutes for homes, and there is a marked tendency to-day to give public aid, when necessary, in a form that helps to keep families together at home. More than three fourths of the states now have laws providing for mothers' pensions to be paid to widows and deserted wives who have small children and are without the means necessary for their support. Thus homes need not be broken up and children sent to public institutions. The cost to the public is perhaps not much greater than the old system of support in charitable institutions, and the advantages of a mother's care may be secured. It is customary to grade the amount of the pension on the basis of the number and age of the children.

Following close on the heels of mothers' pension legislation came the demand for a complete system of old age pensions, as a substitute for the poor house. A Pennsylvania commission appointed to inquire into the matter reported in 1920 that "forty-three per cent of the population fifty years of age or over in that state have no means of support except what they earn themselves." The secretary of the commission estimates that only thirty-eight per cent of the wage earners surveyed by the commission had property of any kind. Other figures compiled by expert investigators point to the astounding conclusion that approximately one third of the persons in the United States sixty-five years of age or older are dependent upon public or private charity.[1] Three states, Montana, Nevada, and Pennsylvania, have enacted laws providing for old age pensions, and the subject is now before the legislatures of many other states.

Those who are pressing this reform advocate a standard bill which makes available one dollar a day, including income from

[1] Abraham Epstein, *American Labor Legislation Review*, Vol. XII, p. 223. For current developments see the files of this excellent journal.

the pension and other sources, to every person seventy years of age or upwards who has qualified by a record of good citizenship and by a residence of not less than fifteen years in the state. Funds are to come from the state treasury but are to be administered locally. The battle over this reform is now raging and it remains to be seen whether the United States will follow the example of Germany and establish a universal system of sickness, invalidity, and old age insurance, which makes the state the general guardian of public and private welfare.

Education

Education in the United States is regarded as a purely state and local function. Even the project of establishing a national university, which has been before Congress since the early days of the republic, is probably no nearer realization than it was fifty years ago. It is true there is a bureau of education in the Department of the Interior, but the commissioner in charge of that bureau has no direct administrative control over the educational systems of the several states. His functions are limited principally to a study of educational problems, the publication of useful educational data, and coöperation with state authorities in certain cases. In this respect, therefore, the United States differs from most countries of Europe where the educational systems are largely dominated by the central governments. It is partly due to this autonomy that the educational methods of the several commonwealths, while founded upon certain American ideals, possess a high degree of adaptability to local needs. Although this autonomy has prevailed unimpaired from the beginning of our history, it should be noted that the Federal Government has rendered immense financial assistance to state education; recently it has coupled financial aid with a certain degree of control over the methods of state administration with respect to the work subsidized from the national treasury.[1]

The principle that "knowledge and learning generally diffused throughout the community are essential to the preservation of a free government and of the rights and liberties of the people," is embodied in many of our state constitutions; several of them provide in more or less detail for the establishment of state educational systems. The constitution of New York, for instance,

[1] See above, p. 443.

requires the legislature to provide "for the maintenance and support of a system of free common schools, wherein all children of this state may be educated" — a provision to be found in some form in the constitutions drafted since the middle of the nineteenth century. The fundamental law of Oklahoma orders the legislature to provide for the attendance at some public or other school, unless other means of education is afforded, of all the children in the state between eight and sixteen years of age, who are sound in mind and body; and fixes the minimum education for such children at three months in each year. Under the constitution of Nebraska, the legislature must arrange for free instruction, in the common schools, of all persons between the ages of five and twenty-one years. The constitutions of several Western states also provide for a state university, and in a number of cases, institutions of higher learning have been established by the legislatures under general constitutional provisions — such as that found in Indiana, making it the duty of the legislature "to encourage by all suitable means, moral, intellectual, scientific and agricultural improvement." A number of state constitutions, in addition to making education compulsory, set aside special funds for the purpose.

The supervision of the educational interests of each state is usually invested in a commissioner or superintendent of education, sometimes acting in conjunction with a board and sometimes alone. Generally speaking, the state superintendent or commissioner of education is rather narrowly controlled by state laws and has very little power over the subjects taught in the schools or the methods of teaching. It is usually his duty to visit the various parts of the state; to coöperate with county superintendents and other local educational authorities in developing uniformly higher standards; to collect statistics and other data; to devise plans for the improvement of the educational system; and to make reports to the governor and legislature upon which new legislation may be based. Frequently state normal schools and institutions for the training of teachers are placed under the supervision of the state superintendent, but the state universities stand on a more independent basis.

The powers of central boards of education vary greatly from state to state. In some instances they are simply charged with the guardianship of the school funds and school lands; in others,

their function is merely to advise the state superintendent or commissioner on educational policies; in others, they are given a large authority over the whole system of the state, including the power to make rules and regulations affecting the curriculum, books, methods of instruction, examinations, and appointment of teachers.

In the East, where there are a number of colleges and universities older than the Republic itself, the states make little or no provision for higher education except in normal schools and agricultural colleges. In some instances, however, private institutions, such as Cornell and Pennsylvania, are recognized by the state or aided, at least in the development of certain departments. In the East, therefore, college and university work is generally regarded as a peculiar field for private enterprise, and it is usually held that the people should not be taxed to furnish higher education to the relatively few who can take advantage of it. On the other hand, in the West the state university is looked upon as the crowning institution of a great democratic educational system, beginning in the kindergarten and running through the elementary and high schools to the university.

During recent years there has been a marked development, particularly in the state universities, away from the classical models of earlier days. The university is becoming less of a scholastic institution and more of a public service institution. This does not mean that the liberal arts are receiving less attention. On the contrary there probably never has been a more genuine interest in all things which enlarge the intellectual life than at the present time, and one of the newer phases of university administration is making the opportunities for general culture available to a wider circle of the population than ever before. For this purpose, extension departments are now being founded by the greater institutions, public and private. In Wisconsin, for example, centers are established throughout the state, and university lecturers are sent out to deliver regular courses on cultural subjects such as literature, art, history and social science. A correspondence school is also organized at the university so that the humblest citizen with a little leisure at his disposal may undertake systematic study under expert guidance.

In addition to encouraging the diffusion of knowledge on those subjects which are commonly regarded as scholastic in

character, the universities are widening the curriculum to include the practical arts and sciences: technology, engineering, agriculture, and domestic science. No subject calculated to throw light upon the problems of the world's work is being neglected. In university laboratories experiments are being conducted along many lines to improve the quality and enlarge the quantity of wealth produced.

Moreover, special arrangements are made for those busily engaged in a life work and unable to take regular courses of instruction in the university. Wisconsin, for example, has established "short courses" for farmers, which they can take during the weeks when their farm labors are the lightest. The extension department also makes provision for carrying to the agricultural and manufacturing districts, by means of lectures and correspondence, the practical bearing of higher researches upon the problems of farm and factory. Thus the college, originating as a center for the cultured few, may become the servant of the whole community in its effort to combine wisdom, efficiency, and labor. In all past ages culture has rested upon slavery and exploitation; American democracy is trying the great experiment of combining learning with what the Greeks regarded as the "vulgar" pursuit of earning a living.

The central government of the state also controls by special and general acts the incorporation of colleges, seminaries, and institutions of higher education. It is from the state that institutions of learning secure the power to grant degrees.

The actual direction of secondary education is, for the most part, regarded as a local matter and is vested in county, city, township, and other local authorities. Outside of New England we usually find a county superintendent or a county board of education, or both, having somewhat the same relation to the county schools which the state superintendent or board bears to the whole system of the commonwealth.[1]

Provision is generally made by law for the division of the county into school districts, but usually township lines are not crossed in the formation of these units. In fact, the township is often the lowest division of the state educational system; the administration of educational matters in the township or town is

[1] In New England the local school system is generally in the hands of school committees or supervisors elected in the several towns.

left to a trustee or to a special authority locally elected.[1] The administration of education in cities is vested in a board, sometimes appointed, but often elected by the voters.[2]

Few tendencies in educational administration are more widespread and of more practical importance than what is known as the consolidation of schools. A small district, with little taxable wealth, can support only a poorly equipped school house and one or two teachers who must take charge of pupils of all ages in all subjects. Modern transportation makes possible the union of districts, the erection of better buildings, and the employment of teachers for each of the chief branches of learning. By this process the standards of education in rural regions are being raised until the country is more nearly on the level of the city in educational opportunities.

Large experiments have also been made in extending the advantages of education beyond the schools and universities to the broad masses of the people by library extension work. More than two thirds of the states, including New York, Michigan, Wisconsin, Indiana, and Minnesota, maintain traveling libraries which are sent on request to local associations.

In the increasing expenditures of American states and cities there is no more important and weighty item than the appropriations for education. With the rising cost of living that accompanied the Great War, it became necessary to increase the salaries of teachers, but in few instances does it appear that the increase was commensurate with the rise in the cost of living. One effect of this condition of affairs was to drive thousands of teachers into business, industrial, and professional life. At the same time, the country had pressed upon its attention as never before the value of the schools in promoting national solidarity, raising the standards of citizenship, and particularly in assimilating the alien. "A period of thinking nationally has had its effect on education as on few other things. Illiteracy, ignorance of the English language, poorly prepared teachers, physical difficulties, and low salaries for educational work are all felt as national problems in a sense that was not the case before the war."

The cost of maintaining a system of education that will measure up to the high ideal of the nation is staggering; the states

[1] Townships are frequently divided into school districts with a special authority in each.
[2] Below, p. 755.

and cities, perplexed as to ways and means of meeting the situation, have turned to the Federal Government for aid. For a long time it had been the practice of progressive states to grant large sums from the central treasury in aid of local schools, thus bringing the poorest and most backward districts up to a higher standard. It was easy to carry the idea over into the national field. Congress, by the Morrill Act of 1862, had stimulated the states to advance education, by dedicating millions of acres of public lands to the support of colleges for instruction in agriculture and mechanical arts. The principle, as we have seen, has been extended in more recent times until the Federal Government now grants huge sums of money to aid the states in promoting education in agriculture, trades, domestic economy, and industry.[1]

[1] See above, p. 443.

CHAPTER XXXII

MUNICIPAL ORGANIZATION AND FINANCE

Modern civilization is industrial. The industries are in the cities. Considered in a narrow sense, the government of the city bears a vital relation to the economic life of the nation. The productive efficiency of labor has an inescapable connection with housing, transportation, education, recreation, markets, and other services of the city. The cost of production is raised or lowered for the manufacturer by fire hazards, freight terminal facilities, traffic regulation, and other factors closely associated with the functions of city administration. Considered in a broader sense the government of the city bears a vital relation to the rights and duties of citizens, to the development of self-government, to the satisfaction of growing social needs, to the very perdurance of civilization itself. If the cities fail, then industrial civilization fails.

All the great revolutions of modern times that have shaken civilization to its foundations have had their centers in great cities. Consider the rôle of London in the overthrow of the Stuarts, Paris and the Bourbons, Berlin and the Hohenzollerns, Petrograd and the Romanoffs. Ancient writers, such as Aristotle, believed that the populations of great cities had neither the morals nor the intelligence required for successful self-government. Many founders of the American republic believed with Jefferson that "the mobs of the great cities" were "sores on the body politic," the fomenters of revolution, the outstanding menace to civilization. On the other hand, most modern writers speak of the city as the hope of democracy, the place where intelligent and humane experiments are being made in progressive government, the center of rising standards of life and thought. At all events, the great city is a challenge to us.

Half a century ago Bryce declared "there is no denying that the government of cities is the one conspicuous failure of the United States." Though one need not accept that indictment without

reservations, one should remember the special difficulties associated with municipal administration in America. Our cities have sprung up swiftly with the amazing growth of population and industry. When Washington was inaugurated first President there were only three cities with more than ten thousand inhabitants — Boston, New York, and Philadelphia. Only one, New York, had more than thirty thousand inhabitants. The census of 1920 reported 253 cities of more than thirty thousand inhabitants. There were four cities with more than a million: New York, Chicago, Philadelphia, and Detroit. Eight other cities had above a half a million. More than one half the people of the United States now live in towns and cities having 2500 or more inhabitants. Chicago, an overgrown village of about 100,000 in 1860, has become a metropolis of nearly three millions. New York has far more inhabitants than the entire country had when Washington first took the oath of office in Wall Street.

The great masses that have crowded into these growing cities have been as a rule without experience and without traditions in urban government. They embrace shrewd and ambitious Americans who have flocked in from the farms in pursuit of careers and fortunes. They embrace millions from foreign countries, mainly peasants, or at best people who had little or no share in the government of cities in their native lands. It is not an uncommon thing to find that one fourth or one third of the inhabitants of a great city are of foreign birth. The percentage tends to decline with the decline in immigration, but the proportion is still striking and significant. To the alien groups of every race and language must be added the negro population which in some Southern cities is fifty per cent of the whole. Themselves the descendants of slaves, the negroes too are without historic experience in the arts of self-government.

Now during the very period in which these masses have been crowding to the cities, the suffrage has been made universal. Staggering burdens have been thrown upon municipal administration and everybody — Tom, Dick, Harry, and Will, and Bridget, Jane, and Susan, to modify a lament of James I — has been invited to help solve problems which cities had never faced before in the history of the world. Before condemning the government of American cities one should pause therefore to reflect upon the perplexing functions suddenly thrust upon peoples

untrained to deal with them — functions relative to health, housing, sanitation, water supply, sewerage, lighting, transportation, education, street paving, and finance. The right discharge of these grave responsibilities calls for economic skill as great as that employed in the most gigantic business concerns, the mastery of all arts and sciences and crafts — the whole range of modern technology — and statesmanship of the highest order.

Moreover the scene is constantly shifting. Who could have foreseen that the horse car would take the place of the old omnibus, that the cable car would supersede the horse car, that electricity would drive them both off the streets, and that the automobile and subway would almost paralyze the surface lines in the great cities? In meeting these wholly new technical problems, the past offered no guide, for the oldest cities of Europe began their experimentation with them about the same time as America. When the municipal crisis became acute some fifty years ago, there were no books on the subject of municipal organization and finance, municipal utilities, and the thousand other technical matters involved in city government. There were no courses of instruction on municipal government in colleges and high schools. There were none of the great technical and civic societies that now work with zeal and understanding at the problems of administration. There was no philosophy of municipal administration, no appreciation of the rôle which it was to play in the development of American civilization. So looking at the whole matter calmly and without chauvinism, one may with justification express surprise that waste, inefficiency, corruption, and above all ineptitude have not been greater. Bryce, in looking over the ground many years after his book was first published, was moved to say that his stringent criticism was no longer true.[1]

The City and the State

Before taking up the study of municipal government it is necessary to consider the position of the city as a unit in the state. In principle the city is completely subject to the control of the legislature except in so far as it is protected by constitutional limitations enacted in its behalf. In other words, there

[1] For a comprehensive treatment of the subject see Munro, *Municipal Government and Administration*, 2 vols. (1923).

are no such things as "inherent rights of local self-government." The charter of the city establishing its form of government and defining its powers, save in the circumstances discussed below, is merely an act of the legislature. The charter is only the beginning, for it is supplemented by innumerable acts, general and special, affecting the form and functions of municipal government. Anyone who will follow Professor Arthur W. Macmahon through his ingenious analysis of *The Statutory Sources of New York City Government* will discover how tangled is the maze of statutes in which a city must work; between 1901 and 1921 at least 550 amendments were made in the charter of New York City by the state legislature, and 1002 special acts relating to the city were passed in addition to the formal amendments. To these laws must be added general election, education, transit, civil service, and other measures affecting the powers and duties of the city government.

During the early years of the nineteenth century, the city everywhere was practically at the mercy of the state government. Legislatures corruptly granted franchises to utility corporations authorizing them to operate in cities contrary to the wishes of the inhabitants. They sometimes were brazen enough to take utilities away from cities and sell them to private companies. They imposed financial burdens on cities to give employment and profit to politicians. In 1870, for example, the legislature of Pennsylvania created a commission for Philadelphia, authorized it to erect a city hall and other buildings, to tax the people to pay for the work, and to spend the money without consulting the government of the city. Where they were not corrupt, the legislatures insisted on constant interference with the government of cities; at every session they poured out a stream of local, special, and general bills limiting the powers of city authorities, imposing new duties on them, and laying new burdens on municipal finances.

Long before the end of the nineteenth century the abuses committed by state politicians in interfering with the affairs of cities became so flagrant that there arose a movement among citizens to restrain legislatures on the one hand and enlarge the powers of cities on the other. Their proposals in this connection ranged from minor limitations on the legislative sphere to somewhat radical schemes for "home rule" — namely, the largest

possible freedom for the city in choosing its form of government and in exercising rights of local self-government. This movement gained rapid headway at the opening of this century and is still a considerable force in municipal politics.

It is urged by the champions of municipal home rule that the state legislature is unfitted to exercise control over matters which affect only the dwellers in large cities. It is composed mainly of countrymen or residents of small towns who are not familiar with the requirements of urban life. It is always busy with other affairs and in making decisions affecting city problems is likely to take the word of local bosses. Owing to the constitutional discriminations against cities in favor of rural regions, the legislature does not accurately reflect the opinion of urban populations; in fact rural minorities are constantly imposing on cities laws which are unsuited to urban life. In the next place, it is contended by the advocates of home rule that there are a number of purely municipal problems which cannot have any considerable interest for the people of the state at large. They say, for example, that the paving and lighting of the streets, the provision of means of transportation, the establishment of water works, the maintenance of markets, and many other matters should be left entirely to the determination of the municipal voters.

To these contentions the reply is made that there are few, if any, purely municipal functions which do not have an interest for the state as a whole. If a city wishes to establish water works, it must go sometimes, as New York City has gone, a hundred miles or more into the country, and must, therefore, secure watersheds by a state concession. With the growth of the means of rapid communication, our city populations have spread far beyond the boundaries of municipalities, and systems of municipal transportation accordingly cover far more than the areas under city government. A notable example of this is New York City, which is really the urban center for a vast region extending fifty miles or more in every direction. Owing to the large number of voters in the municipalities, the integrity of every state election may depend upon the effectiveness with which the municipal police uphold the election laws and secure an honest count. Finally, the tenements, industries, health, and progress of each city are inextricably woven with larger state and even national problems of the land, taxation, natural resources, labor

legislation, and social control. Speaking generally, therefore, the state as a whole, even the nation, has a fundamental interest in the health and well-being of the city dwellers, and accordingly there is hardly a question of municipal government that is not vitally connected with the larger aspects of government.

Indeed, Professor Goodnow has shown, by a survey of the historical development of cities, that the whole tendency of modern times is away from that autonomy enjoyed by cities in the Middle Ages. He points out that matters which were once of purely local interest have now become general; that in modern life commerce and industry have become state concerns; and that it is impossible to determine arbitrarily the point at which state interest ends and municipal interest begins. He cites the example of Massachusetts, where the competition of many cities for sources of water supply became so keen that the state had to interfere and assume general control. He also shows that what may be a municipal function in one city may not be in another, citing, as an example of this, Chicago and New York: in the disposal of sewage Chicago uses one of the rivers which flows through the state, and thus the sewage question becomes a matter of state concern; while New York is differently situated in this regard, owing to the fact that it can discharge its sewage into the ocean.

It is therefore clear that the limits of municipal government cannot be fixed for any state or city by a general rule of law; but it is also evident that, owing to the abuses which cities have suffered at the hands of state politicians, some restraints must be placed on the power of the legislature to control municipal affairs. Broadly speaking, four kinds of checks have been devised to effect this reform.

1. In the first place an attempt has been made to cut off legislative interference by forbidding special legislation of every character and allowing the legislature to pass only general laws applicable to cities. For example, the constitutional convention of Pennsylvania, in 1873, sought to solve the problem by adopting the rule that the state legislature should not pass any local or special laws regulating the affairs of counties, cities, townships, wards, boroughs, or school districts; but this restriction was found to be entirely too narrow. When the general assembly sought to legislate for Philadelphia alone by passing a law which

was to apply to all cities having a population of at least 300,000, a high court pronounced it constitutional. The court held that it could not have been the intention of the framers of the constitution to bolt and rivet down, by fundamental law, the machinery of state government in such a way that it could not perform its necessary functions. "If the classification of cities," said the court, "is in violation of the constitution, it follows of necessity that Philadelphia, as a city of the first class, must be denied the legislation necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs. For if the constitution means what the complainants aver that it does, Philadelphia can have no legislation that is not common to all other cities of the state. . . . We have but to glance at this legislation [relating to quarantine, pilotage, trade, inspection, etc.] to see that most of it is wholly unsuited to small inland cities and that to inflict it upon them would be little short of a calamity. Must the city of Scranton, over a hundred miles from tide-water, with a stream hardly large enough to float a bateau, be subjected to quarantine regulations and have its lazaretto? Must the legislation for a great commercial and manufacturing city with a population of more than a million be regulated by the wants or necessities of an inland city of 10,000 inhabitants?" [1]

2. A second type of check on state interference with cities is a development of the first; special legislation is forbidden, except when approved by the city concerned.[2] An example of this class is afforded by the Illinois amendment of 1904. The Illinois constitution already had the usual provision against incorporating cities, towns, or villages, and amending their charters by local or special law. This was found to be too rigid; for the purpose of permitting a special treatment of Chicago, it was provided by the amendment above mentioned that the legislature could establish a separate system of municipal government for that city. However, a check was placed on legislative action by a stipulation that all such special legislation, before going into effect, must be approved by a majority of all the legal voters of

[1] See *Readings*, p. 512, on this important topic.

[2] The constitution of the state of New York formerly contained a check on the legislature providing for the classification of cities on the basis of population and the submission of special legislation, applying to less than all the cities of a class, to local authorities for approval. This system was abrogated in 1923 by the adoption of a home rule amendment.

Chicago voting thereon at an election. In practice this amendment has worked well in a negative sense; a charter drafted shortly after its adoption was defeated by the voters. They can at least reject undesirable legislation even though they cannot get what they want. Negation, however, is not a remedy; in the constitution drafted in 1922 and submitted to the voters, there was a section on home rule. As it was overwhelmingly defeated in the referendum to the voters, the old system remains in force.

3. Another variation on the principle of vesting a certain control in the locality is the "optional charter" device which gives the city a choice among two or more schemes of city government, such as the commission form, the city manager type, and the mayor and council plan. New York adopted this idea for certain classes of cities in 1914 and the example has been followed in different parts of the country. While it does not satisfy the most ardent advocates of municipal home rule, it at least gives the cities affected a wide range of choice in deciding upon their form of government. Like all other schemes, however, it leaves the boundary between state and municipal powers shadowy and changing.

4. The fourth, and judging by current tendencies, the most popular method of controlling state legislatures is that known as "home rule." This device was first adopted in 1875. The Missouri constitution of that year gave each city having a population of more than 100,000 inhabitants the right to frame a charter for its own government consistent with and subject to the constitution and laws of the state. It stipulates that such a charter shall be drafted by a board of freeholders elected by the qualified voters of the city, shall be laid before the voters for their judgment, and shall go into effect on receiving at least four sevenths of the votes cast in the election at which it is submitted. This plan with modifications and elaborations has been adopted by California, Oregon, Washington, Minnesota, Colorado, Oklahoma, Michigan, Arizona, Ohio, Texas, Nebraska, Florida, Maryland, and New York—the last coming under "the new roof" in 1923.

At first glance the matter looks simple, but in fact it is very complex. The people of a city may draft their own charter. Yes. But what may they include in the charter? What powers may they confer on the municipal authorities which they create?

It really does not mean anything very definite to say that cities may frame charters for their "own government," and exercise "all powers of local self-government." It is unwise to deprive the legislature of its authority over matters of common interest to the people of the state and it is impossible by a legal phrase to draw a line between the functions proper and exclusive for cities and those belonging to the state at large. Ingenious attempts have been made to do it, but they always end in litigation in the courts. A searching examination of the whole subject by Professor Howard L. McBain shows that home rule, in effect, takes the ultimate fate of the city out of the hands of the legislature and places it in the hands of the courts, which must define by endless decisions the respective rights of the cities and the legislature.[1] Whether the city fares well or ill depends on the opinions, prejudices, and reasoning of the courts.

Indeed, it is hardly worth while to discuss state control over cities in the abstract. We may say that in general the form of government which a city has may very well be left to the determination of the voters within the city. They are not likely to make any more mistakes than the members of a state legislature in this respect. It may be wise to confer certain specific powers, such as the right to own and operate municipal utilities, upon cities, but there are many fields of legislation in which the state as a whole has a valid interest. Great improvements have been made in urban life by the establishment of state-wide standards in health, education, civil service administration, financial management, utility regulation, and other matters of deep significance. State administrative authorities in these fields have exercised a salutary influence on the conduct of municipal affairs. Moreover there are many cases in which coöperation is required among cities, especially in securing water supplies and hydro-electric power. The problems of all cities are so much alike that the pooling of experience and the establishment of general standards are highly desirable. Massachusetts, for example, lends valuable aid to her cities by state supervision of water supplies for the metropolitan district in and around Boston and by state supervision over cities in floating loans and making city plans. So the boundaries of neither administration nor legislation can be set or ought to be set in any rigid form.

[1] *The Law and the Practice of Municipal Home Rule.*

Very often the relation of a city to the county and to outlying urban areas is just as important as its relation to the legislature of the state. In this connection are presented some of the most perplexing problems of municipal science. When a city occupies a large part of a county there is usually a conflict between the city and county authorities, if not a duplication of work; this can only be avoided by a consolidation of the two governments as in the case of Denver and San Francisco, or a complete separation of the city from the county. If a city contains within its limits one or more counties there is likewise a waste of effort and money in administration, but the county politicians are generally able to prevent an application of the remedy, namely, the abolition of county government.

Even more frequently the city has scattered about in the neighborhood a number of satellite communities, each jealous of its independence. Sometimes it is possible to effect a union of these districts such, for example, as was brought about by the creation of Greater New York in 1898, but the political difficulties inherent in the operation are almost insuperable. In spite of persistent efforts for many years, Boston has been unable to consolidate the entire metropolitan area under one government. Equally perplexing is the problem presented by the haphazard growth of suburban districts beyond the boundaries of the city, subject to no control in the interest of the whole community. Here is a situation which calls for a super-municipality or for regional planning on a large scale.[1] To make matters more troublesome, the automobile has broken down the boundaries between city and country; the daily flow of population in and out along radii extending fifty miles or more creates entirely new social relations — often involving two or more states as in the case of New York.

The City Council

Turning now from the position of the city in the state to the organization of municipal government, we are confronted by a bewildering variety of institutions that seem to defy all attempts at classification and orderly treatment; but certain general features can be drawn out by the comparative process.

[1] Maxey, "The Political Integration of Metropolitan Communities," *National Municipal Review*, Supplement for August, 1922.

Every city has a legislative body of some kind endowed with some powers of local government. In the beginning of our history, the city council, according to the old English plan, was a unicameral body with two classes of members, common councilors and aldermen; but after the Revolution many states began to remodel their city governments, trying a number of experiments. Broadly speaking, however, there were two outstanding characteristics in the new schemes. The councils were as a rule composed of two chambers and the members of one or both houses were elected from districts by popular vote. The reason assigned was that which "dictated a similar division of power into two branches, each checking and controlling the other, in our general government."

The bicameral system did not work happily in practice. There was a division of powers, and it contributed to confusion, controversy, and irresponsibility in government. So the system came under the fire of the reformers. By 1910 one half of the ten largest cities had single chamber councils — New York, Boston, Chicago, Cleveland, and San Francisco; and one half still clung to the bicameral plan — Philadelphia, St. Louis, Baltimore, Pittsburg, and Buffalo. Within a little more than ten years, however, all of the latter had abandoned the old system in favor of one chamber, Philadelphia surrendering in 1920 and Baltimore in 1923. So to-day practically all great cities have the unicameral system; still the double chamber plan remains in a few important places, such as Atlanta, Kansas City, and Louisville, and in the smaller New England cities.

The fire of criticism which resulted in the adoption of the unicameral system was accompanied by an attack equally vigorous on the practice of electing councilors by districts. In many instances the councilors were men of small caliber and low ideals, ignorant on matters of public policy, and bent on getting measures benefiting their districts and on finding jobs in the administration for their constituents. After an official investigation a committee in Boston reported in 1909 that membership in the legislative body of the city was a discredit rather than an honor, and that it was difficult to induce representative men to become candidates for either branch. The reform proposed and adopted in Boston was a reduction of the number of councilors to nine and their election at large instead of by dis-

tricts. The same principle has been adopted in San Francisco, where twelve councilors are chosen at large. The four greatest cities, however, namely, New York, Chicago, Philadelphia, and Detroit, retain the plan of district election.

More than four hundred cities and towns, including some important centers, such as Dayton and Buffalo, have outdone Boston and San Francisco by sweeping away the council entirely and substituting for it a commission of five members elected at large.[1] In most of these cities the commission combines legislative and administrative powers, the commissioners being heads of departments as well as law-makers. In nearly half of them — a number that is rapidly increasing — the commission elects the chief administrator, the city manager, and exercises merely the functions of the city council.

Still criticism of the city council is not silenced. It is urged against both the district system and election at large that they do not provide for the representation of minorities. If a victorious party in a municipal election carries its districts by small margins and the defeated party carries its districts by large margins, the victor may in fact represent only a minority of the voters of the entire city. At all events under the district system there is always a considerable minority not represented at all. This is equally true of elections at large. If a group carries the city by even the smallest possible margin it nevertheless secures all the seats in the council or commission as the case may be.

The remedy offered for this is proportional representation, or at all events some kind of preferential voting which assures representation to minority groups.[2] Cleveland was the first great city to make an experiment in this field, but Ashtabula, Boulder (Colorado), Kalamazoo, and Sacramento[3] had already led the way. The Cleveland scheme, adopted in 1921, provides for a council of twenty-five members elected in four great districts, two having seven members and two having six and five respectively. "The four districts," says Professor Maxey, "represent a studied attempt to distribute representation on the basis of social and economic rather than geographical and numerical considerations. The districts are not equal in size or popu-

[1] See below, p. 718. [2] Above, p. 27.

[3] See "The Constitutionality of Proportional Representation," by William Anderson, *National Municipal Review*, Supplement to December, 1923, issue. In the case of Kalamazoo and Sacramento proportional representation was declared invalid by the courts.

lation (hence the inequality of representation in the council), but each is in a broad way a homogeneous social and economic entity."[1]

Under the system of proportional representation generally used in America the members of the city council or commission are elected at large on a single ticket or in groups from large districts. The candidates are nominated by petition. The voter, on election day, indicates by arabic numbers, "1," "2," "3," etc., his first, second, third choices, and so forth. A "quota" is then ascertained by dividing the total number of valid ballots cast by the number of members to be elected, plus one. This quota is the number of votes which any candidate must receive to be elected. As many candidates as have a quota of first-choice ballots are at once declared elected. The surplus votes not needed by the candidates elected, and afterwards the votes of the candidates at the bottom of the polls, are distributed to the other candidates according to the choices indicated on the ballots until at length the total number of vacancies (commissioners or councilors to be elected) are filled by candidates having the required quotas. The scheme, though apparently complicated, is easy to operate when understood. In practice, it seems to give all the important groups of the city representation according to their respective numbers.[2]

Another device designed to obviate some of the evils of mere plurality elections and insure fairer representation is the plan of "preferential voting" introduced in Grand Junction, Colorado, in 1909, and afterward adopted in one form or another in Spokane, Duluth, and a score or more of towns and cities. Under the Grand Junction scheme, the names of the candidates are arranged in one column on the ballot and after the names are three blank columns, headed "first choice," "second choice," and "other choices." The voter may thus indicate his first and second choices for the office in question, and if he has sufficient regard for any other candidates he may indicate any or all of them as acceptable by marking their names among the "other choices." If any candidate receives a majority of first choices, he is declared elected; if not, then the first and second choices of the candidates are added, the candidate with the highest

[1] *National Municipal Review*, Vol. XII, p. 31.

[2] Raymond Moley, "Proportional Representation in Cleveland," *Political Science Quarterly*, December, 1923.

number of votes winning if he has a majority. If this second step does not produce a majority, then all the choices of each candidate are added together and the man standing highest wins whether he has a majority or not.

The Powers of the City Council

Unlike the state legislature the city council has no "inherent powers." As Professor McBain points out, the position of the council in this respect, strange as it may seem, is akin to that of Congress; it can only exercise those powers which are specifically granted to it by the constitution and laws of the state; but at the same time it enjoys the implied powers necessary and proper to carry into effect those which are enumerated. Indeed some state laws, following the language of the federal Constitution, authorize the council to pass all ordinances which are essential to carrying into execution the powers expressly granted. Moreover, in practice there may be a loose or strict construction of the law as in the case of the federal Constitution. Some judicial decisions, especially those of many years ago, have been liberal in spirit, but the trend seems to be toward a narrow interpretation of the powers enjoyed by city councils.[1]

First among the general powers of the city council may be placed its "police power." The city charter usually provides that the council may exercise the "powers necessary to preserve the peace and good order of the community and promote the public welfare." The council ordinarily may make, amend, or repeal ordinances relating to health, parks, fires, and buildings, except in so far as such power is conferred on the heads of departments or on other boards, and not controlled by state or federal law. The council may make ordinances relative to beggars, vagrants, intoxication, fighting and disorder in the streets, public amusements, markets, gambling, bathing places, suppression of vice and immorality, the preservation of peace and good order, the use of firearms and firecrackers in the streets, parades, steam vessels, advertisements, circuses, and obnoxious industries.

In the matter of finance — appropriations, taxation, and debts — the city council works under definite limitations. Nowhere

[1] McBain, *American City Progress and the Law*, chap. ii. This admirable volume should be read by every student interested in the problems of modern city government.

can it make appropriations, lay taxes, and incur debts at will. In some instances the amount of money which it can appropriate is fixed at a certain percentage of the assessed valuation of the property within the city limits. Even methods of making appropriations — the time, form, and manner — may be prescribed in great detail by state legislation relative to the budget. Moreover, mandatory state legislation compels the city to provide funds for interest on the debt, the support of schools, and many other objects, leaving the city no discretion at all in the premises.

In a few cities, New York and Boston, for example, the initiation of appropriations is taken out of the hands of the city council. In New York it is vested in the board of estimate and apportionment composed of the mayor, comptroller, president of the board of aldermen, elected at large, and five borough presidents, each chosen from one of the five boroughs into which the city is divided. In Boston the mayor initiates the budget. In neither city can the council increase or add to the proposed items; it may reduce or eliminate them. As to taxation, the council may lay only those kinds of taxes authorized by state law. As to debts, it can incur such obligations only for specific purposes and to an amount fixed by state law — usually a certain percentage of the total value of the real estate assessed for taxation within the city.

The power to charter public utility companies and to authorize them to use the streets was once generally enjoyed by the city council and still is exercised by it in many cities, especially of the second rank. In some cases charters, however, must be referred to popular vote or at all events the citizens may compel such reference by filing a petition in due course. In New York City the function has been taken from the board of aldermen which in the old days was guilty of so many notorious abuses that it was nicknamed "the board of forty thieves"; the right to grant franchises is now given to the board of estimate and apportionment in coöperation with the state public service commission. Everywhere cities are more or less limited by the state law with respect to utilities, which deals with the term of years for franchises, rates of charges, character of services, and other vital matters; the utilities which cities charter are subject to regulation just like other concerns of that class.[1]

[1] Above, p. 677.

It might be supposed that, since the council cannot appoint and remove high administrative officers (except in commission and city manager cities), its authority over the administration would be slight. According to the letter of the law it is usually slight, but in practice it is not to be ignored. Even where it cannot initiate the budget, it wields great influence over administrative officers through its power over appropriations. At least it can cut salaries and allowances; by threatening officers with reductions, councilors can force the appointment of their friends and political adherents to office in the city government. This is not an academic matter; the practice is very common. The city council may, as a rule, appoint committees to examine the books and papers of departments and conduct investigations of a most searching character. Hence it happens that a belligerent council may exercise at least an obstructive and irritating influence on the course of municipal administration.

The Chief Executive in Mayor and Council Cities

The office of mayor, like that of governor, has undergone many changes since the early days. Once a figurehead chosen by the council, the mayor has risen in large cities to a position of political leadership and great administrative power. Of eighty-three cities having more than one hundred thousand inhabitants, at least fifty, including New York, Chicago, Philadelphia, Detroit, Boston, St. Louis, and San Francisco, yet retain the mayor and council plan of government and assign to the chief executive a rôle of high importance. Even those cities and towns which swept away the old system of municipal government with an impatient gesture and adopted government by a commission without a mayor are rapidly restoring the single executive under the guise of the city manager.

When we speak of the mayor, however, we refer to those cities which have not changed to the commission or manager form — in all about two thirds of the 1467 cities having more than 5000 inhabitants. There the mayor is elected by popular vote. His term of service varies from one to four years — annual election being most common in the smaller towns of New England. In Boston, Chicago, and New York it is four years; in Baltimore, Kansas City, and Milwaukee it is two years. The salary of the

mayor ranges from a few hundred dollars a year in small places to $25,000 a year in New York — an amount two and a half times the salary of the governor and equaled only by the salary of the city manager in Cleveland.

The powers of the mayor extend to legislative, administrative, and financial matters. He may recommend measures to the city council; he enjoys the veto power, including, as a rule, the right to strike out single items in appropriation bills. Following the example of the state constitutions, our city charters generally provide that a vetoed ordinance can become law only when repassed by the council by an extraordinary majority, sometimes two thirds and in some instances even more; but in a few smaller cities the mayor's veto may be overridden by repassage with the ordinary majority.

The financial powers of the mayor vary from city to city. The mayor not only enjoys, as we have seen, the power of vetoing financial measures, but he also has, in a number of instances, a very large control over the making of the city budget. In Boston the preparation of the budget is vested in the mayor.[1] In New York City, the mayor enjoys a very peculiar position with regard to finances. He is a member of the board of estimate and apportionment which initiates the budget[2] and as such possesses three votes out of a total number of sixteen. He also has the right to veto financial measures passed by the board of aldermen, and it takes a three fourths vote to override an exercise of this power. In Baltimore, the mayor is likewise a member of the board of estimate and he is a member of the commission of finance in charge of the sinking funds.

As to the appointment of municipal officers and the direction of municipal administration, the power of the mayor is increasing. At the beginning of our history, municipal officers were generally appointed by the city council; with the democratic revolution during the first half of the nineteenth century, many of the important offices, boards, and commissions were made elective. It was found, however, by practical experience, that popular election did not actually secure responsibility to the voters; for, owing to the number of offices and the complexity of the election operations, the selection of candidates actually fell into the hands of expert politicians, who made the "slates" and thus

[1] See *Readings*, p. 524.

[2] See above, p. 714.

secured possession of the municipal government. In order to check the corruption which resulted from this system, the device of "bi-partisan" boards and commissions was sometimes adopted with the hope that the representatives of one party would hold in leash the representatives of the other party; but, in practice, it turned out that the representatives of both often made terms with each other and divided the spoils of office.

Finding that the elective system did not really secure popular election and that the bi-partisan device did not check the spoilsmen, municipal reformers determined to try the experiment of concentrating the appointing power in the hands of the mayor — thus making him responsible for the conduct of the whole administration. This development has reached a high degree in the city of New York, where the mayor appoints the heads of all important branches of the municipal administration, and enjoys the unrestricted power of removing municipal officers, except members of the board of education, judges, and a few others.

Nevertheless it is dangerous to generalize about the appointing power in American cities, so varied are the practices. Take, for example, thirty-seven great cities having separate health executives: in fifteen of them the mayor alone appoints; in four of them he nominates and the city council or commission confirms; in four the health officer is chosen by the director of welfare; in five by the director of public safety; in one by the board of public safety; in three by the city commission; in two by the city manager; and in three he is selected under civil service rules. What accurate broad principle could be derived from these various cases?

The general tendency towards a concentration of administrative power in the hands of the mayor in the larger municipalities was manifested in the revolution that took place in the government of Boston in 1909. The bicameral city council was abolished and a single-chamber body, composed of nine men, elected on a general ticket by popular vote, was substituted. Partisan nominations for city offices were abolished and nomination by petition was adopted. The mayor, popularly elected, was authorized to originate all the appropriations except those for school purposes, and the city council merely granted the power to reduce and cut. The mayor was also given the absolute veto over any ordinance or resolution carrying an appropriation with

it. To secure adequate scrutiny and publicity for taxation, appropriations, and expenditures, a permanent finance commission, appointed by the governor, was created and invested with the power of examining into all matters relative to the financial affairs of the city. To improve the personnel of the city administration and to restrain the control of the politicians in the council over appointments, the mayor was empowered to fill all important administrative offices, but a provision was adopted requiring him to submit the names of his appointees to the state civil service commission for investigation and approval.

Commission Government

From the exceptions noted above, it is apparent that a considerable proportion of the smaller cities and some of the larger ones do not conform in major respects to the mayor and council type just described. In fact, a revolution in that type was inaugurated with the reconstruction of the government of Galveston, in Texas, after the great storm of 1900, which destroyed a whole section of that city. For a time, the municipal government was paralyzed, because the trying problems connected with the reparation of the ruin were too much for the old political machine which had control. After a spirited contest, the government of Galveston was vested in a mayor and four commissioners elected at large by the voters of the city and invested with all the rights, powers, and duties of the mayor and board of aldermen. The administration of the city is divided into four departments: police and fire, streets and public property, water works and sewage, and finance and revenue; and the mayor and the four commissioners are required by the charter to designate from their own number a commissioner for each of the four great departments. The mayor president is merely one of the commissioners; no city department is assigned to him; he exercises a "general coördinating influence over all." The board meets at stated times for the transaction of public business very much as the board of directors of a corporation meet to discharge their functions.

The commission form, with modifications, spread rapidly throughout the country; within fifteen years approximately four hundred cities had adopted it, including some large municipalities such as Buffalo, Newark, New Orleans, Portland, and

St. Paul. Then the tide began to turn. A few cities, such as Denver, Nashville, and Lowell, tried the plan only to return to the mayor and council form of government. A still larger number gave it up in favor of the city manager scheme. At the present time about one fifth of the 1467 cities with more than 5000 inhabitants have the commission system. A number of states, by general legislation, have authorized their cities to adopt the plan or to abandon it by the use of the referendum.

The system varies somewhat from city to city, but the fundamental principle is the same everywhere — the concentration of executive and legislative power in the hands of a small body, usually five men, elected at large by the voters of the city. Many of the cities[1] have added a system of initiative and referendum and also a device whereby a certain percentage of the voters may "recall" any one of the commission — that is, force a new election for the office. There is also a general tendency to abolish party methods of making nominations and to substitute a non-partisan primary which excludes party emblems from the ballot and permits anyone to run who secures a certain number of voters to sign his petition.

Commission government, as Professor Goodnow points out,[2] is a return to the original type of city government in the United States in so far as it concentrates all powers, administrative and legislative, in one authority. It differs, however, from the original council system in that its members do not represent single districts, but are elected at large by the voters of the entire city — a practice which excludes minority representation, except when some form of proportional representation is used, and is so far highly undesirable. From the standpoint of pure business administration, the commission form of government has many features to commend it. It centralizes power and responsibility in a small group of officers constantly before the public and subjected to the scrutiny of public criticism; it coördinates the taxing and spending powers, thus overcoming the maladjustment so common to American public finance; and it throws down that multiplicity of barriers behind which some of the worst interests in American municipal politics have screened their anti-social operations.

[1] For the initiative, referendum, and recall, as applied in Des Moines, see *Readings*, p. 529.
[2] *Municipal Government*, p. 176.

Two decades of experience with the commission plan have, however, revealed certain intrinsic weaknesses in it. In the first place, there is still a diffusion of power in making appropriations and enacting ordinances. Each commissioner is head of an important department, is jealous of his prerogatives, and naturally seeks to secure enough money from the city treasury to conduct it according to his concept of its importance. He also resents any inquiry on the part of his colleagues into the management of his affairs or into his proposed program of expenditures. Thus no one person can be made responsible for the entire administration of the city with power to check and control all branches in the interest of policy, economy, or efficiency. In practice the commissioners, or three of them at least, often engage in log-rolling; that is, they agree to support one another's plans and by majority vote carry them all through the commission, acting as the council. Thus the ordinances enacted by the city and the program of expenditures often consist of a mosaic of five different pieces.

In administration also there are difficulties. The commissioners, as a rule, are not chosen for any specific office, but are assigned their departments by the commission as a whole. Here politics enters. The commissioners are usually business men, professional men, or labor representatives without actual experience in municipal administration. In the course of things, it may happen that an undertaker is assigned to the post of commissioner of public works and a retired real estate dealer is made head of the fire and police department. Moreover, the appointments made by each commissioner in his sphere are subject, in most cases, to the approval of his colleagues. In other words, the commission plan does not assure expertness in administration any more than does the mayor and council plan.

Another but less important criticism of the commission scheme is based on the contention that, in the light of our municipal experience, it concentrates too great a power in the hands of a small body and makes it easier for those who wish to "buy" a city government to carry out their design. Iowa, however, has sought to meet this objection by establishing the system of recall noted above.[1] Under this system twenty-five per cent of the voters, who disapprove of the policy of any commissioner

[1] See *Readings*, p. 531.

or believe that he is not discharging his functions honestly and efficiently, may petition for his removal and compel a new election. The whole question is then submitted to the electorate at large; if the commissioner is upheld, assuming that he stands for reëlection, he retains his office, but if defeated he is supplanted by the popular choice. Furthermore, all important franchises must be submitted to popular vote before going into effect; municipal ordinances may be initiated by the voters, and ordinances passed by the commission must be referred to the electorate on a petition properly signed and filed.

The danger of concentrating political power in the hands of such a small body is further offset in the Iowa law by the abolition of the party convention as a means of nominating candidates for the offices of mayor and councilmen and the substitution of nomination by direct primary. No party ballot is used at this primary; names are brought forward by petition; the two aspirants receiving the highest vote for mayor and the eight aspirants receiving the highest number of votes for councilmen are put upon the regular ballot as candidates for the offices of mayor and councilmen. This ticket is then submitted to the voters at the regular election. While this system does not prevent members of parties from concentrating their efforts upon their own favorites, it does make it more difficult for the politicians to force their ready-made "slates" upon the voters; furthermore, at the regular election it focuses the attention of the public upon only two candidates for each of the five offices.[1]

The City Manager Plan

Although usually associated in the public mind with the idea of commission government, the city manager idea rests at bottom on a different conception of municipal administration. It is true that most of the cities having the manager plan use the small commission as a part of the scheme; in many cases the manager device has been grafted on a preëxisting commission system. In fact, however, the manager plan does not of itself call for a small council of only five or seven members; Cleveland, in adopting the scheme in 1921, provided for a council of twenty-

[1] See above, p. 712, for preferential voting, which does away with the double election in a score or more of cities.

five members, sixteen more than Boston under its mayor and council charter.

An examination of the manager plan shows clearly why it should be disassociated from the commission system. The latter unites the law-making and law-enforcing powers of the city in the hands of one body of five men; it provides for no responsible chief executive. On the contrary, it introduces the system of collegiate responsibility. The city manager plan, on the other hand, separates the functions of making and enforcing laws. The council or commission makes; the manager enforces. The city manager plan thus repudiates the collegiate idea of administration and substitutes the centralization of executive powers in the hands of one man, the manager. The number and mode of election of the councilors are not the fixed elements in the scheme; the fundamental idea is that of managership in its various relations.

The essential elements of the plan are simple.[1] All executive functions of the city are vested in the manager. He is chosen and removed by the city council or commission as the case may be. He appoints and removes heads of departments and other city officers subject to the limitations imposed by the civil service rules.

It is the duty of the manager to direct all branches of municipal work, initiate the budget, and lay plans before the city council. He may attend meetings of the council to defend and explain his proposals. He may be summoned before it to render an account of his stewardship. The business of the council is to legislate and scrutinize; the business of the manager is to execute. In fact in some cases the council is strictly forbidden to interfere with administration in any way.

The manager is supposed to be a technician trained in the science and art of municipal government, an administrator, not a politician or manipulator of votes. In order that his technical fitness may be guaranteed, the council or commission is ordinarily not bound to choose the manager from among the residents of the city. Indeed, it frequently selects from among the successful executives of other cities. Several of the leading managers are now serving their fourth city. Within a decade after the establishment of the plan there had been at least sixty-five promotions from smaller to larger cities.

[1] For illustrative chart, see above, p. 42.

Thus there is opened to men who are trained in municipal administration a profession which is nation-wide in its reach. According to the statistics of 1923 forty-three per cent of the managers were engineers and forty-five per cent had been engaged in public service previous to their present appointment. This feature of the system is of great promise because it makes possible a new career in public service — that of city manager. A man may start in at the bottom in a small town and rise to the position of head of a great city. Moreover, the profession is organized; it has formed the City Managers' Association, which holds annual conferences, exchanges ideas, and promotes public interest in the movement.

Such are the outlines of the system. Experience with it is too new to warrant many important conclusions about it. The history of the plan really dates from 1913 when Sumter, South Carolina, adopted it, although Staunton, West Virginia, claims the honor of having tried it first in 1908. Within the intervening period, it has spread rapidly until at the present time more than three hundred towns, villages, and cities have adopted it. In 1924 every state in the Union except Alabama, Delaware, Louisiana, Maryland, Mississippi, Nevada, New Hampshire, North Dakota, Rhode Island, Washington, and Wyoming had manager villages and cities. Most of the municipalities were places of minor rank, the smallest being McCracken, Kansas, with 490 inhabitants; but among the large cities were Dayton, Springfield, and Cleveland, Ohio.

Cleveland with a population of 796,000 adopted the device in 1921; the new charter was drawn mainly under the leadership of Professor A. R. Hatton, one of the first authorities on the subject. It embodies about all the latest elements of an ideal scheme as conceived by the sponsors of the system, including proportional representation. There is a council of twenty-five members; it chooses the manager but is forbidden to interfere with appointments and administration. A few departments are created by the charter and the council is authorized to establish and abolish other departments and divisions subject to certain restraints; the manager and other officers designated by the council are given seats in the council without a vote. The manager has the right to take part in any discussion in the council and his subordinates may speak on matters relative to their official functions. The

system is characterized by Professor Maxey, an experienced observer of government, as "the most courageous experiment in political reconstruction undertaken in America to-day." [1]

Advocates of the city manager plan summarize its advantages in the following fashion. It centralizes responsibility for administration. It overcomes the difficulty involved in obtaining technical ability for high office by a democratic process. It broadens the field of choice for the city to include the whole United States, placing all national talents at the disposal of the council. It removes political influences from technical administrative work in which they do not belong. It shifts public interest from personalities in elections to issues.

Nevertheless, those who know the system best admit that it is marked by certain shortcomings. It makes no provision for political leadership in the highest sense of the word. The city manager is a technician. It is not his business to formulate controversial public policies, to bring them before the people, to propose radical innovations, to carry on vigorous battles against opponents, to win the support of the voters and the council for large undertakings calling for vision and great energy. If a manager should oppose the council he might be removed by it and could not appeal to the voters for support. Besides, by taking part in such controversial matters he would cease to be an administrator. Where then is political leadership in a great city having the manager plan to come from? The members of the council are all equal. Will a leader like a prime minister arise in the councils of such cities and assume the rôle of political director? That is a vital question.

The Administrative System of the City

Although the interest of the student and citizen usually centers in the mayor and council, the branch of municipal government which maintains the most intimate contact with life and property is the group of administrative officers charged with carrying out the great functions which the city undertakes. There is little that is spectacular in the regular discharge of these duties, but upon them depends the excellence of the city's government. The making of laws is a relatively simple matter; the execution

[1] *National Municipal Review*, Vol. XII, pp. 29 ff.

of them against thousands or millions of people and enormous property interests is the task which throws the greatest strain upon the machinery of government. The executive officers' work and responsibilities continue night and day; the council may speak its will and adjourn. It is easy to make a model law about tenement houses, for instance; but the condition of the homes of the people depends upon the efficiency and policy of the department in charge as well as upon the details of the law. How to organize administrative departments and make them efficient and enlightened is one of the great problems of city government.

Like the state administration, that of the average city has just grown up as new functions were added one after another. Little or no effort was at first made to group or coördinate them according to some scheme or science of administration. Reformers bent on forcing the city to undertake a new function usually fixed their attention on their own special interest and insisted on the creation of a special agency to administer it. Hence there was an inevitable duplication of work as well as conflicts of authority.

In their search for common honesty and efficiency in administration, American citizens have tried almost every known form of organization. They have tried boards, bi-partisan commissions, single-headed departments with advisory boards attached, and finally single-headed departments. The last-named type seems now to command the most general approval, although it is not without critics.

In determining the methods of choosing administrative agencies our cities have tossed about in uncertainty. They have tried election by the city council, appointment by the mayor with the approval of the council, popular election, appointment by some state authority, and appointment by the mayor or city manager alone. The last of these methods was devised for the purpose of fixing responsibility so that the citizens can know whom to hold accountable. The tendency of current practice is in its favor and the results of experience indicate that it is best calculated to promote both democratic control and efficiency in the performance of official duties.

The problem of the proper classification and grouping of administrative agencies is one which has received marked atten-

tion during recent years. The general principle is emphasized that functions of the same character should be placed under the supervision of the same agency. With the growth of commission government and the city manager plan there is a tendency to group all agencies under a few departments such as public affairs, accounts and finance, public safety, streets and public improvements, parks and public property. In the larger cities, owing to the volume of work, the number of departments will run to fifteen or twenty.

The crossing of the interests of the several functions makes an entirely satisfactory distribution of work among departments difficult. The relation of street cleaning and pavement repairing is obvious; but these functions are often under entirely separate heads. The department in charge of public buildings will naturally seek to control the lighting of the said buildings, but the head of the department of gas and electricity will likewise have an interest in that work. Consequently we have a good deal of pulling at cross purposes in city government, and this is augmented when vitally related matters are placed under the management of separate departments. To meet this difficulty, many progressive mayors and city managers have adopted the practice of holding periodical cabinet meetings of department heads for the purpose of securing coöperation and harmony in their administration.

After the organization of departments and the assignment of functions comes the task of securing efficient public servants for the subordinate positions. This is a serious task, for the welfare of the city depends in such a large measure upon the skill and industry with which the rank and file of employees, who are usually unknown to the public and receive slight honors, do the work entrusted to them. In approaching this problem of securing an efficient personnel, our cities have tried numerous experiments. The spoils system had its day and still holds sway in all our cities to some extent. In more than three hundred of them, however, the principles of civil service reform have been adopted. Although the Federal Government took the lead in introducing civil service reform in 1883, the cities have more recently taken the lead in attempting to perfect the technique of the system. All the cities having more than a million inhabitants, namely, New York, Chicago, Philadelphia, and De-

troit, have separate civil service commissions which administer the rules for examining and promoting city employees. In a few states, on the other hand, the civil service law is enforced by a state commission which supervises all the cities within its jurisdiction.

Municipal Finance

Broadly speaking, the financial transactions of the city fall into three main divisions: appropriations, collection of revenues, and management of debts.

The city government must make periodical appropriations of money for current expenses, capital outlays for buildings and permanent improvements, and fixed charges such as interest on its debt. In the purposes for which appropriations are made the policies of the city government are given concrete form — the culture of the city is reflected. Indeed, the history of urban civilization can be written in terms of appropriations, for they show what the citizens think is worth doing and worth paying for. In the methods of making these appropriations, the city government demonstrates its business ability or lack of it.

It is in this sphere that our cities have been especially negligent. In the beginning of our municipal history, city councils had no general plan. They made appropriations from month to month as the members were moved to make suggestions or the city officers made demands for money. No one could ever tell in advance how much money would be spent in the year or whether the fiscal period would close with a surplus or a deficit. Appropriations made were usually in large amounts, lump sums, and spending officers were given a free hand in fixing wages and salaries, buying supplies, and making contracts. There was a lack of planning, foresight, and control. Waste and corruption on a huge scale flowed from these evil practices.

It was in the cities, as we have seen, that the advocates of budget reform did effective work long before it was taken seriously by state and national governments. The principles of budget making already discussed[1] need not be reviewed here, for they are of general application. It may be said, however, that in all our larger cities there is to be found some kind of budget — some kind of systematic planning of expenditures for definite

[1] Above, p. 50.

periods of time and more or less rigid accounting control over the disbursement of those expenditures. The principles of municipal budget making are almost universally accepted, but the technical details are by no means perfected.

As noted above, there is a marked tendency in some cities to take the initiation of the budget out of the hands of the city council and vest it in some smaller body or the mayor. In New York City, the budget is prepared by the board of estimate and apportionment; the board of aldermen can reduce and strike out items, but not add to or increase them. In Boston the mayor scrutinizes the budget which is assembled by the budget commissioner; as in New York the council may reduce but not increase. In Philadelphia the mayor prepares the budget, but the city council is free to make alterations at will in the program which he formulates.

It is customary for various civic bodies to take an active interest in municipal budget making. When the estimates for the coming year are first made public in tentative form, open hearings are sometimes granted. This may be done a second time when the consolidated budget is ready for final adoption. At these hearings persons and agencies interested in various features of the proposed budget can present their claims and protests and can draw the attention of the city government and the public, through the press, to the points at issue. Thus the budget, as a program for community welfare, can be carried beyond the council chamber and made a matter of concern to the whole city.

After a city government has decided upon its program of expenditures, it must provide the revenues. Its chief source of income is, of course, taxation, but its powers, as we have remarked, are closely restrained. More than two thirds of the total revenue receipts of American cities are derived from the general property tax — a tax on real estate (land and buildings) and on personal property such as machinery, merchandise, furniture, jewelry, etc. To this prime source of revenue must be added other taxes — poll, business, and license taxes. Next in importance to revenues from taxation are those derived from the earnings of public service enterprises, such as water works and electric light plants. Among the other municipal revenues are grants from the state, especially in aid of education, gifts and donations,

rents from municipal property, the earnings of departments from fees and license charges, fines and forfeitures, and assessments on officers for pension funds.

To these sources of municipal revenue should be added special assessments. It is well known that public improvements, such as water mains, sewers, and pavements, add to the value of adjoining land. If such improvements are paid for by general taxation then citizens who may receive no direct benefit contribute an unearned increment to those who do benefit. Hence there arose the practice of laying all or part of the cost of public improvements upon the owners of abutting property specially benefited. This tax is known as the special assessment. The justice inherent in it is almost universally recognized and it is applied with increasing frequency. Taking all American cities of more than thirty thousand, the special assessment ranked third as a producer of municipal revenue in 1921, the general property tax and earnings of municipal utilities being ahead of it.

The assessment or valuation of property for taxation involves many complex and difficult problems, but the most progressive American cities have worked out very effective methods in this sphere, among which the following are especially significant: (1) the assessment of land and buildings at full value; (2) separate valuations for land and buildings; (3) lot and block maps showing the size and shape of every piece of land in the city; (4) the preparation and publication of land value maps showing the value per front foot placed on all land in the city; (5) the adoption of uniform principles for ascertaining the special values of corner lots, long and short lots, etc.; (6) hearings on tentative assessments; and (7) the creation of an efficient assessing agency devoted all the year round to the scientific study of property values and valuation.

The third division of municipal finances embraces debts. As a rule the amount of debt which a city can incur is limited, often to a certain percentage of the assessed value of the real property. There was a time when the city could borrow freely to pay current bills and there is a notorious case of one city that issued fifty year bonds to pay for second-hand fire hose which lasted a few years. This was an easy way of reducing taxes and making the coming generations pay. The practice is now discredited; sound principles forbid the borrowing of money for current ex-

penses except in emergencies and require the city to provide for all such borrowings in the next year's budget if not earlier. Sound principles also require the city to make provision for paying the interest on its debt and for laying aside a certain sum each year to discharge or amortize the principal when it falls due. Equally important is the provision that the term of a bond issue shall bear some relation to the life of the improvement for which it is issued. To issue fifty year bonds for a pavement that lasts ten years is obviously unbusinesslike. The generation that consumes should pay, and in many instances cities now issue serial bonds for such improvements — bonds which fall due in annual installments spread over the life of the improvement in question.

Indispensable to the exact operation of even the best financial devices is a scientific system of records and accounts. In this field there has been a remarkable advance during the past decade — to a considerable extent under the inspiration of the New York Bureau of Municipal Research. Accounting, to the layman, is a dull subject, but it is none the less significant for that reason. In principle an adequate system of records and accounts controls spending offices by showing where every dollar goes in paying wages and salaries, buying material objects, and securing other services. It also affords a statistical record for executive officers, enabling them to review past performances and plan future work in terms of cost.

CHAPTER XXXIII

MUNICIPAL FUNCTIONS

An interesting story of humanism in America could be told in terms of expanding municipal functions. In the prosaic pages of statutes and city ordinances is reflected the determined spirit of American citizens waging war on disease, ignorance, poverty, and delinquency, directing science to the service of human needs, controlling conditions of living in the interests of human betterment, seeking to express higher standards of æsthetics in parks, public buildings, and communal monuments. This story, marred often enough by folly and error, is continuous, cumulative, and full of promise, illustrating the ways of democracy, the ways in which the unknown millions struggle to apply knowledge and understanding to their problems. On the one hand it touches every branch of science, finance, and æsthetics; on the other the health, safety, comfort, education, service, liberty, and property of citizens. It has its great body of technical and general literature ever growing in quantity and improving in quality as specialists, engineers, social workers, and artists, laboring in a thousand fields, report their findings for the common good. Nothing human is alien, for in the wide range of its activities, the modern city summons every power of human mind and character — the ingenuity of the chemist and the tenderness of the nurse. A mere catalogue of these activities would fill a volume of this compass, but broadly speaking, they may be assembled under six heads: public safety, public works and utilities, public health, education, social welfare, and city planning.

Public Safety — Police and Fire Administration

One who sees a blue-coated policeman on his beat or standing in the midst of a stream of automobiles and pedestrians in the street, directing it now this way and now that, may imagine that strength and fortitude are his chief qualifications and that the

whole business of maintaining order is simple in essence. On reflection and inquiry, however, one finds that police administration is as complex as the mysteries of criminal psychology and the texture of society itself. It is supposed to deal primarily with crime and punishments, but in the modern city its other services are of vital importance to public welfare. It must direct traffic — one of the difficult functions of city government. It must provide for the requirements of particular sections and institutions of the city, such as parks, rivers, harbors, manufacturing and residential districts, theaters, and public meeting places. It must report cases of distress and numerous violations of city ordinances. It must deal with the juvenile mischief maker as well as the hardened offender. Three of its manifold functions reach to the basis of life and liberty; namely, the enforcement of the criminal law, the management of strikes, and the control of public meetings.

It is a shame to us, but the record of crime against persons and property in America makes a black page in our history. In a single year, New York City alone, no matter who is mayor, has more murders than England and Wales; Chicago has five times as many murders annually as London, which has a population three times larger. Detroit and Cleveland report more burglaries every year than London, and it is estimated that $3,000,000,000 worth of property is stolen annually in the United States.[1] The fact that our burglary insurance rates are from fifteen to twenty times higher than the rates in English cities is some indication of the state of our morals. In flagrant and open robberies we lead the world, as far as statistics reveal the facts. In daring, brutality, and ingenuity our criminals are not equaled anywhere on the surface of the earth — one superlative of which we are not proud.

The difficulties of enforcing the ordinary criminal law are augmented by attempts of rural communities to impose upon the cities moral standards which the latter do not accept. Furthermore there is in the United States a marked tendency to penalize every action which religious people regard as sinful. A minority of moral enthusiasts can readily push through the state legislature measures which have no support at all from the masses, and which even the enthusiasts themselves are unwilling to up-

[1] This includes frauds of all kinds.

hold by concentrated and persistent action. Accordingly we have upon our statute books hundreds of laws imposing fines and other penalties for actions which the majority do not regard as even harmful. There are statutes forbidding card playing, tennis, and golf on Sunday. In some states the sale of soda water, tobacco, candy, and chewing gum is unlawful on that day. In Texas it is illegal at all times to play cards on trains. A police raid in Baltimore rounded up more than one hundred such terrible offenders as a man who was painting the gate in his back yard when he should have been at church. In New Orleans, we are told by Raymond Fosdick, the enforcement of the law forbidding the sale of tobacco on Sunday was in a state of compromise: "Green curtains were hung to conceal the sale of tobacco on Sunday. The curtains served the double purpose of advertising the location of the stand and of protecting the virtue of the citizen from visions of evil." [1] Of course it may be said that such laws are rarely enforced. Still they are on the books; every now and then there is a moral earthquake in the community and the police are driven to raid the luckless people who assume that the law is asleep. At all events police commissioners are always in mortal fear of being discharged for neglecting or enforcing such laws.

The police commissioner is also between two fires whenever strikes occur. He has it in his power to make any strike a success or failure. If he sympathizes with the employers he may arrest labor leaders on real or trivial charges, dissolve meetings of strikers, prevent them from congregating near their old places of employment and forbid them to persuade other working people to refuse their vacant jobs. The situation is thus summed up by Mr. Fosdick in his careful survey of police administration: "'We lock them up for disorderly conduct,' a chief of police told me when I asked him about his policy in regard to strikes and strikers. 'Obstructing the streets' is another elastic charge often used on such occasions. Sometimes the arbitrary conduct of the police passes belief. Newspapers favoring the strikers' cause have been confiscated and printing establishments closed on the supposition that they would 'incite to riot.' Meetings of workingmen have been prohibited or broken up on the theory that the men were planning a strike. . . . I asked the chief

[1] Fosdick, *American Police Systems*, pp. 46 ff.

of police of a large industrial city on what legal ground he denied the privilege of assembly to the striking operators of an extensive plant. 'We assume that their meeting halls are disorderly houses,' he replied." [1] On the other hand, the police commissioner may allow strikers a free hand verging even upon violence to attain their ends, if his sympathies are on their side — a thing which seldom happens.

The correct course to pursue — that of even-handed justice — is described by Arthur Woods, in orders issued to his subordinates when he was police commissioner in New York City. He laid down the fundamental principle that the business of the police was to protect life and property, to maintain public peace, to take no official interest in the merits of labor controversies, to assume that the purposes of a strike are legal unless otherwise instructed by courts of law or military officers, and to permit strikers to hold meetings or persuade other workers to go on strike provided they did not block the traffic or resort to physical violence or use language offensive to public decency. Surely these ideas are sound and deserve the allegiance of all citizens except those blinded by prejudice.

During strikes and on other occasions the police force has to deal with matters of opinion and the expression of opinion. Theoretically speech is free, but practically there are and must be limits on it. Obviously it is not possible to allow a speaker to set up a soap box in a crowded thoroughfare and block the traffic with his audience, no matter what theme he wishes to discuss. Likewise it is impossible to allow the organizers of parades and demonstrations to fill the streets with banner-waving throngs whenever the spirit moves them. Accordingly it is the general custom to require those who wish to organize street meetings to secure a permit from the police headquarters in advance. Clearly here is an opportunity for the commissioner to express his likes or dislikes and he frequently does it. In his control over public places, he may go even farther, and break up meetings and assemblies on flimsy pretexts. A volume could be filled with cases on abuses of power illustrating this point. On the other hand, police commissioners sometimes use excellent discrimination. A wise policy was adopted by Arthur Woods. His predecessor had been in the habit of "smashing" radical

[1] *American Police Systems*, p. 322.

meetings in Union Square, but Mr. Woods stopped the practice. He placed a large force within quick call, scattered plain clothes men through the crowd, and prepared to stop any violence as soon as the sign appeared. "The change of method," he reports, "was almost unbelievably successful. There was no disorder; the crowd was very large but well behaved, and at the end of the meeting when everything was over and many had gone home three cheers were proposed and given for the police." [1] Arbitrary actions on the part of the police are more likely to stir up revolutionary fever than to allay it. Certainly the average policeman is hardly fitted by temper, education, and experience for the delicate task of estimating the degree and quality of danger contained in any printed or spoken word.

With such extensive and perplexing functions to discharge, a police organization presents thorny problems. Should there be state or local administration of police functions? In three great cities — Boston, St. Louis, Baltimore — and in some minor ones police control is in the hands of a commissioner or board appointed by the governor of the state. This expedient has been tried in many other cities, including New York and Chicago, but it has been generally abandoned in favor of local autonomy. Broadly speaking, police administration in America is vested in a branch of the city government. In organizing that branch the usual experiments have been made with boards and single-headed departments. At the present time all the greatest cities have the one-man department, while many cities of second rank in population retain the board system. There is some division of opinion on the subject among specialists, but the trend of thought favors the concentration of responsibility in one head. Such is the view of Mr. Fosdick and Dr. Graper, who have carefully examined both the law and practice on this point.[2] As a general rule the board or head of the police department is appointed by the mayor or manager of the city, although in commission governed cities one of the commissioners assumes the responsibility. In several Southern cities the common council elects and then sometimes divides responsibility, patronage, and "pull" with the officer chosen.

The operating police force under the police board, director,

[1] *Policeman and Public*, pp. 73–78; Chafee, *Freedom of Speech*, pp. 173 ff.
[2] Fosdick, *American Police Systems*, p. 158; E. D. Graper, *American Police Administration*, pp. 12–27.

or commissioner consists of the chief, his subordinate officials, and the rank and file of patrolmen. The chief, or technical director of the force, is still subject to the spoils system prevailing in municipal politics, and comes and goes with the changing fortunes of parties, but efforts are being made in Ohio, Massachusetts, and New Jersey at least, to give more permanence of tenure under civil service rules. In a very few cities tradition runs against the removal of the chief for political reasons and works for continuity of service. As to the rank and file of the force, the principles of the merit system, now adopted in five sixths of our cities over 100,000, are applied to appointments, promotions, and removals. Even the power to remove is so restricted in New York City that the commissioner has only provisional authority; a discharged policeman can appeal to the courts for a hearing and may be reinstated by judicial order. Examinations for admission and promotion are designed to test the fitness of the candidate for the multifarious duties of a policeman, and in the most progressive cities well-equipped schools have been established in the police departments to give specialized training. As police work increases in complexity, separate squads are drilled for specific duties, and women policemen are frequently employed to deal with certain classes of offenders. Where the merit system prevails, pensions for the police force are usually established to afford security to old age as well as assistance in cases of injury and sickness.

Police administration, whether good or bad, is always involved in politics. Rich opportunities for "graft" are offered day and night to every member of the force, from the roundsmen on their beats to the commissioner in the central office. There are everywhere opportunities for favoritism and persecution. Gamblers, illicit-liquor sellers, quacks, and frauds of all kinds are willing to pay handsomely for "immunity," and it is easy for the police to overlook violations of the law. All the disorderly elements of the city are willing to share their gains with the protecting policemen, and the pressure is often too great for human nature to endure. It was recently estimated that the profits from prostitution alone in Chicago amount to $50,000,000 annually. Add to that the profits of other illegitimate occupations, and the total would be enormous. The ordinary sources of police corruption are augmented by the returns from neglecting the enforcement

of the great mass of "blue laws" penalizing such acts as selling tobacco or playing golf on Sunday.

Closely connected with the police force are the courts in which are tried the offenders, great and small, who are arrested by the patrolmen. The selection of judges for these courts is a serious matter, for such judges have control over the fate of hundreds of poor. It is important that they should be in close and sympathetic touch with the social and economic conditions under which the people who are brought before them are compelled to live. A kind word, a gentle rebuke, or a helping hand at the right moment may stay a new offender on his downward course, or may save from despair some poor person whose only offense is his ignorance, or who may have been arrested without warrant by some equally ignorant policeman. On the other hand, brutality and indifference in a police magistrate may fill the prisons with people who have no business there; may embitter a large portion of the population against what purports to be a system of "justice," and may add to the hopelessness which overwhelms thousands in their fight against the poverty, unemployment, and dependence so prevalent throughout all the great urban centers. Under the best of circumstances, grave injustice is done hourly in our municipal courts especially to the poor who through ignorance and want of able counsel are imprisoned, fined, and often browbeaten by incompetent judges. This is not a matter of speculation. It is a matter of fact established after a careful inquiry under the auspices of the Carnegie Foundation.[1]

An argument is often advanced, therefore, in favor of popular election of police magistrates, in order that they may be brought into close touch with the life of the district in which they preside. It has been found, however, in a number of instances that the system of popular election only brings the police justices under the control of political bosses supported by the elements which pay for immunity against the enforcement of the criminal laws. Thus it may happen that police magistrates are selected, not because they understand sympathetically the conditions of their respective districts, but because they will guarantee immunity to the lawless cliques which, operating through party organization, put them in power. The recogni-

[1] R. H. Smith, *Justice and the Poor* (Carnegie Foundation for the Advancement of Teaching).

tion of this fact has led several large cities to abandon the elective system. In New York City, for example, the city magistrates, having power to try petty criminal offenses and hold prisoners for trial, are appointed by the mayor for a term of ten years; and the justices of the court of special sessions are likewise appointed by the mayor for the same term of years.

The reform of municipal judicial systems in general is fortunately receiving special attention at the hands of individual students and also admirable associations, such as the American Judicature Society. Many important changes in the structure and procedure of the courts have been suggested and a model scheme has been worked out. Reform has gone beyond theory. City after city has completely reorganized its judiciary during the past decade and the main lines of advance have been laid down. First among the new measures is the creation of a great consolidated central court composed of an adequate number of judges who are assigned to certain geographical divisions of the city or to try special classes of cases as daily needs arise. When this reform is accomplished, we do not find the calendar of one court crowded, with resulting delays, while another court in a law-abiding residential district has nothing to do. Second among the tendencies of reform is the establishment of special courts or sections of the central court to deal with important classes of cases. Such courts include traffic courts to try offenders against traffic laws; domestic relations courts to deal with matrimonial and other family controversies; and technical courts to try offenders against the administrative orders of the city relative to buildings, tenements, fire hazards, and similar matters.

Among these special tribunals, separate mention should be made of children's courts which are to be found in all the large cities including New York, Chicago, Denver, Indianapolis, St. Louis, and Philadelphia. The purpose of the juvenile court is to remove young offenders from the influence of old and hardened law-breakers and to treat them, not as criminals, but as delinquents who need proper care and supervision. Trials in these courts are not surrounded with the pomp and circumstance of the law, but are usually conducted in a homelike chamber in which the judge holds consultation with the accused, parents, and witnesses. Ordinarily first offenders are not committed to institutions of any kind, but are released on probation unless

their home influences are bad, or their parents testify to their incorrigibility. Accordingly, there are usually found in connection with the juvenile courts probation officers whose business it is to visit the homes of first offenders to see whether the instructions of the courts are being obeyed or the home environment is conducive to the reform of the children. Obviously the work of this system depends largely upon the tact, humanity, and wisdom of the probation officers, but the reform is a step in the right direction, because it recognizes the importance of influencing offenders early in their careers, and it also takes into account the influence of home environment and social conditions in the creation of the criminal.

The spirit of the juvenile court is so admirably expressed in an article by a former clerk of the New York court that his statement deserves quotation here at some length:

> Its work in withdrawing thousands from the procession of paupers and criminals that press onward to almshouses and penal institutions, and making them future good citizens, entitles the court to be regarded as one of the municipality's most valuable assets. Viewed merely in the cold light of dollars and cents the test of appraisement would be the civic difference in citizenship between preying parasites and profitable producers.
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> The court, in dealing with the multitude of children who come before it each year, views each as a prospective citizen, an individual potentiality for good or evil. The thought of individual salvation is ever uppermost in dealing with each child. If, in the best interests of all, it is possible to rescue the child without commitment to an institution, this is done and he is saved to his home and the state at the same time. The Justice presiding is prosecutor, defendant's attorney, judge, and jury in one; in fact, a big father in time of greatest need to the unfortunate children brought before him. Those charged with actual offences are by law of course entitled to the benefit of counsel which they always receive, but there is no public prosecutor to hammer and harass the young defendants; nor under the law would a public prosecutor have a right to appear and prosecute.
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> Where the case seems to require it, ample time is taken for an investigation of home and other conditions. Frequently it is the delinquency of the parent rather than of the child that is responsible for the latter's appearance in court. This condition

being ascertained, the court directs that specific improvements be made in the home; often the child is released on parole on the condition that suitable corrections be made.

Failure to obey, the parent is made to understand, will lead to the commitment of the child to an institution, because of improper guardianship, accompanied by an order requiring the father to pay the city for the child's maintenance while in such institution. The court in this way often improves the condition of the parents as well as the children.

We should not pass from this topic, so full of human interest, without reference to the institution of public defender. In criminal cases the accused is prosecuted by an officer of the state whose business it is in practice to secure convictions, although theoretically he is merely concerned with equal and exact justice. The accused on his part is defended by a lawyer whom he employs. If he is rich he may summon to his aid powerful and skilled counsel who may baffle both the prosecutor and the judge. If he is poor he must hire a cheap lawyer, often known as a "shyster," or trust his life and liberty to a lawyer appointed by the court — one who may be lacking in knowledge and industry. Here is a possible source of grave injustice and, to mitigate the evils arising from it, a few states have created a new office known as that of public defender. It is the duty of this officer to defend the poor and unfortunate with the same zeal that is shown the prosecutor who seeks to convict. As Charles Zueblin remarks, "it changes the atmosphere of the court when the prisoner has a friend in the state."

A second branch of public safety work is protection against fire and other dangerous hazards of city life. In the smaller cities, especially those that have commission government, the fire department is often united with police administration under the same lay director although it has its own technical chief. Like policemen, firemen are subjected to civil service rules or to the spoils system as the one or the other prevails in the city. Like the policemen, they daily incur the risk of being killed or maimed at their work and are usually protected by pension and benefit funds. As their work also becomes increasingly difficult with the erection of towering office buildings, great factories filled with machinery and using dangerous chemicals, and all kinds of structures for industry and business, the train-

ing of firemen becomes an essential part of fire administration. Hence the rapid rise of fire training schools during recent years.

To cope with complicated dangers, our fire departments and inventors are constantly creating new appliances and increasing efficiency in fire fighting. The spirited horse has been supplanted by the swift motor for drawing engines. Gas masks and all kinds of safety devices are supplied to firemen working under special hazards. Separate mains are laid in certain districts to supply enormous quantities of water for fires at a high pressure which would be dangerous to ordinary water users. Fire alarm telegraph systems, insulated as far as possible from dangers of fire and earthquake, provide quick and sure communications throughout the whole fire fighting force of the city. Water towers reach fires far above the street, and safety towers remove imprisoned occupants of buildings from the path of destruction. No wonder the small boy thrills as he watches the operations of the fire heroes! Who does not?

But with all our magnificent equipment, we are the most reckless destroyers of life and property in the world. Every year about two thousand persons are killed at fires and three times as many wounded. Every year the losses by fire amount to about a quarter of a billion dollars. It has been reckoned that the buildings annually consumed, if placed on lots sixty-five feet wide, would reach in a single line from New York City to Little Rock, Arkansas. Every now and then the public is horrified by an appalling disaster like the Triangle Factory fire in New York in which more than one hundred workers were burned to death or killed by jumping from the upper floors of a high building.

Such losses have turned the attention of our fire departments to fire prevention. Ever stricter regulations are made relative to employing fire-proof materials in buildings and to controlling those in which there are special hazards. The use of inflammable and explosive substances within the city limits is subjected to minute specifications. Theaters and buildings for public assemblies are required to provide safety devices and proper exits. Fire prevention bureaus are established to study the causes of fires and take steps to avoid them. Inspection forces are created to pry into every nook and cranny where a fire hazard

may lurk and to cause the arrest of persons responsible for violations of fire-prevention rules and ordinances.

Public Works and Utilities

Under this head may be grouped all the great engineering and public service enterprises of the city: the paving and maintenance of streets and sidewalks, and the construction and management of parks, water works, sewers, docks, and terminal facilities, gas and electric light plants, street railways, subways, and elevated lines. It is in this sphere that modern technology has made many of its greatest triumphs in the interest of human comfort and convenience. Indeed, critics are inclined to disparage our achievements in this sphere as savoring of "materialism," but before anyone grows too captious he should visit some of the great cities of the Orient where miles of streets may be found without sidewalks, unpaved, and swimming in mud ankle-deep after every downpour, where millions of people in crowded sections have no sewer services, where cesspools abound on every-hand, where public parks are seldom to be found, and where sometimes a metropolis of half a million people may have no street car lines.[1] Art and literature may flourish there, but also needless disease, suffering, discomfort, and death.

In mileage of paved streets and sidewalks, American cities lead the world. Even towns of three or four thousand inhabitants will have brick, asphalt, or cement streets. Enormous sums of money have been spent in this work and extensive opportunities for waste and corruption have been exploited to the full. But science is closing in on the grafters and wasters. It has worked out with great skill the kinds of pavement adapted to various uses — business, industrial, and residential. It has provided by laboratory research and road testing a body of exact specifications for materials and methods of construction — specifications which relate quality to costs. It has demonstrated how expert supervision of construction by contractors and by city employees can guarantee the application of standards necessary to successful work. It is an education in civics for a citizen to run his eye through the thousand compact pages of a mod-

[1] On the efforts of Japanese cities to apply modern science, see Beard, *The Administration and Politics of Tokyo: a Survey and Opinions* (1923).

ern highway engineer's manual such as Blanchard's handbook. There is no longer any need for even the smallest city to suffer from wasteful and inefficient engineering in this field.

The same is true of sewer construction and the scientific treatment of sewage, which, strange to say, are not as widely adopted as road improvements. There are many cities with well-paved streets which do not have sewers at all or are inadequately supplied. New Orleans and Baltimore did not complete their sewers until the twentieth century was well advanced. Even in the heart of great cities there are still to be found primitive sanitary arrangements which are a danger and a disgrace. In many smaller cities where health administration is lax, citizens may connect their houses with sewers or not, as they please, and thousands of them prefer the ancient ways. Still this is no fault of the engineers. They have worked out their standard specifications and are ready to make the "spotless town" whenever they are called into action. They are ready to provide sewage filtration and treatment plants that work with marvelous precision, but unfortunately many of our cities prefer to pollute the public waters by discharging sewage into rivers, lakes, and bays.

If we have been negligent in the field of sewage disposal, the same can hardly be said of our efforts to supply an abundance of pure water to city dwellers. The history of public water works in the United States seems to run back to the establishment of a plant in Boston in 1652, but in the year 1800 there were only sixteen plants in the entire country. New York really set the example in gigantic enterprise by constructing the Croton reservoir and aqueduct which were finished in 1842. This historic achievement was quickly followed by large undertakings in other cities; at the close of the nineteenth century there were more than three thousand plants in operation — a number which has been almost doubled since that time.

With increased facilities for supply, there has been a steady rise in the per capita consumption of water in our cities, until now it is on the average two or three times that of European municipalities. This is due to the fact that sanitary appliances are more widely adopted by all classes, to the liberal policies of our municipal governments, and to the generous use of water for street cleaning and sprinkling. There is no doubt a great

loss due to negligence and leakage — a loss which might be checked by fixing charges on the basis of the amount consumed as measured by meter rather than on the flat rate principle; but most of our cities regard a liberal policy which permits waste as better than a strict régime which tends to prevent the generous use of water.

With the development in street improvements, sewerage, and water supply has gone a steady advance in the technique of street cleaning, snow removal, and waste disposal. We have gone a long way from the old days when pigs wandered around through the streets of our cities helping themselves to overflowing wastes, although we have by no means reached the highest standard attainable. In this field of municipal activity New York, perhaps on account of necessity, has assumed a position of leadership. In 1881, a separate department of street cleaning was established in that city, in charge of a commissioner appointed by the mayor. A noteworthy revolution was made in the organization and methods of the street-cleaning force under the administration of Colonel Waring, a man of large military experience in the service of the United States, who was appointed commissioner by Mayor Strong in 1895. He applied to the organization of the force — then an army of 1400 sweepers and nearly 1000 drivers — the principle of military discipline. In spite of considerable resistance, he compelled the sweepers to wear white uniforms; he provided another uniform for the carters of ashes and garbage; and, finally, he devised a plan to secure harmonious coöperation throughout the whole force.[1] The result was astonishing; it dignified the work of street sweeping, and was a high example to the other cities of the United States.

The disposal of the wastes collected by the street cleaners constitutes a very difficult problem in city administration, for with the growth of the city the old rough-and-ready methods of filling in water fronts or dumping on the outskirts have become not only objectionable, but dangerous. Colonel Waring made a contribution to the solution of the problem by laying down rules to be observed by private citizens in the preparation of their wastes for disposal. He required them to separate decaying vegetable matter from ashes and waste papers, and also established a plant for the reduction of the materials collected

[1] *Readings*, p. 554.

by his force of cleaners. Most of our large cities now have plants for the treatment of wastes, and many of them derive considerable revenue by employing scientific methods. In this sphere as in other branches of municipal engineering, technology has done its part and inventive ingenuity has devised the appliances. Technical literature abounds; he who runs may read; and a city government in search of higher standards can readily discover them.

Far more important than all other municipal enterprises, in terms of capital invested, are the great utilities for supplying gas, electricity, and transportation. Our cities began to wrestle with utility questions long ago without experience and without guidance. It was in 1823 that the first American gas plant was established at Boston. The horse car appeared in the streets of New York in 1852; Edison made his successful demonstration of the electric street car in 1880, and two years later established in New York City a central electric light plant, the first in America. By the end of the nineteenth century the capital invested in municipal utilities reached the staggering total of more than three billion dollars. In the meantime municipal utilities and municipal politics had become hopelessly mixed.

There was no way in which economic interests so enormous could be separated from politics. If municipal ownership and operation had been adopted in the days of the spoils system, the employees engaged in utility operation would have dominated municipal politics, and bureaucratic and unprogressive management would have plagued the public. Certain problems of corruption would have been eliminated; others would have arisen in their stead. But municipal ownership was not generally adopted, as noted below; the great functions of supplying gas, electricity, and transportation to the public were vested in the hands of private capitalists usually organized as corporations.

Now before a corporation could begin operation in the streets of any city, it had to secure a charter or franchise from the city council or some public agency; every time it wanted to make an extension of its lines or pipes or to renew its franchise, it again had to apply to public authorities. As such privileges were highly profitable and competition for them was keen, the unscrupulous city councilor or state legislator could often obtain money in return for his vote in favor of a corporation ap-

plying for a charter. If the company did not approach the politicians in the first place, it was likely to be "seen" by some representative of the politicians and "blackmailed" into making gifts of money in return for votes. So it happens that the story of municipal utilities in the United States is a sordid one. Conditions have doubtless improved during the past quarter of a century, but the end of corruption is not yet in sight. For the Philadelphia gas scandal that shocked Bryce fifty years ago, we have the Minneapolis traction scandal to shock us to-day.[1] We know more about the nature of our utility diseases and are at work devising and applying remedies — so far with rather indifferent success.

The Ownership and Regulation of Utilities

The principle of public ownership and operation is not extensively applied in the United States except in the field of water supply. This service is so vitally connected with public health that it is regarded as a proper function for city governments to assume. At all events out of 253 cities with more than thirty thousand inhabitants according to the last census, all but about fifty own and operate their water works. Next in importance are the electric plants of which about twenty-five are municipally owned and operated — Chicago, Cleveland, Seattle, Los Angeles, Richmond (Virginia), and Tacoma being among the largest investors in this field. Only four or five cities own gas plants; indeed, experiments in the municipal management of gas works do not seem to be successful or popular, although Richmond reports satisfaction with public ownership. In recent years a few cities, after long and bitter struggles with utility concerns, have undertaken to own and manage street railways. Among them are San Francisco, Seattle, Ashtabula, and Detroit, the last of them making the leap in 1922. In a few instances municipal ownership is combined with private operation, the outstanding example being the subways in New York, which are owned by the city but leased to operating companies for long terms on definite agreements as to the fare, rentals, amortization of debts, and final recovery by the city.

There is undoubtedly a great deal of sentiment in America in favor of municipal ownership — sentiment that finds expres-

[1] *National Municipal Review*, Vol. XII, p. 376.

sion in statutes and constitutional amendments empowering cities to buy, construct, and operate utilities. For example, the Colorado constitution was amended in 1902 to authorize Denver to own and operate "waterworks, light plants, power plants, transportation systems, heating plants and any other public utilities." Michigan six years later conferred this power generally on all cities and villages, subject to the proviso that bonds issued by any city for such a purpose in amounts beyond its debt limit should constitute a lien merely on the property and revenues of the utility in question — not on the taxpayers in general. Provisions authorizing municipal ownership are found in other state constitutions; but usually they are not necessary because the state legislature under its general powers may confer on cities the right to own and operate utilities.[1]

Whatever the powers conferred upon the city, there are innumerable obstacles in the way of its embarking upon municipal ownership on a large scale. The streets and other public places are generally occupied by existing utility concerns operating under long-term, if not perpetual, franchises. If a question of buying up an old company arises, there is sure to be an almost interminable legal battle over the amount of money to be paid for its property and rights. If the city can get over these two hurdles, it then confronts the problem of finance. Usually, thanks to the sins of the fathers, it is already in debt to the limit of its borrowing capacity, and finds itself unable to float the bond issue required to purchase any important utility.

It is difficult, therefore, to make a generalization about the status of municipal ownership in the United States at the present time. Doubtless the current view is still fairly well represented by the report of a commission on public ownership appointed by the National Civic Federation as long ago as 1907. That commission came to the conclusion that municipal ownership of public utilities should not be extended to revenue-producing industries not involving public health, safety, and transportation, or the permanent occupation of public streets or grounds. It is generally held that owing to the corruption and inefficiency of so many of our city governments no sort of public business on a large scale can be successfully operated directly by municipal

[1] On this point and other questions involving the legal powers of cities, see H. L. McBain, *American City Progress and the Law*.

authorities. How far this view represents the mature judgment of people who have given the matter any study and how far it is an opinion advanced by the private interests opposed to the extension of municipal ownership it is, of course, difficult to determine.

It is certain that the worst corruption in American city government has been connected with the exploitation of public franchises by private corporations. It is undoubtedly true, also, that "politics," in the bad sense of that word, is mixed up as much with private ownership as with public; the career of some of the New York transit companies equals in mismanagement and dishonesty the career of the Philadelphia gas works under the ownership and operation of the city. Indeed it is argued by the advocates of municipal ownership that the danger of corruption is far more menacing in the case of privately owned utilities. They hold that the greater responsibilities associated with public ownership will attract a higher quality of men to our municipal governments; that in proportion as the city, through public ownership, touches directly the lives of its citizens, popular interest in its government and administration will be increased; that a higher standard of labor conditions may be established; and that only public ownership and operation will secure the control necessary to make the various public utility enterprises render adequate services.

It is questionable, however, whether arguments in the abstract on the subject of municipal ownership are of any practical value. Most opinions which are now rendered as to the respective merits of public and private ownership are merely *ex parte* statements. It may be said with safety that in some places municipal ownership and operation have succeeded remarkably well, and it may be added also that in other places, municipal ownership has been connected with corruption and inefficiency. No general conclusion seems possible at the present time except that municipal ownership will not succeed in any city unless high standards of civil service are established and there is a large and influential group or class permanently and deeply interested in the economical and efficient management of the enterprise in question. Municipal ownership, therefore, is in itself neither good nor bad; its success depends upon the standards and ideals of the community in which it is tried.

Refusal to embark extensively on programs of municipal ownership does not mean, however, that our cities are allowing utility corporations to pursue their own course unchallenged. On the contrary the management of utilities has been made the subject of much scientific inquiry and detailed legislation. A diagnosis of the abuses arising in this connection has shown what cities may expect where the policy of "drift and muddle" is followed. Perpetual franchises will be granted without safeguards, thus saddling private corporations upon the community forever unless their property is bought by the city at a high figure. There will be mergers and consolidations of companies with resulting stock watering, that is, the issuance of stocks and bonds far in excess of the value of the property. High charges will be made and services are likely to be poor in quality and deficient in quantity. Tracks and pipe lines will not be extended to meet expanding needs. Accounts will be juggled to conceal corruption and exorbitant profits.

The remedies which have been devised during the past two decades to meet these evils may be surmised from the nature of the evils. It is no longer the fashion to grant perpetual franchises; it is rather the rule to limit new franchises to a term of years — twenty-five or fifty — and to prescribe in them the precise conditions on which a city may terminate the charters and assume ownership itself. The newer franchises contain a long list of provisions relative to standards of service to be rendered, publicity of accounts, capitalization, new capital issues, profits, rates, and extensions. To guide cities in safeguarding their rights, the National Municipal League has devised a "Model Franchise" embodying the tested principles required in the public interest.

At the same time utility corporations are being subjected to public regulation in all important particulars. In the eye of the law they are quasi-public corporations "affected with public interest" and are liable to regulation by state or municipal authorities either through laws and ordinances or orders from public agents. Following the example of the Federal Government in regulating railways, our states have provided central or local commissions to regulate utility corporations. This practice began with the establishment of a railroad commission in Wisconsin in 1905 to which was given, two years later, large powers of regulation

over all municipal utilities in the state. Within ten years the practice had spread to nearly every state in the Union.

Under model franchises and commission regulations certain great principles of utility control have been worked out. There shall be no overcapitalization; stocks and bonds issued shall represent bona fide property, not inflated values. The services rendered shall be adequate; the gas and electric power sold must comply with established scientific standards as to quantity and quality. Meters, if used, must be accurate. Companies must extend their lines or mains subject to certain precise conditions. Accounts must be kept according to uniform and exact principles and made public.

Finally rates must be "reasonable." The problem of rates is the heart of the matter, for it involves the charges made to the public and the profits of the companies. Hence, many a bitter battle has been waged over this point. In determining reasonable rates, it is necessary, under the Fourteenth Amendment to the federal Constitution,[1] to allow the companies a fair return on their capital. That raises perplexing questions of fact. What is the true capital of the company? Is it operating efficiently so that it can easily earn a fair return on its capital or is it operating wastefully? In the first place, state or municipal utility commissions must get the facts and make their orders as to rates. Then there usually follows a long legal fight which is carried to the Supreme Court at Washington.

During the Great War when the cost of labor and materials rose to unprecedented heights, it became difficult or impossible for the utility companies to operate on the basis of the rates fixed before 1914. They then applied to the state and local commissions for the right to raise their charges, and a serious crisis arose in the history of American utilities. In most cases the corporations were allowed to raise their rates and fares, but in New York City where the transportation companies had a contract with the city for a five cent fare the city government stood fast against any increase. In many cities the service-at-cost principle was adopted in making settlements with the companies; that is, it was agreed that the companies were to raise and lower rates as their fixed charges and operating costs increased and diminished. Here of course the vital issue was

[1] Above, p. 486.

that of "true operating costs" and many impartial students of utility problems maintain that as a rule the companies got the better of the bargain. At all events the prosperity of most of the utility concerns after the Great War would indicate that they did not suffer many reverses. Some critics go so far as to contend that the outcome of this first crucial test demonstrated the fatal weakness of utility regulation by commissions.[1]

Public Health

Apart from the very important function of keeping vital statistics, the work of the municipal health department falls into two main divisions: assistance and care for the sick and the prevention of disease — with increasing emphasis on the latter. In the construction and maintenance of hospitals the humane spirit of America has found perhaps its noblest expression and American science has rendered its most generous service. Private gifts and public subsidies bear witness to a deep-seated sense of social obligation. Compare, for example, some of the cities of China, where persons suffering from sickness or injuries lie helpless in the streets, with the American city where the speeding ambulance brings succor as if on the wings of the wind. Every year sees the rise of new hospitals for special diseases. Every year sees an improvement in hospital technique: more comfort and convenience for the sick, stricter control in the execution of physicians' orders, and advances in the training of nurses. Scientific literature on hospital construction and operation grows apace, driving ignorance before it and spreading light into the smallest out-of-the-way hamlet.

To the work of preventing disease equally splendid energies are being devoted. Indeed prevention is the outstanding characteristic of American health administration to-day, and prevention inevitably leads into a study of the social and economic, as well as the hereditary, causes of disease. Hence the development of special agencies for child hygiene, milk stations for the sale of pure milk, school inspection, visiting nurses, mothers' clinics, and dental clinics. Hence public control over the quality of milk, meat, and other foodstuffs; public supervision of markets, restaurants, and other public places; special campaigns

[1] See above, p. 680.

against communicable diseases like tuberculosis, against flies, mosquitoes, and impure water that spread germs far and wide. As many diseases, such as lead poisoning, arise from the nature of the industries in which people are employed there has sprung up a science of industrial hygiene which looms larger and larger in the great warfare on disease. Finally, the warfare is carried into the schools, homes, and factories in campaigns of health education which inform and warn the people, young and old, preparing them to take precautions against the specter that lurks everywhere to impair and destroy human health.

A committee of the American Public Health Association in coöperation with the Federal Public Health Service after a survey of American conditions has outlined an ideal health department, for a city of more than 100,000 inhabitants, embracing eight bureaus. The names of the proposed bureaus indicate the range of modern health work: (1) administration, to include office routine and public health education, (2) sanitation, (3) foods and milk, (4) communicable diseases, (5) child hygiene including infant and school hygiene, (6) nursing, (7) laboratories for research and (8) vital statistics.[1]

The wide-reaching activity of modern public health service has a profound effect upon the medical profession. It stimulates scientific research into ways and means of combatting disease. It summons the whole profession, too likely to be engrossed in the routine and profits of private practice, to a sense of social obligation. In public esteem it places beside the eminent surgeon and skilled physician, the trained leader in public health nursing and the trained director of public health administration. It invites the great universities to establish schools of public health. It creates a new profession in which the finest sentiments of religion can be united with the rigid thinking of science.

Public Education

Education is essentially a local function in America, although state and federal aid are given to raise standards and augment financial resources. It is perhaps along educational lines that our cities have made their greatest advances during the past fifty years. Although America was supposed to have laid stress

[1] *Public Health Bulletin*, No. 136, United States Public Health Service. July, 1923.

upon universal education early in her history, practical application lagged far behind the theory. It was not until about the middle of the nineteenth century that the foundations of universal and free elementary education were securely laid, but since that time there has been an almost steady growth in the percentage of children of a school age enrolled and attending school. The development of high schools belongs to a still later period, for even in 1880 there were only about one half as many children in public high schools as in the private academies; in less than twenty years, however, they outnumbered the latter four to one.

Yet illiteracy was not conquered. The multitude of negroes in the South and foreigners in the North made the struggle against it especially difficult; but during the Great War, citizens who were indifferent about the matter were startled out of their apathy by official reports that more than one fifth of the men in the draft army could not read a newspaper or write a letter home. Then, in connection with a proposal for federal aid,[1] a more effective campaign was launched to increase the number of schools, teachers, and pupils.

It is not merely in statistics that our educational progress can be measured. The advance made in the design, construction, æsthetic features, and conveniences of our modern city schools will be appreciated by one who contrasts a building of 1924 with one of 1850. The standards of scholarship required of teachers have also improved immeasurably, and the notions of popular education have extended far beyond the mere routine of the three "Rs." Indeed, the schools of our cities are slowly becoming social centers; playground and recreational features are being developed; vacation schools, affording social life to the children of the congested areas, are rapidly multiplying; and there is a constant searching among educators for better methods of instruction and for more effective ways of raising through the school system the standards of intellectual, physical, and moral life in crowded urban districts.

Special attention is being given to the problem of fitting pupils for their double task as bread winners and as citizens; vocational schools, to prepare them for efficient work in some trade or profession are being founded all over the country; in-

1 See above, p. 443.

struction in citizenship has an important place in every curriculum. The care of the health of children is no longer entrusted entirely to their parents; medical inspection is becoming one of the functions of the public school; in order that the bodily ills discovered by this inspection may not go unheeded, dental and medical clinics are frequently attached to schools. For the weaker pupils, particularly those affected with tubercular troubles, open-air schools are being founded, and a few schools maintain lunch rooms where undernourished children may obtain food at a nominal cost. The old motto of a sound mind in a sound body is becoming more than an empty phrase in the United States.

New York City has adopted the principle that education should not be limited to the young, but should be extended to adults as well; it has established a system of free night lectures in the public school buildings and at other available centers. These lectures are conducted under a supervisor, acting in conjunction with the board of education. The system has been quite properly called "the people's university," for the courses of lectures offered cover every important subject in science, art, literature, history, and political economy which can be of interest, utility, or entertainment. A special effort is made to reach the foreign populations of the metropolis by lectures on American history and institutions given in their native tongues. Boston, Philadelphia, Chicago, and Milwaukee have followed the example of New York, though not on as large a scale.

Popular education in the United States is further facilitated by the establishment of public libraries. It seems that Boston led the way, for as early as 1847 the city council at the suggestion of Mayor Quincy passed a resolution asking the state legislature for permission to open a free library supported by taxation. Nearly every Northern state has followed the precedent set by Massachusetts, and nearly all of them have library legislation of a progressive type. Our great cities not only have public libraries well stocked with books for general reading and research work, but they have been steadily developing a system of branch libraries which makes the books available to the inhabitants of every district.

After lagging behind for a long time, New York City, at the opening of this century, made a marked advance. In the great

public library at Forty-second Street and Fifth Avenue are now stored the valuable collections of the Astor, Lenox, and Tilden foundations which give the metropolis one among the first libraries in the country. A large gift by Andrew Carnegie made it possible for the city to erect and maintain at well-selected points no less than sixty-five branches. It is estimated that over three million books are freely at the disposal of the citizens of New York and that the annual circulation amounts to more than five million volumes. An ever increasing attention is given to the needs of children through the school libraries and through the special collections now to be found in the public libraries. Near the city hall has been founded a splendid municipal reference library to furnish city officers and the public with technical information of every kind on municipal affairs.

The administration of education in American cities is usually vested in a board which is either a branch of the municipal government or an entirely separate body elected by popular vote. Of the first type, New York City is an example; the board consists of seven members appointed by the mayor. In a large number of cities the board is an elective body standing apart from the city government and enjoying the power to raise and disburse funds for education on its own motion. Indeed there is a marked tendency to make the school board an almost independent agency whether it is appointed by the mayor or elected by the voters. It usually can lay taxes up to certain limits or draw upon the city treasury for specified sums; whatever its source of income, it can spend money without much interference from the city government. It erects buildings, employs teachers, buys supplies, and arranges the courses of study on its own authority. Even where it must submit its budget to the city government for approval, both law and custom give it a high degree of autonomy. If the city council should attempt a deep cut in a school appropriation a storm would break over its head.

This independence for school authorities, established partly to secure freedom from political influences, has in fact been carried so far in many cases as to cripple the financial power of the city in dealing with other matters. About one third of the total outlay of our cities for current purposes is for education. In this respect the school board stands highest on the list, its total outlay being greater, as a rule, than the expenditures for

police, fire, health, and hospital administration combined. Autonomy in making such heavy expenditures means that it is difficult for the city government to prepare a consolidated budget and to effect economies particularly in the field of building and purchasing. In these days of financial stringency, the problem of independent school administration has therefore become a serious one and deserves reconsideration at the hands of those who shape public sentiment.

Social Welfare

From the earliest times there has always been more or less public and private charity in American cities. This has taken the form of institutions for the poor, hospitals for the sick, and doles to the needy. Religion makes charity a virtue and there is no conceivable order of things in which its exercise will not be a necessity. The spirit of charity, however, has been transformed during recent decades and it has been supplemented by a growing demand that a relentless war shall be waged to prevent undeserved poverty. Schools of philanthropy become schools for social work. In nineteen great cities departments of charity have become departments of public welfare.

Why this change? It is not due so much to the advance of any new theory of social life as to the changing economic conditions which have subjected city dwellers to new hazards and deprived them of the sunlight, air, outdoor exercise, and certainty of employment which are found in communities depending principally upon agriculture for their support. With the progress of democracy, moreover, there has come a demand for a higher standard of individual enlightenment, comfort, and welfare, even at the sacrifice of that exaggerated notion of private rights which would allow every person to do as he pleases as long as he does not positively deprive his neighbors of life and limb.

Many and varied forces have contributed to this change in public opinion. Through university settlements, students of social problems have come into actual contact with the realities which the working-class of the great cities must face. Hull House in Chicago, Neighborhood Guild in New York, the South End House in Boston, and many other social settlements have

been centers of light in which those who have real influence in directing the currents of public thought have been able to learn things undreamed of by the preceding generation. Private investigations into the wages and conditions of life in the great cities — investigations such as those made in Chicago and in Pittsburg — have established concrete facts which were before the subject of speculation.

Moreover, an ever larger attention is being paid by the students and teachers of government to the problems of municipal life, and without doubt the investigations and experiments of European cities have thrown light upon our own urban questions. One thing we have learned, above all, from England is that the unrestrained development of city life along the lines followed in the nineteenth century means poverty, physical degeneration, and moral deterioration among the dwellers in overcrowded areas.

In this enumeration of changing forces, we must not overlook the development of more scientific diagnosis in the form of the "case method" in social work. A few examples will illustrate. "A" is a blind beggar. Why is he blind? At his birth his eyes were infected as a result of ignorance and negligence. He must be helped, but, more important, such cases should be prevented through stricter control over midwives and nurses and better medical education. "B" is a beggar. Why? He is physically incapacitated for work because he was injured in industry and received no compensation. He must be helped by charity, but a just workmen's compensation law wisely administered and a rehabilitation hospital would have kept him a self-respecting citizen. So on through the long list. Every case of charity leads into social causes and is a call to social action. It is blessed to give and always will be, but it is more blessed to use intelligence in reducing the necessity of giving. Justice, not charity; science, not impulse; social action, not private doles — such is the new emphasis.

Under the head of social welfare our cities are coöperating with the state and national governments and taking independent measures to relieve existing poverty and to prevent needless poverty, sickness, and misery. From one point of view social work is a synthesis of all municipal activities designed to improve the physical and moral status of the people. In a narrower

sense it includes a number of specific activities which may be briefly summarized here.

In the first place there may be mentioned various institutions — charitable hospitals, homes for the aged, incurable, and orphaned, free public baths, municipal lodging houses for homeless men and women, and public laundries. In connection with many charitable institutions, there is often coöperation between the city and religious bodies — a practice which leads to many complications of policy and politics and is utterly forbidden in some states, Massachusetts, for example. In the second place reference should be made to such measures as mothers' pensions now established in three fourths of the states and workmen's compensation laws administered in cities but under state authority — laws automatically providing for those injured in industries.[1]

Vitally affecting conditions of life in crowded urban areas is the tenement house department charged with the duty of maintaining certain standards with regard to light, air, sanitary conditions, and fire protection. This is one of the latest developments in American municipal administration, for, until this century, public health and welfare were sacrificed, without protest, under the specious guise of protecting private rights. It was not until several investigations disclosed the horrible housing conditions of Chicago, New York, and other cities that the state legislatures could be brought even to recognize the imperative necessity for action.

In this movement, New York took the lead in 1902 by establishing a tenement house department.[2] The reform has now spread to other states and a National Housing Association has been founded to promote model housing laws throughout the Union. Such a law usually includes the following elements: Under the head of light and ventilation, the percentage of the area of a lot which a tenement may occupy is stated and the height of new tenements fixed. Under the head of sanitary provisions, a proper water supply for each apartment is ordered and the size of the rooms and window space in each are prescribed. Owners of tenements are required to keep the courts, areaways, halls, and yards clean and to comply with the standards set up by the tenement department. A corps of officers is provided to

[1] See above, p. 685.

[2] *Readings*, p. 540.

inspect tenements periodically and to report violations of the law and the rules of the department. A few attempts have even been made to restrict rents in tenements. During an acute housing shortage in 1920 the legislature of New York went so far as to enact drastic legislation designed to hold rents to a "reasonable" figure; every tenant was permitted to protest against a proposed increase in his rent, to carry the case into court, and have the issue of reasonableness tested by judicial process. The effect of the law in holding down rents seems to have been considerable.

Restrictive legislation of this character has been the chief resort in our attempts to improve housing conditions. No American cities have embarked on municipal housing schemes such as those to be found in England and Germany. Indeed it is doubtful whether they now enjoy under their respective state constitutions the legal power to engage in such undertakings. An exception to the general rule is to be found in Massachusetts where a constitutional amendment adopted in 1917 authorized all cities and towns in the state to provide food, shelter, and other common necessities of life to the people at reasonable rates in time of war, emergency, public exigency, or distress. Under this amendment the state homestead commission, created six years before, was empowered to buy or secure land, and provide homesteads and small houses for mechanics, wage earners, and others. Oklahoma seeks to promote better housing by instructing state authorities to lend educational funds (derived from the sale of lands) to individuals and families on easy terms with a view to helping them build homes or pay off mortgages on homes. In 1919 Wisconsin passed an act enabling cities to lend their funds to housing corporations, and the city of Milwaukee took advantage of the law to subscribe to the stock of an association formed to build houses for working people. In the same year North Dakota empowered the state industrial commission to engage in home building. It appears, however, that the only houses built directly by public authorities from public funds (excepting houses erected by the United States Government for industrial workers during the Great War) are a few houses erected in Lowell, by the Massachusetts homestead commission. Nevertheless, the whole subject of housing is under discussion. The National Housing Association promotes interest in it and

holds annual conferences to exchange ideas and enlist public support for progressive policies.

Our cities are coming slowly to realize that the provision of healthful recreation for the great mass of the population is a collective function which must be undertaken in part by the municipality at public expense. In the construction of parks and boulevards, the cities of the United States have made giant strides within the last quarter of a century. Boston takes a high place, for, besides the famous Common and Public Garden, that city has more than seventy small parks and playgrounds, in addition to the local parks and the reservations in the environs. New York City has also given some attention to the problem of reserving breathing spaces. Almost in the heart of the city there is the famous Central Park; Brooklyn has the scarcely less beautiful Prospect Park; and to the northward New York has reserved Riverside, Washington, Van Cortlandt, and Bronx parks.

Every city of importance has now one or more great open spaces. In making these provisions city governments have too often overlooked the fact that many small parks, conveniently scattered through the congested areas, are of far greater utility than wide areas on the outskirts of the city, or at best so situated that they can be reached only by the payment of car fare — an important matter for the children of the poor. It must be admitted, however, that the evils of inaccessible parks are being recognized, and some cities that have been the worst offenders in this respect have attempted to make amends within the last decade.

Cities are also endeavoring to make the parks more useful by providing athletic sports, such as baseball, tennis, golf, and skating. Many give band concerts in the parks in summer time and public fêtes on holidays, that are widely advertised to attract adults as well as children. The physical and social value of healthful play for children is being recognized more and more in the establishment of playgrounds, not only in parks, but in connection with the public schools and at special points in the congested areas. Boston has equipped the school yards as playgrounds for children and provided teachers to take charge of the games and gymnastic exercises. New York has followed this example, and now has a law requiring the provision of a play-

ground with every new school building. In the winter time, Chicago, New York, Boston, and some other cities flood certain playgrounds and turn them into skating rinks. Chicago has provided rinks, lighted by electricity and open day and night.

Some indication of what an enterprising city can do is afforded by the famous experiments of the South Park Board in Chicago. That board secured in 1903 from the state legislature the power to create a number of new small parks, and thereupon made a careful investigation into the recreational needs of the great congested district under its jurisdiction. Within three years the board established fourteen parks ranging in area from six to seventy acres at an expense of over $6,000,000. Combining all the latest devices of social settlements, kindergartens, and other recreational centers, the board sought to make these new parks as attractive as possible to children and adults, and at the same time to develop healthful recreation to the fullest extent. It accordingly provided ball fields, tennis courts, swimming pools, sand piles, swings, lagoons for rowing and skating, stands for band concerts, and outdoor gymnasium for girls and women and boys and men. It furthermore established fine recreation buildings equipped with shower and plunge baths and lockers, and lunch, reading, club, and assembly rooms. In the winter time, lectures, dancing, and musical entertainments are given in the assembly halls. The various recreational features are under capable athletic directors.

In their efforts to cope with some of the problems of welfare involved in the high cost of living, a number of our municipalities have either gone into trading enterprises on a small scale or sought to reduce the expenses of handling food by providing market facilities. The constitution of Massachusetts expressly authorizes the cities of the state to buy and sell the necessaries of life subject to certain restrictions. In other states, under home rule provisions, cities occasionally engage in merchandising; Lincoln, Nebraska, for instance, made an attack on the high cost of fuel in 1921 by establishing a municipal coal and wood yard. Such undertakings, however, are not extensive, nor are they to be viewed as excursions into "municipal socialism." Rather do they represent efforts to force down prices by government competition.

Far more significant are the experiments in municipal markets. In this field, New York, Cleveland, Pittsburg, Indianapolis,

New Orleans, and Milwaukee may be counted among the leaders. In character, municipal markets vary greatly. At one end of the scale are rather primitive shelters to which farmers may bring their produce and retail it to consumers; at the other end are splendid modern buildings, such as that at Cleveland, equipped with refrigerators rented to citizens for the storage of commodities bought in large quantities. New York has attacked the high cost of marketing and transportation within its area by starting on the construction of great terminal markets at railway sidings where customers and wholesalers can come into direct contact with country shippers.

When it is remembered that owing to traffic conditions the cost of transporting a pound of butter a few blocks in the city is greater than the cost of shipping it four hundred miles by rail, the significance of such market facilities becomes apparent. Undoubtedly with the growth of coöperative grading and selling on the part of farmers, there will come an ever larger measure of coöperative buying on the part of urban consumers. Here is a great field of municipal economy in which the city, without affecting adversely the genuine services rendered by private enterprise, can assist in materially reducing the cost of marketing and delivery within the city boundaries. Indeed, under the auspices of state marketing agencies, it may reach out into the countryside and cut deep and direct channels of communication between the producer and the consumer.

City Planning

The municipal functions which we have just reviewed have been adopted one after another as a result of the demands of interested citizens, each representing some particular reform such as tenement house control, lower food costs, or public health. Out of the enthusiasm of citizens great reforms have been effected; but associations founded to promote specific enterprises are likely to be narrow in their outlook; they attack their particular problem as if it were a separate problem; they often fail to consider the community as a whole — the connection of the thing they are interested in with other phases of municipal life.

Now it is obvious on second thought that all the functions of city government are related. Health, for example, is connected

with pure water supply, clean streets, the sanitary conditions of homes, schools, and factories, transportation facilities to relieve congestion, the ownership and taxation of land, parks, and playgrounds. Transportation is related to the distribution of factories and business concerns, the drift of the population, the development of suburbs, and so on through the labyrinth of city administration. From the philosophical point of view and as a matter of hard fact, nearly every great municipal function calls for a synthesis of all sciences, and the wisest administrator is the one who grasps the complex community as an organic whole.

Gradually there has emerged from the selfish conduct of private interests and the efforts of disinterested citizens a noble concept of a city deliberately planned, under the full light of science, with a view to promoting the good life as well as economy in industry and transportation. It is true that a few of our older cities, Washington, for example, were constructed on plans deliberately made in advance by competent engineers, but most of them have grown up in a haphazard fashion — a wilderness of stores, factories, and homes — with little regard to comfort, welfare, æsthetics, and economic efficiency. Even the plans that were put into effect were often narrowly conceived and not at all adapted to the requirements of a great industrial and commercial city.

It was about the opening of the twentieth century that the idea of city planning in a broad sense was taken up in America. Signs of the growing concept appeared in the surveys of cities made by the New York Bureau of Municipal Research, in the surveys of the Russell Sage Foundation, in treatises based partly on European experience such as the writings of Charles M. Robinson, George B. Ford, Nelson P. Lewis, and John Nolen, and in the rise of the profession of city planning consultants. In 1907 a city plan commission was created for Hartford, the first in America; three years later the National City Planning Association was founded and held the first of its annual conferences.

In the beginning, the idea was somewhat nebulous. It was associated with the planning of parks, boulevards, public buildings — show places — rather than the practical requirements of business and trade and the pressing problems of housing and congestion. Gradually it broadened until it included the laying out of all streets and avenues, the construction of parks, relief

and prevention of congestion, control of traffic, distribution of buildings for residential, industrial, and commercial purposes, railway terminal facilities, the coördination of public utilities with reference to the city plan, the control of fire hazards, extension of water and sewer facilities, the provision of parks and playgrounds, and the relation of the city to the outlying "region."

First the idea, then the application, and finally the evolution of the two in an ever widening sweep. City planning is not merely a hypothesis, an engineer's blue print. It is true that many grand plans have been made and neglected, but the realization of ideals goes forward in many ways. All but two of the cities having 150,000 or more inhabitants have prepared city plans calling for alterations in their present network of streets and controlling future growth. Twenty-five states have approved the idea by empowering cities to lay out their areas into various zones — residential, industrial, commercial, etc. — and to control the nature of the structures erected in each.[1] A number of states permit their cities to make excess condemnations of land, that is, to take more land than is actually necessary for any particular improvement and use the balance for public purposes or sell it or lease it.[2] Cities are sometimes authorized to make plans for the area beyond their borders and, by one process or another, to compel all landowners to conform to such plans in laying out new building sections. A national committee, organized under the direction of Herbert Hoover, Secretary of Commerce, has prepared a model zoning ordinance, embodying the best of modern ideas, to be recommended to states undertaking legislation in this field.

In the development of this new ideal, the land question inevitably takes front rank, for the land is the basis of urban life. It is a well known fact that the value of ground in our large cities increases with astonishing rapidity — not through the effort of the owners or of any single private individual, but through the growth of industry and population. The recognition of the fact that an enormous annual tribute of "unearned increment" is paid to the owners of city lots without any service in return on their part has led a group of reformers, known as the

[1] F. B. Williams, *The Law of City Planning and Zoning.*
[2] R. E. Cushman, *Excess Condemnation.*

"single taxers," to advocate the diversion of this money to the public treasury by way of taxation. Henry George, who was the founder of this movement in America, declared that a single tax absorbing all unearned increment in land values would "raise wages, increase the earnings of capital, extirpate pauperism, abolish poverty, give remunerative employment to whoever wishes it, afford free scope to human powers, lessen crimes, elevate morals and taste and intelligence, purify government, and carry civilization to yet nobler heights." Without sharing this generous hope or examining the several objections which may be brought against the rigid application of the single tax doctrine, one may certainly conclude that a gradual increase in the proportion of the municipal taxation that falls on land, as distinguished from improvements and different forms of personal property, is much to be desired. "There is reason to think," remarks Professor Seager, "that especially in large cities absentee landlordism is becoming more and more the rule for the simple reason that more and more people are coming to live in tenement and apartment houses. If this is the case there may be good ground for the contention that the system of private property in land is ceasing to serve any useful purpose in cities which the system of public ownership would not serve as well, and that the time is ripe for a gradual transition to the latter."[1]

It is impossible to survey American city progress during the past quarter of a century and compare it with the urban development of Europe without finding abundant reasons for rejoicing in the many splendid things that have been done and in the promise of the future. At the same time it is impossible to look at the work that remains to be accomplished without seeing the challenge which the city makes to our intelligence and our capacity for inventive ingenuity and coöperation on a large scale.

From what has been said in this chapter it must be apparent that the government of cities is not merely a matter of engineering and bookkeeping as some of our enthusiastic efficiency experts sometimes imagine. It involves social policies of great significance and complexity. It calls for leadership and statesmanship which cannot be supplied off-hand by any business man or lawyer. Above all a successful municipal administrator ought

[1] Seager, *Economics: Briefer Course*, p. 434.

to have a wide vision, the capacity to understand human nature in politics, and the ability to reduce large questions of public interest to concrete form. The leader needed for work of this kind is hard to find; not often does a great city succeed in discovering him. The problem is not solved however by assuming that all will be well if the city is turned over to a hustling business manager.

CHAPTER XXXIV

LOCAL RURAL GOVERNMENT

In modern civilization the city tends to overshadow the country. The drift of the population is toward the urban centers; it is in the cities that we find most of the newspapers, publishers, writers, and makers of public opinion. The problems of capital and labor seem to outweigh in importance the questions of agricultural economics; on matters of municipal government we have whole libraries of books, presenting a sharp contrast to the handful of works dealing with rural and village government. In fact, however, less than a third of the American people live in cities of more than fifty thousand inhabitants; more than fifty millions of them live in the country and in villages of less than 2500. Moreover, the foundations of national life rest essentially on agriculture; if the cities were all destroyed to-morrow, they could be renewed again; but if the countryside were ravaged, every city would sink down in ruin. Again and again in the history of the world great urban centers have arisen and disappeared while civilization has been kept going or has been renewed by the tillers of the soil. It is unfortunate therefore that emphasis should be laid almost entirely on the government of industrial and commercial centers to the exclusion of local government in villages and country districts.

Types of Local Government[1]

The differences in local institutions throughout the rural regions of the United States have been so often emphasized by writers on American government, that it seems well at the outset to indicate certain fundamental principles common to them all. Every state in the Union, save Louisiana, is laid out into counties, and the lone exception is divided into parishes. In all but

[1] In the preparation of this chapter extensive use has been made of the scholarly work by Professor Fairlie, *Local Government in Counties, Towns, and Villages*, and three more recent works likewise of first rate importance: H. G. James, *Local Government in the United States*, C. C. Maxey, *County Administration*, and Kirk H. Porter, *County and Township Government in the United States*.

twenty states the county is in turn divided into townships. The more thickly populated centers in rural districts are, or may be under certain circumstances, erected into separate corporations, known as villages or boroughs. Counties, towns, and villages are units for specific financial, judicial, police, and local improvement purposes. All local communities enjoy a large measure of self government through elective officers; that is, they are not provinces ruled by officers appointed at the center. Finally, subject to a few general provisions in the state constitution, the county and its subdivisions are under the absolute control of the state legislature, which can create and abolish offices, distribute functions among the various authorities, and in other ways regulate by law even to the minutest detail the conduct of local government.

The divergences that occur among local institutions relate to the manner in which functions are divided between the authorities of the county and of the town or township and to the manner in which the inhabitants of the county subdivisions, where such units exist, participate in the conduct of their local affairs. On this basis of differentiation our states have been classified into the three famous groups: (1) those of the New England type in which the town and its open meeting overshadow in importance the county; (2) those of the South and far West where the county predominates and the township is absent or appears only in the most rudimentary form; and (3) those of the middle type, like New York and Pennsylvania, in which the town, or township, as it is sometimes called, has a large and important place, but is subordinate to the county administration.[1] These three types of local government have been carried westward with the expansion of the country and have formed, with varying emphasis, the basis for the development of local institutions west of the Alleghanies.

The County

There are about 3000 counties in the United States, varying in size from the county of Bristol in Rhode Island, embracing twenty-five square miles, to the great county of Custer in Montana covering more than twenty thousand square miles. The

[1] For another classification based upon a more minute analysis see Porter, *County and Township Government in the United States*, pp. 44 ff.

divergences in population are even greater, for at one end of the scale we have New York county, the heart of the metropolis, with more than two million inhabitants and, at the other end, small rural counties with a few hundred residents widely scattered. Delaware has three counties; Texas, 253.

Every county has a county town, which is the seat of the offices of administration. In every state except Rhode Island and Georgia, there is to be found a county board[1] in charge of certain matters of finance and administration, and every county has a group of officers connected with the administration of justice, police control, finance, and miscellaneous matters. Besides being a unit for the satisfaction of purely local needs, the county is also a subdivision of the state for the discharge of many central functions, especially in connection with finance and elections.

Let us examine first the county board. From the point of view of organization, county boards may be divided along the lines laid down by Professor Porter into five general classes: (1) the relatively large board composed in most cases of representatives elected from the townships; (2) the small board of from three to seven members elected at large from the whole county or from districts (to be found in twenty-eight states); (3) the *ex officio* board made up of the county judge and the justices of the peace or some other judicial officers; (4) the hybrid board composed of the county judge and a few specially elected members; and (5) miscellaneous, to be found in a few states including, among others, Connecticut where the board consisting of three is chosen by the legislature, and Georgia where there are only special boards for certain functions such as road and revenue administration.[2]

A majority of the boards fall within the first two classes. Each of the two types, the small board and the large representative body, has its advantages. The former can meet readily on call; it transacts business with more facility; it can, with more certainty, be held responsible for the due discharge of its legal duties. The latter is more representative in principle, affords fewer opportunities for collusion among the members, and partakes more of a deliberative character. In point of fact, however, both systems have been severely criticized as wasteful, inefficient, and sometimes corrupt; and several attempts have

[1] The Louisiana parish also has a board.

[2] *Op. cit.*, p. 70.

been made to institute other organs of local or state government to check and control the county board.

The county board, whatever its form, is always supplemented by a group of officials varying in number and in their powers from state to state. They are usually elected by popular vote, are independent of one another in the discharge of their duties, and are subject more or less to administrative control by the board or state authorities. The historic origins of most of them are to be sought in England during the Norman-Angevin period when sheriffs, coroners, and justices of the peace undertook primitive functions of police control and local administration.

The practice of having a separate judge and court for each county obtains in about one third of the states, while some other states have separate courts for the more populous counties. The more common rule is to group counties into judicial districts and have one judge go on circuit from county to county, holding stated sessions of court. In about three fourths of the states all judges, district and county, are selected by popular vote for varying terms — often six to twelve years. In other states they are selected by the governor in conjunction with a council, the senate, or, as in Connecticut, the entire legislature. In three commonwealths, Rhode Island, Vermont, and Virginia, they are chosen by the legislature alone. Sometimes there is associated with the county judge a special officer, usually known as the probate judge, who is charged with the settlement of estates.[1]

The jurisdiction of the county court, that is, the range of matters which may come before county court judges, of course, varies greatly from state to state. In a few states, the county court has no judicial functions at all, but is merely an administrative organ; in two states, Kentucky and Tennessee, it possesses both judicial and administrative functions; and in some others the duties of the county court are confined to probate business.

Next in importance to the judicial officers of the county is the prosecuting attorney, known in New York as the district attorney and in some other states as the county attorney.[2] He is generally an elective officer and is charged with instituting and conducting criminal prosecutions and with representing the county in civil

[1] There is always attached to the county court a clerk who keeps the judicial records and sometimes has miscellaneous functions in addition; see above, p. 623.

[2] This latter term is applied in some states (including New York) to an attorney appointed to represent the poor in courts.

suits. He usually has the power of appointing assistant prosecuting attorneys for the various localities within the county. Sometimes he derives his salary from fees — a device which furnishes an incentive to activity but is discarded by many states in favor of a fixed salary because it may encourage useless prosecutions.

The chief business of the prosecuting attorney is, of course, the enforcement of the law against criminals of every kind — from the petty thief to the murderer or the defaulting or dishonest public officer. Clearly, therefore, the good order of the community and the efficiency of its government depend in a large measure upon the character of the prosecuting attorney; and it is small wonder that heated political contests are sometimes waged over the selection of the man to fill this position. There is nothing so important to a corrupt county political "machine" as the office of the prosecuting attorney, for it is practically within his power to decide whether corruption and malfeasance shall be tolerated in the various departments.[1]

The prosecuting attorney, however, does not have sole control over the institution of criminal proceedings, for in most states there is a grand jury which may take the preliminary steps in hearing evidence and bringing indictments.[2] The prosecutor has no legal power to force or prevent action on the part of the grand jury; but, as a matter of fact, he usually determines what cases shall come before it, and his advice as to the proper line of action is generally taken.

The development of this practice and the discovery that the grand jury is a slow and unwieldy instrument for prosecution have led several states to abandon it altogether for ordinary cases and to authorize the institution of criminal trials on "information" presented by the prosecutor. There are, of course, grave dangers in substituting the will of a single official for the judgment of a group of citizens; the constitution of Oklahoma, while permitting prosecution by information, provides that no person shall be prosecuted for a felony in that way without having had a preliminary examination before a magistrate, or having waived such preliminary examination.[3] The restriction of the use of the grand jury increases enormously the power of

[1] See Goodnow, *Principles of the Administrative Law of the United States*, p. 416.
[2] See above, p. 624.
[3] *Readings*, p. 87.

the prosecutor — happily if he uses it for good, disastrously if he is associated with the criminal elements.

The chief police officer of the county is the sheriff, who is elected by popular vote in every state except Rhode Island, where he is chosen by the legislature. The sheriff always has power to appoint one or more deputy sheriffs. His term is usually two years but, in some states, it is three or four years. The sheriff receives either a fixed salary or fees or a combination of both. He is custodian of the county jail and is the county hangman; he summons witnesses, arrests indicted persons, sells the property of private persons for taxes or debt under judicial order, and executes the processes of the court.

The sheriff is also conservator of the peace in the county, that is, he may "upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace and bind anyone in recognizance to keep it. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers and commit them to jail for safe custody. For these purposes he may command the *posse comitatus*, or power of the country; and this summons everyone over the age of fifteen years is bound to obey."[1] This power is of great significance in time of peace and of special importance in case of disorder.

The sheriff is to a large extent the guardian of life and property throughout the county. The zeal or laxity with which he takes precautionary measures will often determine the seriousness of a local disturbance; there are many instances of sheriffs allowing their fears or sympathies to outweigh their strict obligations to execute the law. Indeed, in unsettled communities, the contest over the election of sheriff is waged with great vigor on account of its significance to the lawless elements. In serious disturbances, however, the governor of the state may take the police control temporarily out of the hands of the sheriff by declaring martial law and using state troops.[2] He may do this, of course, at the request of a sheriff unable to maintain order with the ordinary resources at his command.

In several states the law enforcement work of the sheriff is supplemented by a state police force or constabulary. Pennsyl-

[1] South *v.* Maryland, 18 Howard, 396, quoted in Fairlie, *op. cit.*, p. 109.
[2] See *Readings*, p. 449.

vania, New Jersey, and New York have such agencies. The force is organized on military principles and is under the direction of the governor. It is frequently used in labor disputes and thus arouses a general opposition in the trade union movement.

Closely associated with the sheriff is the coroner — an office not quite so ancient, but nevertheless with a long and interesting history. There are usually two or more coroners in a county, and, except in a few states, they are elected by popular vote. It is the duty of the coroner to view the body of any person murdered or killed by accident or in whose death there is involved a suspicion of crime. The inquest is made by a jury, generally of six, empaneled by the coroner; witnesses are summoned; all facts relating to the death of the person which can be ascertained are recorded; and at the conclusion of the inquest the jury returns a verdict to the effect that the deceased met his death in some particular manner; if foul play is unearthed, the offender or offenders may be named.

This crude system of ascertaining the cause of accidental deaths works fairly well in rural communities but is hopelessly obsolete in densely populated centers where deaths result from many complex industrial causes and mysterious crimes are committed daily. Early recognizing the special difficulties connected with inquests in urban counties, our lawmakers provided for calling in one or more medical specialists to give expert testimony before coroners' juries. Indeed in some cases expert medical examiners are substituted for coroners and there is a growing demand that this practice be universally adopted. Among the planks in the platform of the local government reformers is the abolition of the office of coroner.[1]

Next in importance to the judicial and police officers of the county is a group of financial officers. They, too, are generally elective. First among them is the treasurer who is to be found in every state except Rhode Island. His duties are primarily fiscal in character; he collects the taxes and transmits to the central authorities that portion of the revenues which goes to the state. He is the guardian of the public funds and chooses the banks in which to deposit them. Unless the law forbids it, he may select them at will and retain the interest accruing on his accounts. Obviously this is a possible source of spoils and cor-

1 Porter, *op. cit.*, p. 296.

ruption. Even in the few states where the law requires the treasurer to deposit his balances with the banks which offer the best terms, he may enter into secret negotiations with them and receive a reward for accepting a low rate of interest. This is an evil which can be cured by specific legislation requiring open bidding for county deposits and providing for state supervision over treasurers' accounts. Naturally, of course, county politicians hardly look with favor upon cutting off such a "choice plum."

About one third of the states, particularly in the north central group, have a county auditor whose business it is to scrutinize the accounts of all county officers, prepare a periodical statement of finances, and issue warrants on the treasury. Until a few years ago, it was the common practice to allow county auditors to keep their books in almost any fashion; as a result all kinds of irregularities crept into county finances. In fact, the corruption in county administration was relatively as great as in city governments. During the opening years of the twentieth century, as we have noted,[1] legislatures began to enact laws providing for state supervision of local finances. Ohio, Indiana, Iowa, New York, Massachusetts, California, Michigan, and Wisconsin have taken this step. The system in California, for example, embraces a board of control, a staff of expert accountants, a uniform system of accounting and reports "for all officers and persons in the state who have the control or custody of public money or its equivalents," and finally a scheme for auditing local books.

In a number of states, especially those in which the township is only slightly developed, notably in the South, there is a county assessor who is usually elected. It is his duty to make out or compile the roll of all the tax-payers residing in the county and the value of the property assessed against each person. Generally the tax-payers list their own property for the information of the assessor, but, of course, he may alter each valuation as he sees fit. Associated with the county assessor there is sometimes a board of equalization whose duty it is to pass upon the assessments of the entire county, correcting inequalities and hearing appeals from tax-payers against the valuations placed on their property.

Finally there is a third group of county officials whose duties

[1] See above, p. 670.

are mainly clerical. This group includes a clerk who often combines keeping court records with other work, such as keeping land records, administering election laws, distributing ballots, and compiling election returns. In about half the states there is a recorder or register of deeds, who guards the records of titles to land and mortgages or other instruments which affect titles to property. Generally speaking, outside of New England, there is either a county board of education or a superintendent of education. Among the other administrative officers, found in a large number of states, are the superintendent of the county poor farm, the manager of the county hospital, if there is one, and the health commissioner.

The functions of county government as indicated by the above list of officials fall into certain broad divisions. They are summarized by Professor Porter in the following fashion:

Maintenance of peace
Administration of justice
Administration of probate and other specialized judicial work; and keeping of vital statistics
Poor relief
Maintenance of schools
Care of highways
Administration of tax machinery
Administration of election machinery
Recording of land titles
Militia organization
Serving as an administrative district for purposes of state government.
Miscellaneous minor functions, such as administration of parks, libraries, and hospitals.

Town and Township Government; Villages

On the basis for classifying local governments laid down at the opening of this chapter — that of the organization and functions of the subdivisions of the county — the New England states stand in a group by themselves. In that section of the Union, every county is divided into towns, or, to use the word in a western sense, townships. Many diverting attempts have been made to trace the origin of these rural hamlets to that "great cradle of

liberty, the forests of Germany," and as a matter of fact they do have a very long and interesting history. In the more sparsely settled districts, they have remained almost unchanged in their form of government amid the political revolutions of the nineteenth century.[1] It is customary to call them pure democracies because they are governed by assemblies of all the voters in open town meetings, and possess most of the important powers which are elsewhere vested in the county.

The New England towns are very irregular in shape, owing to their having been originally settlements laid out roughly before an official survey was made. Generally speaking, they vary in size from twenty to forty square miles, although the western rectangular township of thirty-six square miles is found in the northern part of Maine. The town is usually a rural region containing one or more "villages," varying in size from very small hamlets to settlements containing three or four thousand inhabitants. The more thickly populated urban centers are often organized as city corporations distinct from the town, but this is not always the case. The town of Brookline, Massachusetts, between Boston and Newton, has a population of over 20,000 and yet retains its primitive town government. Even New Haven and Hartford, Connecticut, have continued the town organization separate from the city government. The feature of the system which is more striking to the observer from the Middle West is the combination of rural with municipal government; for in many instances considerable villages and even small cities, containing several thousand inhabitants, are not separated from the surrounding agricultural district, but the whole of the "township" is governed by one meeting of all the electors, rural and urban.

The government of the town is vested in a town-meeting composed of all the voters, held annually and on special occasions. The meeting commonly assembles in the town hall and seems to be attended by a considerable proportion of the voters, especially in the rural regions. At the town-meeting the selectmen, or executive committee, the town clerk, assessor, treasurer, constable, and other officers are chosen by secret ballot, and matters relating to appropriations, streets, schools, and other local functions are discussed and determined. In

[1] Compare the extracts on p. 11, and on p. 556 of the *Readings*.

rural districts where primitive conditions have been undisturbed by the rise of the factory system or by the influx of immigrants, and where everyone knows everybody's business, the town-meeting preserves much of its ancient vitality and interest, but to a considerable extent the business of the meeting is determined in advance by a caucus of the adepts in rural politics.[1] It is only when some matter of special importance is to be debated, such as the laying out of an important street or the erection of a new school building, that the town meeting rises to the dignity of a deliberative assembly.

The administrative work of the town is done by a group of officers elected for terms of one or more years at the town meeting. The chief executive officers of the town are the selectmen, varying in number from three to nine. Their emoluments and the character of their duties are largely determined by the size of the town. They may execute the special orders of the meeting, lay out highways, draw warrants on the town treasury, act as assessors, health officers, and election clerks, and grant licenses. The town clerk is an important and often an interesting character, for his knowledge of local matters and family histories is sometimes stupendous. He issues marriage licenses, serves as a registrar of marriages, births, and deaths, records the proceedings of the town meetings, and in Connecticut and Rhode Island is a recorder of deeds, mortgages, and other documents relating to land titles. The funds of the town are guarded by a treasurer, and sometimes there is an auditor to supervise all accounts. The peace of the town is in the keeping of the constables, who often have other duties, such as the serving of writs and the collection of taxes. Except in Massachusetts and Maine, where they are appointed, justices of the peace are elected at the town meeting. There are in addition numerous other minor officers, such as poor guardians, pound-keepers, library trustees, and fence-viewers, sometimes elected, and sometimes appointed by the selectmen.

In a great group of Northern and Central states the town, or township as it is often called, has a position of importance in the county; but there does not exist in these sections the intense localism which has made the town such a vital part of the New England system. In New York, New Jersey, Michigan, Illinois,

[1] See *Readings*, p. 12, for the Boston caucus in colonial times.

Wisconsin, Minnesota, Nebraska, North and South Dakota, for example, the town-meeting with variations is frequently found, but its functions are of slight importance, and with few exceptions the voters do not take a lively interest in its proceedings. In Pennsylvania, Ohio, Indiana, Iowa, Kansas, and Missouri there is no township assembly at all, the local business being transacted by elective officers.

The decline or disappearance of the town meeting in the Middle West is principally due to the fact that in most cases the township is an artificial unit laid out by the surveyor, not a settlement of neighbors and friends such as we find in New England. There the county organization came first, when the regions were only sparsely settled, and it has retained most of the functions assigned to it in the beginning. Those states, furthermore, were settled by immigrants from all parts of the East and from Europe, and conditions did not favor that spontaneous coöperation which naturally arises among people closely associated in long historical traditions. It must be remembered also that in this group of states the more populous urban centers are cut off from the rural regions by special village or city organization, thus leaving only the scattered farmers to conduct their rural affairs by themselves.

In most of the states which have established the town-meeting, the authority of that body is by no means as great as in New England, although in New York it theoretically enjoys substantial local powers. In that state the meetings are held biennially,[1] usually on the general election day in November and at other times on special call for particular purposes. The town meeting elects local officers and makes provision for abating nuisances, destroying noxious weeds, establishing "pounds," and caring for town property; it may vote money for town purposes, but an elector of a town cannot vote upon any proposition for the raising or appropriation of money or incurring any town liability unless he is the owner of property in the town assessed upon the tax roll. As a matter of practice, however, the town meeting of New York in a large number of cases is merely an election, the government of the town being conducted by the town board, consisting of the supervisor, town clerk, and the justices of the peace.

[1] In a number of towns the general meeting is abandoned altogether and the voters assemble in election districts to choose town officers.

In those states which do not have township meetings the local functions are vested in elective officers, such as trustees, clerks, assessors, treasurers, justices of the peace, and constables. These officers are charged with certain definite duties by statute, and there is no occasion for by-laws and debate. In Indiana, for example, the most important officer is the trustee, who prepares the township budget, supervises the common schools in rural districts, and, generally speaking, occupies the place of the town board in New York or the selectmen in New England. However, an attempt has been made in that commonwealth to establish popular control over the trustee by the creation of an elective board of freeholders to supervise his financial activities.

Whether the town or township is governed by a general meeting of the voters or by elected officers, its importance, as Professor Porter demonstrates, is steadily declining.[1] This is a result, in the main, of the extension of state and federal activities into rural regions, particularly in respect to the construction and maintenance of highways, the direction of public education, the enforcement of health standards, and the care of the poor and defective. As time goes on the township sinks into the background and the county is magnified. Champions of local democracy lament the passing of the good old days when neighbors gathered at the town hall to discuss weighty matters of state and trained themselves in the village school of politics. Such discussion is salutary, but it is not useful in discovering the right kind of material for highway construction or the sources of contagious diseases. So in the township, as in the nation, those who take thought about government are confronted with the problem of reconciling democracy and efficiency.

The subdivisions of the county in the South and Far West need not detain us long, for they are generally of slight importance historically or practically, and attempts to introduce the township system of the North and East have not been at all successful. In some of the Southern states the county subdivisions are known as magisterial districts, in others as election districts or precincts. These divisions are quite frequently used as the units for electing justices of the peace, constables, and members of the county board or for school administration. The voting of appropriations and general functions of adminis-

[1] *County and Township Government*, pp. 72 ff.

tration vested in the New England town meeting are in the South and West vested in the county board.

In all the states outside of New England it is the common practice to separate thickly populated centers from the surrounding rural districts and to incorporate them as villages, towns, or boroughs. This is done to some extent even in New England where the town meeting retains so much of its ancient vitality. The number of such incorporated places in the United States is more than 10,000 and they range in population from 100 to 10,000. In some instances they are incorporated by special act of the state legislature, but more commonly in accordance with a general law which provides the conditions under which the people of a thickly settled region may set up their own government. The village government consists of a small elected board and usually a chairman chosen by the board, although frequently a village makes some pretensions by having an elected mayor. The business of the government consists in managing local finances, public buildings, streets, pavements, drains, and the maintenance of order.[1]

Criticism and Reform

Although more than one half the people live in the country under county, town, and village government, the subject has only recently become a matter for critical comment and constructive suggestions. Bryce, who devoted so much attention to the evils of municipal administration, passed lightly over rural affairs. No one has undertaken to survey and attack from every angle the processes of county and town administration. The standard works by Fairlie and James are essentially analytical and descriptive rather than critical and belligerent. The more recent book by Porter, though marked by an appreciation of current defects and containing a program of reform, is judicial rather than censorious in tone.

General assaults on the time-honored system of local government have come from other sources. H. S. Gilbertson, in a study, *The County*, published in 1917, made an attack all along the line. Shortly afterward, R. S. Childs assailed local

[1] F. G. Bates, "Village Government in New England," *American Political Science Review*," Vol. VI, pp. 367 ff. (1912); E. A. Cottrell, "Recent Changes in Town Government," *National Municipal Review*, Vol. VI, pp. 64 ff. (1917).

politics in an article bearing the aggressive title of "Ramshackle County Government," which has been widely circulated as a reprint.[1] In a searching study of county government in Delaware, made on the ground, Professor C. C. Maxey unearthed a long list of local diseases and then proposed an elaborate scheme of reform. In 1922–23, a special committee of the New York legislature made a minute inquiry into the methods of local government in that state and reported critical findings accompanied by definite measures of reconstruction.[2]

From various sources we have now laid before us an appalling bill of indictment. The large, representative county board is denounced as cumbersome, wasteful, negligent, and inefficient, even where honest. The long list of county officers is described as "a smoke screen" which confuses the voters and hides "the invisible government" of county bosses. The methods employed in assessing property, collecting taxes, building and maintaining roads, administering jails, poor houses, and other county institutions, preparing budgets, reporting expenditures, letting contracts for construction work and printing, buying supplies, and transacting business generally are assailed as obsolete, crude, and extravagant where not actually and willfully corrupt. "Most counties and towns have no budget systems, no adequate audit, and no systematic purchasing. . . . Collectors of taxes have come to the county treasurer with handbags full of tax money, who did not know how much they had. . . . County and town printing is extravagant. . . . County, town, and village payrolls have been used as a pension system for superannuated citizens" — so run a few of the charges brought by the New York legislative committee. That is not all. As the powers conferred upon the county board by state law are usually enumerated or narrowly limited, citizens are constantly running to the state legislature to secure special legislation or to protest against interference with their local affairs. Thus home rule is violated, confusion is added to county politics, and the burdens of the legislature are increased.

The remedies offered for the improvement of local government are in the main those which have been found more or less effective in cities:

[1] A copy can be secured from the National Municipal League, 261 Broadway, New York City.
[2] *Report of the Joint Committee on Taxation and Retrenchment*, State of New York, 1923.

Home rule for counties

A small county board elected at large by proportional representation

Abolition of all elective officers, except sheriff, auditor, and prosecutor

Adoption of the manager plan for counties (and perhaps for villages), similar to that in force in many cities

The grouping of all executive officers under the leadership of the manager

Establishment of a budget system for counties and subdivisions

Installation of modern accounting devices

State control and supervision of accounts

Enforcement of state and national standards for local services

Transfer of many functions from townships to counties

Consolidation of county with city government in densely populated urban counties.

This seems like a formidable list, but it is not altogether academic. Some of the proposed reforms are already being adopted and others are in process of extensive agitation. It is not improbable that the coming decades will see a revolution in rural government as significant as that wrought in city government since Bryce published his *American Commonwealth.*

Take, for example, the question of home rule. The constitution of Michigan attacks this problem by authorizing the legislature to confer a general ordinance power on county boards; by legislative enactment they have been given full power "to pass such laws, regulations, and ordinances relating to purely county affairs as they may see fit"; but these laws and ordinances must not conflict with the general laws of the state or interfere with the legal rights of townships and other local bodies. Moreover, measures passed by the county board are subject to the governor's veto and can be passed in spite of his veto only by a two thirds vote.

A far more significant step in the direction of granting home rule and reorganizing county government along efficient lines was made in California in 1911 by the adoption of a constitutional amendment empowering counties, through boards of freeholders, to frame their own charters or plans of government and on popular approval to put the same into effect. Steps to establish home rule under this provision may be taken by the county board of

supervisors or may be initiated on petition of fifteen per cent of the voters. The charter drafting board is elected by popular vote and it is authorized under the state constitution to make a substantial revolution in county government — in the nature of many of the county offices, the methods of choice to fill them, and in the functions which the county may undertake. The charter as drafted by the board must be approved by popular vote and also by the state legislature.

The first county in California to try the plan was Los Angeles county which approved a new scheme of local government in November, 1912. The elements of the Los Angeles scheme are as follows:

Commission government, in the form of a board of five members, in control of county affairs

The appointment by this board of all county officers, excepting the assessor, auditor, and district attorney

Creation of new offices, including corporation counsel, a purchasing agent, superintendent of charities, and a public defender

Appointment of three civil service commissioners by the board of supervisors

The creation of the office of road commissioner with full power to manage the road system of the entire county under the direction of the board of supervisors.[1]

While we are only at the beginning of a reconstruction in the system of local government we have advanced far along the way toward state control over the processes of local government. The dogma that the people of a locality, even in the remote towns of the New England hills or the mountain regions of Tennessee, know more about their own affairs than anybody from the state capital or from Washington has received many hard knocks during recent years. Moreover, as a result of radical changes in our economic life matters that were once of purely local concern have become of state-wide and even national importance. It does not matter much to neighboring counties whether any particular county keeps the weeds cut along the roadside[2] or allows the pound fences to fall into decay, but in these days of swift and constant intercommunication it does matter whether the

[1] Three other California counties followed the example of Los Angeles. Maryland adopted a county home rule amendment in 1915, and New York in 1921 authorized the legislature to provide special forms of government for two counties, Westchester and Nassau.

[2] Even this is scarcely true, for the spread of weeds is not limited to county lines.

county safeguards its inhabitants against contagious diseases, keeps its highways in order, allows the children to grow up in ignorance, or permits factories to pollute the streams.

As a result of increasing state-wide interests, there has come inevitably a demand for more state supervision over local institutions. We now have state boards of health with large powers over local sanitary arrangements, food and dairy products, water supplies, and other matters affecting the health of the state generally. We have state factory and mining inspectors, railway commissions, highway boards, charity and correctional boards and officers, tax supervisors, excise commissioners, and educational officials.[1] Only recently many states have sought to standardize the whole system of local finances and to secure efficiency and honesty in local financial administration by instituting state bureaus of inspection.[2] State legislatures are more and more subjecting local authorities to uniform standards in the matter of education, sanitation, highways, and finance. Consequently, through both legislative and executive centralization, local authorities are in many respects mere subordinate officers, carrying out state-wide laws dealing with all matters of fundamental importance.

Indeed, since the opening of the twentieth century we have begun to realize dimly that rural districts need skillful administration and the application of natural science to human service quite as much as do the cities. The movements which have been launched to improve the politics and living conditions of great urban centers are beginning to be noticeable here and there in the country. We no longer assume that anyone with a fair degree of intelligence can manage a farm, a household, or a village without the assistance afforded by the accumulated knowledge of modern times.

We have at last begun to study in a scientific way the conditions of life for large sections of our farming populations. We are, for instance, beginning to find out something about rural sanitation which was once supposed to take care of itself automatically. As a result of careful studies made in different parts of the Union, the federal Public Health Service declared in 1920 that in less than two per cent of the rural homes in the United States are the most essential principles of sanitation consistently followed in

[1] See above, p. 694.

[2] See *Readings*, p. 565.

practice, and that for less than three per cent of our rural population is the local health work approaching adequacy. The Service also discovered that "certain diseases which are caused by infections spreading from person to person are, notwithstanding the sparser population, much more prevalent in our rural sections than in our cities. Hookworm disease and malaria are now almost entirely of rural origin. In many sections of our country typhoid fever and dysentery are more prevalent in the rural districts than in the cities. Tuberculosis is appallingly common in our average farming community."[1]

It is often supposed that any person reasonably intelligent can "run" a farm, but in point of fact farm management calls for a far more special knowledge than most if not all the trades and employments to be found in cities. The successful farmer must know about finance and accounts, how to buy and sell commodities advantageously, how to select stock, seeds, and implements. He ought to know something about the chemistry of soils and scientific fertilization. In short, he ought to be a good manager, a financier, a chemist, and a biologist all in one. The work of the housewife on the farm is infinitely more arduous and complicated than that of the housewife in town, and yet how little is done in comparison to lighten the burden and make smooth the way for the women on the farms! Most of them, in addition to household duties, take an active part in dairying, chicken raising, fruit growing, and preserving. The successful woman on the farm must be all that the man is and more — to most of his accomplishments she must add a knowledge of cooking, sewing, the care of children, and hygiene. She is the chief guardian of health on the farm.

Fortunately there are signs of a new day. Owing to the demands of automobile owners and manufacturers and the support of federal and state authorities, improved highways break down the boundaries between town and country.[2] State and federal health agencies attack rural sanitary problems directly by going to the people with expert information and scientific demonstrations. They wage war on communicable diseases, on pollution of the soil and water supplies, insanitary conditions in the schools, unscientific diets ruinous to health, and the disease of children.

To aid in the advancement of agriculture and home life on the

[1] *Federal Public Health Service Reports*, Nos. 570, 613, 615, 708.

[2] See above, p. 445.

farms, county extension agents acting under state and federal authority carry the lamp of science to the door of the humblest farm house. Dr. Macdonald has described this work with such clearness and such insight that he deserves quotation here at length: "The county agents are usually selected from among the graduates of the agricultural colleges. Their duty is to disseminate information regarding proper methods of farming and this they do, wherever possible, by means of personal contact with the rural population. They conduct actual demonstrations on the farmer's own land, explaining the proper use of fertilizers and showing how to prune, spray, and otherwise care for trees. . . . They even furnish plans for homes, suggest how farm buildings should be constructed, help establish new pastures, and renovate old. Through the bureau of agricultural economics . . . they sell nitrate of soda direct to the farmers. Women employed as demonstrators carry on similar work in and about the homes. They teach gardening and poultry raising and show how to preserve foods. The family dietary is given special attention, and suggestions are made for increasing the conveniences and comforts of country life. Women and girls are taught how to sew.

"In many other ways the county agents render themselves almost indispensable to the farming population of the country. They answer thousands of requests for information coming to them by mail and distribute the publications of the United States Department of Agriculture and of the state agricultural colleges. . . . They visit the schools of the counties in which they work, frequently giving advice in outlining agricultural courses; and at the fairs they give demonstrations. Perhaps their most important work is the organization of county farm bureaus, consisting of men, women, and children. These bureaus are voluntary associations which stimulate a spirit of friendly rivalry among the farmers and aim at the improvement of agriculture. . . . Throughout the South special help is given the negro. Colored agents, about one hundred and fifty in number, work exclusively among their own people." [1]

The results of these varied activities and indeed all combinations between federal, state, and local agencies in rural service have been good. There is a steady and marked advance in the scientific standards applied to the improvement of rural

[1] *Federal Subsidies to the States*, pp. 30–31.

life, though immense difficulties are yet to be surmounted. All this is in keeping with the spirit of the great American experiment — a union of private initiative with coöperative enterprise in the development and right use of the most marvelous natural endowment ever given to any nation.

APPENDIX

CONSTITUTION OF THE UNITED STATES

WE the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes[1] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[1] See the 16th Amendment, below, p. 801.
[2] Partly superseded by the 14th Amendment. (See below, p. 800.)

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.[1]

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[1]

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualifications to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. 1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

[1] See the 17th Amendment, below, p. 801.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House

of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. 1. The Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. 1. The migration or importation of such persons as any of the

States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.[1]

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no

[1] See the 16th Amendment, below, p. 801.

senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[1] The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.[2]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to

[1] The following paragraph was in force only from 1788 to 1803.
[2] Superseded by the 12th Amendment. (See p. 799.)

the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. 1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more States; — between a State and citizens of another State; [1] — between citizens of differ-

[1] See the 11th Amendment, p. 799.

ent States, — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Consitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names. [Names omitted]

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

ARTICLE I[1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

[1] The first ten Amendments adopted in 1791.

or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI[1]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII[2]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death

[1] Adopted in 1798.

[2] Adopted in 1804.

or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE XIII[1]

SECTION 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[2]

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

[1] Adopted in 1865.

[2] Adopted in 1868.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI[2]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII[3]

The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII[4]

After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

[1] Adopted in 1870. [2] Passed July, 1909; proclaimed February 25, 1913.
[3] Passed May, 1912, in lieu of paragraph one, Section 3, Article I, of the Constitution and so much of paragraph two of the same Section as relates to the filling of vacancies; proclaimed May 31, 1913.
[4] Submitted by Congress in December, 1917. Requisite number of ratifications received on January 16, 1919; proclaimed January 29, 1919.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the states by Congress.

ARTICLE XIX [1]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The Congress shall have power by appropriate legislation to enforce the provisions of this article.

[1] Submitted by Congress in June, 1919. Proclaimed in August, 1920.

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INDEX

(For references to cities and states, consult topics.)

Absent voting, 540.
Acceptance speech, 172.
Adamson law, 397.
Administration, science of, 38 ff.; national, 303 ff.; state, 575 ff.; municipal, 724 ff.; centralization of, 447 ff., 784.
Admission of states, 489.
Advisory opinions, 115, 296, 652.
Agriculture, department of, bureaus and divisions of, chart, 308–9; work of, 403, 427, 445, 785–6.
Alaska, 433.
Alien act, 130.
Alien property custodian, 359.
Aliens. *See* Immigration, Naturalization, *and* Suffrage.
Ambassadors, appointment of, 197, 203; duties of, 327 ff.
Amendment clause of federal Constitution, 82 ff.
Amendments, to federal Constitution, adoption of, 85 ff.
Amendments, to state constitutions, 462, 503 ff.
Annapolis convention, 68.
Anti-federalists, 129 ff.
Anti-lobby legislation, 619.
Anti-trust act of 1890, 390; Clayton, 390, 400; state legislation, 673 ff.
Appeals, in courts, 640, 650.
Apportionment of representatives, problem of, 24; in Congress, 225 ff.; in state legislatures, 595 ff.
Appropriations. *See* Budget.
Arbitration, in labor disputes, 398 and note, 399, 688; courts of, 652.
Aristotle, concept of politics, 13.
Army, United States, 352 ff.
Arrest. *See* Due process of law.
Articles of Confederation, 61 ff.
Assessments, state and local, 661 ff.; special, 729.
Attainder, bill of, 110, 480.
Attorney, prosecuting, 624, 770.
Attorney-General. *See* Justice, department of; state, 578.
Auditor, state, 578; county, 774.
Australian ballot. *See* Ballot.

Ballot, Australian, 153, 537 ff.; Massachusetts, 538; popular control through, 517 ff.; non-partisan, 538 ff.
Bankruptcy, 248.
Bank, United States, 128, 131, 134, 136.
Banks, federal reserve, 379 ff.; supervision of state, 676; guarantee of deposits, 677. *See* Finance.
Baths, municipal, 758.
Berger case, 224.
Bicameral principle, 24, 222, 455, 592, 710.
Bill of attainder, 110, 480.
Bill of credit, 136, 480.
Bill of rights, federal, 85 ff.; 106 ff.; state, 491 ff.
Bills. *See* Congress *and* Legislature, state.
Blue sky laws, 676.
Board of estimate and apportionment, New York City, 714, 716.
Board system, in general, 45; federal, 308; state, 578 ff., 586; in cities, 717, 724 ff.
Boards, county, 769 ff.
Bonus, 361 f.
Boycott, 682.
Boxer uprising, 202.
Budget, principles of, 50 ff.; federal, 372 ff.; state, 656 ff.; municipal, 727 ff.
Bureau of Municipal Research (New York) founded, 40; 469, 585, 660, 730.
Burke, Edmund, Theory of representation, 29.
Business. *See* Commerce, Industry, *and* Taxation.

Cabinet, appointment of, 187, 196; rôle as council, 190 ff.; proposed state, 660, 620.
Campaign funds, 177, 178, 240, 553.
Campaign, national, 176 ff. *See* Elections.
Candidates. *See* President, Congress, Legislature, *and* Governor.
Capital issues committee, 359.
Capital punishment, 649.
Capper-Volstead act, 403.
Carey act, 427.
Case method, 757.
Caucus, party, 151; congressional, 151; in Congress, 259 ff.
Chancery, 628.
Charities, public, 690 ff., 756 ff.
Charters, municipal, 703 ff.; optional, 707.
Check and balance system, 35 f.
Child labor, extent of, 398 note; federal legislation, 398; state legislation, 684.
Children's courts, 738.
Chinese exclusion, 405.
Circuit court, of appeals, federal, 287; state, 623.
Citizens' Union (New York), 555.
Citizenship, 120. *See* Naturalization.
City government, relation to state, 702 ff.; home rule, 707; relation to county, 709; council, 709 ff.; proportional representation, 711; preferential voting, 712; powers of council, 713 ff.; mayor, 715 ff.; commission government, 718; city manager, 721 ff.; administrative system, 724; finance, 727 ff.; budget, 728; assessment methods, 729; debts, 729 f.; police administration, 731 ff.; judiciary in, 737 ff.; children's courts, 738; public defender, 740; fire administration, 740 ff.; pavements, 742; sewers, 743; water supply, 743; street cleaning, 744; waste disposal, 744; public utilities, 745 ff.; municipal ownership, 746 ff.; regulation of utilities, 749; public health, 751 ff.; education, 752 ff.; social work, 756 ff.; tenement house reform, 758; housing, 759; recreation, 760; markets, 761; city planning, 762 ff.
City manager plan, 42, 721 ff.
City planning, 762 ff.
Civil service, problems of, 6, 46 ff.; federal, 310 ff.; state, 588 ff.; municipal, 726.
Claims, federal court of, 288 note.
Class representation, 25.
Classification act, 319.
Clayton act, 390, 400.
Closure rule in Senate, 275.
Coal, conservation, 424; commission reports, 8, 425.
Codification of the law, 630 f.
Coinage, 250. *See* Finance.
Commander-in-chief, President's power, 200 ff.; 352 ff.
Commerce, origin of power to regulate, 63 ff.; power of Congress, 248; federal regulation, 382 ff.; state regulation, 674 ff.
Commerce, department of, 249, 397; organization, chart, 308–09.
Commission government in cities, 718 ff.
Commission, interstate commerce, 385 ff.; public service, 677 ff.
Committee, national, 176 ff.; state, 526, 545; county, 528 f.
Committee of the whole, 274 note.
Committee on public information, 359.
Committee system, in Congress, 267 ff.; in state legislatures, 607 ff.
Common law, 627 ff.
Comptroller, state, 578.
Conciliation courts, 653.
Concurrent resolutions, 278 note.
Confederation, Articles of, 61 ff.
Conference committee, 278, 370.
Congress, organization, 222 ff.; powers of, 245 ff.; conduct of business, 257 ff. *See* House of Representatives, Senate, Committee system, *and* Speaker.
Congressional, caucus, 151; campaign committee, 179.
Conservation, natural resources, 414 ff.
Consolidation of schools, 698.
Constitution, federal, demand for, 67 ff.; call of convention to frame, 68; framing of, 69 ff.; compromises of, 75; contrasted with Articles of confederation, 76 ff.; ratification of, 78; amendments to, 81 ff.; principles of, 102 ff.; position of state under, 477 ff.
Constitutions, state, origins, 452 ff.; formation of first, 459; development of, 462 ff.; elements of, 491 ff.

Consuls, appointments and duties, 332 ff.
Contempt of court, 291. *See* Injunctions.
Contested election of 1876, 184 note.
Contract, obligation of, 480 ff.
Contract labor, excluded, 405.
Contracts, law of, 634 ff.
Contributory negligence, 634, 685.
Convention of 1787, 69 ff.
Conventions (party), rise of, 151; working of national, 164 ff.; state, 527 ff.
Conventions, state constitutional, 503 ff.
Coöperative marketing, 403.
Copyrights, 249.
Coroner, 773.
Corporations, federal regulation, 383 ff.; state regulation, 486, 496, 674 ff.; law of, 637; campaign contributions by, 240, 553; taxation of, 663.
Corrupt practices acts, 178, 240, 553.
Cost of government. *See* Expenditures.
Council, city, 709 ff.
Council of national defense, 358.
County, party organization, 528 ff.; court, 623; government, 458, 768 ff.; representation in legislature, 596.
Courts. *See* Judiciary.
Crime, power of Congress over, 109, 252; amount of, 732.
Criminal law, 642 ff.; procedure, 645 ff.
Cuba, relation to United States, 440.
Cumulative voting in Illinois, 598.
Currency. *See* Finance.
Custom, in our political system, 81, 95 ff.
Customs court, 288 note.

Dartmouth College case, 481.
Debate, limits on in House of Representatives, 274; in Senate, 275; in state legislature, 610.
Debt, national, 371; state, 655; municipal, 729.
Delegated powers, doctrine of, 104.
Democracy, nature of, 17 ff.; feared, 71; rise of political, 129; Western, 132; direct, 505 ff.
Democratic party, 129 ff., 164 ff.
Departments, list of federal, *see* chart, 308–09; history of, 307; heads of, as cabinet, 190 ff.; functions of, 304 ff.; state, 577 ff.
Deportation of aliens, 408.
Des Moines, commission government in, 539, 719.
Dictatorship, cause of, 32.
Dingley, bill, 393.
Direct government. *See* Initiative and referendum.
Direct primary, 546 ff.
Disputed election, 184 note.
Dissenting opinions, 286.
District court, federal, 287 ff.
District of Columbia, 251, 439.
Divorce, 636.
Dollar diplomacy, 331.
Domain, public, 414 ff.
Domestic relations, law of, 635; courts, 738.
Draft, selective, 354.
Due process of law, 109 ff.; 482 ff.

Economics and politics, 7 ff.
Edge law, 395.
Education, federal aid, 443 ff.; state, 496, 694 ff.; municipal, 752 ff.
Educational tests for voting, 499 f.
Efficiency bureau, 319.
Eighteenth amendment, 84, 93, 403 f.
Elections, presidential, 163 ff.; multiplicity of, 517 ff.; regulation of, 535 ff.; primary, 546 ff. *See* Corrupt practices acts.
Electors, presidential, 88, 181 ff.
Eleventh amendment, 87.
Emblem, party, 538.
Emergency fleet corporation, 357, 396.
Eminent domain, 112.
Employer's liability, 634, 685.
Enrollment, party, 542 ff.
Espionage act, 109, 356, 413.
Excess profits tax, 355, 367.
Executive, nature of the, 31 ff.
Executive agreement, 204 f.
Expenditures, federal, 4; state and local, 4, 656.
Ex post facto, 110, 480.
Extradition, 119.

Factory legislation, 683 ff.
False imprisonment, 633.
Farewell address by Washington, 341.
Farm bloc, 147, 261.
Farmers' alliance, 146.
Federalist, the, 80.
Federal law, supremacy of, 104.

Federal reserve system, 379.
Federal trade commission, 391 ff.
Fellow-servant doctrine, 634, 685.
Fifteenth amendment, 92, 123.
Felonies, defined, 643.
Filibustering, 234.
Finance, Articles of Confederation, 62 ff.
Finance, federal, powers of Congress, 78, 246; taxing power, 363; direct taxes, 364 f.; indirect taxes, 364 f.; revenue bills and revenues, 366 ff.; appropriations, 372 ff.; budget act, 374; administration, 375; money and banking, 250, 376 ff., 480; farm loan system, 380 f.; postal savings system, 381.
Finance, municipal, 670, 711, 727 ff.
Finance, state, limitations on legislatures, 654 ff.; appropriation methods, 656; budget legislation, 656; taxation and assessments, 661 ff.; current tendencies, 665 ff.; audit, 668; custody of funds, by treasurer, 669; supervision of local finance, 670.
Fire department, 740.
Food laws, federal, 402; state, 691; during World War, 355.
Foreign affairs, 202 ff., 252, 323 ff.
Forests, national, 418 ff.; reserve act, 418.
Four power treaty, 334.
Fourteenth amendment, 91, 474, 483 ff., 750.
Franchises, municipal, 745 ff. *See* Corporations.
Fraud orders, 412.
Free delivery service, 411.
Free Soil party, 137.
Full faith and credit clause, 119.
Functions of government, increase in, 3 ff.

Gasoline tax, 665.
General property tax, 661.
General staff, 352.
Gerrymander, origin of term, 226 note; congressional districts, 226; state, 595.
Gold basis, 378.
Governor, colonial, 453 ff.; development of office, 460 f.; nomination and election, 558 ff.; qualifications, term, and salary, 562 f.; impeachment, 563; relation to administration, 563 ff., 581 ff.; appointing power, 565 ff.; martial law, 568; pardoning power, 568; and the budget, 656; relation to legislature, 569 ff.; message, 570; special sessions, 570; veto, 571 ff.; leadership in legislation, 572; removal power, 583.
Grandfather clause, 500 f.
Grand jury, 646.
Greenback party, 145.
Guam, 439 note.

Habeas corpus, suspension by President, 201; writ of, 291; in states, 564.
Hague conferences, 343.
Hail insurance, 677.
Hare system of proportional representation, 27.
Harrison act, 403.
Health, public, federal, 446, 784; state, 690 ff.; municipal, 751.
Highways, 445, 680.
Home rule, municipal, 702 ff.
Homestead act, 139, 415.
Honduras, 441 note.
House of Representatives, number of members, 222; qualifications of members, 223; apportionment, 225 f.; gerrymander, 226; term of members, 227; elections, 228; contested elections, 229; privileges and pay of members, 232; internal organization, 233; quorum, 234; filibustering, 234; compared with Senate, 236; bills in, 256; caucus, 258 ff.; Speaker, 262 ff.; committees in, 267; rules committee, 264; rules of, 272; procedure, 275; limitation on debate, 274; lobby, 281 ff.
Housing, 758 f.

Immigration, 405 ff.
Impeachment, federal process, 253; state, 563, 582.
Imports, tax on, 364, 477.
Inauguration, presidential, 186.
Income tax, federal, 92, 300, 355, 364 ff., 449; state, 663, 665.
Incorporation, federal, 392; state, 746 ff.
Identical note, 204.
Indeterminate sentence, 649.
Indians, 409 note.

Indictment. *See* Grand jury *and* Prosecutor.
Industrial insurance, 687.
Industrial rehabilitation, 446, 687.
Inferior officers, 196.
Information, prosecution by, 647.
Inheritance, law of, 637.
Inheritance tax, federal, 10, 355, 364, 367; state, 662.
Initiative and referendum, state, 505 ff.; municipal, 717 ff.
Injunction, writ of, 293, 399 ff.
Institutions, state, 691.
Instrumentalities, tax on, 365, 478.
Insurance, war risk, 355; state regulation, 677; industrial, 686 f.; not interstate commerce, 383.
Interior, department of, divisions, chart, 308–09; 249.
Internal revenue collector, 372.
Interstate commerce, nature of, 382 ff.; regulation of, 383 ff.; commission, duties of, 385 ff.; state interference with, 479.
Irrigation, 427.

Japan, opening of, 342; relations with, 336, 344; exclusion of laborers, 406 note.
Judiciary, federal, origin of, 77; supremacy of, 116; expansion of Constitution by, 98; organization and jurisdiction of, 284 ff.; power over statutes, 294 ff.; political controversies over, 297 ff.; five-to-four decisions, 302; control over state legislation, 477 ff.; relation to Congress, 253. *See* Injunction.
Judiciary, state, power over statutes, 466, 497 ff.; organization and election, 622 ff.; proposed reforms, 651 ff.; municipal, 737 ff.
Jury, federal cases, 110; state, 638, 646.
Justice, department of, organization, chart, 308–09; functions, 194, 206, 280, 289.

Labor, department of, organization, chart, 308–09; functions, 402.
Labor legislation, federal, 397 ff.; state, 487, 681 ff.
Labor organization in civil service, 321.
Labor reformers, 143.
Labor unions. *See* Labor legislation.
La Follette seamen's act, 397.
Laissez faire, policy of, 5, 14, 672 ff.
Lands, federal, disposal and administration of, 414 ff.; state policy, 673.
Land values, taxation of, 764.
Larceny, 643.
Law, due process, federal, 110 f.; state, 91, 483 ff.
Law, martial, 494, 564, 568.
Law, private, elements of, 627 ff.
League of Nations, 343.
League of women voters, 555.
Legislature, colonial, 455 ff.; state, early, 459 ff.; decline of, 465; limitations on, 477 ff.; 602; money bills in, 593; two houses, 593; apportionment of members, 595; number of members, 595; cumulative voting, 598; sessions, 600; character of members, 601; payment of members, 601; special legislation, 604; organization and procedure, 605 ff.; caucus, 606; speaker, 607; committees, 607; "bifurcated" session, 615; reference bureaus, 616; lobby, 618; criticism and reform, 613 ff.
Libel, law of, 493.
Liberal construction, 244.
Liberty, definition of, 483.
Liberty loans, 355.
Libraries, municipal, 754; traveling, 698; reference, 616.
Lieutenant governor, 577.
List system of proportional representation, 28.
Literacy test, on suffrage, 501. *See* Immigration.
Lobby, congressional, 281 ff.; state legislature, 618.
Local government, colonial, 457; modern, 767 ff.
Log rolling, 258.
Lotteries, prohibited, 403.

Mail matter, 409.
Majority rule, dangers of, 34.
Mandamus, 292.
Mann act, 403.
Manslaughter, 643.
Maternity act, 447.
Marbury *v.* Madison, 99, 295.
Markets, municipal, 761.
Marque and reprisal, 247.

Marriage, law of, 635.
Marshals, federal, 289.
Martial law, 494, 564, 568.
Massachusetts ballot, 538.
Mayor, 715 ff.
Merchant marine act, 396.
Message, presidential, 207 ff.; governor's, 570 ff.
Mexico, 201.
Militia, 353, 445.
Mineral lands, 424 ff.
Minimum wage laws, 487, 685.
Ministers, 327.
Misdemeanor, defined, 644.
Monetary system. *See* Finance.
Monopolies, forbidden, 674. *See* Anti-trust acts.
Monroe doctrine, 344 ff.
Morrill act, 443.
Municipal. *See* City government.
Municipal ownership, 746 ff

Narcotics, control of, 403.
National Federation of Federal Employees, 321.
National Republican party, 131 ff.
Natural resources, 414 ff.
Naturalization, 122 ff.
Naval academy, 353.
Navy, 353; department of, organization, chart, 308–09; functions, 353.
Necessary and proper clause, 255.
Negro suffrage, 500.
Newberry case, 241.
Newlands act, 427.
Nineteenth amendment, 93, 123.
Nominations, early methods, 151 ff.; regulation of, 152 f.; direct primary, 546 ff.
Non-partisan league, 147.
Non-partisan elections, 538.
Non-partisanship, 554 ff.
Notification speech, 172.
Nullification, 134.

Oleomargarine act, 402.
Optional referendum, 506.
Overman act, 193, 201, 303.

Panama canal zone, 439.
Pan-Americanism, 348.
Paper money, 65, 250. *See* Finance.
Parcel post, 411.
Pardon, President's power, 205; governor's power, 568.
Parks, municipal, 760 ff.
Parliamentary government, 33, 127, 259, 262.
Parties, political, causes of, 20 ff.; place in government, 125 ff.; origin of, in United States, 127 ff.; development of, 131 ff.; minor parties, 143 ff.; origin and development of machinery, 151 ff.; regulation of, 153 ff., 541 ff.; nature and strength of, 155 ff.; state organization, 526 ff.; local organization, 528 ff.; legislation controlling, 541 ff. *See* President and Civil service.
Patents, 249.
Patronage. *See* Civil service.
Pensions, military, 361; federal civilian, 322; police, 736; fire, 740; old age, 693; mothers', 693.
Petition, right of, 109; nomination by, 539.
Philippine Islands, 435 ff.
Picketing, 683.
Platform, national party, 170; preparation of state, 553.
Platt amendment, 440.
Pocket veto, 209.
Police, state, 772; municipal, 731 ff.; courts, 737.
Police power, 9, 488.
Politics. *See* Parties.
Politics, world, 341 ff.
Polygamy, 106.
Popular election of Senators, 93, 231.
Populists, 146.
Pork barrel, 257.
Porto Rico, 434.
Postage rates, 411.
Postal savings, 381.
Post-office, services of, 409 ff.; department, organization of, chart, 308–09; appointments, 312 f.
Powers, separation of, 33 ff., 113, 156, 207, 211, 252; state, 495.
Preferential voting, 712.
President, origin of office, 76 f.; nomination and election, 163 ff.; power as national leader, 189; relation to cabinet, 190; appointment and removal power, 195 ff.; war powers, 200 ff., 354 ff.; foreign affairs, 203, 323 ff.;

President, *Continued:*
pardoning power, 205; salary and privileges, 206 f.; relation to the legislature, 207 ff.; veto, 208 ff.
Presidency, succession to, 185 note.
Presidential primary, 166 ff.
Press, freedom of, 36 ff.; 107 ff.
Primary legislation, historical development, 152 ff.; legislation, 541 ff.; reaction against, 550; criticism of, 551.
Primogeniture, 673.
Privileges and immunities of citizens, 106 ff.; 483.
Procedure, civil, 637; criminal, 645.
Procedure, legislative. *See* Congress and Legislature, state.
Progressive party, 148.
Prohibition, 43, 84, 143, 403.
Prohibitionists, 143.
Property, basis of government, 71; private, protected, 112; law of, 632 ff.
Proportional representation, 27, 227; in cities, 711.
Prosecutor, office of, 624, 647, 771.
Public defender, 740.

Quorum in Congress, 234, 272, 274.

Railroads, federal regulation, 383 ff.; during World War, 356; state regulation, 677 ff.; labor board, 398.
Rebates, 384.
Recall, general, 514; in cities, 719, 720, 722.
Recapture clause, 389.
Reclamation work, 427.
Recorder, county, 775.
Recreation in cities, 760.
Reference bureaus, 616.
Referendum. *See* Initiative.
Regional planning, 709.
Registration of voters, 543.
Religion, freedom of, 106.
Religious tests, 460, 464, 495.
Removal power, President's, 195; governor's, 565, 581 ff.; in civil service, 317.
Rendition, interstate, 119.
Rent regulation, 759.
Representation, principle of, 22 ff.
Representatives. *See* House of Representatives.
Republicans (Jeffersonian), 129 ff.
Republican form of government, 202.
Republican party, origin of, 136 ff.; first national campaign, 138; first state ticket, 138; campaign of 1860, 139; later development of, 146 ff.
Residence requirement, for voting, 499.
Revenue. *See* Finance.
Riders on bills, 209.
River and harbor improvements, 427.
Robbery, legal definition, 643.
Rotation in office, 469.
Rules, of House of Representatives, 273; Senate, 275; committee on, 262 ff.

Samoa, 439 note.
Santo Domingo, 205, 440.
Scientific management, 40.
Second class mail, 411.
Secretary of state (state), 577.
Secret diplomacy, 326.
Sedition acts, 109, 130, 356, 492.
Selectmen, town, 777.
Senate, United States, patronage, 197; representation of states in, 229 f.; election to, 231; term, 231; compared with House, 236 ff.; procedure in, 256 ff.; power over appropriations, 367; power over treaties, 337 ff. *See* Caucus, Committee system, *and* Rules.
Senate, state, 593 ff.
Senatorial courtesy, 197.
Separation of powers, federal, 33 ff., 113 ff., 156, 207, 211, 252; state, 495. *See* Check and balance system.
Sessions, Congress, 235; state legislature, 570, 600.
Seventeenth amendment, 93, 231.
Sheriff, 772.
Sherman anti-trust act, 390.
Sheppard-Towner act, 446.
Ship subsidies, 396.
Shipping Act, 396.
Shipping board, 396.
Short ballot, 461, 522 ff.
Silver, free, 146 ff.
Single tax, 765.
Sixteenth amendment, 92.
Slavery, abolition, 89.
Smith-Lever act, 444.
Smith-Hughes act, 445.
Social legislation, 604, 702 ff.
Socialist party, 144.
Socialist labor party, 144.

Soil conservation, 426 ff.
Speaker, House of Representatives, 262 ff.; state legislature, 605 ff.
Special sessions, Congress, 236; state legislature, 570.
Speech, freedom of, 36, 107, 492.
Spoils system, 47, 199, 311.
Standards, bureau of, 249.
State, federal department of, 324 ff.; organization, chart, 308–09.
States relations service, 443.
States, origin of, 452 ff.
Street cleaning, 744.
Strict construction, 244.
Strikes, 398; state interference with, 464; police interference, 733; legality of, 681 f. *See* Labor.
Subway (New York), 9.
Suffrage, colonial, 455; federal limitations on, 123; present qualifications on, 17, 499 ff.; woman suffrage amendment, 93.
Supplies, purchase of, 55 ff., 669.
Supreme Court. *See* Judiciary.
Surrogates' courts, 623.

Tammany Hall, 529 ff.
Tariff, protective, 128, 133, 139 ff., 177, 392 ff.
Taxation. *See* Finance.
Tenement house control, 758 ff.
Tenure of office act (1820), 196; (1867), 199.
Territories, government of, 431 ff.
Testing laboratories, 56.
Third term doctrine, 185.
Thirteenth amendment, 89 ff.
Tonnage tax, 447.
Torts, legal definition, 633.
Town government, 775.
Treason, defined, 109.
Trade commission, federal, 391.
Treasurer, state, 577, 669; county, 663.
Treasury, department of, 218, 372; organization of, chart, 308–09.
Treaties, power over, 204, 335; negotiation of, 337 ff.
Trustee, township, 779.
Trusts. *See* Anti-trust acts.
Tutuila, 439 note.
Tweed ring, 530 f.
Twelfth amendment, 88.
Two-thirds rule, 172.

Unanimous consent, 272.
Unemployment problem, 687.
Union, Albany plan of, 60.
Unit rule, 171.

Veterans' preference, 316.
Veto, presidential, 209 ff., 278; governor's, 465, 571.
Vice President, nomination and election of, 175; qualifications of, 185, 276.
Village government, 780.
Virgin Islands, 439 note.
Volstead act, 404.
Voters' league, Chicago, 554.

War, powers of President, 193, 200, 354 ff.; powers of Congress, 247, 352 ff.; cost of, 361.
War, department, 352; organization of, chart, 308–09.
War labor board, 357.
War trade board, 358.
Ward politics, 533.
Warren act, 427.
Water power conservation, 422; water power act, 423.
Washington. *See* District of Columbia.
Washington conference, 344.
Waterways, 427.
Waterworks, municipal, 743.
Ways and means committee, 369.
Webb act, 395.
Weeks law, 444.
Weights and measures, 248.
West Point, 352.
Whigs, 131 ff.
White slave act, 403.
Wisconsin case (1922), 387.
Woman suffrage. *See* Suffrage.
Workmen's compensation, federal, 397; state, 685.

Zoning, in cities, 764.